

Equalities, Human Rights and Civil Justice Committee

14th Meeting, 2023 (Session 6), Tuesday 30 May 2023

Subordinate legislation

Note by the Clerk

Purpose of the paper

1. This paper invites the Committee to consider the following draft affirmative instrument:
 - [The Forced Marriage etc. \(Protection and Jurisdiction\) \(Scotland\) Act 2011 \(Application to Civil Partnerships and Consequential Provision\) Order 2023 \[draft\]](#) - Policy Note and any other associated documents are at [Annexe A](#).

2023/Draft: The Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (Application to Civil Partnerships and Consequential Provision) Order 2023

2. This draft instrument is to be made under powers in the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (“the 2011 Act”) and the Marriage and Civil Partnership (Scotland) Act 2014.
3. The purpose of this instrument is to extend civil measures intended to protect a person from forced marriage to forced civil partnerships. To achieve this, the instrument:
 - amends part 1 of the 2011 Act so that forced marriage protection orders can cover forced civil partnerships,
 - amends the definition of “marriage” in the 2011 Act so it covers belief marriages as well as religious and civil marriages and;
 - inserts a definition of “civil partnership” that includes a purported civil partnership.
4. The instrument also amends section 28A(7) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965, in relation to the register of divorces operated

by National Records of Scotland, so that the references to declarators of nullity of marriage in section 28A are read to include declarators granted by a sheriff.

5. The Policy Note accompanying this instrument states that there are currently no provisions in place in Scotland which relate to forced civil partnership. The Scottish Government considers that this instrument will close a potential loophole in respect of coercive relationships by applying protective orders to civil partnerships.

Delegated Powers and Law Reform Committee Consideration

6. The Delegated Powers and Law Reform Committee (DPLR) considered the instrument at its meeting on [23 May 2023](#) and agreed that it did not need to draw the Parliament's attention to the instrument on any grounds within its remit.

Equalities, Human Rights and Civil Justice Committee Consideration

Procedure for Affirmative instruments

7. The draft instrument was laid on 15 May 2023 and referred to the Equalities, Human Rights and Civil Justice Committee. The instrument is subject to affirmative procedure (Rule 10.6) and, if approved, due to come into force on 30 November 2023. It is for the Equalities, Human Rights and Civil Justice Committee to recommend to the Parliament whether the instrument should be approved.
8. The Cabinet Secretary for Social Justice has, by motion [S6M-08951](#), proposed that the Committee recommends the approval of the instrument.
9. The Cabinet Secretary for Social Justice is due to attend the Committee meeting on 30 May to answer any questions on the instrument and to move the motion for approval.
10. **It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 23 June 2023. Thereafter, the Parliament will be invited to approve the instrument.**
11. **The Committee is asked to delegate to the Convener authority to approve a short, factual report on the instrument for publication.**

Clerks to the Committee
May 2023

Annexe A

Scottish Government Policy Note

The above instrument was made in exercise of the powers conferred by sections 10(1) and (2) and 16(1) and (2) of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 and section 35(1) and (3) of the Marriage and Civil Partnership (Scotland) Act 2014. The instrument is subject to affirmative procedure.

Purpose of the instrument

This Order amends part 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 so that forced marriage protection orders can cover forced civil partnerships as well. It also amends the definition of “marriage” in the 2011 Act so it covers belief marriages as well as religious and civil marriages. The Order also amends section 28A(7) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 in relation to the register of divorces operated by National Records of Scotland. The effect is that the references in section 28A to declarators of nullity of marriage include declarators granted by a sheriff.

Policy objectives

The Civil Partnership (Scotland) Act 2020¹ (“the 2020 Act”) extended the availability of civil partnership to mixed sex couples and made some other changes to the law on civil partnership.

As paragraph 121 of the Policy Memorandum² for the Bill which led to the 2020 Act noted, there are currently no provisions in place in Scotland which relate to forced civil partnership. The Scottish Government’s view is that the extension of civil partnership to mixed sex couples may create a loophole.

Paragraph 127 of the Policy Memorandum went on to note that Part 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011³ (“the 2011 Act”) contains civil measures on forced marriage, including forced marriage protection orders. These orders can contain prohibitions, restrictions, requirements or other measures intended to protect someone from forced marriage.

Section 10 of the 2011 Act provides the Scottish Ministers with the power to make an Order applying Part 1 (or part of Part 1) to civil partnership. This draft Order extends Part 1 of the 2011 Act so that forced marriage protection orders can cover forced

¹ The Civil Partnership (Scotland) Act 2020 - <https://www.legislation.gov.uk/asp/2020/15/contents/enacted>

² Civil Partnership (Scotland) Bill Policy Memorandum (parliament.scot) - <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/civil-partnership-scotland-bill/introduced/policy-memorandum-civil-partnership-scotland-bill.pdf>

³ Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 - <https://www.legislation.gov.uk/asp/2011/15/part/1/enacted>

civil partnerships too. The intention to make an Order in this area was outlined in paragraph 129 of the Policy Memorandum.

This draft Order also makes two further amendments. It amends:

- The definition of “marriage” in the 2011 Act so that it refers to “any religious, belief or civil ceremony of marriage”. This reflects that the Marriage and Civil Partnership (Scotland) Act 2014 put belief marriages (e.g. humanist marriages) on the same footing as religious marriages; and
- section 28A(7) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965⁴ (“the 1965 Act”). Section 28A of the 1965 Act establishes the register of divorces operated by National Records of Scotland. The effect of the amendment is that the references in section 28A to declarators of nullity of marriage should be read as including such declarators when granted by a sheriff. This is consequential on section 15 of the 2011 Act which extends jurisdiction in nullity of marriage proceedings to the sheriff court.

Along with this draft Order, the Scottish Government have laid before Parliament a set of commencement regulations for the 2020 Act. These commencement regulations will commence section 13 of the 2020 Act. Section 13 amends section 122 of the Anti-social Behaviour, Crime and Policing Act 2014⁵ to apply the forced marriage offence under the law of Scotland to civil partnerships.

If this draft Order is approved by Parliament, the intention is the Order and the commencement regulations will come into force around the same time, to provide a comprehensive package of measures against forced civil partnership.

Consultation

There has been no specific consultation on this draft Order.

The UK Supreme Court made a declaration in 2018 that the Civil Partnership Act 2004 was incompatible with the European Convention on Human Rights in so far as it made civil partnership available only to same sex couples⁶. Following this, the Scottish Government consulted on two options for the future of civil partnership in Scotland⁷. The first involved closure of civil partnership to new relationships from a specific date in the future. The second involved making civil partnership available to mixed sex couples. After this consultation, the Scottish Government introduced into Parliament the Bill which led to the 2020 Act.

More recently, the Scottish Government has written to the Foreign, Commonwealth and Development Office (which runs a Forced Marriage Unit); the Crown Office and

⁴ Registration of Births, Deaths and Marriages (Scotland) Act 1965 - <https://www.legislation.gov.uk/ukpga/1965/49/section/28A>

⁵ Anti-social Behaviour, Crime and Policing Act 2014 (legislation.gov.uk) - <https://www.legislation.gov.uk/ukpga/2014/12/section/122/enacted>

⁶ The Supreme Court judgment is at <https://www.supremecourt.uk/cases/uksc-2017-0060.html>

⁷ The future of civil partnership in Scotland - Scottish Government - Citizen Space (consult.gov.scot) - <https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/>

Procurator Fiscal Service and Police Scotland to advise of the intention to commence the extension of the forced marriage offence to civil partnership and to extend the provisions on forced marriage protection orders to cover forced civil partnerships.

Impact assessments

The Scottish Government prepared and published a range of Impact Assessments for the Bill which led to the 2020 Act:

- [A Business and Regulatory Impact Assessment](#)
- [A Child Rights and Wellbeing Impact Assessment](#)
- [An Equality Impact Assessment](#)

Financial effects

No significant costs are expected as a consequence of this Order.

As indicated above, extending forced marriage protection orders so they cover forced civil partnership as well is closing a potential loophole. The Scottish Government is not expecting a significant volume of orders in relation to forced civil partnership.

The statistics on forced civil marriage orders show that in 2017/18, there were two applications to the courts for these orders; in 2018/19, there were six applications; in 2019/20, 2020/21 and 2021/22 there was one application in each of these years.

Section 9 of the 2011 Act makes it a criminal offence to breach a forced marriage protection order. Up to and including 2020/21, there have been no prosecutions for breaching a forced marriage protection order.