Same-sex marriage: a step forward but a missed opportunity

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Same-sex marriage is finally with us – and a good thing too. But the government has missed the chance for a wholesale tidy up of the family law system

It has been well publicised that same-sex marriage is now legal. I am often asked by colleagues, contemporaries and clients what the impact of this will be.

When the coalition government (or at least certain corners of it) announced in January this year that they wanted to introduce marriage for same-sex couples there was, perhaps inevitably, something of a furore. There has been great debate over the Marriage (Same Sex Couples) Act 2013 (the Act) and what it means not only from a legal perspective but also socially and politically. Our job as family practitioners is to assess what impact the legislation will have, if any, for the purposes of our work.

The Bill made steady progress through Parliament and received royal assent on 17 July 2013. This means the Act is now law and is expected to be implemented in stages from spring 2014, when it is thought the first same-sex marriages will take place. The introduction of the Act at the very least will add another layer of confusion in terms of terminology, with both the Civil Partnership Act and the Matrimonial Causes Act operating in tandem with one another and the introduction of the Children and Families Bill imminent. But what does the introduction of the Act mean and what impact will it likely have?

What the act does

The most obvious and significant feature is that for the first time it will be legal for same-sex couples in England & Wales to marry rather then enter into a civil partnership. This is an extension to the existing legislation in place for opposite-sex couples. The Act itself is fairly detailed with some obscurities, but the most important provisions to be aware of are as follows.

Same-sex couples can have a civil or religious wedding, but can only have a religious wedding if the relevant religious group decides to "opt in". Every religious group can do so except for the Church of England, which cannot conduct them under canon law. The Act states that no group can be compelled to "opt in" so it is an entirely discretionary power for the particular religious group involved.

If a religious group does "opt in" they can equally 'opt out' at a later date if they choose to do so and cannot be compelled to refrain from using the 'opt out' procedure.

Civil partnerships will remain an option for same-sex, but not heterosexual couples (although whether this should remain the case will be reviewed separately by the Secretary of State in due course).

Same-sex couples already in a civil partnership can convert their civil partnership into a marriage if it was registered in England & Wales. This will not apply to couples who registered a civil partnership in Northern Ireland, Scotland or abroad – they will not be able to marry unless they dissolve their civil partnership first.

With the right to marry comes the right to divorce. This means that same-sex couples who marry (or convert their existing civil partnership) will be able to divorce rather than dissolve the civil partnership or marriage. The grounds for doing so will be the same as for heterosexual couples – irretrievable breakdown – with the same factors coming into play: unreasonable behaviour, two years separation, five years separation, desertion and adultery.

However, there is one important exception when relying on adultery in that the adultery must have taken place with a member of the opposite sex. If the adultery was with a member of the same sex, adultery is not an available ground (a result, no doubt, of ancient common law definitions of adultery which do not fit easily in a same-sex context). However, as with civil partnership dissolution, infidelity can be an example of unreasonable behaviour, so in practice this makes little difference.

It is likely a same-sex marriage will be recognised if

entered into abroad if that country in question recognises same-sex marriage. For example, France has recently undergone similar changes in its legislation, making it legal for same-sex couples to marry.

The Secretary of State must also review survivor benefits under occupational pension schemes and in particular the differences in survivor benefits between same-sex and opposite-sex couples.

What will be the impact in practice?

The Act puts same-sex couples on the same legal footing as opposite-sex couples. The upcoming change in the law rather nicely comes at a time when the latest statistics from the ONS have been released on civil partnerships.

It has been seven years since the Civil Partnership Act came into force, leading some of the press to use the handy headline "the seven-year itch", as there has been a 20% increase in the number of civil partnership dissolutions in the last year. In 2012 there were 7,037 civil partnerships registered, which was an increase of 3.6% from 2011. There were 794 dissolutions in that time which as mentioned was up a fifth from the year before. This may not be too surprising a statistic as it is inevitable that some relationships will break down over time, as family practitioners are acutely aware.

Interestingly since the inception of the Civil Partnership Act there have been 60,454 civil partnerships registered, which is far more than the government initially estimated (which was approximately 10,000 to 20,000). The impact of the new Act on these statistics will be interesting to follow. What is clear for family practitioners, however, is that same-sex relationships will continue to play more of a role in everyday practice, with increasing numbers of partnerships being registered and increasing numbers of those which are breaking down.

The legislation on civil partnership put same-sex civil partners in the same legal position as heterosexual spouses, and this leaves many of us questioning what the difference is with same-sex marriage. Does it in fact matter and what it will mean for us as practitioners?

The introduction of the Act is clearly a significant step towards the concept of equal marriage, meaning that same-sex couples are no longer seen as "equal but different", which is effectively the legal framework the Civil Partnership Act created. As any family lawyer who has handled a civil partnership dissolution or drafted a pre-registration agreement will know, the law deals with the dissolution of a civil partnership and any financial dispute in the same way as a heterosexual divorce.

This does not mean there will not be additional issues to be aware of in practice as I identified in my article on the alternative family structures (such as more complex issues in relation to children), but the same ground rules and legislative criteria apply. When dealing with an application for financial remedy, Schedule 5 to the Civil Partnership Act tells you that the courts will use the section 25 criteria as under the MCA 1973 in any event. With same-sex marriages the MCA 1973 will apply rather than the Civil Partnership Act.

Those familiar with the dissolution procedure will know the terminology is different from that of divorce, but the court procedure is the same. This change in the law may in fact make things easier for those who are less familiar with the dissolution process and more used to dealing with divorce, as the usual divorce procedure will be followed.

As mentioned above it will be possible to convert a civil partnership into a marriage and it will be interesting to see how many couples do this and what the process will be. Family practitioners may feel it prudent to carry out a review of a pre-registration agreement to reflect the change in the law, if the client has in fact converted the civil partnership into a marriage. It is hard to envisage the validity of such an agreement being questioned in a dispute on that basis alone, but it would not hurt to update any agreements just to be sure.

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It is not currently possible for opposite-sex couples to register a civil partnership, but this will remain an option – alongside marriage – for same-sex couples. To many couples this may not matter but it does create an inequality in the law which will form part of the Secretary of State's promised review of the Civil Partnership Act. It is possible that the Act will be extended to opposite-sex couples. Alternatively civil partnership may be abolished in light of the Act (which may leave a class of same-sex couples who have registered a civil partnership but do not wish to marry, a historical anomaly which family law practitioners would need to be alert to long into the future).

The change in the law is an important step forward from a social perspective and is a welcome change to what was clearly an out-of-date situation. However, from a legal perspective the change will mean complexity for practitioners dealing with family law issues. It seems unnecessarily confusing to have civil partnership and marriage as options (as well as conversion) rather than having one easy to understand

system, but this is of course what happens when social progress happens one step at a time.

Seven years ago, civil partnership only navigated Parliament safely because its difference from marriage could be clearly articulated; seven years on, that difference and separation has become unacceptable. It is important for family law practitioners to be aware of the changes and, when dealing with a relationship breakdown, there will need to be some investigation as to whether there is a civil partnership or a marriage.

However, in some ways the Act feels like a bit of a missed opportunity to review the current divorce laws altogether. I was interested to read Sir Paul Coleridge's comments upon his recent retirement that the UK's laws dealing with divorce and financial provision were created at a very different time from where society is today, and need to be abolished to reflect the shift in the cultural and social dynamic.

This seems particularly so with families being created in non-traditional ways. It is a shame that, whilst updating the law to deal with one aspect of social advance, the government did not take the opportunity to do more.

However, until a much-needed overhaul of the family law system takes place we will continue as practitioners to operate within the current legislation, which perhaps has possibly just become that little bit more confusing with the introduction of same-sex marriage.

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