

CIVIL PARTNERSHIP (SCOTLAND) ACT 2020

EXPLANATORY NOTES

COMMENTARY ON PROVISIONS

Final provisions

Section 15: Ancillary provision

32. Section 15 enables the Scottish Ministers to make ancillary provision, by regulations, to give full effect to the Act or any provision made under it. This includes the power to modify other enactments (including the Act itself).
33. Regulations made under section 15 that amend the text of primary legislation (including the Act) are subject to the affirmative procedure. Otherwise, regulations under section 15 are subject to the negative procedure.
34. The affirmative procedure is defined in [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#). The negative procedure is defined in [section 28 of that Act](#).

Section 16: Commencement

35. Section 16 deals with when the Act's provisions come into effect as a matter of law.
36. The Act's final provisions (sections 15 to 17) take effect the day after the Bill receives Royal Assent.
37. The rest of the Act's provisions take effect on the day, or days, appointed by the Scottish Ministers by regulations. Section 16 allows the regulations to appoint different days for different purposes. Regulations appointing the day that some or all of the Act's provisions take effect will be laid before the Scottish Parliament in accordance with [section 30 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#).

Schedule 2

Family law

38. Paragraphs 1 to 4 of schedule 2 amend various family law acts, principally so that they accommodate different sex civil partnerships and the possibility of reproduction between civil partners.

Paragraph 1: Modification of the Registration of Births, Deaths and Marriages (Scotland) Act 1965

39. Paragraph 1 of schedule 2 amends [Part 2 of the Registration of Births, Deaths and Marriages \(Scotland\) Act 1965](#) ("the 1965 Act"). Part 2 of the 1965 Act provides for the registration of births. [Section 13](#) sets out the particulars of birth to be registered.
40. [Section 14](#) specifies which persons have a duty to give those particulars of birth, including certain fathers. Section 14(5) excludes fathers who are not married to the mother and have not been married to her since the child's conception. It would therefore

not apply the duty to a father who had been in a civil partnership with the mother. Paragraph 1(2) of schedule 2 of the Bill amends section 14 to limit that exclusion to fathers who are neither married to nor in a civil partnership with the mother and have neither been married to nor in a civil partnership with her since the child's conception. The overall effect of section 14, once amended, is to apply the duty to a father who has been either married to or in a civil partnership with the mother at some point since the child's conception.

41. **Section 18** provides that the name of a child's father is only to be entered in the register of births if the father is married to the mother, or has been married to her since the child's conception, or if certain conditions are satisfied (generally requiring the mother to ask for the father's name to be entered). The effect of the amendment to section 18 made by paragraph 1(3) of schedule 2 of the Act is to require the name of a child's father to be entered in the register if the father is in a civil partnership with the mother, or has been in a civil partnership with her since the child's conception.
42. **Section 20 of the 1965 Act** provides for re-registration in certain cases, including where the register suggests that a person was born at a time when the person's parents were not married but they have subsequently done so. Paragraph 1(4) of schedule 2 amends section 20 and extends this case to include the case where a person's parents subsequently enter into a civil partnership.

Paragraph 2: Modification of the Family Law (Scotland) Act 1985

43. Paragraph 2 of schedule 2 amends the **Family Law (Scotland) Act 1985** ("the 1985 Act"). **Section 9 of the 1985 Act** sets down the principles to be applied by the court in deciding what order to make for financial provision on divorce or dissolution. Section 9(1)(c) of the 1985 Act provides that the economic burden of caring for certain children should be shared equally between the parties.
44. In the case of marriage, section 9(1)(c)(i) provides that it is any "child of the marriage" under the age of 16 that is taken into account. **Section 27 of the 1985 Act** states that the expression "child of the marriage" includes a child (other than a child who has been boarded out with the parties, or one of them, by a local or other public authority or a voluntary organisation) who has been accepted by the parties as a child of the family.
45. In the case of civil partnership, section 9(1)(c)(ii), on its face, provides that it is a child under the age of 16 who has been accepted by both partners as a child of the family or in respect of whom the partners are parents by virtue of the **Human Fertilisation and Embryology Act 2008** ("the 2008 Act") that is taken into account.
46. There is therefore an asymmetry between the drafting concerning children of a marriage and that concerning children of a civil partnership. The Act takes the opportunity to remedy that asymmetry by aligning the drafting treatment of each. This is possible given that both marriage and civil partnership will now be available to both same sex and different sex couples.
47. The Act also takes the opportunity to remove references to the deeming provisions of the 2008 Act. Like those who adopt, it goes without saying that those who are parents under the 2008 Act, are parents for the purposes of the 1985 Act.
48. Paragraph 2(2) of schedule 2 amends section 9(1)(c)(ii) so that it echoes section 9(1)(a)(i) and simply refers to children of the civil partnership under the age of 16.
49. Paragraph 2(3) of schedule 2 amends section 27 of the 1985 Act (interpretation).
50. Sub-paragraph (a) amends the definition of "child" so that it includes a child whether or not its parents have ever been in a civil partnership with one another and that it now refers to "a child of the civil partnership" and makes clear that this includes a child who has been accepted by the parties as a child of the family.

51. Sub-paragraph (b) amends the definition of “family”. The definition currently spells out that “family” in relation to a civil partnership means the members of the civil partnership together with any child accepted by them both as a child of the family. The specific reference to civil partnership is repealed on the basis that those words state the obvious and are therefore unnecessary, particularly in light of the amendment to the definition of “child” in section 27, outlined above.

Paragraph 3: Modification of the Law Reform (Parent and Child) (Scotland) Act 1986

52. Paragraph 3 of schedule 2 amends the [Law Reform \(Parent and Child\) Scotland Act 1986](#). It amends [section 5](#) (presumptions) so that the conditions under which a man will be presumed to be the father of a child are extended to where he was in a civil partnership with the mother of the child at any time between conception and birth, even in the case of a void or voidable civil partnership.

Paragraph 4: Modification of the Children (Scotland) Act 1995

53. Paragraph 4 of schedule 2 amends the [Children \(Scotland\) Act 1995](#) (“the 1995 Act”). [Section 3 of the 1995 Act](#) sets out the circumstances in which a parent will automatically acquire parental responsibilities and rights in relation to a child.
54. Paragraph 4(2) of schedule 2 amends section 3 of the 1995 Act to extend those circumstances to where the father was in a civil partnership with the mother at the time of the child’s conception or subsequently.
55. Paragraph 4(2) of schedule 2 also amends section 3 of the 1995 Act to make clear that a purported civil partnership will suffice for this purpose, if conditions are met.
56. Paragraph 4(3) of schedule 2 amends the definition of “child of the family” in [section 12 of the 1995 Act](#). That definition defines “child of the family” in two different ways, one relating to the parties to a marriage and the other relating to the parties to a civil partnership. The introduction of different sex civil partnerships affords the opportunity to streamline that definition. Paragraph 4(3) repeals the existing two limbs of the definition in section 12 and replaces it with a single global definition, which captures children of both of the parties or children treated by both of them as a child of the family. The provision is silent as to the means by which the child came to be a child of both of them for the reasons set out above.

Change of gender of civil partners

57. Paragraphs 5, 6(2) and 7 of schedule 2 of the Act make consequential amendments to legislation concerning gender recognition so that a civil partner obtaining gender recognition can stay in the civil partnership.

Introduction

58. The position, prior to section 1 of the Act coming into force, is that civil partnership is only available to same sex couples. As a result, the law has prevented one partner in a civil partnership from changing gender because that would result in an impermissible different sex civil partnership. Schedule 2 of the Act modifies the following enactments to allow for the fact that, once section 1 comes into force, a civil partnership will be able to continue when the partners are no longer the same gender:

- the Gender Recognition Act 2004,
- the Civil Partnership Act 2004,
- the Marriage and Civil Partnership (Scotland) Act 2014.

Modification of the Gender Recognition Act 2004

Overview of the modifications to the Gender Recognition Act

59. The Gender Recognition Act enables people to change their legal gender. A change in legal gender is effected by the issuing of a full gender recognition certificate. The process for obtaining a full gender recognition certificate begins with an application to a gender recognition panel under [section 1 of the Gender Recognition Act](#).
60. [Section 4 of that Act](#) sets out the circumstances in which a gender recognition panel, having granted an application, must issue a full gender recognition certificate or an interim gender recognition certificate. If the person who made the application is in a civil partnership, and the person's partner is not also changing gender, section 4 provides that a gender recognition panel can only issue an interim gender recognition certificate. This is because issuing a full gender recognition certificate to only one of the partners would result in a different sex civil partnership which, as mentioned in paragraph 58 above, was not permitted when the Gender Recognition Act was enacted.
61. The issuing of an interim gender recognition certificate allows the civil partnership to be dissolved (under [section 117\(2\)\(b\) of the Civil Partnership Act 2004](#)), at which point the court must issue a full gender recognition certificate under [section 5A of the Gender Recognition Act](#). The issuing of an interim gender recognition certificate can also lead to the issuing of a full gender recognition if the civil partnership ends as a result of the other partner's death (see [section 4F of the Gender Recognition Act](#)).
62. Paragraph 5 of schedule 2 modifies the Gender Recognition Act so that being in a civil partnership will cease to be an absolute barrier to one partner obtaining a full gender recognition certificate. In their effect, the modifications largely mirror those made to the Gender Recognition Act by [the Marriage and Civil Partnership \(Scotland\) Act 2014](#), which made same sex marriage possible and in consequence modified the Gender Recognition Act so that being married ceased to be an absolute barrier to one spouse obtaining a full gender recognition certificate.

Modification of sections 3 and 3D

63. [Sections 3 and 3D of the Gender Recognition Act](#) set out requirements that an application under section 1 must satisfy. (The requirements set out in section 3 apply if the application does not bear to be an application for a certificate under section 3A, 3C or 3E, whereas the requirements set out in section 3D apply if the application does bear to be an application for a certificate under section 3C.)¹ Those sections are modified by sub-paragraphs (2) and (3) of paragraph 5 of schedule 2 so that applicants have to provide, as part of an application, a statutory declaration about the applicant's civil partnership. In particular, there must be a statutory declaration about whether or not the applicant's civil partner consents to the partnership continuing.
64. If a statutory declaration is made that the applicant's partner has consented to the partnership continuing, sections 3 and 3D are further modified so that the gender recognition panel, on receiving such a statutory declaration, must inform the applicant's civil partner. Whether or not an applicant's civil partner has consented to their civil partnership continuing will determine whether a full gender recognition certificate or an interim certificate has to be issued (see paragraph 66 below).
65. It is a crime to deliberately make a false statement in a statutory declaration (see [section 44\(2\) of the Criminal Law \(Consolidation\) \(Scotland\) Act 1995](#)).

Modification of section 4

66. Section 4 of the Gender Recognition Act is modified by paragraph 5(4) of schedule 2 so that:
- the rule that a gender recognition panel can only issue an interim gender recognition certificate to an applicant who is in a civil partnership is abolished,

¹ See [section 2 of the Gender Recognition Act](#). The Bill does not modify the requirements associated with applications that bear to be for certificates under section 3A or 3E because those provisions relate to applications by persons ordinarily resident in England and Wales.

*These notes relate to the Civil Partnership (Scotland) Act
2020 (asp 15) which received Royal Assent on 28 July 2020*

- where the conditions for granting a gender recognition certificate are met, the applicant is in a civil partnership, and both partners consent to the civil partnership continuing, the gender recognition panel is required to issue a full gender recognition certificate,
- if the gender recognition panel issues a full gender recognition certificate in those circumstances, the panel must notify the applicant's civil partner,
- where the conditions for granting a gender recognition certificate are met, the applicant is in a civil partnership, and one of the partners does not consent to the partnership continuing, the gender recognition panel is required to issue an interim gender recognition certificate.

Modification of section 4C

67. **Section 4C of the Gender Recognition Act** allows an individual who has an interim gender recognition certificate to apply to a gender recognition panel for a full gender recognition certificate. Paragraph 5(5) of schedule 2 modifies section 4C so that the panel must grant a full gender recognition certificate to an applicant who is in a civil partnership if, since the issuing of the interim certificate, both parties have decided to continue their partnership.
68. The terms of the new subsection (1A) of section 4C allow for the possibility that the relationship between the applicant and the applicant's partner may have changed from a civil partnership to a marriage in the period between the granting of the interim gender recognition certificate and the application for a full gender recognition certificate under section 4C being determined. The change in the legal character of their relationship from one type to the other has no bearing on the availability of section 4C as a mechanism for going from an interim gender recognition certificate to a full gender recognition certificate.

Modification of section 4D

69. **Section 4D of the Gender Recognition Act**, in its original form, deals with the situation in which an application for a full gender recognition certificate has been made under section 4C and the person's spouse dies before the application is determined. In light of the modifications to section 4C discussed above, which have the effect of making that section work in the same way for applicants in civil partnerships as it works for applicants in marriages, paragraph 5(6) of schedule 2 modifies section 4D so that it too works in the same way for people in marriages and civil partnerships.

Modification of section 4E

70. **Section 4E of the Gender Recognition Act**, in its original form, allows a sheriff to grant a full gender recognition certificate to someone who has been granted an interim gender recognition certificate, notwithstanding the fact that the person is married and the person's spouse has not provided a statutory declaration consenting to the marriage continuing. Paragraph 5(7) of schedule 2 modifies section 4E so that the same route to being granted a full gender recognition certificate is available to people in civil partnerships.

Repeal of section 4F

71. **Section 4F of the Gender Recognition Act** provides a mechanism for a person with an interim gender recognition certificate to obtain a full gender recognition certificate where:
- the person's civil partner dies within 6 months of their submitting notice of their intention to change their civil partnership into a marriage, or
 - within 6 months of their civil partnership changing into a marriage the person's spouse died.

72. Paragraph 5(8) of schedule 2 repeals section 4F because the other changes the schedule makes to the Gender Recognition Act mean that changing a civil partnership into a marriage is no longer a necessary step on the route to obtaining a full gender recognition certificate (see, in particular, the discussion above in relation to sections 4 and 4C of the Gender Recognition Act).

Modification of section 5A

73. Paragraph 5(9) of schedule 2 modifies [section 5A of the Gender Recognition Act](#) so that it acknowledges the possibility that a full gender recognition certificate may have been issued under section 4E of that Act (the modifications to which are discussed above) before a court dissolves a civil partnership on the basis of an interim gender recognition certificate having been granted. The effect is simply to make clear that the court granting the dissolution is not to issue another full gender recognition certificate, on top of the one already issued under section 4E.

Repeal of section 5C

74. [Section 5C of the Gender Recognition Act](#) makes provision about the issuing of full gender recognition certificates to both parties in a civil partnership. Its purpose was to ensure that the legal gender of both partners changed simultaneously so as to avoid creating a different sex civil partnership. When different sex civil partnerships become lawful, section 5C will be redundant and therefore paragraph 5(10) removes it from the statute book.

Repeal of section 5D

75. [Section 5D of the Gender Recognition Act](#) empowers the Scottish Ministers to make provision, by order, to set up further procedures to issue full gender recognition certificates to applicants in protected Scottish civil partnerships (as defined in [section 25 of that Act](#)). The power has not been exercised since it was added to the Gender Recognition Act in 2014. As a result of the other changes schedule 2 makes to the Gender Recognition Act, the procedures for issuing full gender recognition certificates to applicants in protected Scottish civil partnerships will be the same as those for issuing full certificates to applicants in protected Scottish marriages. Paragraph 5(11) of schedule 2 repeals section 5D as the Scottish Ministers have no intention of exercising the power to create special procedures for issuing full gender recognition certificates to applicants in civil partnerships that are not available to applicants in marriages.

Further minor changes

76. Sub-paragraphs (12) to (19) of paragraph 5 of schedule 2 make a number of changes to the Gender Recognition Act in consequence of those discussed above. In particular, sub-paragraphs (14), (15) and (18)(b) ensure that a change in gender does not affect the continuity of a protected civil partnership or a protected Scottish civil partnership.

Modification of the Civil Partnership Act 2004

77. [Section 117 of the Civil Partnership Act 2004](#) sets out the process for dissolving a civil partnership in the Scottish courts. Subsection (2)(b), in its original form, makes the issuing of an interim gender recognition certificate to one of the partners a ground for dissolving the partnership. The rationale for having this as a ground of dissolution was to allow the civil partnership to be brought to an end so that a full gender recognition certificate could be issued (the rule being that a full gender recognition certificate could not be issued if that would result in a different sex civil partnership because different sex civil partnerships were impermissible).

78. The modifications to schedule 2 will make to the Gender Recognition Act 2004 (which are discussed above) will mean that a full gender recognition certificate can be issued to one civil partner, but only if the other partner consents to the partnership continuing. If an interim gender recognition certificate has been issued to one partner in a civil partnership and the civil partnership has continued after a full gender recognition certificate has been issued that can only mean (subject to one exception discussed below) that the other partner has consented to the civil partnership continuing. Since the other partner has consented to remain in the civil partnership, it follows that the

issuing of the interim gender recognition certificate should cease to be a ground for dissolving the partnership. Paragraph 6(2) of schedule 2 amends section 117 of the Civil Partnership Act 2004 accordingly.

79. The exception (mentioned in the previous paragraph) to the rule that a civil partnership can only continue after the issuing of a full gender recognition certificate to one partner if the other partner consents to it continuing, is where the full gender recognition certificate is issued by a sheriff under section 4E of the Gender Recognition Act. As the issuing of a full gender recognition certificate to a person in a civil partnership under that section does not mean that the person's partner has consented to the civil partnership continuing, the amendment to section 117 of the Civil Partnership Act 2004 provides that the issuing of an interim gender recognition certificate remains a ground of dissolution despite the subsequent issuing of a full gender recognition certificate under section 4E.

Modification of the Marriage and Civil Partnership (Scotland) Act 2014

80. Section 30 of the Marriage and Civil Partnership (Scotland) Act 2014 ("the 2014 Act") allows the Scottish Ministers to make regulations about the solemnisation or registration of a marriage or civil partnership that is renewed after a full gender recognition certificate has been issued. In its original form, subsection (1)(b) of section 30 only provided for regulations to deal with the renewal of a civil partnership where both partners had been issued with a full gender recognition certificate. A civil partnership could not be renewed where a full gender recognition certificate had been issued to only one of the partners, because the change of legal gender of one of the partners only would result in what was, at the time, an impermissible different sex civil partnership.
81. Paragraph 7 of schedule 2 broadens the terms of section 30(1)(b) of the 2014 Act so that regulations can be made in relation to the renewal of a civil partnership following the issuing of a full gender recognition certificate to one of the partners. This change brings the terms of paragraph (b) of section 30(1) into line with the terms of paragraph (a), which allows for regulations to be made about the renewal of a marriage following the issuing of a full gender recognition certificate to one or both of the parties to the marriage.

Nullity of civil partnership and recognition of dissolution

Paragraph 6(3) Register of Dissolutions of Civil Partnership

82. Section 122 of the Civil Partnership Act 2004 ("the 2004 Act") requires the Registrar General to maintain a register of decrees of dissolution of civil partnership known as the Register of Dissolutions of Civil Partnership. Paragraph 6(3) of schedule 2 requires the Registrar General to include decrees of declarator of nullity of civil partnerships in that register. The modification achieves consistency with the Register of Divorces, as provided for in section 28A of the Registration of Births, Deaths and Marriages (Scotland) Act 1965, which records both decrees of divorce and decrees of declarator of nullity of marriage.

Paragraph 6(4): Jurisdiction in respects of declarator of nullity of civil partnership

83. Section 225 of the 2004 Act makes provision regarding the jurisdiction of the Scottish courts to entertain certain types of proceedings relating to civil partnerships. At present the Court of Session is the only Scottish court with jurisdiction to entertain actions for declarator of nullity of civil partnership. Paragraph 6(4) of schedule 2 extends jurisdiction to the sheriff court in relation to such proceedings provided the case is one in which the Court of Session would have jurisdiction and a residence connection with the sheriffdom is satisfied.

Paragraph 6(5): Recognition of overseas dissolutions

84. Sections 234 to 237 of the 2004 Act contain provisions regarding the recognition of overseas dissolutions, annulments and separations. Section 237(2)(b)(ii) allows regulations to modify the application of those provisions in circumstances where a civil partner is domiciled in a country that does not recognise same sex civil partnerships. Paragraph 6(5) of schedule 2 extends the scope of the power to allow it also to be exercised where a civil partner is domiciled in a country that does not recognise civil partnerships between two people of different sexes.