

# **CIVIL PARTNERSHIP (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Civil Partnership (Scotland) Bill introduced in the Scottish Parliament on 30 September 2019.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 57–EN);
  - a Financial Memorandum (SP Bill 57–FM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 57–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### **Terminology**

4. The Scottish Government uses “mixed sex” civil partnership to describe a civil partnership where the parties to it are not of the same sex. Other language options to describe the relationship type include “opposite sex” or “different sex”. The Scottish Government has opted to use “mixed sex” following comments received from stakeholders to its 2018 consultation on the future of civil partnership that this is a more inclusive term than “opposite sex”.

### **BACKGROUND**

#### **General background to the Bill**

5. In 2018, the UK Supreme Court considered whether the inability of a mixed sex couple in England and Wales to form a civil partnership under the Civil Partnership Act 2004 (“the 2004 Act”) breached their rights in terms of Article 14 (prohibition on discrimination) and Article 8 (right to a private life) of the European Convention on Human Rights (ECHR) given that same sex couples have, since the introduction of same sex marriage, had the choice of marrying or forming a civil partnership.
6. In June 2018, the Supreme Court ruled that certain provisions of the 2004 Act are incompatible with Article 14 in conjunction with Article 8 to the extent that they preclude a mixed

sex couple from entering into a civil partnership.<sup>1</sup> (This judgment is referred to subsequently in this Policy Memorandum as “Steinfeld”.)

7. Following this decision of the UK Supreme Court, the Scottish Government consulted<sup>2</sup> on the future of civil partnership in Scotland. After careful consideration of responses, the Scottish Ministers decided to introduce legislation that will make civil partnership available to mixed sex couples.

## **Marriage, civil partnership and cohabitation in Scotland**

### ***General***

8. In Scotland, couples can marry or enter into a civil partnership, or choose to cohabit. Same sex and mixed sex couples can marry, and same sex and mixed sex couples can decide to cohabit. Civil partnership is currently available only to same sex couples, but this Bill will extend the relationship to mixed sex couples.

9. Mixed sex marriage has been available in Scotland for centuries. Same sex marriage was introduced by the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”). That Act generally placed same sex spouses on the same footing as mixed sex spouses. Marriages are created through a marriage ceremony and can be religious or belief, or civil.

10. Civil partnership was introduced to Scotland by the 2004 Act, an Act of the UK Parliament. A Sewel Motion (now known as a Legislative Consent Motion) was debated and agreed in the Scottish Parliament on 3 June 2004<sup>3</sup>.

11. The purpose of the 2004 Act was to provide same sex couples with the opportunity to obtain legal recognition of their relationship, The 2004 Act therefore only made civil partnership available to same sex couples, with the relationship generally being modelled on marriage. The first civil partnerships in Scotland took place in December 2005.

12. Civil partnerships are, in essence, modelled on marriage. They provide for couples to enter into a legally recognised relationship that represents a life-long commitment to one another. Civil partnerships are created by registration, which can be civil, or religious or belief<sup>4</sup>.

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<sup>1</sup> *R (Steinfeld and Keidan) v Secretary of State for International Development*  
<https://www.supremecourt.uk/cases/uksc-2017-0060.html>

<sup>2</sup> <https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/>

<sup>3</sup> The Official Report is available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4518>

<sup>4</sup> Religious or belief registration of civil partnership in Scotland was introduced by the Marriage and Civil Partnership (Scotland) Act 2014: before then all registration of civil partnership was civil only. Section 135 of the Civil Partnership Act 2004 defines a religious or belief body as:

“... as organised group of people –

(a) which meets regularly for religious worship, or

(b) the principal object (or one of the principal objects) of which is to uphold or promote philosophical beliefs and which meets regularly for that purpose”.

13. Akin to a marriage, a civil partnership can only end through death or dissolution<sup>5</sup>, and a series of legal consequences flows from entering into the relationship. The legal consequences that result from entering into a marriage or a civil partnership are largely the same, including:

- Rights of succession on the death of one of the parties to a civil partnership;
- A right to occupy the family home that may take precedence over the rights of a purchaser, the holder of a standard security (mortgage) or the party named in a tenancy agreement;
- Aliment<sup>6</sup> obligations;
- Financial provision on dissolution.

14. There have been some differences for same sex couples and mixed sex couples in survivor benefits: in some pension schemes, these benefits have been lower for some surviving civil partners when compared to some surviving spouses. However, there has been a recent UK Supreme Court case<sup>7</sup> in this area.

15. This Bill will make no change to the law of cohabitation.

16. In Scotland, cohabitants are given some rights although these are less extensive than those of married couples or civil partners.

17. In particular, the Family Law (Scotland) Act 2006 makes provisions on rights for cohabitants, generally when the relationship comes to an end. Section 25<sup>8</sup> of this Act defines cohabitants as a couple who live together as if married.

18. In terms of the 2006 Act, cohabitants have the following rights:

- A presumption of an equal share in household goods bought during the time the couple lived together;
- An equal share in money derived from an allowance made by one or other of the couple for household expenses, and/or any property bought using these funds;
- On separation, a right in certain circumstances to ask the court to make an order for financial provision against the other former cohabitant;
- A right to apply to the court for an order for money or property from the estate if a cohabitant dies without leaving a will;

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<sup>5</sup> When a couple in a same sex civil partnership change their relationship to a marriage under section 11 of the Marriage and Civil Partnership (Scotland) Act 2014, the civil partnership ends on the date the marriage is established.

<sup>6</sup> "Aliment" is an obligation on spouses and civil partners to maintain each other and to maintain any children they may have.

<sup>7</sup> <https://www.supremecourt.uk/cases/uksc-2016-0090.html>

<sup>8</sup> <https://www.legislation.gov.uk/asp/2006/2/section/25>

- The right to apply to court for a domestic interdict in domestic abuse cases. Such orders could, for example, restrain or prohibit conduct of a person towards the applicant, or a child in the care of the applicant.

19. One of the Scottish Law Commission's current law reform projects includes aspects of family law<sup>9</sup>, focussing on cohabitation. It expects to publish a Discussion Paper at the beginning of 2020, followed by a report on the law relating to cohabitants in early 2021.

## **England and Wales**

20. The UK Government has announced that it will make mixed sex civil partnership available in England and Wales by way of Regulations made under section 2<sup>10</sup> of the Civil Partnerships, Marriages and Deaths (Registration etc.) Act 2019. This was a Private Member's Bill introduced by Tim Loughton MP. Section 2 requires the Secretary of State to exercise the power to make Regulations extending civil partnership to mixed sex couples in England and Wales so that the Regulations are in force no later than 31 December 2019.

## **Northern Ireland**

21. Section 8 of the Northern Ireland (Executive Formation etc) Act 2019<sup>11</sup> requires the Secretary of State to make regulations to introduce mixed sex civil partnership (and same sex marriage) in Northern Ireland. The section comes into effect on 22 October 2019 if a Northern Ireland Executive is not restored by 21 October 2019. The regulations, which would be subject to the negative resolution procedure at Westminster, must be in force on or before 13 January 2020.

## **POLICY OBJECTIVES OF THE BILL**

### **General**

22. The Scottish Government aims to create an inclusive Scotland which protects, respects, promotes and implements internationally recognised human rights. In line with this, the policy of the Bill is aimed at upholding human rights and providing equality of opportunity for couples who decide they wish to enter into a legally recognised relationship. In line with this, the key principles behind the Bill are promotion of:

- Equality of opportunity; and
- Human rights.

23. The main policy objective of the Bill is to make civil partnership available to mixed sex couples. This is consistent both with the key principles of the Bill and with the UK Supreme Court's decision in *Steinfeld*.

24. The Scottish Government has been mindful that equality of opportunity is not limited to simply making civil partnership available to mixed sex couples: it also informs how mixed sex

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<sup>9</sup> <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/>

<sup>10</sup> <http://www.legislation.gov.uk/ukpga/2019/12/section/2/enacted>

<sup>11</sup> <http://www.legislation.gov.uk/ukpga/2019/22/section/8/enacted>

civil partnership will operate in Scotland. This Bill ensures equality of treatment for all couples in civil partnerships by generally aligning the scheme of mixed sex civil partnership in the Bill to the existing scheme of same sex civil partnership in the 2004 Act.

25. This Bill follows the Scottish Government's consultation<sup>12</sup> on the future of civil partnership in 2018. The consultation set out two options for change: closure of civil partnership to new relationships from a date in the future, or extension of civil partnership to mixed sex couples. The purpose of the consultation was to seek fresh insights into the known arguments for and against the two options. The Scottish Government has published an analysis<sup>13</sup> of consultation responses, and the responses themselves<sup>14</sup> where permission to publish was given.

## **Alternative approaches**

### ***No action***

26. The UK Supreme Court's analysis of the existing law in England and Wales precluded the option of taking no action. The Scottish Government therefore limited its consideration to options that would address the incompatibility. The alternative approach that was identified would have involved closure of civil partnership to new relationships from a date in the future.

### ***Closure of civil partnership to new relationships***

27. Closing civil partnership to new relationships from a date in the future would have been consistent with the UK Supreme Court decision in *Steinfeld*. Scottish statistics indicate that since the introduction of same sex marriage there is limited demand<sup>15</sup> for same sex civil partnership. In other jurisdictions where marriage and civil partnership (or a similar relationship) are available to mixed sex and same sex couples, and the rights and responsibilities are broadly the same, most couples will opt for marriage<sup>16</sup>.

28. In addition, the legal consequences of marriage and civil partnership in Scotland and the UK as a whole are largely the same. The Scottish Government was also aware of suggestions that the introduction of same sex marriage essentially rendered civil partnership obsolete, and that closure would create administrative simplicity, with marriage left as the sole option.

29. The closure scheme would not have required those in existing civil partnerships to end their relationship. However, there could nonetheless have been an impact on these couples. Closure could have left couples in legacy relationships at increased risk of the nature of their relationship being misunderstood as time passed: this could have impacted on recognition of the relationship and the acknowledgment that rights flow from it. It could also have created insecurity about the

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<sup>12</sup> <https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/>

<sup>13</sup> <https://www.gov.scot/publications/future-civil-partnership-scotland-analysis-consultation-responses/>

<sup>14</sup> [https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/consultation/published\\_select\\_respondent](https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/consultation/published_select_respondent)

<sup>15</sup> <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/marriages-and-civil-partnerships/marriages-and-civil-partnership-time-series-data>

<sup>16</sup> For example, New Zealand has published statistics on uptake of both relationships:

<https://www.stats.govt.nz/information-releases/marriages-civil-unions-and-divorces-year-ended-december-2018>

value of the relationship more generally, and inadvertently placed couples under pressure to change their relationship to marriage.

30. Stonewall Scotland touched on this as part of its response to the consultation on the future of civil partnership in Scotland:

*“Stonewall Scotland shares concerns that ending the registration of civil partnership would negatively affect LGBT people, as this would limit the options available to same-sex couples and undermine the relationships of those in existing same-sex civil partnerships.”*

31. The Scottish Government was also mindful of what closure could not do. People in civil partnerships would continue to be effectively outed as being in a same sex relationship once their relationship status became known. Mixed sex couples who felt unable to marry for personal reasons (for example, if someone had experienced domestic abuse in a previous marriage) would not be able to access the rights and responsibilities of a legally recognised relationship. Transgender people in civil partnerships would have to dissolve their relationship or change it to marriage should they wish to obtain a full Gender Recognition Certificate, as there is no current recognition of mixed sex civil partnership in Scotland.

32. After careful consideration the Government decided that extending civil partnership to mixed sex couples is preferable to closing civil partnership to new relationships from a date in the future. Opening up civil partnership to mixed sex couples is consistent with the general equality principles of “levelling up”, and extending choice.

### **Summary of main provisions in the Bill**

33. The Bill makes civil partnership available to mixed sex couples. More details are at paragraphs 22 to 25.

34. The current eligibility criteria for entering into a same civil partnership will be applied to mixed sex couples, other than the requirement that the couple be of the same sex. The Bill will remove the same sex requirement. More details are at paragraphs 41 and 42.

35. Same sex civil partnerships are created by civil registration. Religious and belief registration of civil partnership is also available. This Bill replicates those arrangements for mixed sex couples. More details are at paragraphs 46 and 47.

36. The Bill also provides for the legal consequences of entering into this relationship. More details are from paragraph 64 onwards.

37. The Bill brings an end to the requirement for a person in a civil partnership who obtains legal recognition of their change of gender to end their relationship. This mirrors current arrangements for transgender people in marriages. More details are at paragraphs 100 to 103.

38. Mixed sex civil partnerships from elsewhere in the UK will be recognised in Scotland. The Bill contains provisions on the recognition in Scotland of overseas relationships akin to mixed sex civil partnerships. More details are at paragraphs 107 to 111.

39. The Bill also makes interim arrangements for mixed sex civil partnerships from outwith Scotland to be recognised as marriages in Scotland until mixed sex civil partnership is available here. More details are at paragraphs 113 to 117.

40. At present, couples in same sex civil partnerships can change their relationship to a marriage. The extension of civil partnership to mixed sex couples will mean that mixed sex civil partnerships will be covered by these arrangements. More details are at paragraphs 134 to 136.

## **GENERAL PROVISIONS ON MIXED SEX CIVIL PARTNERSHIP**

### **Eligibility**

41. Eligibility criteria for entering into a civil partnership in Scotland are set out in section 86 of the 2004 Act, including the requirement that both parties be of the same sex. That requirement will be removed by the Bill in order to meet the key policy aim of making civil partnership available to mixed sex couples.

42. Prohibited degrees of relationship are set out in Schedule 10 to the 2004 Act (which mirror those which apply to marriage). These prevent people with certain close degrees of relationship to each other from entering into a civil partnership. The Scottish Government's policy intention is that these prohibited degrees should also apply to mixed sex civil partnership.

### ***Alternative approaches***

43. A small number of respondents to the 2018 consultation on the future of civil partnership suggested that the way forward for civil partnership could include making it available to sibling couples. This would involve establishing a legally recognised relationship that siblings could enter. Civil partnership is not open to siblings because two people are not eligible to enter into civil partnership if they are within forbidden degrees<sup>17</sup> of relationship to each other.

44. That echoes discussions in England and Wales. Lord Lexden has introduced a private member's Bill, the Civil Partnership (Amendment) (Sibling Couples) Bill<sup>18</sup>, to the House of Lords. The Bill would make sibling civil partnership available in England and Wales, and Scotland and Northern Ireland. The purpose of this Bill is to give sibling couples access to the rights that flow from a legally recognised relationship, particularly those relating to inheritance.

45. The Scottish Government does not consider that sibling civil partnerships are needed. The main driver for sibling civil partnership appears to be inheritance tax<sup>19</sup>, which is a reserved matter.

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<sup>17</sup> Schedule 10 to the 2004 Act sets out the forbidden degrees of relationship:

<http://www.legislation.gov.uk/ukpga/2004/33/schedule/10>

<sup>18</sup> [https://publications.parliament.uk/pa/bills/lbill/2017-2019/0025/lbill\\_2017-20190025\\_en\\_2.htm](https://publications.parliament.uk/pa/bills/lbill/2017-2019/0025/lbill_2017-20190025_en_2.htm)

<sup>19</sup> [https://hansard.parliament.uk/lords/2018-07-20/debates/016BE715-69D4-41C7-9473-82CB03215DE8/CivilPartnershipAct2004\(Amendment\)\(SiblingCouples\)Bill\(HL\)](https://hansard.parliament.uk/lords/2018-07-20/debates/016BE715-69D4-41C7-9473-82CB03215DE8/CivilPartnershipAct2004(Amendment)(SiblingCouples)Bill(HL)) Column 1398

If changes are needed, it would seem more proportionate to amend the legislation on inheritance tax rather than introduce sibling civil partnership. In addition, it would not be appropriate to apply some provisions in civil partnership legislation, on matters like parentage and parental responsibilities and rights, to sibling relationships.

### **Registration of civil partnership, including religious and belief registration**

46. When civil partnership was first introduced by the 2004 Act, civil partnership could only be registered by civil registrars. Religious and belief registration was introduced for civil partnership by amendments to the 2004 Act made by section 24 of the 2014 Act. As a result, same sex civil partnerships can be registered by:

- Civil registrars;
- A celebrant of a religious or belief body prescribed by regulations made by the Scottish Ministers<sup>20</sup>;
- A person nominated by a religious or belief body to the Registrar General and approved by the Registrar General to act as a celebrant;
- A celebrant belonging to a member of a religious or belief body who has been granted temporary authorisation by the Registrar General. Such temporary authorisation may be for a specific civil partnership (or civil partnerships) or for a period of time.

47. This Bill will replicate these arrangements for mixed sex civil partnerships, giving mixed sex couples the same choices in how their civil partnership is to be created as same sex couples.

### **Alternatives**

48. The Scottish Government understands that religious or belief civil partnerships are relatively rare. The best information available suggests that there have been fewer than ten<sup>21</sup> up to and including 2018. The seemingly low demand could suggest that there would be no need to replicate these provisions for mixed sex civil partnership. However, absence of provisions in this area would prevent a mixed sex couple from entering into a civil partnership within their faith or belief.

49. In addition, the Scottish Government expects that there will be more mixed sex civil partnerships than same sex ones. This is because, in general, there are more mixed sex couples in society than same sex couples. As a result, there could be more demand for religious or belief civil partnerships. Making no provision for religious or belief civil partnership would fail to reflect that probable demand.

### **No duty on religious or belief bodies to register mixed sex civil partnerships**

50. While the Scottish Government's intention is that couples should have the option to enter into a civil partnership within their own faith or belief, it wishes to strike a balance between

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<sup>20</sup> So far, Humanist Society Scotland and the Scottish Unitarian Association have been prescribed to register civil partnerships. A list of prescribed religious or belief bodies can be found at: [http://www.legislation.gov.uk/ssi/2016/427/pdfs/ssipn\\_20160427\\_en.pdf](http://www.legislation.gov.uk/ssi/2016/427/pdfs/ssipn_20160427_en.pdf) (see Annex A)

<sup>21</sup> Preliminary figures from National Records of Scotland.



meeting the wishes of these couples and reflecting that some religious and belief bodies may not want to register mixed sex civil partnerships.

51. As indicated above, there are a variety of ways by which a celebrant can be authorised to register civil partnerships. A celebrant may have been nominated to the Registrar General or may have been granted temporary authorisation by the Registrar General, or the celebrant may belong to a religious or belief body prescribed by the Scottish Ministers in regulations.

52. The 2004 Act provides that a religious or belief body can only be prescribed for the purposes of registering same sex civil partnerships if the body requests them to do so. The 2004 Act also provides that there is no duty on a religious or belief body to make such a request. Similarly, there is no duty on a religious or belief body to nominate any member as empowered to register civil partnerships; neither is there a duty on any person to apply for temporary authorisation to register these relationships.

53. The Bill replicates these provisions for the registration of mixed sex civil partnership. This reflects that some religious and belief bodies may not wish to register these relationships.

### ***Alternatives***

54. Alternative approaches would have been (i) not to replicate the provisions that apply to same sex civil partnership, or (ii) to make the registration of mixed sex civil partnership a civil process only.

55. The first option would have failed to take into account the possibility that some religious or belief bodies, or religious or belief celebrants may prefer not to register mixed sex civil partnerships.

56. The second option would have denied mixed sex couples the opportunity to enter into a civil partnership in a ceremony that acknowledged their faith or belief. It would also have denied religious and belief bodies that did wish to register mixed sex civil partnerships the opportunity to do so. This option would also have failed to provide mixed sex couples who wish to enter into a civil partnership with the options that are available to same sex couples who choose that relationship.

### ***Equality Act 2010***

57. The subject matter of this Act is generally reserved. The registration of same sex civil partnership by religious or belief bodies was introduced by the 2014 Act, along with same sex marriage. Specific provisions were made in an Order under section 104 of the Scotland Act 1998<sup>22</sup> to protect religious and belief celebrants and bodies<sup>23</sup>, recognising that some bodies and celebrants would not wish to take part in the registration of civil partnership and the solemnisation of same sex marriage. Should this Bill be enacted, the Scottish Government intends to ask the UK

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<sup>22</sup> An Order under section 104 of the Scotland Act 1998 at Westminster may make consequential provision following an Act of the Scottish Parliament.

<sup>23</sup> Paragraph 19 of Schedule 5 to SI 2014/3229 refers: <http://www.legislation.gov.uk/uk/si/2014/3229/schedule/5/made>

Government to modify these provisions in the Equality Act 2010, by way of another section 104 Order, so that they also extend to the religious or belief registration of mixed sex civil partnership.

## **Second civil partnership ceremony**

58. At present, a couple who have gone through a marriage ceremony outside the United Kingdom but are not, or are unable to prove that they are, validly married to each other can undergo a second marriage ceremony under section 20 of the Marriage (Scotland) Act 1977 (“the 1977 Act”). Under section 20, couples have to submit a statutory declaration<sup>24</sup> stating that they have previously gone through a marriage ceremony with each other and specifying the place and date at which, and the circumstances in which, they went through that ceremony. Ceremonies under section 20 are civil only.

59. The Scottish Government’s policy intention is to make provision allowing a second civil partnership registration. This will apply to both mixed sex and same sex couples. However, the reasons why this might be required are different to the rationale for second marriage ceremonies. This is because the provision in the 1977 Act may have traditionally been used where people overseas had a marriage ceremony that was not registered by the local civil authorities, or where the jurisdiction in question does not issue formal civil status documents.

60. Civil partnership, or equivalent relationships from overseas are far less likely to have been informally created, or created without a document being produced. The relationship is one established by modern legislation and created by a formal paper (or perhaps electronic) registration process. Therefore, the Scottish Government’s policy will allow for second civil partnership registration where a couple provides a statutory declaration that they registered a relationship overseas that would be recognised as a civil partnership in Scotland, but the couple cannot prove that they registered the relationship.

61. This approach may provide a solution for couples where they cannot evidence their relationship because of the destruction of documents through war, civil disturbance or natural disaster<sup>25</sup>. Couples in that situation will benefit from being able to secure the rights and responsibilities of their relationship through a second registration. A couple may find reassurance in a process that involves the use of information about the relationship that they are not able to evidence rather than requiring them to register their relationship as completely new.

## ***Alternatives***

62. The Scottish Government considered not making provision in this area, on the basis that section 20 of the 1977 Act is rarely used, and that civil partnership (or overseas equivalents) differs from marriage in that it will be underpinned by a registration process that should make evidence of the relationship available. On balance, the Scottish Government concluded that it would be useful to make provision in this area to reflect the possibility of registration records being

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<sup>24</sup> Provision on the form of statutory declarations is made in the Statutory Declarations Act 1835: <http://www.legislation.gov.uk/ukpga/Will4/5-6/62/contents>

<sup>25</sup> For example, in Japan, family records are held by the local authority. The Scottish Government understands that the Tohoku earthquake of 2011, subsequent tsunami and nuclear reactor disaster at Fukushima destroyed some local records or otherwise rendered them inaccessible.

destroyed by war, civil disturbance or natural disaster. The new provision is unlikely to be used very often but it may be very useful for a small number of couples.

## **Rights and responsibilities**

### ***General approach***

63. Where biological factors make alignment of mixed sex civil partnership to same sex civil partnership inappropriate, the Scottish Government's approach is to align mixed sex civil partnership to mixed sex marriage. This occurs in relation to the rights and responsibilities that arise in certain aspects of family law.

### ***Bill provisions on rights and responsibilities***

#### ***Presumption of parentage***

64. Section 5 of the Law Reform (Parent and Child) (Scotland) Act 1986 contains a presumption that a man is the father of a child if he is married to the mother at any time during her pregnancy. This is sometimes known as the "*pater est*" presumption as the presumption has a Latin tag of "*pater est quem nuptiae demonstrant*" or "the father is he who is married to the mother".

65. The Bill extends the presumption so that the male civil partner of a woman is presumed to be the father of her child.

#### ***Alternatives***

66. As part of a 2018 consultation<sup>26</sup> on the review of Part 1 of the Children (Scotland) Act 1995, the Scottish Government sought views on removing the existing presumption.

67. Respondents to the consultation made the following arguments for removal:

- The presumption could seem old fashioned;
- A child should know who their biological father is rather than operating on the basis of presumption;
- The operation of the presumption may not benefit a woman in an abusive marriage.

68. Respondents to the consultation made the following arguments against removal:

- The presumption is rebuttable by proof on the balance of probabilities;
- The existence of the presumption does not appear to cause any practical difficulties;
- Removal of the presumption could increase uncertainties on parentage and would be likely to lead to an increase in court cases on establishing fatherhood;

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<sup>26</sup> <https://consult.gov.scot/family-law/children-scotland-act/>

- The removal of the presumption could have had unintended consequences in other areas relating to families and children (e.g. inheritance).

69. Respondents' views were mixed<sup>27</sup>, and on balance, the Scottish Government concluded that it was appropriate to retain the presumption as there was not a strong enough argument for removal. The Scottish Government also concluded that the arguments against removal represented a strong case for the extension of the principle to the male civil partner of a woman.

70. Secondly, there is an argument that this presumption should not be extended to civil partners. However, this appears to be one of the areas where biological factors suggest that mixed sex civil partners should be aligned with mixed sex spouses.

### Registration of births

71. In relation to registration of births, sections 14 and 18 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provide that where the father of a child is not married to the mother he is not required to give notice of the birth, and the registrar is not to enter his details as the father in the birth register unless certain conditions are met. Generally this requires the man to acknowledge that he is the father, and the mother to want his name to be entered in the register.

72. The Bill would, for registration purposes, place the father of a child who is in a civil partnership with the mother in the same position as a father who is married to the mother. Such a father would therefore have a duty to report the birth, his relatives would be qualified to do so, and the consent of the mother would not be required for his name to be entered on the register.

### Alternative

73. An alternative would have been to make no provisions placing the father of a child who is in a civil partnership in the same position as a father married to a mother. This would have left fathers who were civil partners in a mixed sex relationship with the ability to register if:

- He jointly signs the register with the mother;
- He and the mother sign declarations that he is the father; or
- A court declares that he is the father, and the mother registers the birth.

74. The Scottish Government concluded that the nature of civil partnership, being similar to marriage, is such that there is no stateable case for placing fathers in a mixed sex civil partnership in a less beneficial position than married fathers. This appears to be one of the areas where biological factors suggest that mixed sex civil partners should be aligned with mixed sex spouses.

### Parental responsibilities and rights

75. Section 3 of the Children (Scotland) Act 1995 provides for a father to have parental responsibilities and rights ("PRRs") in certain circumstances, one of which is that he is married to the mother at the time of conception or later. A father can also obtain PRRs where he jointly

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<sup>27</sup><https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/pages/7/>

registers the birth with the mother, or where he registers a Parental Responsibilities and Parental Rights Agreement with the mother or where he obtains them through a court order.

76. The Bill makes provision so that the father will acquire PRRs when he is in a civil partnership with the mother at the time of conception or later. This aligns male civil partners of women with husbands of women.

#### *Alternatives*

77. Two alternatives were considered.

78. Firstly, in the 2018 consultation<sup>28</sup> on the review of Part 1 of the Children (Scotland) Act 1995, the Scottish Government sought views on whether all fathers should obtain PRRs. The Scottish Government decided against this approach, for a number of reasons. There may be good reasons why a mother decides not to jointly register the birth of a child, such as the having been the victim of domestic abuse or violence at the hands of the father. In addition, some fathers may be disinterested in the child. There may also be cases where a child is conceived as a result of rape or incest.

79. Another alternative would have been to make no provision in relation to a father obtaining PRRs when he is in a civil partnership with the mother. A father of a child in this position could still obtain PRRs through joint birth registration or by registering a Parental Responsibilities and Parental Rights Agreement or by going to court. The Scottish Government considers that these options would have disadvantaged fathers in mixed sex civil partnerships, requiring him to take action to secure his responsibilities and rights whereas married fathers would not. The mother and the child could also have been disadvantaged by these additional steps having to be taken.

#### *“Child of the family”*

##### *Children (Scotland) Act 1995*

80. Section 12 of the Children (Scotland) Act 1995 imposes certain duties on the courts in the context of actions of divorce, dissolution etc where there is a child of the family aged under 16. At present, the definition of “child of a family” is linked to biological factors inherent to mixed sex marriage and same sex civil partnership. The Bill amends this definition to take into account the possibility of a child being the biological child of two civil partners, and rationalises and simplifies the definition.

##### *Family Law (Scotland) Act 1985*

81. The Family Law (Scotland) Act 1985 regulates financial provision on divorce and dissolution. Section 9 sets out the principles that are to be applied. These includes the sharing of any economic burden of caring for a child of a marriage or a child accepted by civil partners as a child of the family or a child in relation to whom the parties are deemed to be parents by virtue of the Human Fertilisation and Embryology Act 2008. The Bill amends this to include a child who is the biological child of civil partners.

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<sup>28</sup> <https://consult.gov.scot/family-law/children-scotland-act/>

82. The Bill also amends the definition of “child” in section 27 of the 1985 Act so that it will cover the biological child of two civil partners. At present the definition relates only to a child accepted by the parties to a civil partnership as a child of the family. It also amends the definition of family so that it no longer assumes that the child of a civil partnership cannot be the biological child of civil partners.

#### *Alternatives*

83. In the course of reviewing the definitions of “child of the family” in the Children (Scotland) Act 1995 and Family Law (Scotland) Act 1985, the Scottish Government considered whether it was necessary or appropriate to retain express references to persons being treated as parents of a child by virtue of the legislation regulating assisted reproduction. The Scottish Government concluded that such explicit references were unnecessary and at odds with the general approach to references to these children.

84. The Adoption and Children (Scotland) Act 2007<sup>29</sup> provides that an adopted child is treated in law as if he or she was the biological child of the adopters or adopter. This approach replicates that used in the predecessor Act, the Adoption (Scotland) Act 1978. In the context of a marriage in which the parties to the marriage are the adoptive parents this provision means that an adopted child is included in the reference to a “child of the marriage” in section 9(1)(c) of the Family Law (Scotland) Act 1985 and in the reference to “a child of both of them” in section 12(4) of the Children (Scotland) Act 1995 without the need for any explicit reference to adopted children.

85. Various provisions in Part 2 of the Human Fertilisation and Embryology Act 2008 (“the HFEA”) also provide that a person is to be treated as the mother, father or a parent of a child in particular circumstances associated with assisted reproduction. When determining when a spouse or civil partner who is not a biological parent is treated as being a parent for the purpose of the references to “child of the marriage”, “child of both of them” and “child of the civil partnership”, the Scottish Government has concluded that there is no difference between the effect of being treated as a parent by virtue of adoption legislation, or being treated as a parent by virtue of a provision of HFEA. Accordingly, express references to persons treated as parents by virtue of HFEA are unnecessary in this context and are omitted in the revised definitions. The Scottish Government also considers that such references are undesirable: specific references would unnecessarily single out the parents of children born of assisted reproduction and be at odds with contemporary attitudes to assisted reproduction: that it is both commonplace and the equivalent of traditional reproduction.

#### *Human Fertilisation and Embryology Act 2008*

86. The HFEA is reserved. It makes provisions relating to assisted reproduction, including, in Part 2, on parenthood. Section 35 provides that, where a man is married to a woman, he is to be treated as the father of a child born to that woman through assisted reproduction. The Scottish Government intends to ask the UK Government to make amendments to the HFEA that will

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<sup>29</sup> See section 40: <https://www.legislation.gov.uk/asp/2007/4/section/40>

replicate these provisions for mixed sex civil partners in an Order under section 104 of the Scotland Act 1998<sup>30</sup>.

### ***Ending legally recognised relationships***

#### *Dissolutions: grounds*

87. There are two grounds for dissolution of a civil partnership in Scotland. The first ground is irretrievable breakdown. This can be shown by the parties not cohabiting for one year (with both parties consenting to the dissolution); the parties not cohabiting for two years (regardless of whether or not both parties consent to the dissolution) or by one of the parties behaving in such a way that the other party cannot reasonably be expected to cohabit with him or her. The second ground is if either of the civil partners obtains an interim Gender Recognition Certificate.

88. In either case, an application to the court is required. A simplified process can be followed where certain criteria are met<sup>31</sup>.

89. The policy intention is for the grounds of dissolution of a mixed sex civil partnership to be the same as for the dissolution of a same sex civil partnership. However, in the case of both same sex and mixed sex civil partnership the issue of an interim Gender Recognition Certificate will cease to provide a ground for dissolution where the Gender Recognition Panel has subsequently issued the same person with a full Gender Recognition Certificate. This is because the Gender Recognition Panel will only be able to issue a full Gender Recognition Certificate to someone in a civil partnership when the other partner has consented to the civil partnership continuing: such consent may become available after the Panel has issued an interim Gender Recognition Certificate. See paragraphs 100 to 103 for further information about the provisions in the Bill that relate to transgender people.

#### *Alternative*

90. Adultery cannot be used to establish the irretrievable breakdown of a civil partnership whereas it can be used to establish the irretrievable breakdown of a marriage<sup>32</sup>. Adultery is defined at common law<sup>33</sup> as voluntary heterosexual intercourse outside marriage. The Scottish Government does not intend to extend adultery to the law of dissolution of civil partnership. If a civil partner wishes to raise a dissolution action based on the sexual infidelity of his or her partner, then there is the option of raising an action on the basis of one of the parties behaving in such a way that the other party cannot reasonably be expected to cohabit with him or her.

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<sup>30</sup> The HFEA is discussed in paragraphs 53 and 54 of the UK Government's consultation on next steps for civil partnership:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815741/Civil\\_Partnerships\\_-\\_Next\\_Steps\\_and\\_Consultation\\_on\\_Conversion.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815741/Civil_Partnerships_-_Next_Steps_and_Consultation_on_Conversion.pdf)

<sup>31</sup> Information on simplified divorce and dissolution procedures is at <https://www.scotcourts.gov.uk/taking-action/divorce-and-dissolution-of-civil-partnership>

<sup>32</sup> Adultery is now rarely used to establish irretrievable breakdown of a marriage: see <https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/supptab1516> (see table 2).

<sup>33</sup> *MacLennan v MacLennan* 1958 S.C. 105

### Voidable marriage

91. A marriage is voidable, as opposed to being void, when it is not a complete nullity from the outset, but there is a ground on which it can be annulled by a court. In Scotland, a marriage is voidable only if one of the parties is at the time of the marriage permanently and incurably impotent in relation to the other spouse<sup>34</sup>. This only applies to mixed sex marriages: it does not apply to same sex marriages<sup>35</sup> or same sex civil partnerships. However, the Scottish Government understands that permanent incurable impotency is rarely used to void a marriage. In light of this, the Scottish Government has concluded that it is not necessary to provide in legislation that mixed sex civil partnership should be voidable on these grounds.

### Alternative

92. An alternative would be to extend this provision so that it extends to mixed sex civil partnerships. However, the provision is little used. More significantly for the purposes of this Bill, impotence appears to be antiquated grounds for bringing a relationship to an end. Accordingly, the Scottish Government has concluded that there is no need to replicate this for mixed sex civil partners.

### Religious divorce

93. Section 3A of the Divorce (Scotland) Act 1976 empowers a court in divorce proceedings to postpone granting a decree of divorce where there is a religious impediment to one of the parties remarrying and the other party can act to remove the impediment. Section 3A applies where the new marriage would be solemnised by a celebrant of a religious body that has been prescribed by regulations.

94. So far, the only prescribed body is the Jewish religion in terms of the Divorce (Religious Bodies) (Scotland) Regulations 2006<sup>36</sup>. An impediment to divorce may arise within Judaism where one party refuses to grant the *get* (Jewish religious divorce). The *get* is granted by the *Beth Din* (court of Jewish religious law). Without the *get*, the other spouse may find it difficult to remarry in some branches of Judaism, such as Orthodox Judaism.

95. The Scottish Government notes that this legislation may be of value not only when actively employed in the courts but also where it prevents a situation arising where one party is disadvantaged. For example, if a religious divorce is not already in place before civil proceedings, this may result in one party withholding consent to the religious divorce in order to extract financial or other concessions, thereby frustrating the will of the civil court. The Scottish Government understands that section 3A and the 2006 Regulations have prevented this situation from arising, thus protecting vulnerable individuals (typically women).

96. The Bill replicates these provisions in relation to the postponement of a decree of dissolution of a civil partnership where a religious impediment to marriage exists. The policy here, consistent with that which informs section 3A of the Divorce (Scotland) Act 1976, is to ensure that

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<sup>34</sup> The Scottish Government understands that in England and Wales, a mixed sex marriage may be annulled on the basis of non-consummation. This does not form part of the law of Scotland.

<sup>35</sup> See section 5(1) of the Marriage and Civil Partnership (Scotland) Act 2014

<sup>36</sup> <http://www.legislation.gov.uk/ssi/2006/253/contents/made>



the civil court is able to postpone the grant of the decree until such time as the relevant party has acted to remove the impediment.

### *Alternatives*

97. An alternative would have been to make no provisions in these areas on the basis that they were unlikely to be used. The Scottish Government concluded that there was not sufficient evidence to support this view, and that the absence of provisions in this area could place women within the Jewish community (and, potentially, in other communities if other religious bodies should be prescribed) at a disadvantage.

## **Transgender people in civil partnerships**

### *Current position*

98. The Gender Recognition Act 2004 (“the GRA”) establishes the scheme of legal gender recognition in the UK. It provides for someone to make an application to the Gender Recognition Panel (“GRP”) in order to obtain a Gender Recognition Certificate (“GRC”).

99. The current application process takes into account that civil partnership is only available to same sex couples and there is no current recognition of mixed sex civil partnership. As a result, a civil partner wishing to obtain a full GRC has to either dissolve the civil partnership or change it to marriage, unless both civil partners are obtaining legal gender recognition on the same day.<sup>37</sup>

### *Specific Bill provisions on transgender people in civil partnerships*

100. The Bill makes provision so that the GRP can issue a full GRC to a civil partner so long as the other civil partner consents to the civil partnership continuing. This mirrors the current provision in place in respect of spouses.

101. In addition, section 4E of the GRA as it stands makes provision so that a person in a protected Scottish marriage (i.e. a marriage solemnised in Scotland) who has an interim GRC and does not have the consent of the spouse may apply to the sheriff for the issue of the full GRC. The Bill replicates this so that similar provision is made for civil partners.

102. The Bill also makes some consequential provision. As indicated above, civil partners can currently stay in their relationship if both obtain legal gender recognition on the same day. As civil partners obtaining legal gender recognition will not now need to do so on the same day to stay in the relationship, provisions which relate specifically to the same day requirement are being removed.

103. Section 5D of the GRA currently makes provision requiring the Scottish Ministers to make provision by Order for a further way for civil partners to obtain a full GRC. This Order-making power has not been used and is no longer needed given that the Bill will make provision so that

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<sup>37</sup> Section 5C of the Gender Recognition Act: <http://www.legislation.gov.uk/ukpga/2004/7/section/5C>

civil partners obtaining legal gender recognition can stay in the relationship. As a result, the Bill repeals section 5D of the GRA.

### ***Alternative***

104. An alternative would have been to make no provision in this area at all, leaving any amendment of the GRA to reflect the introduction of mixed sex civil partnership to be considered as part of broader reform of the GRA. However, the rationale behind current provisions in the GRA is that civil partnership can only be a same sex relationship. That will cease to be the case as a consequence of the Bill and it is logical to change provisions accordingly. In addition, not changing provisions in the GRA to reflect the introduction of mixed sex civil partnership would have placed transgender civil partners at a disadvantage compared to their married counterparts.

## **Recognition of overseas relationships**

### ***Terminology: relationships from other jurisdictions***

105. Terms used outside the U.K. to describe relationships similar to civil partnerships include:

- Civil union (New Zealand);
- Domestic partnership (some states in the United States of America);
- Registered partnership (Denmark, Norway, Sweden and the Netherlands);
- Pacte civil de solidarité (PACs or civil solidarity pact: the term used in France);
- Cohabitation légale (legal cohabitation: the term used in Belgium);
- Unión Concubinaria (consensual union: the term used in Uruguay).

106. For convenience, this Policy Memorandum uses “civil partnership” as a term for registered relationships from outside the United Kingdom which are not marriage.

## **General scheme**

107. The Bill makes provision that will allow mixed sex relationships registered overseas that are akin to mixed sex civil partnership to be recognised here as civil partnerships.

108. At present, overseas mixed sex civil partnerships are not recognised in Scotland, although overseas same sex civil partnerships are recognised. The Scottish Government’s general policy intention is to recognise overseas mixed sex civil partnerships on the same lines as existing provisions for recognition of same sex civil partnership from overseas. This will allow couples in relationships from other jurisdictions access in Scotland to the rights and responsibilities that flow from their relationship.

109. The current scheme of recognition of same sex relationships requires that certain criteria be met for relationships to be recognised. In essence, the relationship should be one which has either been specified or meets certain general conditions. The current list of specified relationships

is in Schedule 20<sup>38</sup> to the 2004 Act. Section 213 of the 2004 Act provides that the list can be amended by an Order made by the Secretary of State with the consent of the Scottish Ministers and the Department of Finance and Personnel in Northern Ireland<sup>39</sup>.

110. The Scottish Government's policy is to recognise mixed sex civil partnership based on equivalent criteria: specified relationships or general criteria. However, the Scottish Ministers are to have the power to specify mixed sex relationships rather than the Secretary of State. Specified same sex relationships and specified mixed sex relationships are to be set out in separate lists. This should make the information accessible and user-friendly.

111. The policy on the consequences of recognising mixed sex relationships registered overseas is to reflect existing provisions for same sex civil partnership registered overseas. The rights and responsibilities that attach to same sex civil partnerships registered in Scotland also attach to overseas civil partnerships. This can result in people in certain relationships (the French PACs, for example) having more rights and responsibilities in Scotland than in the original jurisdiction. In some cases the rights and responsibilities are very similar (the civil union from New Zealand, for example).

### ***Alternatives***

112. The Scottish Government considered the alternative approach of providing the Secretary of State with the power to specify mixed sex relationships to be recognised in Scotland. The Scottish Government's view is that the new arrangements for recognising mixed sex civil partnerships in Scotland, where the relevant powers are to be exercised by the Scottish Ministers, is in line with the devolution settlement. The Scottish Government is not, however, aware of any practical problems in relation to how overseas same sex relationships are recognised in Scotland and is not proposing any changes to these existing arrangements.

### **Interim recognition of mixed sex civil partnerships**

113. As indicated above, regulations extending civil partnership to mixed sex couples in England and Wales are required to be in force no later than 31 December 2019. This means that mixed sex civil partnerships are likely to be capable of formation in England and Wales before they are in Scotland. Once mixed sex civil partnership is available in Scotland, mixed sex civil partnerships registered elsewhere in the UK will be automatically recognised in Scotland as the definition of civil partnership in the law of Scotland will include any civil partnership formed under the 2004 Act, and will no longer require the parties to be of the same sex.

114. The legislation that has been put in place for England and Wales, and Northern Ireland to introduce mixed sex civil partnerships, including the timescales, has prompted the Scottish Government to develop a policy on interim recognition of non-Scottish mixed sex civil partnerships.

115. The interim recognition scheme will allow mixed sex civil partnerships from other jurisdictions (not just England and Wales, and Northern Ireland) to be recognised as marriages

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<sup>38</sup> <http://www.legislation.gov.uk/ukpga/2004/33/schedule/20>

<sup>39</sup> Under section 23(2) of the Northern Ireland Act 1998: <http://www.legislation.gov.uk/ukpga/1998/47/section/23>

until such time as Scottish provisions on the creation of mixed sex civil partnerships in this jurisdiction are in force. A comprehensive package of statutory rights and responsibilities for mixed sex marriage is already in place, and temporarily recognising mixed sex civil partnerships from elsewhere as marriages will benefit couples when their rights and responsibilities fall to be determined according to the law of Scotland by applying that body of law and avoiding the risk of any missing provision.

116. This will not be the first time there has been an interim scheme of recognition in place: the Marriage (Same Sex Couples) Act 2013 took into account that same sex marriage was available in England and Wales ahead of Scotland by making provision in Schedule 2<sup>40</sup> for temporary recognition of same sex marriages as civil partnership.

117. The policy is that recognition in this way will end automatically when the scheme of rights and responsibilities for mixed sex civil partnerships in the Bill commences, and the Bill makes provision to this effect. At this time, the relationships will then be recognised as mixed sex civil partnership.

### ***Alternatives***

118. The Scottish Government considered implementing no scheme of interim recognition, on the basis that recognition would follow in due course, and that recognition as marriage could be confusing for couples even if only for a short time. On balance, the Scottish Government concluded that it would be better for couples to have access to rights and responsibilities as soon as possible, and that any risk of confusion about the nature of the relationship was outweighed by the benefits of recognition.

119. The Scottish Government also considered limiting its interim recognition provisions to only those mixed sex civil partnerships formed in England and Wales, and Northern Ireland. It concluded that there were insufficient grounds to limit the interim recognition scheme to mixed sex civil partnerships from these jurisdictions only as couples or individuals from other countries could be unfairly disadvantaged by this.

### **Forced civil partnership**

#### ***Criminal measure***

120. Section 122<sup>41</sup> of the Anti-Social Behaviour, Crime and Policing Act 2014 (a UK Act) created the offence of forced marriage in Scotland<sup>42</sup>. This Bill will amend that section in order to create the offence of forced civil partnership in Scotland. This will apply to same sex and mixed sex civil partnerships.

121. 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

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<sup>40</sup> <http://www.legislation.gov.uk/ukpga/2013/30/schedule/2/enacted>

<sup>41</sup> <http://www.legislation.gov.uk/ukpga/2014/12/section/122/enacted>

<sup>42</sup> <https://www.parliament.scot/parliamentarybusiness/Bills/63923.aspx>

sex couples may create a loophole. The Scottish Government's intention is to close that loophole by creating the offence of forced civil partnership.

122. This approach is consistent with the general principles of the Council of Europe Convention on preventing and combating violence against women and domestic violence<sup>43</sup> (the Istanbul Convention). The Preamble to that Convention characterised forced marriage as a serious violation of the human rights of women and girls, and an obstacle to equality<sup>44</sup>, and Article 37 required signatories to take steps to criminalise forced marriage.

123. That accords with the view taken by the United Nations, which adopted Resolution 71/175 on Child, early and forced marriage<sup>45</sup> on 19 December 2016. That Resolution treats forced marriage as a human rights violation.

124. While the name of the relationship in a forced civil partnership is different, the consequences for the human rights of the affected individual would be the same. Accordingly, the Scottish Government's view is that making provisions in this area is consistent with the policy intentions of the Istanbul Convention, and the thinking that underpins the UN's view on the human rights implications of forced marriage.

125. The Scottish Government has also considered certain concerns raised by stakeholders during the debate on the Legislative Consent Motion for the Anti-Social Behaviour, Crime and Policing Bill (as it was at the time) in the Scottish Parliament. Some organisations thought that the creation of the offence might act as a deterrent to reporting, particularly if family members were involved. The Scottish Government is aware that the same point could be made in relation to the forced civil partnership offence.

126. However, the Scottish Government has come to the conclusion that not creating the offence of forced civil partnership would leave a loophole in the law that could easily be exploited.

### ***Civil measure***

127. Part 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 contains civil measures on forced marriage, including forced marriage protection orders. These orders can contain prohibitions, restrictions or requirements, or other terms 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 partnerships. That power is subject to the affirmative procedure. It has not been used.

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<sup>43</sup><https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046031c>

<sup>44</sup>"Recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men ..."

<sup>45</sup><https://digitallibrary.un.org/record/857708?ln=en>

128. Based on the same reasoning that applies to the extension of the criminal measure, the Scottish Government's intention is to replicate the civil measures to extend them to civil partnership (both mixed and same sex).

129. The Scottish Government intends to make an order under section 10 of the 2011 Act to a timescale that will allow for the criminal and civil measures to both be in place when the increased risk of forced civil partnership crystallises upon the introduction of mixed sex civil partnership. The extension of Part 1 of the 2011 by order and the amendment of section 122 of the 2014 Act in this Bill will jointly provide a comprehensive package of measures against forced civil partnership.

### Alternatives

130. Alternatives to extending the criminal measure in this Bill would have been:

- Option 1: not making provision for an offence of forced civil partnership, (and not extending the civil measure); or
- Option 2: not making provision for the offence of forced civil partnership (but extending the civil measure in secondary legislation in time for the introduction of mixed sex civil partnership).

131. Option 1 would have been at odds with the principles of the Istanbul Convention, and the thinking that underpins the UN's view on the human rights implications of forced marriage. It would also have been at odds with the Scottish Government's view that the extension of civil partnership to mixed sex couples might create a loophole that would have been vulnerable to exploitation.

132. On option 2, as with option 1, the absence of a criminal offence would have been at odds with the principles of the Istanbul Convention, and the thinking that underpins the UN's view on the human rights implications of forced marriage. The Scottish Government's view is that option 2 would have failed to provide a sufficiently robust scheme of measures against forced civil partnership, given that the consequences for the rights of the victims are likely to be the same regardless of whether a forced relationship is a marriage or a civil partnership.

## **Changing legally recognised relationships**

### *A note on terminology*

133. This Policy Memorandum outlines the Scottish Government's approach to changing legally recognised relationships (e.g. on changing civil partnerships to marriage). In New Zealand, where there is existing provision in this area<sup>46</sup> the term "change" is also used. In England and Wales, the terms "convert" and "conversion" are used. In Scotland, the term "change" is used (e.g. in section 10 of the 2014 Act) and is employed throughout this Policy Memorandum.

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<sup>46</sup> Section 18 of the Civil Union Act 2004  
(<http://www.legislation.govt.nz/act/public/2004/0102/latest/DLM323429.html>)

*Changing a civil partnership to a marriage*

134. There are currently two routes through which a same sex civil partnership registered in Scotland can be changed to a marriage. Couples can have a marriage ceremony or couples can change their civil partnership to a marriage under an administrative route set out in section 10 of the 2014 Act, and in regulations made under section 10. Civil partners in a same sex civil partnership registered outwith Scotland can only change their relationship to marriage through having a ceremony. This reflects that the registrar will have details of a relationship registered in Scotland on their IT system but will not have details of a relationship registered elsewhere.

135. The provisions in this Bill mean that the two routes of changing a civil partnership to a marriage will apply to mixed sex couples. Again, civil partners in a civil partnership registered outwith Scotland will only be able to change their relationship to marriage through having a ceremony.

136. The approach of allowing mixed sex civil partners to change their relationship to marriage is consistent with the Scottish Government's general policy for mixed sex civil partnership: to align it to same sex civil partnership. The Bill also makes it clear that being authorised to solemnise mixed sex marriages does not mean that a celebrant has to solemnise the marriage of a mixed sex couple who are already civil partners.

*Alternatives*

137. The Scottish Government considered a number of alternative approaches to changing legally recognised relationships, including making provisions on changing same sex and mixed sex marriages to civil partnerships. The Bill does not contain provisions to this effect.

138. One alternative would have been to bring an end to the current system whereby same sex civil partners can change their relationship to a marriage, and to make no provision for mixed sex civil partners to change their relationship to marriage. This option was rejected as the Scottish Government's position is that there are strong equality drivers, relating to the acceptance of same sex relationships in society, for continuing to allow civil partners to change their relationship to marriage if they so wish.

139. A second alternative would have been to continue the existing arrangements where same sex civil partners can change their relationship to marriage, but not extend them to mixed sex civil partners on the basis that mixed sex couples will have had, and rejected, the option to marry when making the decision to enter into their relationship. This alternative was rejected because the Scottish Government could see no reasonable justification for treating mixed sex civil partners differently to same sex civil partners. While there are reasons for wishing to change a civil partnership into a marriage that might be specific to same sex couples, there are other reasons that might apply equally to same sex and mixed sex couples, such as a wish to ensure full recognition of their relationship overseas.

140. Another alternative would be to allow changes of same sex and mixed sex civil partnerships to marriage for a limited period, similar to UK Government proposals for England and Wales<sup>47</sup>. This option was rejected as the factors that might cause a couple to change their civil partnership into a marriage are not time-limited. For example, a couple might wish to change their relationship to a marriage so as to access greater recognition overseas, or a couple might acquire religious faith and wish to be married.

141. A further alternative considered by the Scottish Government was to make provisions in this Bill allowing all married couples to change their relationship to a civil partnership. However, the Scottish Government considers that none of the key considerations that justify providing for civil partnerships to be changed to marriages apply with equal effect to the converse situation of changing marriages into civil partnerships.

142. The existence of a means to change civil partnerships into marriages is intrinsically linked to the key aim of the Scottish legislation introducing same sex marriage: the validation of same sex relationships as fully deserving of equal societal recognition and the same respect as mixed sex relationships. Allowing same sex couples to marry was particularly important in achieving that aim because of the historic importance of marriage as the key relationship in family life and its wider role in society and social history.

143. For those who are in a civil partnership, changing the civil partnership into a marriage provides a means of achieving the same societal validation. The same facility will be extended to mixed sex civil partners, principally because the Scottish Government does not wish to treat them differently from same sex couples. The Scottish Government also recognises that views about the traditional importance of marriage may have a role in causing mixed sex couples who initially choose civil partnership to seek to change their relationship.

144. The Scottish Government considers that these considerations do not apply when it comes to changing marriages to civil partnerships. This is reflected in the position adopted in other jurisdictions: the Scottish Government is only aware of two countries where marriage and civil partnership are available to all where changes in both direction are possible: Austria and New Zealand.

145. At a practical level, the Scottish Government's view is that the considerations which justify providing for civil partnerships to be changed into marriages are not matched by corresponding considerations that favour marriages being changed into civil partnerships. There may be greater recognition of marriages overseas than of civil partnerships. As a result, couples who initially opted for civil partnership may have practical reasons for wishing to change their relationship to marriage to secure more legal rights overseas. That may also apply where one or both parties to a relationship retain links to a country that would not recognise their relationship. That could impact how the children of the relationship are seen, for example. The more limited availability of civil partnership generally means that it is unlikely a couple would wish to change their relationship from a marriage to a civil partnership in order to access recognition overseas.

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<sup>47</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815741/Civil\\_Partnerships\\_-\\_Next\\_Steps\\_and\\_Consultation\\_on\\_Conversion.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815741/Civil_Partnerships_-_Next_Steps_and_Consultation_on_Conversion.pdf) See page 23 et seq.



146. There are also complexities in relation to changing marriages to civil partnerships. The UK Government consultation notes<sup>48</sup> that changing mixed sex marriage to a mixed sex civil partnership will result in less favourable inheritable state pension rights where a subsequent bereavement takes place (this is a reserved matter). The UK Government indicates that guidance will be available on this.

147. In addition, when a same sex civil partnership is changed to marriage, it ends and the resulting marriage is treated as having existed since the date the civil partnership was formed. This is the case even if the civil partnership pre-dates the introduction of same sex marriage. This means that some same sex marriages could be treated as having existed as far back as December 2005, when the first civil partnerships were registered.

148. Applying the same approach to changing marriages to civil partnerships is more complicated given that mixed sex couples have always been able to marry. Some of those married couples who may now wish to change to a civil partnership may have married long before civil partnerships existed in Scotland.

149. There may be a particular issue in Scotland on financial provision on dissolution of a civil partnership. In Scotland, when a couple divorce their joint assets are regarded as “matrimonial property”, with “matrimonial property” being property bought for or during the marriage. The same regime is in place when civil partners dissolve – the property is known as “civil partnership property”.

150. For all these reasons the option of permitting married couples to change their marriage into a civil partnership was rejected.

## **CONSULTATION**

### **2018 consultation**

151. The Scottish Government consulted<sup>49</sup> from 28 September 2018 to 21 December 2018 on the future of civil partnership in Scotland. The consultation set out two options for change:

- Closure of civil partnership to new relationships from a date in the future; or
- Extension of civil partnership to mixed sex couples.

152. The purpose of the consultation was qualitative: to seek fresh insight into the known arguments for and against these two options.

### ***Consultation outcome***

153. The Scottish Government has published<sup>50</sup> an analysis of consultation responses.

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<sup>48</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815741/Civil\\_Partnerships\\_-\\_Next\\_Steps\\_and\\_Consultation\\_on\\_Conversion.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815741/Civil_Partnerships_-_Next_Steps_and_Consultation_on_Conversion.pdf) page 32, paragraph 27.

<sup>49</sup> <https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/>

<sup>50</sup> <https://www.gov.scot/publications/future-civil-partnership-scotland-analysis-consultation-responses/>

154. There were 481 responses. 462 were from individuals; 19 from organisations. Of the 472 respondents who answered the question about where they were resident, 369 respondents stated they were resident in Scotland; 97 stated the rest of the UK, and 6 from the rest of the world.

155. Consultation respondents raised a number of points including those outlined below.

***On the option to close civil partnership to new relationships***

156. Some respondents commented that civil partnerships are a now unnecessary reminder that same sex couples were once excluded from marriage.

***On the option to extend civil partnership to mixed sex couples***

157. Points raised included:

- civil partnership offers a valuable alternative for women who have had negative experiences of marriage, including abusive relationships;
- civil partnership would promote family stability for couples who feel unable to marry for personal reasons but would enter a civil partnership;
- people in Scotland might travel to England or Wales to have a mixed sex civil partnership if Scotland did not make mixed sex civil partnership available;
- for bisexual people, the sex of their partner would cease to inform the nature of the relationship they were able to enter into;
- if civil partnership were to be extended, a transgender person without a GRC would be able to enter into a civil partnership with a same sex partner;
- mixed sex civil partnership would be an option for people who object to marriage on the grounds that it is still not available to same sex couples in some parts of the world.

158. Within their answers to consultation questions, some respondents said that they would have preferred to enter into a civil partnership rather than marry, had the choice been available.

159. One respondent<sup>51</sup> to the consultation raised pensions in their reply, suggesting that the introduction of mixed sex civil partnership could open up the possibility of some civil partners being entitled to higher survivor benefits in pensions than spouses. This could mean that some people in mixed sex marriages would be better off in a mixed sex civil partnership instead<sup>52</sup>.

160. The Equality Network suggested that it might be necessary to make provision in the Equality Act 2010 in relation to religious or belief bodies or celebrants who do not wish to register

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<sup>51</sup>[https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/consultation/view\\_respondent?show\\_all\\_questions=0&sort=submitted&order=ascending&q\\_text=pension&uuId=814415521](https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=pension&uuId=814415521) For devolved public service pension schemes, the Scottish Government intends to align mixed sex civil partners with mixed sex married couples.

<sup>52</sup> Pensions are generally reserved. The UK Government has outlined its approach to survivor benefits in pensions on pages 16 to 18 of its consultation “Implementing Opposite-Sex Civil Partnerships: Next Steps”: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815741/Civil\\_Partnerships\\_-\\_Next\\_Steps\\_and\\_Consultation\\_on\\_Conversion.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815741/Civil_Partnerships_-_Next_Steps_and_Consultation_on_Conversion.pdf)

mixed sex civil partnerships<sup>53</sup>. This would be in line with provisions added to the 2010 Act when same sex marriage and the religious or belief registration of same sex civil partnership was introduced in 2014. This issue is outlined in paragraph 56 of this Policy Memorandum.

## **2015 consultation**

161. The Scottish Government consulted in 2015 on a review of civil partnership. The options set out for civil partnership in that consultation were:

- Do nothing;
- Closure of civil partnership to new relationships from a date in the future; and
- Extend civil partnership to mixed sex couples.

162. There were 411 responses to this consultation. No consensus emerged from responses on a way forward for civil partnership in Scotland, with respondents identifying pros and cons across all three options.

163. In its response<sup>54</sup> to the consultation, the Scottish Government concluded that it was not the time to legislate on civil partnership, but did not rule out legislation later. It went on to state that further work would be required to evaluate the impact of same sex marriage on civil partnership uptake, and the demand and support for mixed sex civil partnership. The Scottish Government suggested that a five-year period would be likely to be a reasonable time period for gathering this evidence.

164. The response also noted the recent (at the time) judgment<sup>55</sup> by the English Court of Appeal in *Steinfeld and Keidan v Secretary of State for Education*, and that the UK Supreme Court had granted permission to appeal that judgment. The response stated that this decision was one of the reasons why the Scottish Government had to gather further evidence rather than legislate.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

165. The 2018 consultation on the future of civil partnership included a draft Equality Impact Assessment. The Scottish Government is publishing a full Equality Impact Assessment at (<https://www.gov.scot/publications/>).

166. On religion and belief, this Bill includes provisions that will provide protection for religious and belief bodies and celebrants who may prefer not to register mixed sex civil partnerships or to solemnise the marriage of a mixed sex couples who are already in a civil partnership. Should the Bill be enacted, the Scottish Government also intends to seek amendments to the Equality Act

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<sup>53</sup> For example, a body might see marriage as a relationship for mixed sex couples, and civil partnership as the relationship for same sex couples.

<sup>54</sup> <https://www2.gov.scot/Resource/0052/00527978.pdf>

<sup>55</sup> <https://www.judiciary.uk/judgments/steinfeld-and-keidan-v-secretary-of-state-for-education/>

2010 in a section 104 Order under the Scotland Act 1998 that will provide protection from discrimination actions in the context of registration of mixed sex civil partnership.

167. On sexual orientation, the Bill will allow mixed sex couples to enter into a civil partnership, thereby providing equal opportunity between same sex and mixed sex couples in the choice of relationship.

168. On gender reassignment, the Bill removes the requirement for a transgender person in a civil partnership to end or change their relationship before obtaining a full GRC. This increases equality of opportunity for civil partners who wish to obtain legal recognition of their change of gender by placing them on the same footing as married people who can be issued with a full GRC without ending or changing their relationship. The Bill will also enable a transgender person who does not have a GRC and is in a same sex relationship to enter into a civil partnership.

169. For example, if a trans woman without a GRC is in a relationship with a woman, the trans woman is still legally treated as if she were a man, including for the purposes of determining which legally recognised relationships are open to her. As her relationship is treated as a mixed sex one, at present, she may not enter into a civil partnership if her partner is a woman. She would be able to enter a civil partnership with a man, as she is in law still treated as male.

170. On age, National Records of Scotland have published statistics<sup>56</sup> on the sex and age of people who have entering into civil partnerships. However, the Scottish Government's view is that introduction of mixed sex civil partnership will have neither a positive or negative impact on this protected characteristic.

171. The Scottish Government is not aware of any evidence which suggests that this Bill will have an impact on the protected characteristics of race.

172. On disability, the forced civil partnership offence could benefit disabled people, given that this offence will cover victims who are not capable of consenting to enter into a civil partnership due to mental disorder. For the purposes of the offence, "mental disorder" has the meaning set out in section 328<sup>57</sup> of the Mental Health (Care and Treatment) (Scotland) Act 2003, which includes mental illness, personality disorder or learning disability. All three potentially fall into the category of disability as set out in section 6<sup>58</sup> of the Equality Act 2010.

173. On sex, the forced civil partnership offence could benefit women. Statistics<sup>59</sup> published by the Forced Marriage Unit indicates that women and girls are more frequently the victims of forced marriage. The offence could create a deterrent and in doing so protect women and girls.

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<sup>56</sup><https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables/2018/section-7-marriages>

<sup>57</sup> <https://www.legislation.gov.uk/asp/2003/13/section/328>

<sup>58</sup> <https://www.legislation.gov.uk/ukpga/2010/15/section/6>

<sup>59</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/804044/Forced\\_Marriage\\_Unit\\_Statistics\\_2018\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804044/Forced_Marriage_Unit_Statistics_2018_FINAL.pdf) (page 9)

174. Also on sex, the provision on religious divorce could protect women. The Scottish Government understands that the current provision generally benefits women by preventing them from being disadvantaged in divorce proceedings due to the withholding of the consent required to enable them to remarry in their chosen faith, or due to the threat of consent being withheld. The provisions in this Bill could extend this benefit to women who are party to dissolution proceedings and who are similarly at risk of being disadvantaged through the withholding of consent.

175. More generally, mixed sex civil partnership could benefit women who choose to cohabit, due to a wish not to marry. Cohabitation attracts fewer rights than a legally recognised relationship. Women who prefer not to marry may be more likely to be affected by the absence of rights than men due to economic gender inequality. These women could benefit from increased access to rights through mixed sex civil partnership.

176. The Scottish Government is publishing a Children's Rights and Wellbeing Impact Assessment at (<https://www.gov.scot/publications/>). This highlights the effects of the Bill provisions on children and young people up to the age of 18. In brief, there are two strands to this: firstly, mixed sex civil partnership will become an option for young people aged 16 and 17 years old who wish to enter into a legally recognised relationships; secondly, children and young people may be the children of parents who have entered into a mixed sex civil partnership.

## **Human rights**

177. While the decision in *Steinfeld* related to the law in England and Wales, the Scottish Ministers took the view that it was necessary to take steps to address the ECHR incompatibility identified by the UK Supreme Court. The Bill does so by amending the 2004 Act to remove all statutory impediments to the registration of mixed sex civil partnerships in Scotland, thereby eliminating difference in treatment in regard to access to civil partnership as between same sex and mixed sex couples.

178. Amendments to other legislation promote the equal enjoyment of family life as between fathers in mixed sex marriages and fathers in mixed sex civil partnerships in regard to the registration of births and the conferring of parental rights and responsibilities.

179. In the light of the introduction of mixed sex civil partnership, the Bill also includes provision to protect the right to freedom of thought and conscience of celebrants by ensuring that the arrangements for the authorisation place no obligation on religious or belief bodies or their members to participate in the registration of mixed sex civil partnerships.

## **Islands**

180. No differential impact on island communities is expected as a result of this Bill.

## **Local government**

181. The Bill will have an impact on the registration services provided by local government, although the extent of this will depend upon uptake of mixed sex civil partnership. This is

considered in more detail in the Financial Memorandum and the Business and Regulatory Impact Assessment (BRIA) prepared for this Bill at (<https://www.gov.scot/publications/>).

182. In brief, local authority registrars will need to familiarise themselves with arrangements for the registration of mixed sex civil partnership, including religious and belief civil partnership. However, these arrangements will be built on existing arrangements for the registration of same sex civil partnership and so the work involved will relate to changes to existing systems rather than the creation of anything completely new.

### **Sustainable development**

183. The Scottish Government sent the Strategic Environmental Assessment (SEA) pre-screening notification to the SEA consultation authorities through the SEA gateway in July 2019. No response was received.

184. The Bill will not negatively impact on sustainable development.

185. On environmental protection and the environment generally, the Scottish Government does not foresee any impact given the probable low uptake of the relationship.

186. On social equity, the Scottish Government considers that the Bill will have no obvious impact, although it did consider the view that the costs of civil partnership are likely to be less than the cost of a wedding. However, any costs in these areas, other than registration, are driven by a couple's preferences rather than legislation.

187. On economic activity, the Bill has no obvious effect.

### **SECTION 104 ORDER**

188. The Scottish Government has identified a number of consequences that flow from this Bill that are matters reserved to the UK Parliament under the Scotland Act 1998. The Scottish Government and the UK Government will prepare an Order under section 104 of the 1998 Act to cover these matters. This order will be voted on at Westminster.

189. At present, the Scottish Government has identified the following areas that may need to be covered in this Order:

- Amendments to the Equality Act 2010, to provide protection for religious or belief celebrants who may not wish to register mixed sex civil partnerships. There may also need to be amendments to the 2010 Act in relation to comparators and religious employment.
- Amendments to reserved UK legislation to treat male civil partners in the same way as husbands. As discussed at paragraph 86, there is a clear need to do this for assisted reproduction provisions in the Human Fertilisation and Embryology Act 2008. Similar points may arise in relation to child support and the British Nationality Act. There may also be a need to make a minor change to pension protection fund legislation.

- In public service pension schemes, the UK Government's intention is to treat mixed sex civil partners in the same way as mixed sex spouses for the purposes of survivor benefits. The Scottish Government has devolved responsibility for some public service pension schemes (e.g. Police, Fire, Local Government, NHS, and teachers) and the intention here is to make any necessary changes by secondary legislation. However, there may need to be changes to reserved public service pension schemes (e.g. the civil service schemes).
- Minor changes to the state pension scheme may be needed.
- Private sector occupational pension schemes.
- Possible provisions in relation to Bereavement Support Payment and the Marriage Allowance in taxation (although these may be areas where existing references to civil partnership may be enough).
- Consular and Armed Forces mixed sex civil partnership, where the couple identify with Scotland.
- Due to the Scottish Government's proposed interim recognition scheme for mixed sex civil partnerships from elsewhere in the UK and overseas being recognised as marriages for a brief period, the section 104 Order may need to provide that any divorces of these relationships will be recognised across the United Kingdom.
- Changes to the Gender Recognition Act 2004 where cross-border issues arise (for example, to reflect that a person in a civil partnership registered in Scotland may now be living in England and Wales).

*This document relates to the Civil Partnership (Scotland) Bill (SP Bill 57) as introduced in the Scottish Parliament on 30 September 2019*

# **CIVIL PARTNERSHIP (SCOTLAND) BILL**

## **POLICY MEMORANDUM**

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