

EXPLANATORY MEMORANDUM TO
THE CIVIL PARTNERSHIP (SCOTLAND) ACT 2020 AND MARRIAGE AND
CIVIL PARTNERSHIP (SCOTLAND) ACT 2014 (CONSEQUENTIAL
MODIFICATIONS) ORDER 2022

2022 No. 74

1. Introduction

1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order makes provisions principally in consequence of the Civil Partnership (Scotland) Act 2020¹ (“the 2020 Act”), which introduced opposite sex civil partnership in Scotland.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom, except where otherwise specified.

4.2 The territorial application of this instrument is the United Kingdom, except where otherwise specified.

5. European Convention on Human Rights

5.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

“In my view the provisions of the Civil Partnership (Scotland) Act 2020 and Marriage and Civil Partnership (Scotland) Act 2014 (Consequential Modifications) Order 2022 are compatible with the Convention rights.”

6. Legislative Context

6.1 This Order is made in exercise of the powers conferred by sections 104, 112(1) and 113(5) of the Scotland Act 1998² (“the 1998 Act”). Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament which contains provisions which are necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament.

6.2 This Order is made principally in consequence of the 2020 Act, which provided for the introduction of opposite sex civil partnership in Scotland. The Order is required to make

¹ 2020 asp.15. <https://www.legislation.gov.uk/asp/2020/15/introduction/enacted>

² 1998 c.46. <https://www.legislation.gov.uk/ukpga/1998/46/contents>

provisions on matters outside devolved competence that are consequential on the 2020 Act.

- 6.3 Amendments are required to the Equality Act 2010³ (“the 2010 Act”) to ensure the refusal of certain individuals or bodies to be involved in the registration of opposite sex civil partnerships in Scotland, or in the marriage of opposite sex civil partners, cannot be considered unlawful discrimination.
- 6.4 The Human Fertilisation and Embryology Act 2008⁴ (“the 2008 Act”) is also amended to ensure that being treated as the child of a marriage and being treated as the child of a civil partnership have the same effect in cases involving assisted reproduction.
- 6.5 A number of amendments are made to the Gender Recognition Act 2004⁵ (“the 2004 Act”). Firstly, changes are made to applications for a Gender Recognition Certificate (“GRC”) by persons who are party to a civil partnership registered in Scotland. Additionally, provision is included to make it clear that the continuation of an overseas civil partnership under Scots law has no effect on the law where the civil partnership was registered. Finally, provision is included to make it clear that for the purposes of the law of England and Wales and Northern Ireland, a civil partnership registered in Scotland continues after either party to it has obtained a full GRC.
- 6.6 Amendments are also made to the Marriage (Same Sex Couples) Act 2013⁶ (“the 2013 Act”), the Civil Partnership (Registration Abroad and Certificates) Order 2005⁷ (“the 2005 Order”), the Marriage and Civil Partnership (Scotland) Act 2014⁸ and the Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order 2014⁹ (“the 2014 Order”).

7. Policy background

What is being done and why?

- 7.1 This Order, which makes amendments that are principally consequential on the 2020 Act, is required as a consequence of opposite sex couples being able to register as civil partners in Scotland. Opposite sex civil partnerships were introduced in 2019 in England and Wales through the Civil Partnership (Opposite-sex Couples) Regulations 2019¹⁰ and in Northern Ireland through the Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019¹¹.
- 7.2 This Order makes amendments to the 2010 Act to reflect the introduction of opposite sex civil partnership in Scotland and therefore that civil partnership is no longer just a same sex relationship. It amends section 110 of the 2010 Act, which concerns the liability of employees and agents in relation to discrimination. The amendments provide that there is no contravention of section 110 where a religious or belief celebrant refuses to solemnise a marriage for the reason that the marriage is between persons of the opposite sex who are in a civil partnership with each other. These

³ 2010 c.15. <https://www.legislation.gov.uk/ukpga/2010/15/introduction>

⁴ 2008 c.22. <https://www.legislation.gov.uk/ukpga/2008/22/introduction>

⁵ 2004 c.7. <https://www.legislation.gov.uk/ukpga/2004/7/introduction>

⁶ 2013 c.30. <https://www.legislation.gov.uk/ukpga/2013/30/introduction/enacted>

⁷ 2005 No.2761. <https://www.legislation.gov.uk/uksi/2005/2761/schedules/made>

⁸ 2014 asp.5. <https://www.legislation.gov.uk/asp/2014/5/introduction/enacted>

⁹ 2014 No.3229. <https://www.legislation.gov.uk/uksi/2014/3229/introduction/made>

¹⁰ 2019 No.1458. <https://www.legislation.gov.uk/uksi/2019/1458/contents/made>

¹¹ 2019 No. 1514. <https://www.legislation.gov.uk/uksi/2019/1514/regulation/64/made>

amendments reflect that, in Scotland, one way of changing a civil partnership to a marriage is by having a marriage ceremony.

- 7.3 The amendments further provide that there is no contravention of section 110 where a religious or belief celebrant refuses to register a civil partnership for the reason that the celebrant does not wish to register either civil partnerships generally, or those between same sex couples or those between opposite sex couples.
- 7.4 Similarly, amendments to Paragraph 25B of Schedule 3 of the 2010 Act provide that it is not unlawful discrimination for a celebrant to refuse to solemnise a marriage, or where a person refuses to participate in such a marriage, for the reason that the marriage is between persons of the opposite sex who are in a civil partnership with each other.
- 7.5 The amendments also provide that it is not unlawful discrimination where a celebrant refuses to register a civil partnership, or where a person refuses to participate in such a registration, for the reason that they do not wish to register, or participate in, either civil partnerships generally or those between same sex couples or those between opposite sex couples.
- 7.6 The Order also makes some modifications in relation to the circumstances in which refusal by a religious or belief body to allow premises in Scotland to be used for the solemnisation of a marriage or the registration of a civil partnership does not contravene Parts 3, 4 or 7 of the 2010 Act.
- 7.7 The 2004 Act makes provision so that people can apply to the Gender Recognition Panel and obtain a GRC whilst remaining in a civil partnership. A person with a full GRC is legally recognised as having acquired a new gender. With the 2020 Act extending civil partnership to opposite sex couples in Scotland it becomes possible for a person in a civil partnership to apply for a GRC and remain in their civil partnership as both opposite sex and same sex civil partnerships are now legally recognised. Previously, this was only possible when both civil partners obtained a full GRC on the same day.
- 7.8 This Order amends section 3F of the 2004 Act in respect of applicants under the “alternative track” who are party to a civil partnership registered in Scotland but resident in England and Wales or Northern Ireland. (The “alternative track” is an application route available to long-termed transitioned people who are or were married, or in civil partnership, and who have lived in their acquired gender for six years before the commencement of certain gender recognition provisions. For people in Scottish marriages or civil partnerships, these provisions were commenced on 16 December 2014). Applicants have to provide, as part of an application, a statutory declaration about the applicant’s civil partnership. In particular, there must be a statutory declaration about whether or not the applicant’s civil partner consents to the partnership continuing.
- 7.9 The Order also amends section 11B of the 2004 Act to provide that the continuation of an overseas civil partnership after a party to it has obtained a full GRC for the purposes of the law of Scotland has no effect on the law of the country where the civil partnership was registered.
- 7.10 This Order also amends section 11D of the 2004 Act to make it clear that for the purposes of the law of England and Wales and Northern Ireland, a civil partnership registered in Scotland continues after either party to it has obtained a full GRC.

- 7.11 The 2008 Act makes provision on assisted conception, including on parentage following assisted conception. Sections 35 and 36 of the 2008 Act make provision on when a man can be treated as the father of the child. Section 38(3) of the 2008 Act provides that in Scotland sections 35 and 36 do not apply in relation to any child who, by virtue of any enactment or other rule of law, is treated as the child of the parties to a marriage.
- 7.12 This Order amends section 38(3) to extend it to cases where the child is treated as the child of the parties to a civil partnership. Similarly, sections 42 and 43 of the 2008 Act make provision on when a woman can be treated as the second female parent of the child. Section 45(3) provides that in Scotland, sections 42 and 43 do not apply in relation to any child who, by virtue of any enactment or other rule of law, is treated as the child of the parties to a marriage. This Order amends section 45(3) to extend it to cases where the child is treated as the child of the parties to a civil partnership.
- 7.13 Schedule 6 of the 2013 Act makes provision in relation to consular marriages and armed forces marriages overseas. As indicated above, in Scotland it is possible to change a civil partnership into a marriage through having a marriage ceremony. An administrative route, run by local authority registrars, is also available. The intention is that only the equivalent of the administrative route should be available through UK consular officials and UK armed forces. As a result, this Order provides that it is not possible to change a civil partnership into a marriage through having a marriage ceremony organised by UK consular officials or UK armed forces overseas. This provision is consequential on the Marriage and Civil Partnership (Scotland) Act 2014.
- 7.14 Under the 2005 Order, which makes provision on the registration of civil partnerships by UK consular officials, a couple are only eligible to register a civil partnership overseas where insufficient facilities exist for them to enter into an overseas relationship locally. A country or territory is treated as having sufficient facilities if a form of relationship available in that country is listed as a specified relationship in Schedule 20 to the Civil Partnership Act 2004. Schedule 20, as it extends to Scotland, has been amended by the 2020 Act to provide separate lists of specified relationship for same sex and opposite sex couples. This Order amends the 2005 Order to provide that, where the couple have nominated Scotland as the relevant part of the UK, the applicable list in Schedule 20 is referred to for the purpose of determining whether or not sufficient facilities exist locally.
- 7.15 With the 2014 Order making provision on civil partnerships changing into marriages overseas through UK consular officials and UK armed forces, this Order ensures this facility is only available overseas to couples in a same sex civil partnership. This reflects that couples in an opposite sex civil partnership always had the option of marrying whereas couples in same sex relationships did not used to have the option of marrying.
- 7.16 This Order also revokes article 15 of the 2014 Order. Article 15 made modifications to section 4C (3), section 4C (8) and section 4F of the 2004 Act. These provisions in the 2004 Act are repealed by the 2020 Act and so the modifications are no longer required.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

- 9.1 Though the Order amends primary legislation, the modifications are minor and make consequential provision principally in relation to the 2020 Act. Therefore, there is no need to consider consolidation.

10. Consultation outcome

- 10.1 As amendments in this Order are consequential, no consultation on the draft Order was considered necessary. Consultation was however carried out by the Scottish Government on the key proposals which led to the 2020 Act. The Scottish Government consulted 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 opposite sex couples.
- 10.2 The purpose of the consultation was qualitative: to seek fresh insight into the known arguments for and against these two options. Following this consultation, the Scottish Government decided to bring forward legislation to introduce opposite sex civil partnership in Scotland.

11. Guidance

- 11.1 No guidance will be made available on the use of these powers as they are principally consequential on the 2020 Act, and will be used to give this Act full effect.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because the Scottish Government does not anticipate any impact on the private or voluntary sectors.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Order is principally consequential upon the 2020 Act. No formal monitoring or review is considered necessary.
- 14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 the Secretary of State for Scotland has made the following statement: “There is no need for review or monitoring as the Order does not regulate businesses.”

15. Contact

- 15.1 Arthur Halfhide at the Office of the Secretary of State for Scotland (telephone: 07557896644 or email: Arthur.Halfhide@ukgovscotland.gov.uk) can be contacted with any queries regarding the instrument.

- 15.2 Rachel Irvine, Deputy Director for Constitutional Policy, at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Secretary of State for Scotland at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.