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## Introduction to the Act

### 1.1 Background

The Civil Partnership Act 2004 received the Royal Assent on 18 November 2004. Section 263 of the Act provides for the coming into force of its provisions. All the substantive provisions of the Act are to come into force by commencement orders. At the date of publication of this book at least one commencement order has been made, namely the Civil Partnership Act 2004 (Commencement Order No.1) Order 2005 (S.I. 112) and the indication from the Department of Constitutional Affairs is that because of the large volume of rules to be made in the wake of the Act, it will not be brought fully into force until 5 December 2005.

The Act was heralded by a document originating in the Women and Equality Unit of the Department of Trade and Industry in June 2003 entitled ‘Civil Partnership – A framework for the legal recognition of same-sex couples’ with a foreword by Jacqui Smith M.P., the then Minister of State for Industry and the Regions and Deputy Minister for Women and Equality. Her words are an attempt to summarise or encapsulate what the government perceived as the unfairness and injustice that the Act seeks to remedy. In that foreword the Minister stated:

Today there are thousands of same-sex couples living in stable and committed partnership. These relationships span many years with couples looking after each other, caring for their loved ones and actively participating in society; in fact living in exactly the same way as any other family. They are our families, our friends, our colleagues and our neighbours. Yet the law rarely recognises their relationship.

Many have been refused a hospital visit to see their seriously ill partners, or have been refused their rightful place at their partner’s funeral. Others find themselves unable to access employment benefits reserved only for married partners. Couples who have supported each other financially throughout their working lives often have no way of gaining pension rights. Grieving partners can find themselves unable to stay in their shared home or to inherit the possessions they have shared for years when one partner dies suddenly without leaving a will.

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In so many areas, as far as the law is concerned, same-sex relationships simply do not exist. This is not acceptable. After a consultation period of three months a report summarising the consultation findings was published. An intention to bring forward a Civil Partnership Bill was announced in the Queen's Speech on 26 November 2003 and the Civil Partnership Bill was introduced into the House of Lords on 30 March 2004.

The press was largely supportive of the Bill. In April 2004 *The Times* in an editorial comment entitled 'Commitment Rewarded' opined that

... far from undermining marriage the Bill encourages the long term commitment and mutual support that make marriage such a benefit to society. Gay couples will not enter lightly into civil partnerships, for their dissolution will be as complicated and painful as divorce. In order to avail themselves of the tax and legal advantages of a civil partnership they will also have to take on the responsibility to care for each other and live together as a loving and supportive couple.

The fact that all the three leading parliamentary parties decided that there was to be a free vote on the Bill and that Michael Howard, as leader of the Conservative Opposition, signalled at an early stage that he intended to support it was an indication of how political thinking has changed in relation to the way society perceives same-sex relations in Britain today. However, the passage of the Bill through its parliamentary stages was not without its difficulties, particularly in the House of Lords, when, in its final stages, an attempt was made to amend it in such a way that the whole rationale and intent of the legislation would have been undermined. The House of Commons rejected the amendment and the Lords finally yielded to the will of the lower House.

## 1.2 Summary

The purpose of the legislation is to enable same-sex couples to obtain legal recognition of their relationship by forming a civil partnership, which they may do by registering as civil partners of each other provided:

- they are of the same sex,
- they are not already in an existing civil partnership or lawfully married,
- they are both over the age of sixteen,
- they are not within the prohibited degrees of relationship.

Forming a civil partnership will have legal consequences. The civil partners will assume legal rights and responsibilities with regard to each other and to third parties, including the state. Some foreign jurisdictions have amended their domestic law to make available to same-sex couples the institution of marriage. For example in Belgium it is possible for a same-sex couple to get married in the same way as a heterosexual couple and more recently Canada has taken this step. However, most European countries, now including ours, have shrunk

from going that far and have opted for a civil partnership or something very close to it. Although it is not marriage, civil partnership is in truth very close to that institution and many of the provisions of the Act will sound familiar to the family practitioner. Many of its provisions are taken directly, word for word, from the statutes that regulate heterosexual married life and many of the amendments to existing legislation are achieved by inserting after 'spouse' the words 'or civil partner'. The vast array of amendments to existing legislation ensure that partners who are in a civil partnership are put on a similar footing to a couple who have married heterosexually with the result that, although the proponents of the legislation assiduously avoided the phrase, something very like 'gay marriage' has been created by this Act.

### 1.3 Scotland and Northern Ireland

Somewhat unusually for legislation of this nature, the Act contains not only provisions relating to the jurisdiction of England and Wales, but also provisions that relate to both Scotland and Northern Ireland. The reason for that is that both the Scottish Parliament and the Northern Ireland Office Ministers agreed to the inclusion in the Westminster Civil Partnership Bill of the provisions necessary to make the scheme available to those resident within their own borders. This makes for a somewhat bulky, if not intimidating, document. In one sense it is three Acts of Parliament rolled into one, but only one of which is material to those who practise exclusively in the jurisdiction of England and Wales. Helpfully, the Act is divided in such a way that it is abundantly clear which of the 264 sections contained within its 8 Parts and which of the 30 Schedules (alone comprising some 300 pages) relate to which of the three jurisdictions.

It is beyond the ambition of this book to serve as a practical guide for Scottish lawyers, or for those who practise in Northern Ireland, who will no doubt have the benefit, or burden, of similar publications to address the substantive law and procedures peculiar to their respective jurisdictions.

It is necessary, however, to have some understanding of the provisions in the Act that relate to nullity in Scotland and in Northern Ireland as those provisions contribute to a full knowledge of the grounds upon which a civil partnership is regarded by the law of this jurisdiction as either void or voidable (as to nullity, see chapter 11). Where two people register as civil partners of each other in Scotland, the civil partnership is void for the purposes of the law of England and Wales only if it would be void under the Scottish provisions in section 123 of the Act. The partnership will also be voidable if an interim gender certificate is subsequently issued to either party under the Gender Recognition Act 2004 (s.54(1) of the Act). Similarly, in relation to Northern Ireland where two people register as civil partners of each other in that jurisdiction, the civil partnership is void for the purposes of the law of England and Wales only if it would be void under the Northern Ireland provisions in section 173 of the Act. The partnership

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will also be voidable if the circumstances are as described in paragraph 50(1) of the Act.

Gretna Green

It has always been possible for young lovers (i.e. those over sixteen, but under eighteen years) to elope to Scotland, specifically to Gretna Green near Dumfries, in order to marry where the consent of their parents or guardian is not forthcoming, and for that marriage to be recognised as valid in England and Wales. It appears that the same facility will be available to prospective civil partners.

Under the provisions that relate to England and Wales (see chapter 2) where one of the proposed civil partners is over sixteen years, but under eighteen years of age, parental consent is required under section 4 of the Act. Without such consent (or the consent of the court where parental consent is either withheld or unobtainable) any subsequent civil partnership is effectively void in this jurisdiction under section 49(c).

In Scotland, however, although both civil partners must be at least sixteen years of age (one of the same eligibility requirements as in England and Wales), if a prospective civil partner is over sixteen, but under eighteen years of age, there is no requirement for parental consent. In determining whether the civil partnership of two people, one or both of whom are under eighteen years of age and who register as civil partners of each other in Scotland, is valid in England and Wales, section 54 of the Act provides that such a civil partnership is void if, and only if, it would be void in Scotland under section 123. In fact any civil partnership formed or created without parental consent is perfectly lawful in Scotland and an absence of parental consent is not a ground for holding that the civil partnership is void (see section 123 of the Act).

## 2

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# What is a civil partnership? Formation by registration in England and Wales: eligibility

## 2.1 Introduction

In essence, a civil partnership is a legal relationship between two people of the same sex, which can be created, or formed, in either of two ways. The first method is by registration of the civil partnership *either* in the United Kingdom, *or* under what is termed an Order in Council, which allows for registration at British Consulates or by armed forces personnel. The second method is where the couple register an ‘overseas relationship’ (as defined in the Act) which is treated under the Act as a civil partnership. Once formed, the civil partnership, however created, subsists until it is ended by death, dissolution or annulment (s.1(3)).

In England and Wales the chief method whereby a civil partnership will be formed or created, namely by registration, is achieved by the prospective civil partners signing a document issued to them by an authority created under the Act called the registration authority. The signing has to be attended by certain formalities, and before it is issued the partners have to comply with the pre-registration procedure, the steps of which differ according to the particular circumstances of the prospective partners. This chapter will deal chiefly with eligibility. In the next chapter we will deal with the pre-registration procedure in relation to the method that most English and Welsh practitioners are likely to encounter, namely by registration of the civil partnership in the United Kingdom, and specifically in England and Wales. In later chapters we examine in detail the other pre-registration procedures, the signing ceremony or registration itself, and how a civil partnership can be created abroad either by registration under Order in Council, or where the couple register an overseas relationship which is treated as a civil partnership under Chapter 2 of Part 5 of the Act. Before a detailed consideration of the procedural stages is undertaken it is necessary to establish eligibility.

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### 2.2 Eligibility

Section 3(1) of the Act provides that two people are not eligible to register as civil partners of each other if:

- (a) they are not of the same sex;
- (b) either of them is already a civil partner or lawfully married;
- (c) either of them is under sixteen;
- (d) they are within prohibited degrees of relationship.

#### 2.2.1 Not of the same sex

One of the elements that render a couple ineligible to marry each other is an essential constituent of the eligibility test for a civil partnership. In most cases this element of eligibility will not cause a problem. However, the provisions of the Gender Recognition Act 2004 may bring about complications, and it must be remembered that gender is no longer determined simply by the entry on a birth certificate. It is now possible for an individual to acquire a gender different from the one they were born with. The Gender Recognition Act has a significant impact on the Civil Partnership Act and is the subject of a separate chapter (chapter 9), which examines the correlation between the two Acts.

#### 2.2.2 Already a civil partner or lawfully married

Under the Act the court is given powers to dissolve a civil partnership or to annul such a partnership or even to make an order which dissolves a civil partnership on the ground that one of the civil partners is presumed to be dead. Clearly, therefore, the Act only renders ineligible someone who is in a subsisting civil partnership and not a party who has previously been in such a partnership, which has been the subject of any of the dissolving orders under the Act. The section also prohibits a person who is in a subsisting marriage from registering as the civil partner of another.

#### 2.2.3 Either is under the age of sixteen

The section renders wholly ineligible any person who is under sixteen. Moreover, where one of the prospective civil partners is under eighteen the consent of an appropriate person is generally required.

#### 2.2.4 Prohibited degrees of relationship

Part 1 of Schedule 1 of the Act contains provisions for determining when two people are within prohibited degrees of relationship for the purposes of section 3 of the Act (s.3(2)). What follows is a summary of those provisions, but it is essential that, in any given case, careful reference is made to the detailed provisions contained in Schedule 1.

**Absolute prohibitions** Paragraph 1(1) of Part 1 of Schedule 1 lists the people who are absolutely prohibited from forming a civil partnership with each other. Broadly speaking, they are blood relationships and there are no circumstances in which a civil partnership is permitted between them. Two people are within absolutely prohibited degrees of relationship if one falls within the list below in relation to the other.

- Adoptive child
- Adoptive parent
- Child
- Former adoptive child
- Grandparent
- Grandchild
- Parent
- Parent's sibling
- Sibling
- Sibling's child

'Sibling' in this context means a brother, sister, half-brother or half-sister (paragraph 1(2)).

**Qualified prohibitions** Paragraphs 2 and 3 of Part 1 list the people who are prohibited from forming a civil partnership with each other unless certain conditions are met. Broadly speaking, they are 'in-laws'. Two people are within prohibited degrees of relationship if one of them falls within the list below in relation to the other:

- Child of former civil partner
- Child of former spouse
- Former civil partner of grandparent
- Former civil partner of parent
- Former spouse of grandparent
- Former spouse of parent
- Grandchild of former civil partner
- Grandchild of former spouse

(paragraph 2(1)).

In this context 'child of the family', in relation to another person, means a person who has lived in the same household as that other person and has been treated by that other person as a child of his family (paragraph 2(2)).

However, if both persons in the qualified prohibitions list have reached twenty-one at the time when they register as civil partners of each other and the younger has not at any time before reaching eighteen been a child of the family in relation to the other, the partnership is permissible although the Act imposes additional procedural safeguards to ensure that the requirements of the legislation are complied with.

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**Death removes certain prohibitions** Two people are within prohibited degrees of relationship if one falls within column 1 of the table below in relation to the other unless:

- (a) both of them have reached twenty-one at the time when they register as civil partners of each other, and
- (b) the persons who fall within column 2 are dead.

<i>Relationship</i>	<i>Relevant deaths</i>
Former civil partner of child	The child The child's other parent
Former spouse of child	The child The child's other parent
Parent of former civil partner	The former civil partner The former civil partner's other parent
Parent of former spouse	The former spouse The former spouse's other parent



## 3

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# Pre-registration procedure: standard procedure; house-bound and detained partners; certain non-residents and other special cases

### 3.1 Introduction

The pre-registration procedure followed by prospective civil partners will depend on their particular circumstances. Most will follow what the Act describes as the standard procedure, but the Act also caters for persons who are house-bound, for detained persons and there is also a special procedure for cases where one or both of the prospective civil partners is seriously ill and not expected to recover. Moreover, all the procedures (except for the special procedure) are subject to modification where one of the partners is a non-resident (see 3.5 for who is regarded as a non-resident) or is a former spouse who has changed sex. The procedure will also be different in those cases where there are issues of prohibited degrees of relationship and where one of the proposed civil partners is under eighteen. Finally, there are special procedural considerations in the case of a prospective civil partner who is subject to immigration control.

### 3.2 Standard pre-registration procedure

#### 3.2.1 Giving notice

Each of the would-be civil partners must give notice of the proposed civil partnership to a registration authority and must also have resided in England and Wales for at least seven days immediately before giving the notice (s.8(1)).

**Registration authority** In relation to England ‘registration authority’ means a county council, the council of any district comprised in an area for which there is no county council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly (s.28(a)) and in relation to Wales, a county council or county borough council (s.28(b)).

**Notice** The notice must contain such information as may be prescribed by the regulations (s.8(2)). At the time of writing, the prescribed information has not yet been the subject of regulation, but section 8(3) already provides that the

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notice must include a solemn declaration in writing by the person giving notice that he or she believes that there are no lawful impediments to the formation of the civil partnership and that each of the civil partners has had a usual place of residence in England and Wales for at least seven days immediately before giving the notice (s.8(4)(a) and (b)). The declaration must be signed by the person giving the notice at the time when the notice is given and in the presence of an authorised person (s.8(3)(a) and (b)). The authorised person must then attest the declaration by adding his name, description and place of residence (s.8(3)).

**Authorised person** Section 8(6) defines an authorised person as an employee or officer or other person provided by a registration authority who is authorised by that authority to attest notices of proposed civil partnership.

#### 3.2.2 Duty of the registration authority

When the registration authority is given notice of a proposed civil partnership, it must record in the register as soon as possible the fact that the notice has been given, together with the information in it and that the authorised person has attested the declaration (s.8(5)).

**The register** Section 30(2) of the Act imposes a duty on the Registrar General for England and Wales to provide a system for keeping any records that relate to civil partnership required by the Act, and the register is defined as the system for keeping those records (s.30(4)).

**Registrar General** Section 30 of the Act defines the Registrar General as the Registrar General for England and Wales.

#### 3.2.3 Evidence

The registration authority need not take at face value the information provided by each of the civil partners. Section 9 of the Act empowers a registration authority to request a person giving notice to provide evidence to verify certain information. Such requests may be made any time before the registration authority issues the civil partnership schedule, and the evidence can relate to a person's name and surname, age, as to whether the person has previously formed a civil partnership or a marriage, and, if so, as to the ending of the civil partnership or marriage. Evidence may also be requested of a person's nationality and about their residence in England and Wales during the relevant seven days (s.9(3)).

#### 3.2.4 Publicity

Civil partnership is not for the publicity shy. Reminiscent of the concept of 'banns' in the context of marriage, there is a requirement imposed by section 10(1) on potentially several different registration authorities, as well as the Registrar General (as to which see 3.2.2) to publicise during 'the waiting period' information (referred to as 'relevant information') in relation to the proposed