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The Civil Partnership Bill **[HL]: the detail & legal implications**

Bill 132 of 2003-04

This paper considers the *Civil Partnership Bill* which is expected to have its Second Reading in the House of Commons after the summer recess. Explanatory Notes to the Bill have also been issued [Bill 132-EN].

The Government has stated that the purpose of the *Civil Partnership Bill* is to establish a new legal relationship for same-sex couples and to enable those couples who register as civil partners of each other to access many of the legal rights and responsibilities to which married couples are entitled.

As a result of an amendment passed on Report in the House of Lords, the Bill would also enable certain close family members to register as civil partners of each other whether they are of the same sex or of the opposite sex.

This Paper summarises the main clauses of the Bill, including how the registration system would work in practice and the legal rights and responsibilities which the Bill would impose.

This Paper should be read in conjunction with Research Paper 04/64, which discusses the background to civil partnership registration and the debate in the House of Lords relating to the scope of the Bill.

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Summary of main points

At present, same-sex couples do not have legal recognition of their relationship. The Government has stated that the purpose of the *Civil Partnership Bill* is to create equality and recognition for same-sex couples. The Bill would create a new legal status, similar but not identical to marriage, which would allow adult same-sex couples to gain formal recognition of their relationship.

The *Civil Partnership Bill* would enable same-sex couples to enter a civil partnership through a statutory, civil registration procedure. There would also be a statutory dissolution process to deal with situations where a civil partnership breaks down. Same-sex couples who enter a civil partnership would access a wide range of rights and responsibilities in many areas including property and financial arrangements; social security; children; housing and tenancies; employment and pension benefits; recognition under intestacy rules; life assurance; access to fatal accidents compensation; protection from domestic violence; and tax treatment.

In the House of Lords there was considerable debate on the question of whether the civil partnership scheme should be limited in ambit to unrelated same sex couples, or whether it should also be available to a wider range of couples including relatives and carers and heterosexual couples. On 24 June 2004, an amendment was passed at Report Stage that would widen the scope of the civil partnership scheme and allow close relatives (whether of the same sex or of the opposite sex) who are over the age of 30 and have been living together continually for 12 years to form a civil partnership.

Following the passing of this amendment, the Government confirmed that they would not be proceeding any further with the many amendments they had previously tabled because they considered that the amendment “fundamentally alters the basis upon which the Government have brought forward the whole Bill”. The Government has announced its intention to overturn the amendment in the House of Commons.

The *Civil Partnership Bill* would apply to the whole of the UK. The Scottish Parliament has agreed a Sewel motion to include Scottish provisions in the Bill although doubt has been expressed as to whether a further motion may now be needed as a result of the amendment. The Northern Ireland Assembly is currently in suspension but, in its absence, the Secretary of State for Northern Ireland has endorsed the same approach as Scotland, although there was considerable debate in the House of Lords about whether it was appropriate, in these circumstances, to extend the scope of the Bill to Northern Ireland.

This Research Paper provides a summary of the main clauses of the Bill, including an explanation of how registration and dissolution of civil partnerships would work. It also considers the legal rights and responsibilities which might be imposed on a civil partner if the Bill were enacted. A separate Research Paper, 04/64, considers the background to the Bill and the debate in the House of Lords relating to the scope of the Bill which resulted in the passing of the amendment referred to above.

This Research Paper has been produced by a number of Library staff. The relevant subject specialists are as follows:

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I Introduction

The *Civil Partnership Bill* was introduced in the House of Lords as Bill 53 of 2003-04 on 30 March 2004. It was passed on Third Reading in the House of Lords on 1 July 2004 and had its First Reading in the House of Commons on 5 July 2004 (Bill 132 of 2003-04).

Patricia Hewitt, Secretary of State for Trade and Industry confirmed the purpose of the Bill in a written answer on 30 April 2004:

Mr. Leigh: To ask the Secretary of State for Trade and Industry pursuant to the answer of 24 March 2004, *Official Report*, column 861W, on civil partnerships, whether legal rights and benefits to which married couples are entitled have not been included in the Civil Partnership Bill.

Ms Hewitt [holding answer 28 April 2004]: The purpose of the Civil Partnership Bill is to establish a new legal relationship for same-sex couples and to enable those couples who register as civil partners of each other to access many of the legal rights and responsibilities to which married couples are entitled. The Government have therefore aimed to provide parity of treatment for civil partners.¹

As a result of an amendment passed on Report, the *Civil Partnership Bill* would also enable two people to register as civil partners of each other where they are within the degrees of family relationship set out in Schedule 1, provided that they are both aged over thirty years and they have lived together for a continuous period of twelve years immediately prior to the date of registration. In this case, the two people could be of the same sex or of the opposite sex and they would be eligible to register as civil partners of each other, despite being within the prohibited degrees of relationship set out in paragraph 1 of Schedule 2.

During the Bill's Third Reading on 1 July 2004, Baroness Scotland of Asthal, Minister of State, Home Office, outlined the Government's position in respect of the new character of the Bill:

[...] It has never been the Government's policy to apply these provisions to the wider group who can form a civil partnership as a result of last week's amendment.

The Government are not able to give an adequate explanation of the policy underlying these further or additional changes or their legal effect and consistency with other provisions on the statute book or in the Bill. A further difficulty is that before introducing the Bill, the Government consulted widely

¹ HC Deb 30 April 2004 c1364W

about their plans for the new legal relationship and the legal rights and responsibilities which should attach to it. This fundamental change, without any additional consultation, deprives the Government of important background to policy making.

Those considerations will also make it difficult for the Government to comment on other issues raised by the Bill and other amendments which have been tabled today. However, we shall attempt to describe the crucial issues in outline. In a few cases that has meant that we have not been able to table minor amendments because they are closely linked to the substantive amendment, which the Government have decided not to move, for the reasons that I have just explained.

It is the Government's intention to overturn last week's amendment in another place and then to table the remaining government amendments to the Bill, which have had to be put on hold for that reason. It will be a decision for the other place whether it feels it wants to do that.²

The Bill was brought to the House of Commons, without consequential amendments, on 5 July 2004 and is expected to have its Second Reading when the House of Commons reconvenes in September 2004.

This Research Paper provides a summary of the main provisions of the Bill, including an explanation of how registration and dissolution of civil partnerships would work. It considers the impact the Bill would have on property and financial arrangements; children; housing, occupancy rights and tenancies; domestic violence; social security, tax credits and child support; pensions; employment; and the armed forces. It also considers the treatment of civil partnerships by the tax system. This paper does not include a clause by clause explanation of all the provisions in the Bill but seeks to give an overview of the main areas covered. Reference should be made to the full Explanatory Notes which were published with the Bill and which include the Government's explanation of how individual provisions would operate.³

The debate in the House of Lords was extensive and covered wide-ranging issues. Considerable disagreement was expressed, both to the basic principles underlying the Bill and to the operation of individual clauses. For an outline of the debate relating to the scope of the Bill, together with a summary of the background including Government policy, the territorial extent of the Bill and the current legal position, the reader is referred to Research Paper 04/64.

² HL Deb 1 July 2004 c409

³ Bill132-EN, <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x--.htm>

II The Bill

A. What is a civil partnership?

Clause 1 of the Bill provides that a civil partnership is a relationship between two people of the same sex or between two people of the categories set out in Clause 2:

- which is formed when they register as civil partners of each other in England and Wales; Scotland; Northern Ireland or outside the United Kingdom under an Order of Council made under the Bill (under provisions which allow for registration overseas at British consulates or by armed forces personnel); or
- which they are treated as having formed by virtue of having registered an overseas relationship (as defined in the Bill).

A civil partnership would be ended only by death, dissolution or annulment.

As a result of an amendment passed on Report (which is discussed in Research Paper 04/64), **Clause 2** would allow the registration of a civil partnership between two family members, each of whom is over 30 years of age, who have lived together for a continuous period of twelve years immediately before the date of registration. **Schedule 1** sets out provisions for determining whether two people would be within the specified degrees of family relationship capable of registering a civil partnership and would have the effect of enabling an individual to register a civil partnership with another person from a range of close family members including parents, children, siblings, grandparents, aunts, uncles, nephews or nieces. In this case the two people would not need to be of the same sex, and so it would be possible, for example, for a father and daughter to register a civil partnership provided they met the conditions set out in Clause 2.

Different eligibility criteria would now apply to unrelated same sex couples from those which would apply to two family members. The provisions differ slightly according to whether the registration would take place in England and Wales, Scotland or Northern Ireland.

a. England and Wales

Clause 4 sets out the eligibility criteria.

Unrelated couples:

No two people would be eligible to register as civil partners of each other if:

- They are not of the same sex
- Either of them is already a civil partner or already married
- Either of them is under 16 or
- They are within the prohibited degrees of relationship

Clause 4 also introduces **Schedule 2** which includes further provisions relating to prohibited degrees of relationships including an absolute bar on civil partnerships between individuals and their parents, grandparents, adoptive parents, siblings, nephews and nieces.

Two family members:

No two people would be eligible to register as civil partners of each other if:

- Either of them is already a civil partner or already married or
- Either of them is under 16

Therefore, two family members, who wish to register under Clause 2, would not have to be of the same sex and could be within the prohibited degrees of relationship.

b. Scotland

The eligibility criteria for registration of a civil partnership in Scotland are set out in **Clause 84**. The criteria would be similar to those which would apply in England and Wales, save that in Scotland the reference to “prohibited degree” is replaced by a reference to “forbidden degree”. There is also an additional requirement which would prevent the registration of a civil partnership, whether of unrelated same-sex couples or of two family members, if either of the partners is incapable of understanding the nature of civil partnership.

As a result of an amendment to Clause 84, as in England and Wales, two family members, who wish to register under Clause 2, would not have to be of the same sex and could be within the forbidden degrees of relationship.

Clause 84 and **Schedule 11** set out further provisions about forbidden degrees of relationships.

c. Northern Ireland

The eligibility criteria for registration of a civil partnership in Northern Ireland are set out in **Clause 134**. The criteria are similar to those which would apply in England and Wales, save that, as in Scotland, there is also an additional requirement which would prevent the registration of a civil partnership if either of the partners is incapable of understanding the nature of civil partnership.

Again, as a result of an amendment to Clause 134, as in England and Wales, two family members, who wish to register under Clause 2, would not have to be of the same sex and could be within the prohibited degrees.

Clause 134 also introduces **Schedule 13** which sets out further provisions about prohibited degrees of relationships.

There was extensive debate in the House of Lords on the question of who should be eligible to register a civil partnership and on the nature of a civil partnership. The background and debate relating to the Bill is discussed in detail in separate Research Paper 04/64.

B. Registration of civil partnerships

1. England and Wales

Clauses 3 to 36 of Part 2 of the Bill, and **Schedules 2-4**, deal with the formation of civil partnership by registration in England and Wales. The registration procedure (and also the dissolution provisions) makes it clear that a civil partnership is intended to represent a long-term commitment. The Bill provides for four different types of registration procedure:

- (a) the standard procedure;
- (b) the procedure for house-bound persons;
- (c) the procedure for detained persons; and
- (d) the special procedure (which is for cases where a person is seriously ill and not expected to recover).⁴

The Bill also provides relevant modifications of those procedures which apply where one of the proposed civil partners lives in Scotland, Northern Ireland or is a member of the armed forces serving abroad, and the other has a usual residence in England and Wales, or where the proposed civil partners are former spouses, one of whom has been recognised in an acquired gender.⁵

a. The standard procedure

The eligibility provisions in **Clause 4(1)** are discussed in Section II (A) of this Research Paper above.

To register a civil partnership (either under Clauses 1 or 2) requires exclusivity of relationship. Individuals are able to enter into only one partnership arrangement at any given time. This means that an individual who is in an existing registered partnership or marriage will not be able to register a new relationship until that partnership or marriage has been legally dissolved.

⁴ Clause 6(1)

⁵ Clause 6(2) and 6(3)

Clause 5 provides that parental consent (or other specified consents) is required before a child and another person can register as civil partners of each other.⁶ However, clause 5(3) provides an exception to the requirement of consent where a civil partner has been bereaved and wishes to register a subsequent civil partnership before he or she is 18.

Part 1 of Schedule 3 to the Bill identifies the appropriate persons or bodies who may give consent. For example, before a child under the age of 18 can enter into a civil partnership, any parent of the child who has parental responsibility or any guardian must give their consent. If the child is subject to a special care order, the local authority designated in the order and each parent, guardian or special guardian must give their consent.

Parts 2 and 3 of Schedule 3 are concerned with the situation where a person's consent to a child registering as a civil partner is unobtainable or refused and sets out the circumstances in which that consent can be dispensed with or an application could be made to the court for it to give consent.

Assuming both prospective civil partners are eligible to register, **Clauses 9 to 18** set out the formalities which must be observed.

Clause 9(1) states:

9(1) For two people to register as civil partners of each other under the standard procedure, each of them must –

- (a) give a notice of proposed civil partnership to a registration authority, and
- (b) have resided in England or Wales for at least 7 days immediately before giving the notice.

The content of the notice may be prescribed by regulations. However, pursuant to subsections (3) and (4), the notice must include a declaration about kindred, affinity or other lawful impediment⁷:

9(3) A notice of proposed civil partnership must also include the necessary declaration, made and signed by the person giving the notice –

- (a) at the time when the notice is given, and
 - (b) in the presence of an authorised person;
- and the authorised person must attest the declaration by adding his name, description and place of residence.

⁶ Clause 5(5) defines a 'child' for the purpose of Part 2 of the Bill as a person who is under 18

⁷ 'Kindred' is defined as relationships by blood, 'affinity' relationships by marriage

- (4) The necessary declaration is a solemn declaration in writing –
- (a) that the proposed civil partner believes that there is no impediment of kindred or affinity or other lawful hindrance to the formation of the civil partnership;
 - (b) that each of the proposed civil partners has had a usual place of residence in England or Wales for at least 7 days immediately before giving the notice.

It is significant that the registration process requires a written declaration by both partners that there is “*no impediment of kindred or affinity or other lawful hindrance to the formation of the civil partnership*”. This wording parallels the relevant provision in the first half of the *Marriage Act 1949*. In Committee and during the Bill’s Report Stage, the Government stated its support for this wording as it reflects the position in civil marriages and emphasises the solemnity and longevity of the commitment being entered into.

Clause 9(5) requires the registration authority to record the fact that notice has been given and that the authorised person attested the declaration. Under **clause 10** the registration authority is able to request specified evidence to verify certain information contained in a notice of proposed civil partnership.

After a notice of a proposed civil partnership has been given, there is a ‘waiting period’ of fifteen days beginning with the day after the notice is recorded.⁸ However, **clause 13** enables the Registrar General, on an application made to him, to reduce the waiting period if satisfied that there are compelling reasons to do so. During the ‘waiting period’ certain relevant information (the names of the proposed civil partners and such other information as may be prescribed by Regulations) have to be publicised by the registration authority.⁹

If, during the ‘waiting period’, an objection is made to the proposed civil partnership the registration authority must record this fact (and any relevant information) in the register as soon as possible.¹⁰ However, anyone who makes a frivolous objection or representation could be liable under **clause 17** for costs of the proceedings before the Registrar General and for damages payable to the proposed civil partner to whom the objection relates.¹¹

Clause 15 provides that at the end of the fifteen day waiting period, a civil partnership schedule can be issued at the request of one or both of the proposed civil partners, provided the registration authority is satisfied that there is no lawful impediment to the couple forming a civil partnership and that any objections to the proposed civil partnership have been satisfactorily investigated or withdrawn.

⁸ Clause 12

⁹ Clause 11

¹⁰ Clause 14

¹¹ Clause 17

Under **clause 16** an appeal can be made to the Registrar General if the relevant registration authority refuses to issue the civil partnership schedule. The Registrar General must either confirm the refusal or direct that a civil partnership schedule be issued.

The Bill makes it clear that until the fifteen days waiting period in relation to a notice of a proposed civil partnership has expired, the proposed civil partners are unable to form a civil partnership. It also limits the life of a civil partnership schedule to 12 months running from the date that notice of the proposed civil partnership was recorded. Specifically, **clause 18** states:

18(1) the proposed civil partners may not register as civil partners of each other on the production of the civil partnership schedule until the waiting period in relation to each notice of proposed civil partnership has expired.

(2) Subject to subsection (1), under the standard procedure, they may register as civil partners by signing the civil partnership schedule at any time during the applicable period.

(3) If they do not register as civil partners by signing the civil partnership schedule before the end of the applicable period –

(a) the notices of proposed civil partnership and the civil partnership schedule are void, and

(b) no civil partnership registrar may officiate at the signing of the civil partnership schedule by them.

Before two people can register as civil partners, the civil partnership document (i.e. the civil partnership schedule in the case of the standard procedure) must be delivered to the civil partnership registrar. The registrar can ask for any information to be recorded in the register.¹²

The civil partnership is formed at the point when both parties have signed the civil partnership schedule. Specifically, **clause 3(1)** states:

3(1) For the purposes of section 1, two people are to be regarded as having registered as civil partners of each other once each of them has signed the civil partnership document –

(a) at the invitation of, and in the presence of, a civil partnership registrar, and

(b) in the presence of each other and two witnesses.

(2) Subsection (1) applies regardless of whether subsections (3) and (4) are complied with.

¹² Clause 3(4)

(3) After the civil partnership document has been signed under subsection (1), it must also be signed, in the presence of the civil partners and each other, by –

- (a) each of the two witnesses, and
- (b) the civil partnership registrar.

(4) After the witnesses and the civil partnership registrar have signed the civil partnership document, the relevant registration authority must ensure that–

- (a) the fact that the two people have registered as civil partners of each other, and
 - (b) any other information prescribed by regulations,
- is recorded in the register as soon as is practicable.

It is clear that the civil partnership registration process is purely a written process. No spoken words are included in the registration procedure. There was debate on this issue at Second Reading, in Grand Committee and during the Bill's Report Stage. Many peers were concerned that those who form a civil partnership should make a spoken statement to each other, or exchange of words, at some point during the procedure to form a civil partnership. For example, in Second Reading, the Bishop of Oxford argued why he thought it necessary for the registration process to allow for some expression of commitment:

Similarly, I would like to see the registration of a civil partnership involving not only a written statement that such a partnership now exists, but some verbal understanding that this is a commitment of two human beings to one another through all the vicissitudes of human existence. I believe that that conforms to the deepest desires and longings of those people who do in fact commit themselves to one another in such a relationship, even though, until this Bill becomes law, there is no way in which their commitment to one another can be legally recognised

In short, I believe that we need to ensure that in the law of this country, marriage itself is understood as it always has been in both its civil and religious form, as a commitment of two people to one another to the exclusion of all others, through all the ups and downs of human existence, for life. I would also like to see some reflection of that, in non-religious terms, in the understanding of what two people are committing themselves to when they enter into and register their civil partnership.¹³

During the Bill's Report Stage, Baroness Scotland of Asthal, Minister of State, Home Office, explained why the Government had decided to keep the registration of civil partnerships as a purely written procedure:

¹³ HL Deb 22 April 2004 c400

It is clear that noble Lords are concerned that those who form a civil partnership should make a spoken statement to each other, or exchange words, during steps taken to form a civil partnership. Perhaps I may therefore explain why the Government have not included any spoken words in the registration procedure.

First and most importantly, in civil marriage, the point at which the marriage is formed is when the spoken vows are exchanged in the course of the marriage ceremony. Registration records the formation of the relationship which has already occurred. The structure of the Bill is somewhat different as it establishes a quite different procedure for the formation of civil partnership, and spoken words are not part of that registration process.

For civil partnership, by contrast, it is the signing of the civil partnership document in an administrative procedure that marks the moment of the formation of the partnership and the change of status. We believe that that is simple, clear and all that is necessary. To add into that procedure a requirement for these spoken words would alter the emphasis of the procedure. In our view that is unnecessary and could introduce confusion about what was the vital step in the formation of the civil partnership.

Secondly, civil partners will have the option of exchanging spoken words with each other. Local authorities are able to offer the option of a ceremony which would very likely include spoken words, and couples will also be free to organise any religious blessing with any vows or other statements that they might wish to make to each other.

We have, however, listened very carefully to what noble Lords have said. While we still believe that it would be problematic to prescribe spoken words, we have tabled amendments to Clauses 14 and 25. Clause 14(2) provides that a,

"civil partnership schedule must contain such information as may be prescribed by regulations".

Clause 25(4)(b) provides that the Registrar General's licence,

"must contain such other information",

in addition to that prescribed in Clause 25(4)(a),

"as may be prescribed by regulations".

The purpose of the amendments is to widen the scope of Clause 14(2) and Clause 25 so that regulations may make provision as to the content of a civil partnership document rather than just the information in it. That will allow for the inclusion in the civil partnership document of a form of words.

The Government will consider what is the most appropriate form of words to be printed on the civil partnership document as part of the implementation work to be taken forward after Royal Assent.¹⁴

Clause 3(5) makes it clear that no religious service is to be used during the registration formalities. During the Bill's Second Reading in the Lords, Baroness Scotland of Asthal gave the Government's position as follows:

A ceremony would not form part of the statutory process. Responses to the England and Wales consultation suggested that while some same-sex couples would welcome a ceremony, others would not. The local authority would be free to offer the option of a ceremony in addition if it wished. Whether or not a ceremony were to take place would be a decision for the couple and the local authority concerned.¹⁵

The absence of a religious ceremony was an issue commented upon by the Labour peer, Baroness Rendell of Babergh:

[...] There is a strong emphasis in the Bill that anything in the nature of a religious service should be avoided when registering. Several gay people have written to me pointing out that they would like their partnership to be recognised with more gravity and formality, and some of them asked for a religious service. Being gay does not turn someone into an atheist. Many homosexual and lesbian people are deeply religious, as we have seen in a number of instances lately, and would like to feel their commitment to each other was made in the sight of God as well as man.¹⁶

Clause 7(1) of the Bill stipulates where civil registration can take place:

7(1) The place at which two people may register as civil partners of each other –

- (a) must be in England or Wales,
- (b) must not be in religious premises, and
- (c) must be specified in the notices, or notice, of proposed civil partnership required by this chapter.

The Bill is quite clear that civil registration should not take place in religious premises. **Clause 7(1) (b)** (and **clause 91(2)** in relation to Scotland) statutorily prevent registration from taking place in any premises designed or mainly used for religious purposes (or in Scotland, regarded as 'a place of reverence'). During Second Reading, the Bishop of Oxford expressed his dissatisfaction with this prohibition for two reasons:

¹⁴ HL Deb 24 June 2004 c1359

¹⁵ HL Deb 22 April 2004 c389

¹⁶ HL Deb 22 April 2004 c414

First, it infringes the proper freedom of religious authorities to control such premises. As a matter of principle, it is for those authorities and not for the state to decide whether or not their premises should be available to be used for registration purposes—unless there is some overriding national interest, which is very difficult to identify on this issue.

Secondly, the ban would deny some couples the possibility of a religious celebration in close proximity to a civil registration, which they may see as a commitment with a religious dimension. For example, they may want to have a civil registration in a church hall and then to move on afterwards to a religious ceremony in a church. Of course, that is not allowed in the Church of England and some other Christian denominations. But there may very well be religious bodies which would not only permit but welcome such a development, and it would be quite wrong to preclude them from having such a ceremony in proximity to a church hall, for example.¹⁷

For registration under the standard procedure, there must be prior agreement with the registration authority as to where the registration is to take place otherwise the notice of proposed civil partnership will be void. **Clause 7** also provides that the chosen place must be one which is open to any person wishing to attend the registration. Under subsection 7(5) a registration authority can provide a place in its area for the registration of civil partnerships.

To summarise, the standard procedure requires 7 days' residence in England and Wales immediately before giving notice of a proposed civil partnership, then the giving of notice to a registration authority (including appropriate solemn declarations), publication of the notice, issue by the registration authority of a civil partnership schedule, followed by registration as civil partners within 12 months from the original giving of notice.

b. The housebound procedure

There is a separate housebound procedure for those who would like to register as civil partners of each other at the place where one of them is house-bound.

Under **clause 19(2)**, a person is deemed to be house-bound at any place if a registered medical practitioner is willing to make a statement that in his opinion-

(a) because of illness or disability, that person ought not to move or be moved from the place where he is at the time the statement is made, and

(b) it is likely to be the case for at least the following 3 months that because of the illness or disability that person ought not to move or be moved from that place.

¹⁷ HL Deb 22 April 2004 c399-400

In such circumstances, the procedure under which the two people concerned might register as civil partners is the same as the standard procedure (see clauses 9-18 above), with the additional requirement that the receipt of a medical statement, which must accompany each notice, is recorded in the register and the applicable period during which the civil partnership schedule might be signed is shortened to 3 months (instead of 12 months).

c. The procedure for detained persons

Again, there is a separate procedure for a detained person to register as a civil partner at the place where that person is detained as set out at **clause 20**. For the purposes of the Bill a ‘detained person’ is defined as meaning a patient in a hospital (other than a short-term detainee under the *Mental Health Act 1983*) or in a prison or other place to which the *Prison Act 1952* applies.

In such circumstances, the procedure under which the two people concerned might register as civil partners is the same as the standard procedure (see clauses 9-18 above), with the additional requirement that the receipt of a supporting statement, which must accompany each notice, is recorded in the register and the applicable period during which the civil partnership schedule must be signed is shortened to 3 months.

A supporting statement is defined by clause 20(4) as one made by the responsible authority identifying the establishment where the person is detained and confirming that the responsible authority has no objection to that place being specified in a notice of proposed civil partnership.

In respect of the standard, house-bound and detained persons procedures, **clause 21(5)** applies modified procedures to cases where two people wish to register as civil partners of each other in England or Wales where one resides in England or Wales and the other resides in Scotland, Northern Ireland or is a member of Her Majesty’s forces serving outside the UK.

d. The special procedure (for cases where a person is seriously ill)

Clauses 22 – 28 enable a civil partnership registration to take place very quickly where one of the couple is seriously ill and is not expected to recover. This is the special procedure.

The registration authority can issue a Register General’s licence but only if given authority to do so by the Registrar General. The Registrar General must only give his authority if he is satisfied that one of the proposed civil partners is seriously ill and not expected to recover, and even then only if there is no lawful impediment to the issue of the licence.

Clause 22 allows just one of the proposed civil partners to give a notice of proposed civil partnership under the special procedure, provided that person complies with any

requirements as to evidence. The evidence that the Registrar General might require in order to be satisfied of the need to use the special procedure is set out in **clause 23**:

23(1) The person giving a notice of proposed civil partnership to a registration authority under the special procedure must produce to the authority such evidence as the Registrar General may require to satisfy him-

- (a) that there is no lawful impediment to the formation of the civil partnership,
- (b) that the conditions in subsection (2) are met, and
- (c) that there is sufficient reason why a licence should be granted.

(2) The conditions are that one of the proposed civil partners-

- (a) is seriously ill and not expected to recover, and
- (b) understands the nature and purport of signing a Registrar General's licence.

(3) The certificate of a registered medical practitioner is sufficient evidence of any or all of the matters referred to in subsection (2).

Most of the requirements for a declaration under the standard procedure are applied to the special procedure by virtue of **clause 22(3)**.

Under **clause 25**, any person is given the opportunity to make an objection to the Registrar General giving authority for the issue of his licence. The registration authority in question must record the nature of the objection in the register as soon as possible. The Registrar General must not give his authority until he has investigated the objection and has decided whether it ought to obstruct the issue of the licence or the objection has been withdrawn.¹⁸ If the Registrar General declares an objection to be frivolous, the person who made the objection might be liable under **clause 27** for the costs of the proceedings before the Registrar General and damages recoverable by the proposed civil partner to whom the objection relates.

If a Registrar General's licence has been issued, the proposed civil partners may register as civil partners by signing it at any time within 1 month from the day on which the notice of proposed civil partnership was given. **Clause 28** stipulates that if they fail to register as civil partners within this 1 month period, the notice of proposed civil partnership and the licence are void, and no civil partnership registrar may officiate at the signing of the licence by them.

Clauses 32 – 34 set out offences relating to: the civil partnership schedule; the Registrar General's licence; and to the recording of civil partnerships.

¹⁸ Clause 26(5)

2. Scotland

Part 3 of the Bill deals with civil partnership provisions relating only to Scotland.

The intention is that the spirit of the Bill and the rights conferred to those entering into a civil partnership should be identical throughout the UK. There are some differences between the provisions for civil partnership outlined for Scotland and those for England and Wales. It is the Government's view that most of the differences are minor and of a procedural nature and reflect the distinctive character of Scots law.¹⁹

Scotland has its own Registrar General and the law concerning registration in Scotland is devolved to the Scottish Parliament. There is separate legislation covering the functions of the Registrar General for Scotland. As a consequence, the Bill's provisions on civil partnerships reflect the legislation and procedures that apply in Scotland.

Clauses 86 and 87 require proposed civil partners to observe certain formalities in respect of giving notice of their civil partnership and for particulars to be duly recorded by the district registrar in a notice book.²⁰ These clauses closely follow the procedures for civil preliminaries contained in the *Marriage (Scotland) Act 1977*.

The district registrar and the Registrar General for Scotland are required under **clause 88** to publish relevant information (such as the names of the intended civil partners and the date of registration) regarding a couple's intention to create a civil partnership as soon as practicable.²¹ The purpose of the provision is to give the public an opportunity to object to a proposed civil partnership. Again, the clause follows similar provisions in the *Marriage (Scotland) Act 1977*. **Clause 90** sets out the procedures to be followed for any person to make an objection to the registration of a civil partnership; it is clear that the objection must relate to a lawful impediment.²²

Where the district registrar has received a notice of a proposed civil partnership, he is required to complete a civil partnership schedule provided he is satisfied that:

- both partners are eligible to form a civil partnership – there is no legal impediment to their registration as civil partners;
- there are no concerns over the capacity of the people to enter into the civil partnership;

¹⁹ Bill 132 EN

²⁰ The content of the notice is to be prescribed by regulations made by the registrar General for Scotland with the approval of the Scottish Ministers

²¹ The manner in which the information is to be published is to be prescribed by the Registrar General for Scotland

²² For the purposes of clause 90, there is a legal impediment to registration where the intended civil partners are not eligible to be in civil partnership with each other

- all the formalities have been properly observed;
- the required 14-days publication period has expired and there are no outstanding objections; and
- and the period which has elapsed from the day he received the notices (or, if the two notices were not received on the same day, from the day of receiving the last notice) does not exceed 3 months.²³

It is intended that the partners sign the civil partnership schedule on a date that is more than 14 days after notice of the proposed civil partnership has been made public by the district registrar. It might be signed at a registration office or at any place which the intended civil partners and the local registration authority agree. However, as in England and Wales, the place must not be one where people meet for public worship or be known or regarded by persons of a religious faith as a place of reverence.²⁴

A legally binding civil partnership is formed at the moment when both persons sign the completed civil partnership schedule before two witnesses aged 16 years or over and an authorised registrar – all must be present.²⁵ The registration process is purely a written process; no spoken words are included.

As soon as possible after a civil partnership schedule has been signed the authorised registrar is required to ensure that particulars are entered into the ‘civil partnership register’.²⁶ No alteration might be made to the register except as authorised by or under an Act (including an Act of the Scottish Parliament).²⁷

Under the Scottish provisions there is no set ‘special procedure’ (as there is in England and Wales) for the registration of a civil partnership to be expedited. However, under **clause 89** an authorised registrar is permitted, on receipt of a written request from one or both of the intended civil partners, to register a civil partnership at a date earlier than 14 days after the publication of proposed civil partnership prescribed by clause 88. It is envisaged that this power will be exercised in similar circumstances to an equivalent power under the *Marriage (Scotland) Act 1977*, typically where one of the proposed civil partners is seriously ill and not expected to recover.

Clause 94 also allows a civil partnership schedule to be signed quickly in circumstances where a couple have divorced as a consequence of one of them having changed gender

²³ Clause 92

²⁴ Clause 91

²⁵ Clause 83

²⁶ Clause 93

²⁷ Clause 97

under the *Gender Recognition Act 2004*, and the couple now wish to recreate their legal status with each other by entering into a civil partnership. As explained in the Bill's Explanatory Notes:

The aim is to minimise, as much as possible, the time between the end of the marriage and the creation of the civil partnership.²⁸

In effect, clause 94 allows the signing of the civil partnership schedule to take place on the same day that both notices of proposed civil partnerships are given.

It should also be pointed out that **Clause 95** applies modified procedures to cases where two people wish to register in Scotland as civil partners, but one resides in Scotland and the other resides in England or Wales.

Finally, **clause 98** creates certain new offences and associated penalties in relation to the registration of civil partnerships.

3. Northern Ireland

Part 4 of the Bill deals with provisions relating only to Northern Ireland.

Again, there are some differences between the provisions for civil partnership outlined for Northern Ireland and those for England and Wales but (as with Scotland) it is the Government's view that most of the differences are minor and of a procedural nature.²⁹

As in England and Wales, if one of the prospective partners is under the age of 18, parental (or other specified) consent to the civil partnership is needed. **Clause 141** gives effect to **Schedule 14** which identifies the appropriate persons or bodies who might give consent and makes provision for orders dispensing with consent and for recording consents.

For two people to register as civil partners of each other, each of them must give notice of the proposed civil partnership to the registrar.³⁰ If necessary, the registrar has the discretion to request specified evidence from a proposed civil partner to verify certain information in the notice.³¹ The notice is recorded by the registrar in the civil partnership notice book.³² The registrar is then required to place on public display a list containing relevant information (names of intended civil partners and date of proposed registration) in relation to each proposed civil partnership.

²⁸ Bill 132 EN

²⁹ *Ibid*

³⁰ Clause 135

³¹ Clause 137

³² Clause 136

Under **clause 136(5)** any person who might object to a proposed civil partnership can inspect the entry in the civil partnership notice book.³³ They may make an objection in writing to the registrar at any time before the formation of the civil partnership, but the objection must relate to a lawful impediment.³⁴ If the registrar is satisfied that there is no legal impediment to the formation of the civil partnership or the Registrar General has directed him to proceed, the registrar must complete the civil partnership schedule.³⁵

Clause 140 provides that the civil partnership schedule may be signed at a registration office, or at any place approved for that purpose by the local registration authority. Although there is no separate procedure (akin to the ‘special procedure’ available in England and Wales), in cases of serious illness or disability it may be possible to register a civil partnership at the place where the person concerned resides. For such a request to be considered by the registrar, he would need to see supporting medical evidence. Under **clause 145** it might also be possible for a detained person to register as a civil partner at the place where that person is detained, provided that the civil partnership notice is accompanied by a supporting statement and the Registrar General agrees.

A civil partnership is created in Northern Ireland at the moment when both persons sign the completed civil partnership schedule before two witnesses and the registrar – all must be present. The civil partnership schedule must then be signed by both witnesses and the registrar.³⁶ In uniformity with the rest of the UK, the registration process is purely a written process, no spoken words are included, and no religious service is used when the schedule is being signed.³⁷

However, **clause 142** appears to be unique to Northern Ireland in that it prevents the validity of a civil partnership being questioned in any legal proceedings begun after the date of its registration on the ground of any contravention of a provision of, or made under, the Bill.

Clause 146 applies modified procedures to cases where two people wish to register in Northern Ireland as civil partners, but one resides in Northern Ireland and the other resides in England or Wales. Finally, **clause 154** creates offences and associated penalties in relation to the registration of civil partnerships.

4. A comparison of the different registration procedures for England & Wales, Scotland and Northern Ireland

Comparing the Bill’s civil partnership registration procedures for all three territories, it is apparent that only England and Wales has four distinct procedures. Scotland and

³³ Clause 136(5)

³⁴ Clause 138

³⁵ Clause 139

³⁶ Clause 133

³⁷ Clause 133(5)

Northern Ireland each have one registration procedure but with provisions to cater for detained or seriously ill individuals. The provisions of the ‘standard procedure’ available in England and Wales are very similar in nature and effect to the registration procedures available in Scotland and Northern Ireland. For example, eligibility to form a civil partnership, the requirement to give notice, and the point when the civil partnership is formed (the moment when the civil partnership document is signed) are identical in all three territories. Similarly, the registration of a civil partnership is a written process for England and Wales, Scotland and Northern Ireland; there is no oral statement and no religious service.

However, there are differences. In England and Wales and in Northern Ireland, parental (or other) consent is required before a young person under the age of 18 can enter into a civil partnership. For Scotland there appears to be no such requirement. For England and Wales and for Scotland the Bill includes specific provisions to prevent a religious building from being used for the registration of a civil partnership. For Northern Ireland there is no similar provision. The registration provisions relating to England and Wales (‘standard procedure’) and to Scotland stipulate that, after notice has been given to the registrar, the parties must wait a prescribed period of time before the civil partnership can be formed by signing the civil partnership document. In England and Wales the waiting period is 15 days and in Scotland 14 days. However, for Northern Ireland no waiting period is specified in the Bill.

C. Dissolution, nullity and other proceedings

For England and Wales, Scotland and Northern Ireland a civil partnership would come to an end only on dissolution or annulment or the death of a partner. The dissolution and nullity provisions make it clear that civil partnerships are intended to be long-term committed relationships with legal rights and responsibilities.

The main aim of the proposals is to ensure that there is legal certainty about when civil partnerships legally begin and end; this is important in order to assess accurately a couple’s liabilities towards each other.

1. England and Wales

The Bill stipulates that the High Court or a County Court with jurisdiction to hear civil partnership proceedings can make a dissolution, nullity, presumption of death, or separation order.³⁸ Dissolution, nullity and presumption of death orders are initially conditional, for a period of 6 weeks, before being made final.³⁹ The provisions largely mirror the position for married couples.

³⁸ Clause 37(5) makes it clear that the powers of the court under this clause are subject to the court having jurisdiction under clauses 211 to 216 of the Bill

³⁹ Clauses 37 and 38

Anyone can ask the High Court or County Court for declarations as to the validity of a civil partnership or an annulment, dissolution or separation order at any date, but the court cannot deal with a non-partner's application unless the applicant has a sufficient interest.

a. Dissolution order

It is the Government's intention for registered civil partnerships to be long-term, stable relationships. Consequently, the Bill provides for a formal, court-based process for dissolution. The main characteristics of this procedure are outlined below.

Clause 37 of the Bill stipulates that irretrievable breakdown is the sole ground for the court to grant a dissolution order of a civil partnership. **Clause 41** further stipulates that an application for a dissolution order cannot be made until at least one year after the date of formation of the civil partnership.

Clause 37(2) provides that if an order for dissolution is made by the court it will initially be a conditional order; it cannot be made final until the end of a 6 week period as defined in **clause 38**. The Lord Chancellor is empowered under the Bill to make an order substituting a different period not exceeding 6 months and, in special cases, the court can reduce the duration of the conditional order (for example, in the case of a deathbed dissolution and formation of a new civil partnership).⁴⁰

Under **Clause 44** either civil partner can make an application to the court for a dissolution order on the ground that the civil partnership has broken down irretrievably. On such an application the court must inquire, so far as it reasonably can, into the facts alleged by the applicant and any facts alleged by the respondent. On hearing the application, the court can only hold that the civil partnership had broken down irretrievably if the applicant satisfies the court of one or more of the facts described in clause 44(5):

44(5) The facts referred to in subsections (3) and (4) are-

(a) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent;

(b) that-

(i) the applicant and the respondent have lived apart for a continuous period of at least 2 years immediately preceding the making of the application ('2 years separation'), and

(ii) the respondent consents to a dissolution order being made;

⁴⁰ Clauses 38(2) –(4)

(c) that the applicant and the respondent have lived apart for a continuous period of at least 5 years immediately preceding the making of the application (“5 years’ separation”);

(d) that the respondent has deserted the applicant for a continuous period of at least 2 years immediately preceding the making of the application.

The facts to be proved are precisely the same as in the *Matrimonial Causes Act 1973*, with the omission of adultery, which is already defined in such a way that it cannot apply to same-sex couples.

The Bill has been brought to the House of Commons with the amendment to extend civil partnerships to family members but without consequential amendments. In respect of the Bill’s dissolution provisions, it might be difficult to prove that a civil partnership has irretrievably broken down between family members. This point was made by Baroness Scotland of Asthal during the Bill’s Third Reading:

The procedure that the Government set out for the dissolution of a same-sex civil partnership is based on the court being satisfied that one of the following facts has occurred: unreasonable behaviour or desertion and separation for periods of either two or five years. We do not, however, see the package of provisions relating to dissolution as being remotely appropriate to the reality of family members’ lives.

Perhaps I may illustrate again some of the absurd consequences that may follow if the current dissolution provisions were applied to family members who want to dissolve a civil partnership. A daughter, for instance, wishing to marry, but having formed a civil partnership with her mother, would be unable to marry until the civil partnership was dissolved in a formal court-based procedure. That could take over a year to complete.⁴¹

The Bill contains a number of important supplementary provisions (clauses 45-48), including provisions as to temporary resumption of living together during a period of separation. For example, under **clause 45**, when the court is considering whether a period of living apart or desertion is continuous, no account is to be taken of a period of time not exceeding 6 months in total in which the civil partners resumed living together.⁴² Under **clause 47**, an application for a dissolution order on the grounds of five years’ separation, could be refused by the court on the basis that it would result in grave financial or other hardship to the other civil partner. Whilst **clause 48** permits the respondent to an application for a dissolution order alleging either 2 years’ or 5 years’ separation to apply to the court to consider his or her financial position after dissolution of the civil partnership. Following on from this, **clause 43** is significant in that it allows the court to

⁴¹ HL Deb 1 July 2004 c412

⁴² However, no period when the civil partners lived together can count as part of the period of living apart or desertion

consider a pre-existing agreement made between civil partners regarding the dissolution of the partnership. Court rules could also allow the court to express an opinion about whether the agreement is reasonable, or to give directions.

The Bill caters for attempts at reconciliation. Specifically, **clause 42** allows the court to adjourn an application if it appears that the civil partners have a reasonable prospect of becoming reconciled. Baroness Wilcox, Opposition Whip and Opposition Spokesperson for the Treasury, moved an amendment during the Bill's Third Reading (later withdrawn) to ensure that a solicitor acting for a client who seeks to dissolve his civil partnership would have to raise the possibility of reconciliation with him at the first available opportunity (in the same way as solicitors are currently required to do when acting in a divorce⁴³):

Both the Minister and I have expressed our concern to emphasise the seriousness of the proposed civil partnerships. Such partnerships are for the committed. I suggest that raising the possibility of reconciliation at the start of the prospect of a relationship breakdown would reflect well the Government's serious intent in the Bill.⁴⁴

In response, Baroness Scotland of Asthal said that for reconciliation to be worthwhile, the relationship concerned must be a suitable one. Under the amended Bill, it might be inappropriate to suggest reconciliation to family members seeking to dissolve a civil partnership:

Let me take one example. A person in a civil partnership with his brother would need to dissolve that civil partnership in order to marry. A person in this case would hardly need reconciliation with the brother he has formed a civil partnership with. His decision to dissolve the civil partnership is simple and uncomplicated: all he wants is to be able to marry his fiancée. I am sure noble Lords would not think it necessary to advise him on, and possibly dissuade him from, this course of action. I know that noble Lords are very supportive of those who wish to enter into marriage.⁴⁵

It is clear that the process to legally dissolve a civil partnership closely follows the procedure for divorce as set out in the *Matrimonial Causes Act 1973*. The Government's intention is that civil partnerships should be ended only by a formal, court-based process. This is in keeping with the serious nature of the responsibilities that civil partners would have towards each other.⁴⁶

⁴³ The Law Society's Protocol for family proceedings

⁴⁴ HL Deb 1 July 2004 c411

⁴⁵ HL Deb 1 July 2004 c412

⁴⁶ HL Deb 22 April 2004 c390

However, there has been debate during the Bill's process through the House of Lords that the provisions for dissolution of civil partnerships are based too closely on existing divorce law. For instance, during its Second Reading, Lord Goodhart, the Liberal Democrat Spokesperson for the Lord Chancellor's Department, made the following point:

I regret that Parts 1 and 2 of the Family Law Act 1996, which would have made the breakdown of marriage the sole ground for divorce without having to establish fault, were never implemented.

The noble Baroness, Lady Wilcox, described divorce as expensive and painful. That is all too true. Removing the need for proof of fault would have made it less expensive and less painful. That provision cannot be applied to marriage in this Bill, but the Bill should have followed the grounds for dissolution in the 1996 Act, which represents in my view an advance on the existing divorce law. Many of those who opposed the 1996 Act provisions did so on religious grounds and would not recognise civil partnerships as having an equivalent validity to begin with and would therefore be unlikely to object to making the dissolution of civil partnerships a simpler matter. I should be interested to know the views on that issue both within and outside your Lordships' House.⁴⁷

b. Void and voidable civil partnerships

Under **clause 37(b)** the court can make a 'nullity order' in respect of a civil partnership. Initially the order is conditional, for a period of six weeks, before being made final. When made final, a nullity order will annul a civil partnership which is either void (having never been valid) or voidable (able to be declared invalid on the application of one of the parties).

Clause 49 sets out the grounds on which a civil partnership is void. In effect, a civil partnership will be rendered void if there were breaches of the formal requirements and both civil partners were aware of these breaches at the time of the registration. It will also be void under clause 49(c) if one of the intended civil partners is a child (under the age of 18) and the formation of the civil partnership has been forbidden by a person whose consent is required.

The grounds on which a civil partnership is voidable are set out in **clause 50**:

50(1) where two people register as civil partners of each other in England and Wales, the civil partnership is voidable if-

(a) either of them did not validly consent to its formation (whether as a result of duress, mistake, unsoundness of mind or otherwise);

⁴⁷ HC Deb 22 April 2004 c396

(b) at the time of its formation either of them, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder of such a kind or to such an extent as to be unfitted for civil partnership;

(c) at the time of its formation, the respondent was pregnant by some person other than the applicant;

(d) an interim gender recognition certificate under the Gender Recognition Act 2004 (c.7) has, after the time of its formation, been issued to either civil partner;

(e) the respondent is a person whose gender at the time of its formation had become the acquired gender under the 2004 Act.

The Bill provides for certain bars to obtaining a nullity order. **Clause 51(1)** provides that the court must not make a nullity order on the grounds that a civil partnership is voidable if the applicant had acted towards the respondent in such a way as to indicate that he or she would not apply for a nullity order and that it would be unjust to the respondent to make the order now.

Clause 51(2) only permits an application for a nullity order on the grounds that a civil partnership is voidable if it is made within 3 years of the date of the formation of the civil partnership. The court can consider later applications but only where it was just to do so on the basis that the applicant suffered from mental disorder during the 3 year period. However, where an application is made on the ground that an interim gender recognition certificate has been issued under the *Gender Recognition Act 2004* after the date of formation of the civil partnership, the time limit is 6 months from the date of issue of that certificate.⁴⁸

Clause 51(6) is concerned with a situation where an application is made on the grounds of pregnancy at the time of formation of the civil partnership, or a change of gender previous to that date. In such circumstances, a nullity order must not be made unless the applicant did not know of the relevant facts at the time of formation of the civil partnership.

Clause 52 provides that where two people have registered as civil partners of each other in England and Wales it is not necessary to provide evidence that parental (or other consent) was actually given, or that the person who officiated at the signing of the civil partnership schedule was a designated civil partnership registrar. No evidence may be given in any nullity proceedings to disprove either of these facts. However, this clause is subject to **clause 49(c)**, which provides that a civil partnership will be void if it was forbidden by a person whose consent is required for a child to form a civil partnership.⁴⁹ In certain circumstances, the Lord Chancellor can, under **clause 55**, make an order to

⁴⁸ Clause 51(5)

⁴⁹ Clause 49(c)

validate a civil partnership registered in England and Wales if it appears to him that the partnership is or might be void under clause 49(c). However, before making such an order, a draft order must be advertised for at least one month and the Lord Chancellor must consider any written objections made to him during that month.⁵⁰

The validity of civil partnerships registered outside England and Wales are also dealt with by **clause 54** of this Bill. A civil partnership formed in Scotland or in Northern Ireland would only be void or voidable for the purposes of the law of England and Wales if it would be void or voidable under the Scottish or Northern Ireland provisions. The validity of a civil partnership registered outside the UK under an Order in Council (i.e. at British consulates etc) or by armed forces personnel is also dealt with by the Bill.⁵¹

A civil partnership formed overseas will be void for the purposes of the law of England and Wales if it becomes apparent that the relationship is in fact not an overseas relationship as defined in **clauses 204 to 206**, or if one of the requirements for the overseas relationship to be treated as a civil partnership under **clauses 207 to 210** is not met. By way of example, the Bill's Explanatory Notes states that a civil partnership would be void if, under the law of the country where registration took place, the formalities necessary to enter into the partnership were not fulfilled or if either party was ineligible to enter into the partnership.

c. Presumption of death orders

Under **clause 55**, the court can, on an application made by a civil partner, make a presumption of death order if it is satisfied that reasonable grounds exist for supposing that the other civil partner is dead. In such proceedings, the fact that for a period of 7 years or more the civil partner has been continually absent from the applicant, and the applicant has no reason to believe that the other civil partner has been living within that time, is evidence that the other civil partner is dead until the contrary is proved.

For the purposes of the Bill, the status of a registered partnership is recognised not only during the relationship but also after the death of one of the partners.

d. Separation orders

Clause 56 enables an application for a separation order to be made to the court by either civil partner on the same grounds as is required for an order for dissolution of a civil partnership.⁵² The court must inquire as far as possible into the facts alleged by both civil partners but (unlike dissolution) whether the civil partnership has broken down irretrievably is irrelevant. If the court is satisfied of the facts alleged it must make a separation order (subject to provisions relating to children).

⁵⁰ Clauses 55(1)-(5)

⁵¹ Clauses 202 and 203

⁵² Clause 44(5)(a),(b),(c) or (d)

If either civil partner dies without making a will (intestate) while a separation order is in force and the separation is continuing, the rules in respect of the passing of the intestate estate shall be applied as if the surviving (but separated) civil partner were also dead.⁵³

e. Declarations

The Bill provides for people to apply to the court for declarations regarding the status of a civil partnership.⁵⁴ For example, applications might be made to determine the validity of a partnership or the date it came into existence, or for a declaration as to whether a dissolution obtained outside England and Wales can or cannot be recognised. It is for the court to decide whether the person applying has a sufficient interest to justify making a declaration if the applicant is not one of the civil partners.⁵⁵

The court must make the declaration requested if the truth of the proposition to be declared is proved to the satisfaction of the court, unless to do so would be manifestly contrary to public policy.⁵⁶ However, the court cannot make a declaration that a civil partnership was void at its inception.⁵⁷ If, on hearing the evidence, the court dismisses the application it must not make any other declaration which has not been applied for.

On an application for a declaration under **clause 58**, the court can at any stage of the proceedings, of its own motion or on the application of any party to the proceedings, direct that all papers be sent to the Attorney General. The Attorney General can, in any event, intervene in proceeding for a declaration as he thinks fit, or may argue any question which the court thinks should be fully argued.⁵⁸

The Bill also includes supplementary provisions relating to court declarations.⁵⁹

2. Scotland

a. Dissolution decree

An application for dissolution of a civil partnership can be brought in the Court of Session or in the Sheriff Court.

As in England and Wales, the court will only grant a dissolution decree if it is satisfied that the civil partnership has broken down irretrievably or, an interim gender recognition

⁵³ Clause 57

⁵⁴ Clause 58

⁵⁵ Clause 58(2)

⁵⁶ Clause 59

⁵⁷ The power of the court to make a nullity order is unaffected by clause 58

⁵⁸ Clause 60

⁵⁹ Clauses 61 - 64

certificate under the *Gender Recognition Act 2004* has, after the date of registration of the civil partnership, been issued to either of the civil partners.⁶⁰

Evidence of unreasonable behaviour or desertion, which must be established in order to satisfy the court that the civil partnership has irretrievably broken down, is set out in **clause 115**. For the purposes of Scottish law, the irretrievable breakdown of a civil partnership on grounds of desertion for a continuous two year period will not be taken to be established if, at the end of the two year period, the parties start living together again and did so at any time after the end of the three months which begin from the date the parties resumed living together.⁶¹

When the court is considering whether a period of living apart or desertion is continuous (for either 2 years or 5 years) under clause 115(3(b) to (d), no account is to be taken of a period of time not exceeding 6 months in total in which the civil partners resumed living together. However, no period during which the civil partners lived together can count as part of the period of living apart or desertion.

The Scottish provisions also cater for the possibility of reconciliation. **Clause 116** provides that if it seems to the court that it is likely that the civil partners could reconcile, the court must continue the proceedings for as long as it thinks is necessary to enable the couple to attempt reconciliation. If, after a trial period of living together again (during the court action) the parties still wish to dissolve their civil partnership, the court will not be able to take into account the temporary reconciliation period for the purposes of the proceedings.⁶²

A couple who have already obtained a decree of separation can, under **clause 118**, rely on the same evidence to apply for a decree of dissolution. However, the court is not entitled to grant dissolution without first receiving evidence from the applicant.

The Registrar General for Scotland is required to maintain a register of decrees of dissolution of civil partnership, which may be searched by members of the public.⁶³ An extract of an entry in the register is sufficient evidence of the decree of dissolution to which it relates.

b. Void or voidable civil partnerships

Where two people register in Scotland as civil partners of each other but are, in fact, ineligible to do so under the terms of clause 84(1), the civil partnership is void.⁶⁴ In effect, the civil partnership will be treated as having never taken place. Either partner or

⁶⁰ Clause 115

⁶¹ Clause 117

⁶² Clause 116

⁶³ Clause 119

⁶⁴ Clause 120

another interested person can bring an action in the Court of Session to have the civil partnership declared void.

If a civil partnership registered outside Scotland is void or voidable, a court in Scotland with the appropriate jurisdiction may make a declaration of nullity in respect of the civil partnership under the inherent declaratory power held by the Court of Session.⁶⁵ A civil partnership formed in England and Wales or in Northern Ireland would only be void or voidable for the purposes of Scots law if it would also be void or voidable under the law for England and Wales or Northern Ireland.⁶⁶

In their effect, the Scottish provisions dealing with the validity of civil partnerships formed outside the UK (**clauses 121 and 122**) mirror the provisions which apply in England and Wales.⁶⁷

3. Northern Ireland

a. Dissolution orders

In Northern Ireland, the High Court or a designated County Court can make a dissolution order to bring a civil partnership to an end. The initial dissolution order will be conditional; it will only be made final after a six weeks period has lapsed.⁶⁸

Clause 161 states that it will not be possible for an application for dissolution to be made until at least 2 years after the date of formation of the civil partnership. This is different from the situation in England and Wales where the time bar is only 1 year.

In all other respects, the Northern Ireland provisions are broadly the same as the dissolution provisions for England and Wales. For example, the grounds for applying to the court for a dissolution order, the court-based process, and the provisions dealing with reconciliation attempts are the same.

Similarly, the supplementary provisions dealing with temporary resumption of living together during a period of separation, and refusal of dissolution orders in five-year separation cases for grave financial or other hardship, or if wrong in all the circumstances etc, (clauses 165 - 168) are identical to the provisions in England and Wales (clauses 45-48).

⁶⁵ A court must have appropriate jurisdiction under clauses 211 or 217 to 219

⁶⁶ Clause 121

⁶⁷ See page above

⁶⁸ Clause 157

b. *Void or voidable civil partnerships*

Clause 169 states that, where two people register as civil partners of each other in Northern Ireland, the civil partnership is void if:

- at the time when they register, they are not eligible to do so under the requirements set out in clause 134; or
- certain formalities have not been observed.

Clause 169(b) lists the breaches of the formal requirements which will make the civil partnership void if both civil partners were aware of them at the time of the registration. These are the failure to provide the required notice of proposed civil partnership, the civil partnership schedule not being duly issued, the place of registration not being the place specified in the civil partnership schedule, or a registrar not being present at the registration.

The grounds on which a civil partnership is voidable in Northern Ireland are set out in **clause 170** and are identical to the provisions for England and Wales (embodied in **clause 50**). Similarly, the bars to relief set out in **clause 171** are identical to the provisions for England and Wales (embodied in **clause 51**).

c. *Presumption of death orders*

Clause 173 deals with presumption of death orders in Northern Ireland and is identical to the provision for England and Wales (**clause 55**).

d. *Separation orders*

An application for a separation order can be made to the court by either civil partner on the same grounds and using the same facts as are required for an order for the dissolution of a civil partnership. **Clause 174**, which sets out the process of obtaining a separation order in Northern Ireland, is identical to the provision for England and Wales (**clause 56**).

Similarly, a separation order in Northern Ireland will have exactly the same legal effect as a separation order in England and Wales; **clauses 175** and **57** are identical.

e. *Declarations*

As in England and Wales (but not Scotland), the Northern Ireland provisions provide for people to apply to the court for declarations regarding the status of a civil partnership.⁶⁹ It

⁶⁹ Clause 176

is for the court to decide whether the person applying has a sufficient interest to justify making a declaration if the applicant is not one of the civil partners.⁷⁰

Clauses 177-179 set out the general provisions regarding the making of declarations and their effect in Northern Ireland. The clauses are identical to the provisions for England and Wales (embodied in **clauses 58-61**).

D. Property and financial arrangements

The Bill includes extensive provisions relating to the regulation of property and financial arrangements between partners during a civil partnership, on its dissolution and after the death of one of the partners, which are designed, in large part, to mirror provisions under marriage and divorce law.

1. England and Wales

a. The Bill

Part 2 Chapter 3, Clauses 65 to 71 and Schedules 5 to 8, cover a wide range of matters relating to property and financial arrangements, including, for example, provisions relating to property disputes between partners, provisions relating to the amendment of enactments relating to wills, administration of estates and financial provision, and provisions relating to financial relief (such as periodic payments for maintenance).

b. House of Lords debates

In Grand Committee, the Liberal Democrat peer Lord Lester of Herne Hill described the effect of Chapter 3:

This chapter as a whole, of which Clause 63⁷¹ is the first clause, is doing some very sensible things with regard to property and financial arrangements between civil partners of the kind that one would have between spouses. What it is seeking to do is to provide equity and to give protection.⁷²

Details of the effect of the provisions are included in the Government's Explanatory Notes published with the Bill.⁷³ The Labour peer Lord Filkin also gave a brief explanation of some of the clauses in the course of Grand Committee debate. For example he said:

⁷⁰ Clause 176

⁷¹ Now Clause 65

⁷² HL Deb 13 May 2004 c188GC

⁷³ Bill 132—EN <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x--.htm>

Clause 65⁷⁴ provides additional protection to civil partners in property disputes. It allows one civil partner to make an application under Clause 64⁷⁵ where the other civil partner no longer has the money or property concerned or where it is unknown whether the other partner still has the money or property. The court is given power to order payment of a sum of money or to make any other order that it can make under Clause 64.⁷⁶

In moving a probing amendment in Grand Committee, Baroness Wilcox said:

I am told again and again, in particular by the noble Lord, Lord Alli, that this is a relationship Bill; that this is not a financial Bill; that this is not a property Bill; and that this is not a Bill in that way.

(...)

Such sections as I have already noted make a civil partnership a serious undertaking because there are financial implications that stretch beyond the break-up of a relationship. I am keen to hear the Government's thinking on those clauses.⁷⁷

Lord Lester of Herne Hill commented:

I do not think that anything that I have said would indicate that I ever suggested that the Bill had nothing to do with money. I think that what the noble Lord, Lord Alli, and I were determined to try to get across was that this is not a tax avoidance or a tax reduction Bill. It is about relationships. Of course, the particular clause that we are looking at in the schedule is concerned with ensuring that the relationship is viable and that the relationship between the partners is fairly dealt with by the law to ensure, for example, that there is reasonable maintenance, as happens with married couples. Clearly, that is a very important incident in giving legal recognition to subsisting civil partnership.

Just as when the vows of a marriage fail to provide reasonable maintenance for the other spouse or to make a proper contribution to any child of the family, so the same should apply to a same-sex couple. I know that the noble Baroness, Lady Wilcox, is not suggesting the contrary; she is simply probing to see how this operates. Clearly, this is a necessary part of the overall scheme. It is not that money does not come into it—it clearly does—it is just that it demeans the whole Bill to suggest that the cash nexus is its main purpose.⁷⁸

Lord Filkin explained the importance of the financial provision clauses:

⁷⁴ Now Clause 67

⁷⁵ Now Clause 66

⁷⁶ HL Deb 13 May 2004 c192GC

⁷⁷ HL Deb 13 May 2004 c193GC

⁷⁸ HL Deb 13 May 2004 c193-4GC

It is important that civil partners should be able to apply for financial provision in all levels of court and have access to the widest range of orders, for self-evident reasons.

(...)

The noble Baroness asked why the civil partner should be so burdened. In essence, that goes to the spirit of the Bill which is that civil partnerships confer significant rights and responsibilities on both partners. If, as a consequence of the partnership, they have taken on responsibility for a child of that relationship—we discussed previously that it is perfectly possible through adoption for such a child to be in that position—it seems right to the Government that they should carry the responsibility of maintaining that child into the future, and hopefully maintaining an emotional and a supportive relationship as well as a financial one.

(...)

Civil partners will be under a duty to maintain each other and any children of the family. It is important that they should be able to make application for financial provision when they are living apart by agreement because that goes to the heart of the agreement into which they entered. It would be in the public interest for civil partners to have such a continuing duty when living apart by agreement, otherwise it could fall to the state to support them. But perhaps more importantly, it was part of the responsibilities that they undertook when entering into that relationship. Again, we wish to reduce acrimony between people in situations where relationships are in difficulties. These provisions correspond to those available for partners to a marriage.⁷⁹

2. Scotland

Section 251(2) introduces **Schedule 28** which contains consequential amendments relating to Scotland. **Part 1** of that Schedule amends the *Succession (Scotland) Act 1964*. The Explanatory Notes state that the effect of the amendments would be to provide civil partners with the same rights of succession as spouses.⁸⁰ **Part 2** of the Schedule amends the *Family Law (Scotland) Act 1985* and addresses the financial provision which should be made when a civil partnership ends. The Explanatory Notes set out the effect of this amendment:

The amendments mean that civil partners should be treated in the same way as spouses in determining the rights and responsibilities to financial provision following dissolution of a civil partnership. It further provides that any child

⁷⁹ HL Deb 13 May 2004 c194-5GC

⁸⁰ Bill 132—EN, para 966, <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x--.htm>

brought up in a civil partnership as a child of the family can be financially provided for following the breakdown of the civil partnership.⁸¹

3. Northern Ireland

a. *The Bill*

In Grand Committee, the Government introduced amendments which would apply similar provisions relating to property and financial arrangements to Northern Ireland. These are now contained in **Part 4 Chapter 3, Clauses 186 to 190** and **Schedules 15 to 18**. Baroness Amos, the Leader of the House and Government Spokesperson for Northern Ireland, explained the amendments:

This group of nine amendments make provision in Northern Ireland in connection with civil partnership which is comparable to the provision made for England and Wales by Chapter 3 of Part 2, as well as Schedules 4 to 7.⁸² They cover a wide range of legislative provision which deal with civil partners during a civil partnership, on its dissolution and after the death of one of the partners.⁸³

The effect of the provisions is explained in the Government's Explanatory Notes published with the Bill.⁸⁴ Baroness Amos also explained the amendments which introduced the provisions in some detail in the course of Grand Committee debates.⁸⁵

b. *House of Lords debates*

Baroness O'Cathain, the Conservative peer, questioned whether the provisions were comparable with or identical to those applying in England and Wales.⁸⁶ Baroness Amos confirmed the position:

With respect to "identical" or "comparable", they will be different—or differently worded—only where Northern Ireland legislation is different. The reason that I use the word "comparable" concerning Northern Ireland legislation is that I have sought, as I go through, to highlight those places where it is different, because I know that the Committee would want to know. But in the majority of instances, where there is a slight difference, it will be because the orders or legislation in Northern Ireland are slightly different.⁸⁷

⁸¹ *Ibid* para 967

⁸² Now Schedules 5 to 8

⁸³ HL Deb 13 May 2004 c237GC

⁸⁴ Bill 132—EN <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x--.htm>

⁸⁵ HL Deb 17 May 2004 c239-246GC

⁸⁶ HL Deb 17 May 2004 c241

⁸⁷ HL Deb 17 May 2004 c241-242GC

4. Extended civil partnerships

As a result of Baroness O’Cathain’s amendment which was passed on Report, Clause 2 allows the registration of a civil partnership between two family members, each of whom is over 30 years of age, who have lived together for a continuous period of twelve years immediately before the date of registration. Family members who do register a civil partnership will also be subject to the provisions relating to property and financial arrangements which could result, for example, in the division of property and the requirement for one partner to pay maintenance to the other, in the event of the civil partnership being dissolved. At third reading, Baroness Scotland of Asthal gave an example of how this might operate:

Should a daughter in a civil partnership with her mother wish to marry, she would have to go through a formal court-based dissolution of the civil partnership first. ... Moreover, if she did seek a dissolution, the daughter would be entitled to a share of her mother's property, which might mean that the elderly mother would be dispossessed of her home because it would have to be sold and shared to make provision for her civil partner. So depending on the circumstances, this might require the mother to sell the family home in order to provide a settlement. I am sure that noble Lords did not have that in mind.⁸⁸

Baroness Scotland of Asthal also gave the following example of the potential effect of the amendment:

We might also have the situation of a daughter, who had formed a civil partnership with her father which had been subsequently dissolved, being liable not only for maintenance payments to her father, but also for any of her dependant brothers and sisters who had been treated as children of the family. As I said last Thursday, this could turn the clock back to the 1930s when daughters were held financially responsible for their fathers and others in the household, leading to their lives being restricted in a totally unacceptable way.

Of course such applications for compulsory maintenance between family members would lead to great ill feeling between the applicants if the arrangements for them to live together broke down. Last week's successful amendment would also encourage property disputes between family members where only two have become civil partners. Civil partners have increased rights to apply to the court in respect of property disputes, as opposed to relatives who live together. Under the current Bill an elderly mother could be forced to sell her house, as was said earlier.⁸⁹

⁸⁸ HL Deb 1 July 2004 c395

⁸⁹ HL Deb 1 July 2004 c412-3

E. Children

The Bill proposes to amend existing legislation in respect of the following areas of policy relating to children: parental responsibility; guardianship; contact and residence orders; financial provision; and adoption. The Explanatory Notes to the Bill explain that the Bill “makes various amendments to the *Children Act 1989* and the *Adoption and Children Act 2002* to reflect the creation of the new status of civil partnership”.⁹⁰

In regard to parental responsibility, **clause 74** would amend the *Children Act 1989* in relation to England and Wales so that, like a step-parent (when the legislation comes into force, which is expected to be in September 2005),⁹¹ a civil partner would be able to gain parental responsibility for the child either through agreement with the parents or a parental responsibility order from the courts. **Clause 193** would make an identical provision for Northern Ireland by amending the *Children (Northern Ireland) Order 1995*.⁹²

Clause 75, which would insert a new section 6B into the *Children Act 1989*, relates to England and Wales and concerns the appointment by a parent or existing guardian of a person to act as a guardian in the event of their death. The clause would mean that a civil partner could be named as a guardian, but the appointment would be revoked if the civil partnership were annulled or dissolved, although the appointment would still stand if the appointment itself indicated that the dissolution or annulment of the civil partnership should not affect the appointment. This would replicate the existing legislation (section 6A) in the case when a spouse is appointed to be the guardian. **Clause 194** would make an identical provision for Northern Ireland by amending the *Children (Northern Ireland) Order 1995*.

Clause 76 would allow civil partners and former civil partners in England and Wales to apply for a residence or contact order as of right. At present, under the *Children Act 1989*, anyone can apply for a contact or residence order although only a sub-group of people can apply for such orders as of right i.e. without first requiring the leave of the court to apply. This sub-group includes parents and guardians, as well as current and

⁹⁰ The *Civil Partnerships Bill*, Bill 132 2003–04, Explanatory Notes, p27, para 146

⁹¹ Further information on section 4A of the *Children Act 1989* can be found in the Library Standard Note *Parental responsibility for unmarried fathers and step-parents* (SN/SP/2827), see: <http://hcl1.hclibrary.parliament.uk/notes/sps/snsp-02827.pdf>

⁹² SI 1995/755 (NI 2)

former step-parents.⁹³ **Clause 195** would make an identical provision for Northern Ireland by amending the *Children (Northern Ireland) Order 1995*.

Clause 77 is concerned with amendments to schedule 1 of the *Children Act 1989* (entitled “Financial Provision for Children”) in relation to England and Wales. Sub-clause 2 would mean that courts could make orders for periodical payments by a civil partner to support a child of the family (either directly or indirectly). Sub-clause 3 would mean that local authorities would not pay residence order allowances where the child lives, as a result of a residence order, with a civil partner of the child’s parent. Currently, such allowances are not paid to the child’s parents or to a person who is the spouse of the child’s parent. **Clause 196** would make an identical provision for Northern Ireland by amending the *Children (Northern Ireland) Order 1995*.

Clause 78 is concerned with the adoption of a child by civil partners in England and Wales, although the implications of the clause are somewhat limited given the existence of section 50 of the *Adoption and Children Act 2002* which, when it comes into force, will allow unmarried couples (be they a same-sex or opposite-sex couple) to apply for adoption. As Baroness Scotland highlighted during the Second Reading debate, the Bill “will regularise the position of children who are part of such relationships [i.e. civil partnerships] to take advantage of the same rights as other children and other couples”.⁹⁴

Paragraphs 60 and 61 of Schedule 28 would amend the *Children (Scotland) Act 1995* so that, as well as after divorce, judicial separation or declarator of nullity of marriage, after dissolution or declarator of nullity of a civil partnership, or separation of civil partners, a court could consider whether to exercise its powers under section 11 (court orders relating to parental responsibility etc.) or section 54 (referral of the child to a Principal Report if the child may require compulsory measures of supervision) of the Act in respect to a child who is accepted by both civil partners as a child of the family which their partnership constitutes.

Paragraphs 46 to 53 of Schedule 28 would amend the *Family Law (Scotland) Act 1985*. The Explanatory Notes set out the effect of these provisions:

This clause addresses the financial provision which should be made when a civil partnership ends. It makes amendments to the Family Law (Scotland) Act 1985 to include reference to civil partners. The amendments mean that civil partners should be treated in the same way as spouses in determining the rights and

⁹³ Under the *Children Act 1989*, the following are entitled to apply for a contact or residence order as of right: any parent (whether or not they have parental responsibility for the child) or guardian; any person in whose favour a residence order is already in force with respect to the child; any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family (so including step-parents and former step-parents); any person with whom the child has lived for a period of at least three years; any person with consent of the relevant parties stated in the *Children Act 1989*; or, a local authority foster parent, or prospective adopter, who meet the criteria set out in the *Children Act 1989*.

⁹⁴ [HL Deb 22 April 2004 cc432–3](#)

responsibilities to financial provision following dissolution of a civil partnership. It further provides that any child brought up in a civil partnership as a child of the family can be financially provided for following the breakdown of the civil partnership. This part of the Bill is easiest read in conjunction with the Family Law (Scotland) Act 1985.⁹⁵

Clause 197 relates to adoption in Northern Ireland, where adoption by same-sex couples has not been legislated for. In particular, subsection 4 would mean that an individual who is a civil partner would not be able to adopt.

Clause 181 would allow the court to exercise its powers under the *Children (Northern Ireland) Order 1995* in relation to any children of the family in any proceedings for a dissolution, nullity or separation order of a civil partnership. The court could exercise its powers in order to safeguard the children's welfare and provide for their upbringing.

Clause 238 sets out that references to stepchildren and in-law relations (such as brother-in-law) are to be read as including relationships arising through civil partnerships.

Clause 239 applies this to all the existing legislation listed in **Schedule 22**, as well as future Acts and SIs for England, Wales and Scotland. **Clause 240** makes an identical provision for Northern Ireland legislation, both existing (albeit in relation to the list of existing legislation in **Schedule 23** rather than **Schedule 22**) and future.

Although the clauses and schedules relating to children were not themselves amended during the Bill's passage through the Lords, the insertion of the new clause 2 and new Schedule 1 by Baroness O'Cathain's amendment would affect them. However, because, under clause 2, a member of a family relationship could only be a civil partner when they are thirty years of age and over, this limits the implications of Baroness O'Cathain's amendments in relation to children.

However, in the case where a parent and his son are civil partners, and the son himself has a daughter from a previous relationship, the daughter's grandparent would be able to apply as of right for a contact or a residence order in relation to her. This is in contrast to the current position for grandparents who usually have to obtain the leave of the court to apply for such an order.

In the same situation, though, under **clause 77** the courts could make the grandparent liable for periodical payments to support his granddaughter.

F. Housing, occupancy rights and tenancies

Clause 80 of the Bill introduces **Schedule 9**. The purpose of Schedule 9 is to amend a range of enactments that relate to housing and tenancies in order to ensure equality of treatment between spouses and civil partners. Detailed commentary on the Schedule 9

⁹⁵ Bill 132-EN, para 967, <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x--htm>

provisions is contained in the Explanatory Notes to the Bill. Schedule 9 extends only to England and Wales. Clause 80 and Schedule 9 have remained unamended as the Bill has progressed through its stages in the House of Lords.

Similarly, **clause 199** introduces **Schedule 19** which, in turn, amends various enactments relating to housing and tenancies in Northern Ireland in order to ensure equality of treatment between spouses and civil partners.

Clauses 99-110 makes provision for the occupancy rights of civil partners and for financial arrangements between them in Scotland. Detailed commentary on these clauses is contained in the Explanatory Notes to the Bill; these clauses have not been amended as the Bill has progressed.

G. Domestic violence

1. Background – England, Wales and Northern Ireland

Part IV of the *Family Law Act 1996* gives a spouse rights to occupy the matrimonial home even though they have no legal interest or estate in that home. It also provides for two important remedies for domestic violence victims - occupation orders and non-molestation orders. In brief, non-molestation orders prohibit the respondent from molesting an “associated person”. An occupation order can be obtained where significant harm to the applicant or a relevant child is likely, and might require the respondent to leave the home or exclude him or her from a defined area of the home. Again, the applicant would have to show that she or he and the other party were “associated”.

“Associated” is defined in section 62 of the Act, and includes spouses, former spouses, cohabitants or former co-habitants, relatives and people who are living together “other than as employees, tenants, lodgers or boarders”. The *Domestic Violence, Crime and Victims Bill*, which is nearing the end of its passage through the Commons, would extend the definition of co-habitants to include same-sex couples, giving them access to occupation orders on the same basis as opposite-sex cohabitants. Same-sex couples may already apply for non-molestation orders by virtue of living together in the same household. Further details are given in Library Research Paper 04/44.

The *Family Homes and Domestic Violence (Northern Ireland) Order*, introduced non-molestation orders and occupation orders in Northern Ireland.⁹⁶

⁹⁶ SI 1998/1071. For background see Northern Ireland Office Press Release, *Parliament approves new domestic violence legislation*, 8 May 1998 at <http://www.nio.gov.uk/press/1998/may/980508a-nio.htm>

2. The Bill – England, Wales and Northern Ireland

Clause 81 and **Schedule 10** of the Bill would replace the references in Part IV of the *Family Law Act 1996* to spouses with “civil partner” and substitutes “home rights” for “matrimonial home rights”. Thus civil partners would have the same rights to occupy the home as married people have to occupy the family home. For example, if one civil partner owned the freehold on a house, and the other had no legal interest in it, the latter would have the right not to be evicted or excluded from the dwelling house. In addition, civil partners would also be able to apply to the courts for non-molestation orders and occupation orders on the same basis as married couples.

Clause 200 and **Schedule 20** make equivalent changes in Northern Ireland.

3. The extension of civil partners

Baroness O’Cathain’s amendment would extend what are currently “matrimonial” home rights to family members who have lived together for 12 years or more. For example, if two sisters lived together in a property owned by one of them, registering as civil partners would mean that the other would have the right not to be evicted or excluded from that property.

Family members such as those covered by the amendment are already able to apply for occupation orders under section 33 of the *Family Law Act 1996*, but only if they have the right to occupy the property, for example because they own or rent it. Those without such rights cannot currently obtain an occupation order. The amendment would mean that family members who were civil partners would be able to apply for occupation orders to protect themselves against significant harm, irrespective of whether they had a legal interest in that property. Family members can already apply for non-molestation orders against each other because they would be “associated” persons.

4. Protection from abuse in Scotland – interdicts

In Scotland, an interdict is a civil court order which can be obtained by one person to forbid (or interdict) some course of action, including abusive behaviour, by another person. Scotland has long had a common law interdict, which preceded all statutory protection for victims of domestic violence.⁹⁷ The *Matrimonial Homes (Family Protection) (Scotland) Act 1981* introduced “matrimonial interdicts”, which, unlike common law interdicts, could have a power of arrest attached to them. The *Protection from Abuse (Scotland) Act 2001*, which came into force on 6 February 2002, changed the law to allow anyone who has obtained, or who is applying for, an interdict against an

⁹⁷ For a discussion, see Scottish Executive Social Research, Kate Cavanagh et al, *An evaluation of the Protection from Abuse (Scotland) Act 2001*, 2003 at <http://www.scotland.gov.uk/cru/resfinds/epaa-00.asp>

abusive person to apply to the court to have a power of arrest attached to that interdict. This applies whether it is a matrimonial interdict or not.⁹⁸

Clauses 111 to 114 provide for interdicts, with a power of arrest, to be granted in respect for a couple living together in a civil partnership. The wording of the provision reflects the *Matrimonial Homes (Family Protection) (Scotland) Act 1981*.⁹⁹

H. Civil partnerships formed or dissolved abroad

Part 5 deals with civil partnerships formed or dissolved abroad. The provisions are explained in detail in the Government's Explanatory Notes.

Chapter 1 includes provisions relating to the registration of a partnership outside the UK under an Order in Council.

Clause 202 would confer power to make an Order in Council to allow two people to register a civil partnership in countries or territories outside the United Kingdom in the presence of a prescribed officer of Her Majesty's diplomatic service, where specified conditions are met.

The Government's Explanatory Notes set out the parallel that this would create with marriage law:

This power will be used to make provisions for civil partnership corresponding to the provisions of the Foreign Marriage Act 1892 (c.23). Under that Act it is possible for UK nationals to marry in accordance with UK law at a diplomatic post overseas in certain circumstances, so this power will enable civil partnerships likewise to be registered at diplomatic posts overseas.¹⁰⁰

Chapter 2 (Clauses 204 to 210) sets out the overseas relationships which would be treated as civil partnerships. One of the requirements would be that an overseas relationship must be a "specified relationship" or must meet "general conditions". The general conditions are set out in **Clause 206** and relate to exclusivity, duration, effect and registration, and are therefore similar in effect to the provisions relating to a civil partnership under the Bill. **Clause 205** introduces **Schedule 21** which lists specified relationships which would be capable of being recognised. A couple would be treated as having registered a civil partnership if, under the relevant law, they had sufficient capacity to enter into the relationship and met all the requirements necessary to ensure the formal validity of the relationship. Both members of the couple would have to be of the

⁹⁸ Background is given in a Scottish Parliament Information Centre briefing 04/14, *Protection from Abuse (Scotland) Act 2001*, available at <http://www.scottish.parliament.uk/research/briefings-04/sb04-14.pdf>

⁹⁹ sections 14 and 15

¹⁰⁰ Bill 132-EN, para 400, <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x-f.htm>

same sex and would have to have been eligible to register as civil partners of each other under the law of the part of the United Kingdom in which they are domiciled.

Chapter 3, Clauses 211 to 230, sets out provisions which would enable courts in all parts of the United Kingdom to have jurisdiction, in specified circumstances, to entertain certain proceedings relating to civil partnerships, and also includes further provisions relating to those proceedings. Courts in England and Wales would have jurisdiction to entertain proceedings for the dissolution or annulment of civil partnerships, or for a separation order or presumption of death order, or to make a declaration of validity (**Clauses 212-216**). Courts in Scotland would be able to exercise jurisdiction in an action for the dissolution of a civil partnership or the separation of civil partners or for declarator of nullity (**Clauses 217-219**). Courts in Northern Ireland would have power to entertain proceedings for the dissolution or annulment of civil partnerships, or for a separation order or presumption of death order, or to make a declaration of validity (**Clauses 220-224**).

Clauses 225 to 230 sets out provisions relating to the recognition of dissolution, annulment or separation obtained in the UK or obtained overseas.

Clauses 231 to 237 includes miscellaneous and supplementary provisions relating to civil partnerships formed or dissolved abroad.

I. Social security, tax credits and child support

1. The current rules

a. Benefits and tax credits

When a married couple claims an **income-related benefit** (i.e. Income Support, income-based Jobseeker's Allowance, Pension Credit, Housing Benefit or Council Tax Benefit), the resources of both partners are taken into account. The amount of benefit payable will be less than that which would be payable to two single people claiming independently. This reflects the assumption that there are certain 'economies of scale' for people who are cohabiting (for example, in preparing meals). The same rules apply to unmarried couples of the opposite sex who are deemed to be 'living together as husband and wife'. Partners in such relationships are therefore assumed to be as financially interdependent and mutually supporting as married partners.

Same-sex couples are currently treated as two separate persons when they claim income-related benefits.

The rules governing **tax credits** (the Child Tax Credit and the Working Tax Credit) are the same as those for income-related benefits. Unmarried couples who are 'living

together as husband and wife' are treated in the same way as married couples.¹⁰¹ In other words, their joint income is taken into account, and the circumstances of both partners are considered when determining eligibility for certain elements (e.g. the childcare element of the Working Tax Credit).

When one member of a married couple claims Income Support or income-based Jobseeker's Allowance the Department for Work and Pensions (DWP) may recover some or all of the benefit from the other spouse.¹⁰² This applies even if the couple are separated. So, for example, the DWP may seek to recover money from the separated spouse of someone claiming Income Support, even if he/she is not living with the person who made the claim. This is however a *power* rather than a duty; there is no requirement for the DWP to pursue the spouse. Under section 105 of the *Social Security Administration Act 1992* the DWP may take criminal proceedings if a person 'persistently refuses or neglects to maintain' a spouse and as a result the spouse claims Income Support or income-based Jobseeker's Allowance. It would appear, however, that such prosecutions are extremely rare.¹⁰³

'Adult Dependency Increases' are payable (subject to the earnings of the adult dependant) with certain non-means tested benefits (short-term and long-term Incapacity Benefit, Maternity Allowance, Carer's Allowance, Severe Disablement Allowance, Widowed Parent's Allowance and the Retirement Pension). They can be paid for:

- a spouse residing with the claimant;
- a separated spouse who is being maintained by the claimant; or
- another adult who is maintained by the claimant and who is looking after his/her child.

Dependants in the third category could be same-sex or opposite-sex partners of the claimant, but they do not need to be in any relationship with him/her.

Bereavement benefits (the lump-sum Bereavement Payment, Widowed Parent's Allowance, and the Bereavement Allowance) are paid to people of working age following the death of their spouse (provided the spouse paid sufficient National Insurance contributions). They are only payable to married partners. Bereavement benefits cannot however be paid if the surviving spouse is 'living together as husband and wife' with

¹⁰¹ Section 3 *Tax Credits Act 2002*

¹⁰² Section 106 *Social Security Administration Act 1992*; section 23 *Jobseekers Act 1995* and regulation 169 *Jobseeker's Allowance Regulations SI 1996/207*

¹⁰³ Wikeley, Ogus and Barendt's *The Law of Social Security*, 5th edition, 2002, p 317

someone of the opposite sex.¹⁰⁴ Cohabitation with someone of the same sex would not affect entitlement to bereavement benefits.

b. *Child support*

At present, under the old scheme of calculating child support, a married couple, or a couple living together as if they were married, are assessed jointly in calculating the amount of child maintenance. Under the new scheme, if a non-resident parent has a partner (which is currently defined as someone to whom they are married and a member of the same household, or not married to each other but are living together as husband and wife) and either he or his partner claim certain benefits or the partner is also a non-resident parent who is paying maintenance through the CSA and claiming certain social security benefits, then the non-resident parent only pays the flat rate of child maintenance of £5 (assuming the nil rate does not apply). The definition of child used in regard to child maintenance currently excludes anyone who is or has been married; has celebrated a marriage which is now void; or has celebrated a marriage in respect of which a decree of nullity has been granted. In regard to the powers of inspection, no person is required to answer any question or to give any evidence tending to incriminate himself or, in the case of a person who is married, their spouse.

c. *'Living together as husband and wife'*

Although it is clear that the term 'living together as husband and wife' refers only to relationships between people of the opposite sex, the term is not defined further in legislation. Case law does however point towards certain factors which may be taken into account when decisions on individual claims are made. In addition, administrative guidance produced for benefit staff has been described as providing 'admirable signposts' to assist those making decisions.¹⁰⁵ The DWP technical guide, *A Guide to Income Support* gives a summary of the latest version of the guidance:

Who makes the decision on living together?

There is no definition in the Act or Regulations of 'living together as a husband and wife'. The decision is made by a decision maker following guidance in the Decision Makers' Guide and Social Security Commissioners' case law [...] and is based on the information gathered by the visiting officer. The visiting officer and the decision maker have received special training in dealing with cases of this kind. All the following criteria are taken into account by the decision maker:

¹⁰⁴ In the case of the £2,000 Bereavement Payment, this only applies if the surviving spouse was living with someone else at the time of death; they do not have to repay the amount if they only subsequently cohabit with someone

¹⁰⁵ Woolf J in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498

Membership of the same household

Both partners must be living in the same household and neither of you will usually have any other home where you normally live. This implies that the 2 of you live together the whole time, apart from absence necessary, for example, for employment or visits to relatives; and that, for example, you usually share meals and do jobs around the home for each other.

Established relationship

Living together as husband and wife clearly implies more than an occasional or very brief association. When you first live together, it may be clear from the start that the relationship is similar to that of husband and wife, for example, if you have taken the same surname and have a child together. In other cases it may be some time before such a close relationship develops.

Financial support

In most husband and wife relationships you would expect to find financial support of one partner by the other, or sharing household expenses, but the absence of any such arrangement does not prove that 2 people are not living together as husband and wife.

Sexual relationship

A sexual relationship is normally an important part of marriage and therefore of living together as husband and wife. But its absence does not necessarily prove that you are not living as husband and wife, nor does its presence prove that you are. (You will not be asked about any sexual relationship, but you can give information about this if you think it will make things clearer.)

Children

When you are caring for a child or children of whom you are the parents this is likely to imply that you are living as husband and wife.

How other people see the relationship

Whether you present yourselves to other people as husband and wife is relevant. But many couples living together do not wish to pretend that they are actually married and the fact that you retain your separate identities publicly as single people does not mean you cannot be regarded as living together as husband and wife.¹⁰⁶

No single factor is however conclusive; nor does the list constitute a 'score card' from which the result can be read off.¹⁰⁷ It is the 'general relationship' of the parties that is of paramount importance.¹⁰⁸

¹⁰⁶ Department for Work and Pensions, *A Guide to Income Support*, IS20 April 2004, pp 76-77:
<http://www.dwp.gov.uk/advisers/index.asp#techguides>

The more detailed guidance is in Volume 3, Chapter 11 of the *DWP Decision Maker's Guide*, which is available at: <http://www.dwp.gov.uk/publications/dwp/dmg/index.asp>

¹⁰⁷ CSB/150/1985

The 'living together as husband and wife' rule is a longstanding feature of the social security system.¹⁰⁹ In the 1970s it was particularly controversial, and it was argued that the problems involved in applying the rule, in particular the intrusion of privacy, called into question its legitimacy.¹¹⁰ Wikeley, Ogus and Barendt's *Law of Social Security* comments:

There is no obvious answer to this contention since much depends on departmental practice. The level of complaints against the Department's inquiry agents seems to have dropped since the late 1960s and 1970s. It should also be noted that income support decisions under the rule are now taken at a more senior level within local offices rather than in the normal way by decision makers.¹¹¹

Another possible explanation for the reduction in complaints is that less stigma is attached to cohabitation today than was the case in the 1970s.¹¹²

The rule still nevertheless causes problems for claimants. The Child Poverty Action Group *Welfare benefits and tax credits handbook 2004/2005* states:

Decision makers have often applied too narrow an interpretation of the test. There is no rule, for example, that if your partner stays with you for three nights or more a week you are *automatically* to be treated as a couple who are living together.¹¹³

An article in the journal *Community Care* in 2001 observed:

The living together rules can wreak utter havoc on innocent claimants, leaving them not only distressed but penniless. It is a complex rule that is difficult for benefit officials to apply, hence the scope for error and innuendo. At worst, value judgments can strongly influence decisions to cut benefit, and encourage the making of statements about three nights a week.¹¹⁴

2. Consultation

Social security and tax credits issues were covered in paragraphs 7.19-7.22 and 9.9-9.10 of the June 2003 consultation paper, *Civil Partnership: A framework for the legal*

¹⁰⁸ CIS/087/1993. For a more detailed discussion of the case law see Desmond Rutledge, 'Living together appeals revisited', *Adviser*, 81, September/October 2000, pp 13-15

¹⁰⁹ See Wikeley, Ogus and Barendt, *op cit*, pp 220-223. Prior to 1977 the term was 'cohabiting as man and wife' however.

¹¹⁰ Ruth Lister, *As Man and Wife*, 1970

¹¹¹ Wikeley, Ogus and Barendt, *The Law of Social Security*, 5th edition, 2000, p 221

¹¹² Gillian Douglas, 'The Family, Gender, and Social Security', in Neville Harris (ed.), *Social Security Law in Context*, 2000, p 267

¹¹³ p 799

¹¹⁴ Neil Bateman, 'Benefits Agency guide to love and sex', *Community Care*, 1-7 February 2001, p 27. See also Gary Vaux, 'Why can't we all live together?', *Community Care*, 20-26 July 2000, p 29

*recognition of same-sex couples*¹¹⁵, and in paragraphs 4.7-4.8 of the November 2003 document, *Responses to Civil Partnership*.¹¹⁶

With regard to **income-related benefits**, the Government proposed to treat civil partners in the same way as married couples. Registered partners would be treated as a single family unit when determining entitlement to benefit and the amount of benefit payable. Registered partners would also be 'liable to maintain' each other in the same way as married couples are at present.

In addition, unregistered cohabiting same-sex couples would be treated in the same way as opposite-sex couples 'living together as husband and wife'. The Government argued:

Treating same-sex couples (whether registered or unregistered), in the same way as opposite-sex couples (whether married or unmarried) in relation to income-related benefits is the best way to ensure fairness in this area and ensure that a same-sex couple who wish to register a civil partnership would not be financially worse off than they would be if they chose not to register their partnership.¹¹⁷

Respondents to the consultation pointed out that this would inevitably require DWP staff to make assumptions about people's sexual orientation, and could lead to the 'outing' of some same-sex couples. It could also penalise home-sharers and others living together if incorrect assumptions were made about the nature of their relationship.¹¹⁸ The Government said that the matter would be 'handled sensitively'.¹¹⁹

The Government also proposed that **Adult Dependency Increases** should be payable for registered partners in the same way as they currently are for spouses¹²⁰, and that registered partners should be entitled to the **bereavement benefits**, subject to the usual eligibility conditions, in the same way as married couples

3. The Bill

Clause 244 of the Bill introduces **Schedule 24** which would make amendments to the *Child Support Act 1991*, the *Social Security Contributions and Benefits Act 1992*, the *Social Security Administration Act 1992*, the *Jobseekers Act 1995*, the *State Pension Credit Act 2002*, the *Tax Credits Act 2002* and, where relevant, the corresponding legislation in Northern Ireland. The Explanatory Notes state:

¹¹⁵ http://www.womenandequalityunit.gov.uk/research/civ_par_con.pdf

¹¹⁶ http://www.womenandequalityunit.gov.uk/publications/CP_responses.pdf

¹¹⁷ *Responses to civil partnership*, p 27

¹¹⁸ *Ibid.* p 26

¹¹⁹ *Ibid.* p 27

¹²⁰ *Civil partnership: A framework for the legal recognition of same-sex couples*, para 7.22, p 41

For the purpose of child support, social security and tax credits legislation amended, the intention is that, in general, same-sex couples in a civil partnership are treated in the same way as married couples and that same-sex couples who are not in a civil partnership but who are living together as if they were civil partners are treated in the same way as opposite-sex unmarried couples who are living together as husband and wife.¹²¹

The Explanatory Notes also state:

A same-sex couple will be regarded as "living together as if they were civil partners" for the purposes of the legislation if (but only if) they would, be regarded as living together as husband and wife were they instead two people of the opposite sex. This definition is to ensure that the body of case law that applies to those living together as husband and wife will also apply to those living together as civil partners.¹²²

Clause 244 also provides that the general order making power in clause 249 shall include the power to amend legislation (including subordinate legislation) to include references to people 'living together as if they were civil partners' where the term 'living together as husband and wife' or the equivalent appears. This would enable the detailed benefit rules, such as those in the *Income Support (General) Regulations 1987*¹²³, to be amended to take account of civil partnerships.

Paragraphs 1 to 5 of Schedule 24 would amend the *Child Support Act 1991* in respect of both the old and new schemes of child maintenance so that two people who are of the same sex and are civil partners, or who are not civil partners but live together as if they were, would be treated in the same way as opposite sex married and unmarried couples for the purposes of calculating child support. Further, people who were formerly civil partners could not be classified as a child for the purposes of child maintenance, and civil partners should, like married couples, not have to incriminate themselves or their partners during an inspection by the CSA. **Paragraphs 6 to 10** make similar amendments to the *Child Support (Northern Ireland) Order 1991*.¹²⁴ **Paragraphs 113 and 114 of Schedule 24** would extend the rules concerning the child maintenance bonus in the *Child Support Act 1995* to civil partners or same-sex couples who live together as if they were civil partners.

4. The Lords Stages

Speaking in Grand Committee, the Parliamentary Under-Secretary of State at the DWP, Baroness Hollis of Heigham, said that the purpose of the provisions in the Bill relating to social security was twofold:

¹²¹ HL Bill 132-EN, para 470

¹²² *Ibid.* para 792

¹²³ SI 1987/1967

Two things must be done simultaneously. We must ensure on the one hand that there is equity of treatment between civil partners and married couples while, on the other hand, we must ensure equity and comparability of treatment between cohabiting couples of opposite sexes and cohabiting couples of the same sex for social security purposes. The test used for social security purposes for a cohabiting couple is whether two people are living together as a couple, as husband and wife—or the equivalent wording.¹²⁵

In response to concerns voiced by the Labour peer Lord Alli that gay couples who currently keep their relationships secret because of prejudice might be 'outed' by the rules, Lady Hollis said:

I am very happy that my noble friend Lord Alli raised a substantive point, to which we may wish to return. He referred to the worry that by expanding social security reach to include, for the first time, people living as same-sex couples who have hitherto been treated as individuals, we would turn the clock back to the treatment of cohabiting opposite-sex couples, which many of them experienced in the 1950s. I am thinking of prurience, twitching net curtains, anonymous telephone calls and the like.

It was precisely because I shared those concerns, and because representations had been made to me by friends and colleagues such as my noble friend Lord Alli, that I have had two seminars with relevant organisations, including Stonewall, the Social Security Advisory Committee, the Lesbian and Gay Lawyers Association, the Local Government Association and the CAB. We considered whether the existing test for living together as husband and wife for cohabiting unmarried opposite-sex couples was still appropriate in its language and, if so, whether it could be applied to same-sex relationships. What we came up with as a result was a need to readdress that test across the board.

We found the discussion very helpful—it is going very well—and we are getting a new framework in which we can train our staff to act appropriately, sensitively, discreetly but even-handedly with opposite sex and same-sex couples in future. We are working on the matter, and I hope to have drafts that I can put in the Library and circulate to people as they wish during the summer.

Alongside that process—this has been put to us emphatically—we need to ensure that our staff are trained, both those of heterosexual and those of same-sex orientation. Some staff are worried that they may be outed against their wish, on the ground that they have "special skills" or "special insights". The issue is delicate. I have spoken to staff about the problems, and I am seeking the aid of the organisations to help us to go through the modules of sexual orientation training and role-play, where appropriate. We went through similar exercises when we introduced the disability legislation, to increase sensitivity.¹²⁶

¹²⁴ SI 1991/2628 (NI 23)

¹²⁵ HL Deb 25 May 2004 c 462GC

¹²⁶ HL Deb 25 May 2004 cc 465-466GC

Lady Hollis later added:

We will do our best to ensure that all couples, whether of the same sex or of the opposite sex, let alone civil partners, understand the implications of how social security legislation will affect them once this Bill comes into force in a year or so. Equally, we will seek to avoid asking for repayments from someone who has inadvertently made a mistake and failed to appreciate that, although they have not entered into a civil partnership, nonetheless they are affected because they now form a same-sex couple.¹²⁷

Lady Hollis gave an example which indicated the extent to which same-sex partners could lose out by the application of the ‘living together as husband and wife’ test:

I will take a "Janet and Jane" rather than a "Janet and John" example. Janet has two children and earns £15,000 a year. Jane has one child and earns £10,000 a year. Treated as separate individuals, as they currently are under the law, they would together but as separate individuals, acquire an additional £8,000 tax credit to top up their incomes of £15,000 and £10,000 respectively. However, were this Janet and John—whether married or cohabiting and therefore treated as a couple—they would, with the same income and the same number of children, get not £8,000, but £1,800.¹²⁸

5. Implications of Baroness O’Cathain’s amendment

Baroness O’Cathain’s amendment at Report Stage in the Lords provides that, in addition to same-sex couples, people are eligible to register as civil partners if they are within the degrees of family relationship specified in Schedule 1, both over thirty years of age and have lived together for a continuous period of twelve years immediately prior to the date of registration.¹²⁹

Family members who register as civil partners would therefore enjoy the same rights as same-sex civil partners with regard to social security benefits and tax credits. So, for example, a woman living with her elderly aunt could receive bereavement benefits in the event of her aunt’s death.

Registered family members would also however have the same responsibilities as same-sex civil partners and married people. They would therefore be treated as a single unit when claiming means-tested benefits. The circumstances and resources of both partners would be taken into account when deciding eligibility for benefit, and the amount of benefit payable would be less than the total amount that could be claimed by two single people claiming independently.¹³⁰ So, for example, an elderly woman in a civil

¹²⁷ HL Deb 25 May 2004 c 490GC

¹²⁸ HL Deb 25 May 2004 c 489GC

¹²⁹ Clause 2

¹³⁰ See section I.A above

partnership with her niece might find that her claim for Pension Credit is unsuccessful because her niece has income and/or capital above the specified level.

Registered family members would also be 'liable to maintain' each other, even if they had 'separated' and were no longer living together.¹³¹ So, for example, where a woman separated from her civil partner niece claims Income Support, the DWP might attempt to recover some or all of the benefit from the niece. The niece could even be prosecuted if she 'persistently refused or neglected to maintain' her aunt.

During the Lords Report Stage on 24 June, Baroness Scotland argued that Baroness O'Cathain's amendment would:

...require the tearing up of all social security law since Beveridge. No pensioner would get an income-related benefit such as pension credit from the state if their civil partner son could support them. No brother could get an income-related disability benefit if his civil partner sister could support him. No unemployed adult son could get jobseeker's allowance if his civil partner mother could support him, and no son could fail to pay child support if his mother could meet the Bill. I could go on.

All such benefits would belong not to the individual but to the relationship, which in social security terms would put the clock back to the 1930s. I know that that is not the intention of the noble Baroness. So that is in part why we say, "not this Bill".¹³²

There is also uncertainty about the position of people who, although eligible to register as a civil partner with another member of their family, choose not to do so. As described in section I(1)(a) above, people who are not married but who are 'living together as husband and wife' are treated in the same way as married couples when a claim is submitted for a means-tested benefit or a tax credit. Living together as husband and wife can also affect entitlement to bereavement benefits, and child support calculations. The Government has proposed that unregistered same-sex couples living together as if they were civil partners will likewise be treated in the same way as registered same-sex couples. The intention is to ensure fairness in the treatment of different groups and to ensure that same-sex couples who choose to register do not find themselves financially worse off as a result.¹³³

If a 'living together as if they were civil partners' test were to be applied following income-related benefit or tax credit claims by people who could register as a civil partner with another member of their family but chose not to do so, then some people who currently live together could find themselves worse off. The "Janet and Jane" example in section I(4) above gives an indication of the extent to which people could lose out. If, on

¹³¹ See section I.A above

¹³² HL Deb 24 June 2004 cc 1384-1385

¹³³ *Responses to civil partnership*, p 27

the other hand, only those who had actually registered were treated as civil partners, people who were claiming income-related benefits or tax credits (or who expect to claim them at some point in the future) might have a disincentive to register. The civil partnership provisions for family members might therefore only benefit middle and higher income groups. There might also be equity issues if cohabiting but unmarried couples and unregistered same-sex partners continued to be subject to a 'living together' test.

If a 'living together as if they were civil partners' test were to be applied to family members, there is the issue of what factors decision makers should take into account. Many aspects of the existing guidance on 'living together as husband and wife' are clearly inappropriate. On the face of it, any two members of the same family who meet the criteria set out in section 2 of the Bill should be treated as civil partners, since there are no requirements relating to the nature or depth of a relationship.

J. Pensions

1. Background

There have long been calls to equalise survivors' benefits within pension schemes to extend the same rights to unmarried and same-sex couples as are enjoyed by married couples.

There are usually two types of benefits payable when a member of an occupational pension scheme dies: a lump sum payment and a continuing pension based on the member's accrued rights or the pension in payment. The lump sum payment may usually be paid to an individual nominated by the member. Therefore the question of unmarried and same-sex partners rarely arises in respect of this benefit as the member can simply nominate their partner when they join the scheme. Provision of a continuing pension is more complicated and restricted. It may be influenced by the contracting-out rules, which require that a continuing pension is payable to a surviving spouse, and tax legislation and Inland Revenue rules which govern the tax approval of occupational pension schemes and restrict the provision that a scheme can offer for survivor benefits.

Most occupational pension schemes provide some benefits on the death of a member. Schemes which are contracted out of the state additional pension scheme (S2P, formerly known as SERPS), are obliged to provide a widow's pension and, on rights accrued since 1989, a widower's pension. Schemes are not required to provide benefits to partners who were not married to the scheme member. Practice notes, published by the Inland Revenue's Savings, Pensions and Share Schemes (IR SPSS, formerly the Pension Schemes Office), set out the criteria for the tax approval of occupational pension schemes and these allow some flexibility for schemes which wish to make such provision and recognise relationships outside marriage. Scheme members must show evidence of financial interdependence:

An unmarried partner, whether of the same or opposite sex, can qualify for a survivor's pension only if he or she were financially dependent on the employee or ex spouse. Financial interdependence of the employee or ex spouse and his or her partner would be an acceptable criterion, e.g. where the partner relied on a second income to maintain a standard of living which had depended on joint income prior to the employee's or ex spouse's death.

Decisions on whether or not a person is dependent are a matter for the scheme trustees. IR SPSS would not challenge the trustees' judgement provided they had acted in accordance with the scheme rules.¹³⁴

A new pensions tax regime is to be introduced from April 2006 under the *Finance Bill 2003-04* (Bill 89). The rules on pension death benefits are similar to the current rules and allow for payment to unmarried partners where "the person's financial relationship with the member was one of mutual dependence".¹³⁵

The increase in the number of people cohabiting has led some schemes to use this flexibility and provide benefits for adult dependants either automatically or on a case by case basis at the discretion of the trustees. This has raised issues for those cohabiting with partners of the same sex, for whom fewer schemes pay benefits, and questions of discrimination on the grounds of sexual orientation.

The issue has often been raised in connection with the main public service schemes which until very recently rarely made provision for any surviving partners other than those married to the deceased at the time of his/her death. This lack of recognition of relationships outside marriage mirrors the position in the state pension system. It is often argued that one of the reasons for this is that the main public service pension schemes are set up under statute and their rules contained in regulations. Unlike private sector schemes, they do not have trustees and therefore there is little scope for the discretion which trustees can exercise for the benefit of unmarried partners as set out in the Inland Revenue practice notes.

The TUC has been waging a campaign on the issue of pension provision for unmarried partners in public sector pension schemes for some years now. For example, in December 1995 it published a pamphlet, *Pensions and prejudice: how public sector pension schemes discriminate against non-married partners*, which argued for the introduction of benefits for non-married adult survivors in public sector pension schemes. This issue was also the subject of an EDM in the 1997/98 session, sponsored by Gisela Stuart MP and signed by 132 Members, which called on the government to require public service schemes to provide survivor benefits for unmarried partners.¹³⁶ An EDM in the 2001/02

¹³⁴ Inland Revenue's Savings, Pensions and Share Schemes, *Occupational Practice Schemes Notes*, IR 12 (2001), p 163

¹³⁵ HC Bill 89, schedule 28, part 2, para 15(3)

¹³⁶ EDM 1582 1997/98

session sponsored by James Purnell also called on the government to introduce pensions for partners. This received 202 signatures.¹³⁷

2. The Bill

The *Civil Partnership Bill* would affect rights to state, occupational, public service and personal pensions for same-sex couples and, if Baroness O’Cathain’s amendment stays part of the final Act, for “family members who have lived together on a long-term basis”.¹³⁸

a. State pensions

Schedule 24 of the *Civil Partnerships Bill* (HL Bill 132) would amend the *Social Security Contributions and Benefits Act 1992*, to extend benefits to civil partners in similar circumstances to those applying to married couples. The Explanatory Notes to the Bill describe how **paragraphs 21 to 30** and **46 of schedule 24** deal with state pensions:

781. *Paragraphs 21 to 30 and 46* extend state pension rights to civil partners. Currently, a married woman (but not a married man) can use her husband’s National Insurance contribution record to qualify for a basic state pension when they have both reached state pension age. Civil partners (like married men) will be able to qualify for these pensions when their civil partners who were born on or after 6 April 1950 reach state pension age. Because of the difference in state pension ages, this means that female civil partners will qualify from 2010 onwards and male civil partners from 2015 onwards.

782. Where a woman is widowed after reaching state pension age she can qualify for a state pension calculated as if her husband was entitled to it when he died, regardless of her husband’s age on death. It consists of a basic pension plus additional pension (a percentage of SERPS depending on when the spouse reached pensionable age and 50 per cent of any State Second Pension). Until 2010 civil partners, like widowers, will only be able to receive these pensions if both spouses or civil partners are over state pension age when the first one dies. However, widowers and civil partners who reach pension age on or after 6 April 2010 will be able to qualify regardless of the age at which their wife or civil partner dies (i.e. on the same basis as widows).

783. Where a spouse is widowed before reaching pension age a state pension can be awarded if a widow or widower at any time in the past was entitled to a Bereavement Allowance or Widowed Parent’s Allowance when over age 45 but only as additional pension and, if aged 45 to 54 when widowed, it is reduced on a sliding scale. These provisions will apply to civil partners from the implementation date.

¹³⁷ EDM 1135 2001/02

¹³⁸ HL Deb 24 June 2004 c1362

784. Where a marriage or civil partnership has terminated, the contributions of the former spouse or civil partner may be substituted for the period of the marriage or civil partnership to allow a person to qualify for a basic state pension.¹³⁹

This would enable civil partners to inherit their partner's pension (if worse than their own) from 2010, in accordance with the phasing in of provisions for increasing the woman's pension age to 65 under the *Pension Act 1995*.¹⁴⁰

As stated above, female civil partners would be able to inherit from 2010 and male civil partners from 2015.¹⁴¹

b. Occupational and personal pensions

The intended new standing for members of occupational and personal pension schemes is outlined in the consultation document *Civil partnership: a framework for the legal recognition of same sex couples*, published by the Department of Trade and Industry-Women & Equality Unit in June 2003:

Survivor Pensions - Private Pension Schemes

9.11 Most private pension provision is provided through occupational pension schemes which can be:

- Defined Benefit - where the pension payable depends on the length of service and the salary (usually the final salary) earned by the employee; or
- Defined Contribution - where the contributions are invested to provide a pot of money on retirement, which is used to buy an annuity.

Personal pensions and stakeholder pensions, which are other types of private pension provision, are defined contribution arrangements between providers and individuals.

9.12 Employers providing defined benefit pension schemes that are used to contract their employees out of the State Second Pension (formerly SERPS) are required to pay a survivor pension to the surviving spouse of a scheme member. In practice, many private sector schemes make payments to others, including opposite-sex and same-sex partners if scheme rules allow trustees to do this, but there is no legal requirement for them to do so. Members of defined contribution occupational schemes and personal pension schemes that are contracted out of the State Second Pension, are required to provide for a survivor pension for their

¹³⁹ <http://pubs1.tso.parliament.uk/pa/cm200304/cmbills/132/en/04132x-1.htm>

¹⁴⁰ For further details of pension age equalisation, see SN/BT/2175:
<http://hcl1.hclibrary.parliament.uk/notes/bts/snbt-02175.pdf>

¹⁴¹ For information on how the Bill will affect Pension Credit and other income-related benefits, please see section I, above.

spouse but only on that part of the pension derived from the National Insurance contribution rebate and its investment return (the protected rights).

The Government proposes that the conditions for contracting out should be amended to include a requirement for survivor benefits to be paid to registered partners.

The Bill itself would create the power to amend existing legislation dealing with pensions by order. **Clause 245 (1)** provides that:

A Minister of the Crown may by order make such amendments, repeals or revocations in any enactment, subordinate legislation or Church legislation relating to pensions, allowances or gratuities as he considers appropriate for the purpose of, or in connection with, making provision with respect to pensions, allowances or gratuities for the surviving civil partners or dependants of deceased civil partners.

However, the Explanatory Notes on this clause make it clear that the regulations would be used to require contracted-out schemes to provide survivors' benefits for civil partners, but only in respect of pensionable service after the Bill has come into force:

472. Contracted-out defined benefit pension schemes would be required to take account of periods of pensionable service after commencement of the Bill. Contracted-out defined contribution schemes would be required to provide survivor benefits from the protected rights accrued after commencement of the Civil Partnership Bill, if the member is in a registered civil partnership at the point of retirement. Contracted-out schemes are already required to make provision for survivor benefits for legal spouses.

People who are already pensioners when the legislation comes into force would have no "pensionable service" after that date, so their civil partners would have no right to survivors' benefits under the Act. Others would only have rights in respect of benefits accrued after the legislation comes into force.

c. Pension sharing orders

Pension sharing on divorce was introduced by Parts III and IV of the *Welfare Reform and Pensions Act 1999*, which amended the *Matrimonial Causes Act 1973*. Section 85 of the 1999 Act (transitional provisions) provided:

3. (3) No pension sharing order may be made-

- (a) under section 24B of the *Matrimonial Causes Act 1973* if the proceedings in which the decree is granted were begun before the day on which section 19 comes into force, or

- (b) under section 31(7B) of that Act if the marriage was dissolved by a decree granted in proceedings so begun.

(4) Paragraph 3 of Schedule 3 does not have effect if the proceedings in which the decree is granted were begun before the day on which section 19 comes into force.

Section 19 (pension sharing orders in England and Wales) was brought into force on 1 December 2000 by the *Welfare Reform and Pensions Act 1999*(Commencement No 5) Order 2000.¹⁴²

The provisions contained in **parts 4 and 6 of schedule 6** of the *Civil Partnerships Bill* would provide for pension sharing on broadly the same basis after dissolution of the partnership:

Part 4 - Pension Sharing Orders On or After Dissolution or Nullity Order

550. The Part provides for a pension sharing order to be made so that both civil partners share the benefit of the value of a pension that had previously been held by only one of the partners. The value of the pension is effectively split and the court specifies the amount (in percentage terms) transferred to the other civil partner. The Court can apportion any charge from the cost of making pension sharing arrangements. A pension sharing order cannot be made on a pension that is, or has already been, the subject of a pension sharing order between the same two civil partners, or where there is already in force an order under Part 6 in relation to the same pension. The order can only take effect after the dissolution or nullity order has been made final. The Lord Chancellor, in regulations, can set a minimum period before a pension order can take effect.¹⁴³

4. Issues

a. Pension equity

The issue that is most often raised with regards to the pension provisions of the Bill is that of equity. The charity Stonewall sums up the concerns expressed by many on this issue:

A key concern we have with the Bill is in the area of pensions. The Bill as it currently stands will only provide survivor pensions for same-sex partners in public sector schemes from the date of their partnership registration. This contrasts with people who get married and have their entire career taken into account. This will particularly affect couples approaching retirement age.

This is an issue of equity. Same-sex partners have made the same contributions and, indeed, have helped pay pensions for surviving spouses for many years. It would cost relatively little (according to actuarial estimates between 0.02% and

¹⁴² SI 2000/1116

¹⁴³ <http://pubs1.tso.parliament.uk/pa/cm200304/cmbills/132/en/04132x-i.htm>

0.04% of pensionable payroll, depending on take-up) but would provide equal treatment.¹⁴⁴

This issue was highlighted during the Second Reading debate in the House of Lords by Baroness Thomas of Walliswood, the Liberal Democrat Spokesperson for Women's Issues:

Finally, there is the major problem of pensions. Clearly, the Bill is open to criticism on grounds of justice and equality. Surviving civil partners will stand to gain only from a deceased person's pension benefits that have accrued since the commencement of the Act that will emerge from the Bill. Those people will receive a smaller pension than surviving spouses. But UNISON says that,

"surviving partner pensions should be available to all partners who are financially interdependent irrespective of marital status, gender or sexual orientation".

I take that very broad statement to be a sensible point of view.

The irony is that many private pension providers already rightly recognise equality between partners and spouses, which is quite right. After all, they pay the same contributions. It seems that it is the public sector that lags behind. In that respect, the Bill seems to be introducing or tolerating prejudice that is not in the spirit of human rights legislation. One cannot help but fear that cost arguments may have prevailed.¹⁴⁵

Baroness Thomas was joined in her concerns by the Labour peer Baroness Rendell of Babergh:

Under the Bill, members of public service pension schemes will be entitled to survivor benefits for registered same-sex partners in the same way as for a widow or widower. Same-sex partners will no longer pay inheritance tax on assets passed on after death. However, as the noble Lord, Lord Goodhart, has said, a man or woman in a partnership who is in a pension scheme will not be able to register his or her partnership until the Bill is enacted and their previous period of partnership will not count as part of their pensionable service. Is not the effectiveness of the Bill reduced by failing to backdate the entitlement to the beginning of the employment relationship or of the partnership relationship if later than the former? Is it not making for inequalities? A married person's pensionable service counts from the time of its commencement.¹⁴⁶

¹⁴⁴ Stonewall, *Parliamentary briefing: Civil partnerships bill*, April 2004, p4: http://www.stonewall.org.uk/docs/Lords_Second_Reading_Apr_2004.doc

¹⁴⁵ HL Deb 22 April 2004 c426. For a fuller exposition of UNISON's position, see: http://www.unison.org.uk/activists/pages_view.asp?did=1099

¹⁴⁶ HL Deb 22 April 2004 c414

Responding for the Government, Baroness Scotland of Asthal said:

I should also make clear that in accordance with the usual system in contracted-out schemes, members will accrue rights to survivor benefits for a civil partner from the date of implementation of the civil partnership proposals. Improvements to public service schemes and contracting-out regimes are made for future service only. As noble Lords will remember, when new benefits were introduced for members of pension schemes, they were normally introduced prospectively—for example the guaranteed minimum pensions were extended to widowers from 1988, whereas widows were entitled from 1978—so retrospection would add significant liabilities to those schemes which do not already pay survivor benefits to unmarried couples. Public sector schemes would have to shoulder most of that burden. But I absolutely understand from the comments made by a number of your Lordships in this debate that that will be an issue that we will wish to address with some care.¹⁴⁷

b. Extension of ‘civil partnership’

If Baroness O’Cathain’s amendment to widen the definition of ‘civil partnership’ to embrace “family members who have lived together on a long-term basis” remains in tact as part of the final Act, it will certainly have an impact on the cost of pension provision and throw up many questions of ‘fairness’.

For example, applying the law as described in **Schedule 24**, a grandmother in a civil partnership with her grandson would not be able to use his National Insurance contributions to qualify for a state pension until he had also reached pension age. As there may be a difference in age of perhaps fifty years between the two, it is unlikely that the grandmother would receive any benefit from her grandson’s contributions as she would from a husband or civil partner of a similar age.

Similarly, it is the intent of the Bill to bring all public sector pension schemes into line on the provision of survivors’ benefits for registered same-sex partners. If other forms of partnership were included in the Bill it could mean significant costs for public sector schemes and in some instances, where those schemes are backed by public funds, for the taxpayer too.

The Government Actuary’s Department (GAD) estimate that the cost of extending survivor pension rights in contracted out pension schemes to close family members could be as much as £2.25 billion per annum. The full estimates are set out below:¹⁴⁸

Extending survivor pension rights to civil partners who are close family	Annual cost	Cost of providing retrospective rights
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¹⁴⁷ HL Deb 22 April 2004 cc431-32

¹⁴⁸ GAD, *Extension of the civil partnership bill to close family members* (04/1505), August 2004

relations in:		
Public service schemes	£1 billion	£20 billion
Defined benefit private pension schemes	£1.25 billion	£40 billion
<i>Source: GAD</i>		

K. Employment

1. Sex discrimination: married persons

The *Sex Discrimination Act 1975* (SDA) prohibits sex discrimination against individuals in the areas of employment, education, and the provision of goods, facilities and services and in the disposal or management of premises. The Act covers women, men and transsexual people. In addition, section 3 of the Act prohibits discrimination against a person on the grounds of their marital status in employment:

[3 Direct and indirect discrimination against married persons in employment field]

[(1) In any circumstances relevant for the purposes of any provision of Part 2, a person discriminates against a married person of either sex if—

(a) on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex, or

(b) he applies to that person a provision, criterion or practice which he applies or would apply equally to an unmarried person, but—

- (i) which is such that it would be to the detriment of a considerably larger proportion of married persons than of unmarried persons of the same sex, and
- (ii) which he cannot show to be justifiable irrespective of the marital status of the person to whom it is applied, and
- (iii) which is to that person's detriment.

(2) For the purposes of subsection (1), a provision of Part 2 framed with reference to discrimination against women shall be treated as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.]

The section is limited to Part 2 of the Act which deals with discrimination in employment. Whilst the Act addresses discrimination on the grounds of “marital status” this does not cover single people as such. For example, discrimination against a person on the basis that they are about to get married would not be caught by this section.¹⁴⁹

¹⁴⁹ *Bick v Royal West of England Residential School for the Deaf* [1976] IRLR 202

Sex discrimination revolves around the idea of less favourable treatment. This invokes a comparison which must be made between the claimant and another real or hypothetical person who would have been treated more favourably. Section 5 of the SDA contains the fundamental rule of comparing like with like in deciding whether or not a person has been discriminated against. A comparison of the cases of persons of a different sex must therefore be such that all the circumstances which are relevant to the way they were treated in the one case are the same, or not materially different, in the other.¹⁵⁰

Section 7(1)(a) of the SDA creates an exception to the employment provisions of the Act which cover recruitment by reference to a “genuine occupational qualification”. Subsection (2)(h) provides that a job which is one of two to be held by a married couple is covered by the genuine occupational qualification exception.

2. The Bill

Clause 241 would be a redrafting of sections 3, 5(3) and 7(2)(h) of the SDA. The effect would be to create an identical protection from discrimination in employment for civil partners as currently exists for people who are married; and to extend the genuine occupational qualification exception to civil partners where the job is one of two to be held by a married couple. Thus civil partners would be treated in the same way as married persons for the purposes of the SDA.

Over the course of the development of equality legislation various strands of discrimination law have emerged. There are differences in the way legislation has dealt with each strand reflecting:

- the particular needs of the different groups,
- the unique problems they face,
- the differing requirements under European and human rights law
- the regulatory impact on business (in particular small firms)

Whilst there have been calls for a unification of the various regimes into a Single Equality Act to address what some see as a “hierarchy of equality”, it is not in doubt that differences do exist between different strands which call for different legislative treatment. Accordingly, the different equality strands in the Bill require separate consideration.

a. Lesbian and gay couples

Lesbians and gay men are currently protected by the *Employment Equality (Sexual Orientation) Regulations 2003* SI No. 1660 which came into force in December 2003.

¹⁵⁰ Section 5(3); *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, per Lord Hope

These implemented the sexual orientation strand of the Employment Directive.¹⁵¹ The regulations protect lesbians, gay men, heterosexuals and bisexuals in employment and vocational training from direct or indirect discrimination, harassment or victimisation. A requirement of comparing like with like similar to that found in section 5, SDA is set out in regulation 3(2).

In employment law terms the Bill would provide lesbian and gay couples with a further ground upon which a discrimination claim could be based. This would allow a different set of comparisons to be used to prove discrimination from those which would apply under the *Employment Equality (Sexual Orientation) Regulations 2003*. For example, a comparison might be made between a gay man who is a civil partner and a gay man who is not.

b. Family carers

Under the Bill as amended in the Lords, as civil partners, individuals within the specified degrees of family relationship would be able to claim for sex discrimination. From the point of view of the operation of section 3, 5(3) and 7(2)(h) of the SDA, the application of these provisions to family carers raises a number of issues as regards the suitability of these provisions in their current form for this strand of equality.

The provisions are limited to employment matters and do not cover education, the provision of goods, facilities and services and the disposal or management of premises. It is not clear what relationship this has to the particular needs of family carers.

The impact of the provisions on employers (in particular small firms) may need to be considered, both in terms of being clear about what employers are being asked to do and any disproportionate impact on small firms. Normally this would be considered in a “Small Firms’ Impact Test” at an early stage of development in the regulatory proposals.¹⁵² There is no exemption for small firms in sex discrimination. Such an exemption may be used if it were thought that a period of time was needed for smaller firms to adjust to changes in the law.

The requirements in section 5(3), in relation to a comparison made with a real or hypothetical counterpart, may require careful consideration. It is unclear what the impact would be of the requirement to compare like with like in the case of a family carer claiming sex discrimination in employment as a civil partner. In particular, the ramifications in terms of employment issues such as flexible working would need to be explored.

¹⁵¹ Employment Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

¹⁵² *Better Policy Making: A Guide to Regulatory Impact Assessment*, January 2003: <http://www.cabinet-office.gov.uk/regulation/ria-guidance/content/impact-test/index.asp>

For example, disability discrimination legislation, unlike sex and race discrimination, was framed without a requirement for a comparison of like with like, since this might have effectively deprived disabled people of the protections being created.¹⁵³ The Court of Appeal in *Clark v. Novacold Ltd* noted the “blind man and his guide dog” example used, albeit in a non-employment context, by the Minister for Social Security when the *Disability Discrimination Bill* was passing through Parliament. The Minister had said that if no dogs at all were allowed in a particular café and as a result blind people with guide dogs were not allowed in, this would become prima facie unlawful discrimination when the Bill became law. In that situation the café owner would have treated the blind person in exactly the same way as anyone else, using the “traditional comparator” criteria (as in direct discrimination cases under the sex and race discrimination legislation). However, as the Minister’s speech showed, that was not what Parliament intended in disability discrimination cases.

The distinction between direct and indirect discrimination is another example of a feature of sex and race discrimination law which does not exist in disability legislation. The presence of this distinction may impact on carers as civil partners in terms of employers’ conduct which might fall to be defined as indirect discrimination. For example, if an employer decided to impose a condition or requirement which adversely affected carers but not necessarily lesbians and gay men, carers might have less protection because the impact on gay and lesbian civil partners will probably need to form part of the assessment of whether civil partners as a group are disproportionately affected by the employer’s requirements. If the converse were the case, lesbians and gay men would still be protected as a distinct group under the *Employment Equality (Sexual Orientation) Regulations 2003*.

One effect of bringing discrimination against family carers as civil partners under the SDA is that the sex discrimination framework, and probably case law in respect of a defence of justification by an employer, will apply. The justification defence is not the same for all strands of discrimination. The impact of this application on the interests of carers, as well as employers may require careful consideration.

L. Armed Forces

The Bill covers two main areas in relation to the Armed Forces: the registration of civil partnerships by Armed Forces’ personnel abroad; and amendments to existing statutory provisions relating to the Armed Forces, in particular with respect to pensions, property and the rights of appeal.

¹⁵³ *Clark v. Novacold Ltd* CA 1999 ICR 951, CA; section 5(1) *Disability Discrimination Act 1995*

Clause 203 – Registration of Armed Forces’ Personnel Overseas

The *Foreign Marriages Act 1892* makes provision for members of the Armed Forces, and accompanying civilians, to be married in a country or territory outside the UK by a forces chaplain or an officer authorised by the Commanding Officer. **Clause 203** of the Bill would make equal provision for the registration of a civil partnership.

Under **clause 203** two people could, by Order in Council, register as civil partners in countries or territories outside the UK where one of those proposed civil partners is a member of the Armed Forces serving in that country or territory¹⁵⁴; is employed in the country or territory in an associated capacity¹⁵⁵; or is the child of a person falling within either of these categories and has a home with them in that country or territory. Under the conditions imposed in subsection 2, the proposed civil partners must be eligible to register a civil partnership in the UK.

The countries or territories where a civil partnership may be registered would be set out in the Order in Council. Subsection 5 extends jurisdiction to include reference to HM ships in the waters of a country or territory outside of the UK and to Armed Forces’ personnel and associated civilians employed aboard any such ship.

The provisions for the registration of a civil partnership by a member of the Armed Forces serving abroad and associated civilians, as set out in this clause, differ from those set down for other UK nationals overseas.

Clause 247- Amendments to Current Legislation

Until 2003, the current Armed Forces Pension Scheme (AFPS) provided survivors’ benefits only for widows and widowers. Unmarried partners did not benefit. A number of cases of servicemen killed in action, leaving long-term partners and children with no pensions, highlighted this omission and, on 20 March 2003 - as conflict started in Iraq - the Government announced that unmarried partners of service people who died as a result of service related to conflict would qualify for *ex gratia* payments equivalent to benefits paid to surviving spouses.¹⁵⁶ A statement on changes to the AFPS on 15 September 2003 extended this provision by announcing that the current AFPS would provide attributable benefits to unmarried partners where there is a substantial relationship for all attributable deaths with an effective date of 15 September 2003.¹⁵⁷ In line with these developments the new AFPS, which is due to be introduced for all new entrants in April 2005 and offered to

¹⁵⁴ A member of the Armed Forces is defined in Clause 237 (2) as being compatible with clause 18 of the *Army Act 1955*.

¹⁵⁵ Types of associated employment will be outlined in the Order in Council. Examples of associated employment include MOD civil servants, contractors working with the Armed Forces and employees of Service charities.

¹⁵⁶ HC Deb 20 March 2003 c54WS

¹⁵⁷ HC Deb 15 September 2003 cc39-40WS

all existing service personnel by April 2007, will provide benefits “to registered unmarried partners (both heterosexual and same sex partners) who can demonstrate they are in a substantial relationship including financial inter-dependency”.¹⁵⁸

Clause 247 introduces Schedule 26 of the Bill which outlines amendments to existing Armed Forces’ legislation in relation to a broad range of pension rights of Service personnel, employees of Service charities and of the spouses and surviving spouses of such persons; the leave to appeal with respect to such rights; the disposal of property of deceased personnel; financial compensation for members of the Reserve Forces and the ability to appeal on behalf of a deceased person convicted by courts-martial.

In each case **Schedule 26** amends the legislation so as to make it applicable to a civil partner or surviving civil partner as it would to a spouse or surviving spouse, and to a civil partnership as it already applies to a marriage.

M. Miscellaneous and supplementary

1. Civil Partnership Agreements

An agreement to form a civil partnership would not constitute an enforceable agreement giving rise to legal rights if it is broken. This would be provided by **Clause 72** (England and Wales), **Clause 125** (Scotland) and **Clause 191** (Northern Ireland). This is similar to the law on engaged couples.

Provision would be made for dealing with property when a civil partnership is terminated: **Clause 73** (England and Wales), and **Clause 192** (Northern Ireland).

2. False statements

It would be an offence knowingly to make certain false statements in connection with a civil partnership under **Clause 79** (England and Wales) or **Clause 198** (Northern Ireland).

The Government’s Explanatory Notes set out the effect of Clause 79:

These provisions are similar to those in section 3(1) of the Perjury Act 1911 under which it is an offence to make false statements or representations with reference to marriage. The effect of subsection (4) is that all the other relevant provisions in the Perjury Act 1911 will apply, without having to replicate them in the Civil Partnership Bill. So, for example, section 7(1) of the Perjury Act, which

¹⁵⁸ The new AFPS was introduced by the *Armed Forces (Pensions and Compensation) Bill* (2003-04 Session).
MOD Q&A Brief on the New AFPS, http://www.mod.uk/issues/pensions/new_afps/news/questions.htm

applies to people who aid, abet etc offences under that Act, would apply to a person who helps another person to commit an offence under clause 79.¹⁵⁹

Clause 198 would amend Article 8 of the *Perjury (Northern Ireland) Order 1979* in a similar way.

3. Fatal accident claims

Clause 82 would amend the *Fatal Accidents Act 1976* and **Clause 201** would amend the *Fatal Accidents (Northern) Ireland Order 1977* in each case in order to include civil partners. The Explanatory Notes explain the effect of these amendments:

so that where a person's death is caused by the wrongful act, neglect or default of another person, a civil partner of the deceased will be able to claim compensation in the same way as a spouse.¹⁶⁰

4. Miscellaneous provisions relating to Scotland

Part 3 Chapter 6 contains miscellaneous provisions relating to Scotland and covers such matters as regulations; attachment; the Lord Advocate as party to an action for nullity or dissolution of a civil partnership; a civil partner's competency as a witness; the treatment of civil partners in relation to assurance policies; the joint and several liability of civil partners for payment of council tax; fees; interpretation and the definition of "relative" for the purposes of the *Registration of Births Deaths and Marriages (Scotland) Act 1965*. Full details about the effect of the clauses are included in the Government's Explanatory Notes published with the Bill.¹⁶¹

5. Insurable Interest

Clause 243 provides that civil partners have an unlimited insurable interest in each other. Civil partners would no longer have to establish that they have this insurable interest: it would be presumed as it is for spouses.

6. Supplementary

Part 8, Clauses 248 to 254, contains the supplementary provisions.

- **Clause 248** makes provision about regulations and orders made under the Bill
- **Clause 249** confers power to make further provision in connection with civil partnership

¹⁵⁹ Bill 132-EN, para 167, <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x--htm>

¹⁶⁰ *Ibid* paras 170 and 393

¹⁶¹ *Supra*

- **Clause 250** allows Ministers:

to make parallel provision to any made under section 2(2) of the European Communities Act 1972 which relates to persons who are or have been married (or whose marriage was void) where it does not relate to persons who are or have been civil partners (or whose civil partnership was void)¹⁶²
- **Clause 251** introduces **Schedule 27** which would make minor and consequential amendments to other Acts; **Schedule 28** which would make consequential amendments relating to Scotland (including financial provision on the termination of a civil partnership) and **Schedule 29** which would contain repeals and revocations
- **Clause 252** confirms the territorial extent of the various provisions in the Bill
- **Clauses 253** and **254** contain commencement provisions and the short title.

N. The treatment of civil partnerships by the tax system

The tax treatment of civil partnerships was one issue raised during the consultation exercise on civil partnerships carried out in summer 2003 prior to the introduction of the *Civil Partnerships Bill*.¹⁶³ Many respondents argued that transfers between couples in civil partnerships should be exempt from inheritance tax, in the same way as transfers between married couples.¹⁶⁴ When the Bill was published it contained provisions to replicate the rights and responsibilities of married couples for civil partnerships in relation to certain tax credits and social security benefits *only* (specifically, child and working tax credits, child benefit and guardian's allowance).¹⁶⁵ This remains the case. At the time the Government simply stated that "the Civil Partnership Bill is social policy legislation, so any tax consequences will be dealt with in the first available Finance Bill."¹⁶⁶ Nevertheless, it was widely reported in the press that civil partnerships *would* be granted the same tax treatment as married couples.¹⁶⁷

When the Bill received a Second Reading in the House of Lords on 22 April 2004, several peers were critical of the lack of detail given of any future tax changes. Speaking for the Conservatives Baroness Wilcox said, "it must be wrong for the decisions which surely must have been made to be kept secret from Parliament or delayed until next year." She was also concerned that the House of Lords would be deprived a scrutiny role if these

¹⁶² Bill 132-EN, para 484, <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x--htm>

¹⁶³ "Inheritance tax and civil partnerships", Library Standard Note SN/BT/2995, 17 August 2004

¹⁶⁴ DTI/Women & Equality Unit, *Responses to Civil Partnership: a framework for the legal recognition of same-sex couples*, November 2003 p 18

¹⁶⁵ HL Bill 53, 30 March 2004

¹⁶⁶ Inland Revenue press notice 18/04, *The Civil Partnership Bill: child & working tax credits, child benefit & guardian's allowance*, 31 March 2004; HL Deb 20 April 2004 c 27WA

¹⁶⁷ "The wedding's off for thousands of gay couples", *Times*, 1 April 2004

proposals were contained in a future Finance Bill.¹⁶⁸ Speaking for the Liberal Democrats Lord Goodhart asked for a statement to clarify if the Government was intending to “treat civil partnerships in a similar way to spouses for tax purposes.” He went on to ask if “the right to enter into a civil partnership and the consequential tax changes [are to] come into effect simultaneously ... in October 2005.”¹⁶⁹ Speaking for the Government Baroness Scotland answered this particular point as follows:

The noble Lord, Lord Goodhart, was right ... in his surmise that it is likely that this legislation, if passed, will not come into operation until October 2005, therefore there is plenty of time for there to be another Finance Bill other than that which is currently going through Parliament in which these provisions could appear ... I should have reassured the House that when the proposed tax changes come in they will be implemented at the same time. We anticipate that that will about a year after Royal Assent. Of course, we do not know the precise date when the Bill will finish its passage through this House and the other place.¹⁷⁰

During the progress of the Bill the Conservative peer Lord Higgins raised this issue on two occasions,¹⁷¹ and at the Third Reading moved a new clause to the effect that “for tax purposes civil partners shall be treated as in the Finance Act 2004.” (This move followed the amendment agreed at report stage on 24 June extending civil partnerships to certain family members – discussed above.) Lord Higgins introduced the clause as follows:

I have tried on two previous occasions to refer to the press release issued by the Inland Revenue ahead of this Bill, saying that the Civil Partnership Bill is social policy legislation, so any tax consequences would be dealt with in the “first available Finance Bill.” It seems absolutely clear that the first available Finance Bill is the one now going through the House of Commons, but as far as I can see no tax consequences of this Bill appear in that Finance Bill, at any rate as far as government amendments are concerned. Was the press release simply wrong, or will some clauses appear in the Finance Bill that will eventually become the Finance Act 2004? Repeated attempts to get an answer to that have totally failed. I should like to have an answer.¹⁷²

Speaking for the Government, Baroness Hollis responded to this point as follows:

Lord Higgins [asked] ... whether the unamended Bill would be incorporated into the first available Finance Bill. As the Finance Bill is currently going through the House of Commons, he asked about the Government’s intention. There are two “ifs” relating to that. First, the Bill as unamended must go through; and, secondly, the amendment that your Lordships chose to pass last week must be overturned.

¹⁶⁸ HL Deb 22 April 2004 c 394. At a later stage of the debate Lord Higgins made a similar criticism (c 427).

¹⁶⁹ *op.cit.* c 397

¹⁷⁰ *op.cit.* cc 431, 433

¹⁷¹ HL Deb 10 May 2004 cc 36-42GC; HL Deb 25 May 2004 c 463GC

¹⁷² HL Deb 1 July 2004 c 418

In either circumstance, we could not incorporate a version of civil partnership before the other place had made a decision on what it embraced. That must be determined before anything could be incorporated in a Finance Act. The Finance Bill makes no mention of civil partners and cannot do so until the Civil Partnership Bill passes ...

I do not see how any Bill can pre-judge another Bill that has not yet concluded its proceedings. In so far as the press release said “the next available”, it could only have meant the next available Finance Bill after this Bill had terminated its parliamentary progress. Therefore, it seems to me that, as described, the Inland Revenue’s press release was exactly correct.¹⁷³

Baroness Hollis went on, in her words, to “put the Government’s intentions on record”, given that it appeared Lord Higgins was “using the amendment as a probing amendment”:

The fiscal consequences of the Civil Partnership Bill are crystal clear. We have already announced that, for all tax purposes, same-sex civil partners will be treated in the same way as married couples, if the Bill proceeds in its original form, without the extension to the categories of civil partners made last week by the amendment tabled by the noble Baroness, Lady O’Cathain.

The Government went further and made it clear that all tax consequences of the Civil Partnership Bill, as it applied to same-sex couples, would be addressed and debated at the appropriate time in the first available Finance Bill. That is still the case if the Bill completes the legislative process with the category of civil partners defined only as same-sex couples. We expect that, if the Bill that we are debating is passed and concerns same-sex couples only, it will come into force about a year after Royal Assent. There will be plenty of time for another Finance Bill, to include provisions dealing with the tax consequences of the Civil Partnership Bill. If the Bill proceeds in its current form, the tax matters will be dealt with in the normal Budget process.¹⁷⁴

¹⁷³ *op.cit.* c 420, 421

¹⁷⁴ HL Deb 1 July 2004 c 420. In the event Lord Higgins withdrew the amendment (*op.cit.* c 421).