

# **Lesbian and Gay Lawyers Association**

**LAGLA**

## **Briefing and Background Information on International Aspects of Civil Partnerships**

May 2004

# International Aspects of Civil Partnerships

The Civil Partnership Bill 2004 generally follows closely the law relating to marriage. This is the correct approach as any different treatment could amount to discrimination. It would also make it difficult to advise on the new law and for civil partners to understand what their rights and obligations are towards each other, the State and society.

Therefore, with exceptions the Bill is modelled on the various statutes relating to marriage. Sometimes the wording is clearer and more modern. Certain key points (such as celebration in a religious building) have been omitted for policy reasons.

On the international level the approach of mirroring marriage law is not so easy. Whereas there is a form of marriage in every country and jurisdiction in the world, the countries that have introduced registered partnerships between same-sex couples are limited and the approaches differ. We have looked at these from the point of view of an English family lawyer. We have not considered the provisions for the other UK jurisdictions nor the provisions for armed forces. We do not think that some of the provisions are practical and indeed we feel that they will cause unnecessary complications in a way that they do not occur for married couples because marriage is a universal concept that with variation exists in every country and jurisdiction whereas civil partnerships have been introduced in certain countries only and each has their own new concept of it.

Taking anecdotal evidence that gay men and lesbians are more internationally mobile and that there is a higher degree of cross-national relationships than amongst the heterosexual population, these issues are of significance.

## Overview of the Provisions in the Bill

Part 5 of the Bill deals with the international aspects. Chapter 1 allows registration in diplomatic missions, a suggestion that was made by the Lesbian and Gay Lawyers Association (LAGLA) in its submission to the Government's consultation.<sup>1</sup> This will especially help couples who are in a country that does not have a registered partnership regime and cannot simply come to Britain to register, for example because of the immigration status of one of them<sup>2</sup> or because one of them is too ill to travel. One can envisage a case where a terminally ill partner in a long term relationship would want to register the partnership overseas in order to allow the surviving partner to inherit without a high tax burden. This Chapter also makes provision for registration by armed forces personnel abroad, which may again be an

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<sup>1</sup> See Civil Partnership Registration Response by the Lesbian and Gay Lawyers Association p 10: [http://www.lagla.org.uk/files/lagla\\_civil\\_partnership\\_response.pdf](http://www.lagla.org.uk/files/lagla_civil_partnership_response.pdf)

<sup>2</sup> although it is understood the Home Office will allow "finance(e)s" to enter by amending the Immigration Rules

important option for soldiers in combat situations where they may face a real possibility of death before returning to the UK.

Chapter 2 makes provision for recognition of overseas civil registered partnerships between people of the same sex either one of the regimes specified in Schedule 14 (Clause 153) or those which meet the general conditions of Clause 154. There are provisions for people who have changed their gender (Clause 156) and minimum requirements as to capacity (Clause 157) as well as a public policy exception (Clause 158).

Chapter 3 deals with the jurisdiction of the English courts for applications for dissolution (the civil partnership term for divorce) etc. and the recognition of overseas dissolution. There is power to the Lord Chancellor to make provision akin to Brussels II<sup>3</sup>, different grounds for jurisdiction of the English courts, including jurisdiction for proceedings where the civil partnership was registered in England and Wales and no other court has jurisdiction and it would be in the interests of justice to assume jurisdiction<sup>4</sup>. This is vital as otherwise a couple, neither of whom is domiciled in England and Wales but who registered here and later moved abroad, may never be able to dissolve their partnership without moving back to England, especially if they moved to a country that does not have a regime of civil partnerships at all.

Sections 169 to 172 make provision for recognition of overseas dissolutions. Both dissolutions “by means of proceedings” and “otherwise than by means of proceedings” will be recognised provided some minimum standards have been met.<sup>5</sup> First, there are requirements for a connection with the jurisdiction. For proceedings this has to be the domicile, nationality or habitual residence of one party. Dissolutions etc otherwise than by means of proceedings will only be recognised if neither party was habitually resident in the UK for 1 year and either both are domiciled in the jurisdiction or one is and the other is domiciled in a jurisdiction that recognises as valid the dissolution etc.<sup>6</sup> On a strict interpretation that would include domicile in England and Wales as recognition through this Clause is not excluded, but in analogy to marriage law, it would be excluded and this would be the preferred interpretation. In marriage this means that Islamic divorces, talaqs, between two spouses in say Saudi Arabia will be recognised here if they are both Saudi domiciled and the husband pronounces the talaq there, whether they married in Saudi Arabia or England. Secondly, recognition may be refused if certain minimum requirements of due process were not met.<sup>7</sup> For dissolution etc by means of proceedings the other partner has to be given notice of the proceedings and a reasonable opportunity to take part in them. For dissolution etc other than by means of proceedings there has to be an official document of the dissolution and if either partner was domiciled in another jurisdiction there has to be an official document certifying that the dissolution is recognised under that law. There is also a public policy exception for both forms of dissolution.

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<sup>3</sup> EU Regulation 2001/2003 which substitutes Regulation 1347/2000

<sup>4</sup> Clause 161(1)(c)

<sup>5</sup> cf Family Law Act 1986 Part II

<sup>6</sup> Clause 170(2)

<sup>7</sup> Clause 171(3)

Recognition will not mean recognition of orders on maintenance, custody or other ancillary matters.<sup>8</sup>

Chapter 4 makes provision for certificates of no impediment (Clause 175) for British (and Commonwealth) citizens who want to register abroad, certificates recognising overseas registered partnerships (Clause 176) and provision for certain certificates relating to armed forces. All these are empowering provisions which will have to be implemented by Orders in Council.

### **Recognition of overseas partnerships**

The inclusion of provisions to recognise overseas registered partnership regimes is welcome and this was one of the suggestions made by LAGLA.<sup>9</sup> The Bill provides for two types of regimes that will be recognised:

1. those in Schedule 14, which can be amended by Statutory Instrument, and
2. those that meet the general conditions, which are
  - a. that the relationship is of indeterminate duration,
  - b. that the parties are treated as a couple generally or for specified purposes or as married and
  - c. that the process of entering into the relationship requires a registration with the authorities in that jurisdiction.<sup>10</sup>

This is a wide definition and the specified relationships or those falling within the general requirements could be those with rights and responsibilities very close to marriage (or even marriage) such as marriage in Belgium, the Netherlands, Canada, or registered partnership in the Nordic Countries or it could be a registration that although affording recognition as a couple has very few legal consequences, such as some of the regimes by Spanish regional authorities. There is a danger that recognition of the latter would mean that a couple will be bound by a catalogue of strong obligations towards each other and the State although they only consciously chose to enter into a partnership regime with considerably lesser obligations.

#### *Example 1*

*Juan and Xavier, two Spanish men enter into a union in Madrid. They are recognised as a couple by the Madrid regional government and for working rights of civil servants working for that government, provision of public services, social benefits and regional taxation, but no more. This may save them a small amount of tax but they both know that the registration has largely symbolic character. They subsequently move to London and without their knowledge (and without there being a specific provision stating so) may find that their registration will be recognised*

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<sup>8</sup> Clause 172(6)

<sup>9</sup> LAGLA *ibid* p 9

<sup>10</sup> Clause 154

*in this country with all the obligations for maintenance and financial provision that this entails.*

The aim underlying the Civil Partnership Bill is to provide for those people who chose to be bound by it. The Government's consultation paper stated:

"An opt-in scheme would enable people to make their own choices about how best to organise their lives. Couples with committed same-sex relationships who want a formal legal status and the attached rights and responsibilities could choose to enter the scheme.... The Government recognises that some people deliberately choose not to make formal commitments to each other, and/or to limit their liabilities in respect of each other. An opt-in system would support individual choices, and would not impose responsibilities on those who do not want them."<sup>11</sup>

Therefore automatic recognition of regimes that do not provide a similarly comprehensive system of rights and responsibilities is undesirable. The Government's thinking on the Bill has focused on the rights of the partners and their duties to society. As family lawyers we deal a lot of the times with the obligations of the partners towards each other, such as a duty to pay maintenance, share assets on dissolution or death, all obligations that in some way or another exist in every jurisdiction for marriage. Same-sex couples opting into a system that does not include these obligations in one country would find themselves faced unwillingly with them when moving to the UK.

In our view systems should be recognised that have comprehensive rights and responsibilities, even if they differ from the rights and responsibilities of married couples in that jurisdiction (for example Germany) or if some rights are left out (for example taxation rights in Germany or adoptions in several countries). For the sake of legal certainty it would be desirable if there was a list of all the regimes that are recognised rather than recognising regimes that meet some general criteria. The latter could result in the inland revenue office of one partner recognising the partnership and the office of the other not doing so.

### *Example 2*

*Tracey and Charleen married in San Francisco in 2004. The local government there take the view that the equality provisions under the Californian constitution oblige them to marry same-sex partners. This is challenged and the matter is likely to appeal to the Supreme Court, taking several years. In 2006 Tracey and Charleen move to Manchester. As there is uncertainty about the validity of the Californian marriage, they want to register as partners. The Registrar refuses as they are already registered partners because Californian marriage meets the general conditions. In 2007 Tracey suddenly dies without a will, just a few weeks after the Californian Supreme Court has held that all San Franciscan same-sex marriages are void. Charleen receives nothing from Tracey's estate.*

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<sup>11</sup> page 17

In practice the government would have to have guidelines on which regimes to recognise and which not to recognise or every single civil servant would have to second guess a point of Californian constitutional law. If it is possible to issue guidelines, it would make more sense to simply add or omit a regime from Schedule 14 instead, thereby making the issue clear to all. The confusion would not effectively be stopped by the provision for there to be regulations by Order in Council for certificates relating to “overseas relationships entered into by United Kingdom [sic] nationals in prescribed countries”.<sup>12</sup> The advantage of general recognition is of course that it prevents a couple from not having recognised status because their country’s regime has been left out. This problem could be solved if the Act allowed the Secretary of State to add regimes to Schedule 14 with retrospective effect. In practice a new law in another country (or a ruling of a constitutional court) will be expected while it proceeds through the legislative or judicial process and amendments to Schedule 14 would probably only be necessary once or twice a year. Commencement could then be retrospective to say the beginning of that financial year or prospective to the date the new law in the other jurisdiction comes into force.

A second problem that arises is that it is conceivable that a cosmopolitan mobile couple may register their partnership in different jurisdictions. As the conflict and recognition rules even in those countries that have civil partnership regimes are immature, this is entirely possible.

### *Example 3*

*Maria and Laura register their partnership in Barcelona under the Catalan regime. They subsequently move to Paris where they eventually register a PACS. After a later move to Amsterdam, they marry in Amsterdam Town Hall.*

Under strict interpretation of the rules under the Bill, only the first (or first recognisable) partnership registration would be recognised. There will be uncertainty about the Catalan regime, whereas both the French PACS and Dutch marriage are specified in Schedule 14. On the one hand recognition of the Catalan registration would mean that their partnership would be recognised as such for the entire period. On the other hand this may result in a number of problems:

1. Maria and Laura went through three regimes with different consequences for their property regime. It is likely that they would have considered these every time and before the marriage in Amsterdam either chosen community of property (the Dutch default regime) or, as is common there, made a pre-nuptial agreement under Dutch law. This choice of regime would be ignored if the first in time was recognised. German law has solved this by recognising the last one in time. An equal problem may

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<sup>12</sup> Clause 176(1)(a)

result under the German rules though, for instance in a situation where a Dutch couple moved to Barcelona, a place with a limited regime. They may not have chosen the weaker bond for themselves, but may only want the advantages they can get from the more limited regime while they are living there. As (although not stated) it is likely that in line with marriage law, English courts will apply English law to dissolution and ancillary applications, this is of lesser significance in England.

2. A dissolution in England would only dissolve the Catalan regime and even if the Netherlands and France recognised English dissolution, these partnerships would continue as they could not even be pleaded in the English dissolution application. The solution here must lie in amending the provision for capacity to state that people are not eligible if either of them is already a civil partner of or lawfully married *to another person*.<sup>13</sup> This would recognise all civil partnerships that two people have entered into, even if they have registered their partnership several times in different jurisdictions. The dissolution provisions should state that any form of termination terminates any registered partnership that those two parties have entered into together.

Although the date of commencement of the registered partnership will be relevant for tax law and other areas where retrospectivity is undesirable, for considerations of the duration of the civil partnership for financial applications after dissolution, nullity, separation or death, the longer period since the initial registration should be considered, even if this was before the English Act came into force and a provision stating this should be included in the Bill.<sup>14</sup>

### **Dissolution Jurisdiction**

Although there are provisions for dissolution (which is the equivalent to divorce of marriages and not the umbrella term), nullity proceedings, judicial separation and declarations of death or validity, for simplicity, the focus is on dissolutions. What is said will equally apply for the other proceedings. The Bill gives power to the Lord Chancellor to make provision akin to Brussels II for civil partnerships. This is misconceived. Brussels II is a comprehensive regime of mutual recognition of divorces that goes hand in hand with identical rules for jurisdiction and a hierarchy of jurisdictions based on the basis that the first to issue will prevail. There is no indication that there is even mutual recognition of the different regimes, let alone recognition of dissolution. Therefore any such provision will be entirely premature. It would be desirable for there to be a conference of at least those EU countries that have comprehensive civil partnership regimes to deal with this and regulate this by treaty. It is unlikely that the EU will regulate in an area where only a minority of its member states even have an interest. Nothing, however, prevents rules for jurisdiction similar to those of Brussels II to be included and spelled out in

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<sup>13</sup> cf. Clause 3(1)(b); similar amendments would be necessary to Clause 152(1)(b)(ii) and, if the general condition was kept, to Clause 154(a)

<sup>14</sup> Paragraph 21(2)(d) of Schedule 5 and paragraph 5(d) of Schedule 6; Inheritance (Provision for Family and Dependents) Act 1975 Clause 3(2)(a)

the Bill. Any future treaty or EU Regulation would be binding without the need for an enabling provision in the Act.

Assuming therefore that one way or another there are rules for jurisdiction on grounds of habitual residence, there is also residual jurisdiction on sole domicile.<sup>15</sup>

#### *Example 4*

*Antonio and Giovanni, two Italian nationals, live in Brighton and register their partnership. Years later they retire to Italy and are now both domiciled in Italy. Their relationship breaks down and they want to go their separate ways. They would not be able to dissolve the relationship in Italy as there is no such concept. They could not apply in England under either habitual residence or domicile provisions for jurisdiction.*

For this reason the Bill rightly includes a fall back provision for jurisdiction based on registration in England and Wales alone.<sup>16</sup>

Certainly no regulation the Lord Chancellor can make will bind other courts in other countries. Therefore, the provision that the residual jurisdiction or the fallback provision will only apply if no other court has jurisdiction under the Brussels II equivalent makes no sense. The Lord Chancellor may very well give the Italian courts jurisdiction on the parties' habitual residence, but since there is no recognition of the English regime in Italy, they will not exercise this jurisdiction. The residual jurisdiction or the fall back provision would then be meaningless. Antonio and Giovanni would be forced to move back to England in order to be able to dissolve their partnership.

### **Recognition of dissolution**

The grounds for recognition were outlined in the introductory overview. The fundamental problem here is that the Bill will afford recognition to a registration abroad, but not necessarily to the dissolution abroad.

#### *Example 5*

*Veronique and Sylvane enter into a PACS in France. Veronique is a French born French national. Sylvane is Swiss. The PACS is recognised in England. They separate and Sylvane returns to live in Switzerland. Later Veronique marries Antoine and they move to London. Under French law Veronique's marriage to Antoine dissolves the PACS.*

English law would recognise the PACS because this is included in Schedule 14. It does not recognise the dissolution, which is otherwise than by

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<sup>15</sup> Clause 161(1)(b)

<sup>16</sup> Clause 161(1)(c)

proceedings, because Sylvane is domiciled in Switzerland and Swiss law will not recognise the dissolution as it does not recognise the PACS regime.<sup>17</sup>

Even if Sylvane was French, recognition may be refused if there is no official document certifying that the dissolution is effective under the law of the country in which it was obtained. It is likely that the only document is the marriage certificate of Veronique and Antoine, which does not mention the PACS at all, especially if Veronique and Antoine married on holiday in Las Vegas.

Veronique and Antoine's marriage would therefore not be recognised in England, but would be recognised everywhere else. Therefore Veronique would find herself married to Antoine in France and in a registered partnership with Sylvane in England at the same time. This would cause problems, for instance, if Veronique, by this time domiciled in England, died intestate.

### *Example 6*

*John lives in Barcelona. He is a South African with South African domicile. He is in a relationship with Jordi and registers this under Catalan law in 1999. The relationship breaks down and they separate in 2003. In 2004 John moves to England.*

Under the Catalan regime a partnership terminates:

- (a) by common consent;
- (b) by unilateral decision of one partner, irrefutably notified to the other partner;
- (c) by death of one of the partners
- (d) by separation of more than one year
- (e) by marriage of one of the partners."<sup>18</sup>

There seems no provision for any judicial or non-judicial proceedings or official document.

Assuming for the purposes of this example that the Catalan regime was recognised for meeting the general conditions of Clause 154, English law would recognise the registered partnership but not its dissolution because John was never and is not domiciled in Catalunya. Although by the time John moves to England the partnership is definitely terminated under Catalan law, it still continues and will still be recognised in England. Jordi could start dissolution proceedings in England and make claims for maintenance and other financial provision, which even at the time of separation he could not have done in Barcelona. In fact at that time they separate in 2003 neither of them thought about civil partnership in England.

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<sup>17</sup> This is assumed for the purposes of the present illustration. In fact the Geneva canton has a similar regime and may recognise the French PACS.

<sup>18</sup> Art 30 of Act 10/1998 of 15th July, Regarding Stable Pair Relationships, English version on the Catalan Justice Ministry's website: <http://www.gencat.net/justicia/normes/angl/110e.htm>

The only conceivable way out of these conundrums is to recognise any form of termination of an overseas registered partnership abroad under the law of that jurisdiction. A provision to this effect should be included in the Bill through an amendment. This would not affect UK civil partnerships and partners who registered here would be protected and the recognition of dissolutions would be the same as for marriage.

There are likely to be more complicated problems relating to the enforcement of maintenance orders and succession, which are likely to be irresolvable at this stage without mutual international recognition.

## **Summary**

The Bill should be amended in the following areas:

1. Schedule 14: The regimes listed should be reconsidered. It is easier for reasons of legal certainty of the parties involved to add a regime later than to omit one. Doubts are raised over the Belgium statutory cohabitation regime, and the French PACS.
2. Overseas partnerships that meet the general conditions: for the reasons stated the preference would be for this provision to be omitted.
3. Clause 3(1)(b), Clause 152(1)(b)(ii) (and, if the general condition was kept, Clause 154(a)) removing the fact that the two partners to a registered partnership are already registered in a partnership to each other as an obstacle to capacity.
4. Provide that any termination will terminate all registered partnerships or marriages that the two parties have entered into.
5. Paragraph 21(2)(d) of Schedule 5 and Paragraph 5(d) of Schedule 6; Inheritance (Provision for Family and Dependents) Act 1975 s 3(2)(a) as amended by paragraph 17 of Schedule 4 of the Bill: the time to be taken account for the length of the civil partnership should include the time from the date of first registration anywhere in the world, even if this is before the Act came into force. There is also a strong argument for saying that it should include any pre-registration cohabitation. This may be of significant length, especially for couples who have lived together for many years now but will only be able to register when the Act comes into force.
6. Removing the provisions for the Lord Chancellor to make provision akin to Brussels II and instead include a list of factors akin to Article 2 of Brussels II in the Act.
7. Recognise any termination of an overseas partnership under the law it was formed.

Andrea Woelke, Chairman (020 7940 4000)  
[andrea.woelke@anthonygold.co.uk](mailto:andrea.woelke@anthonygold.co.uk)