

Civil Partnership Registration

**Response by the Lesbian
and Gay Lawyers
Association**

LAGLA

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Response by the Lesbian and Gay Lawyers Association - LAGLA

1. Introduction

The Lesbian and Gay Lawyers Association (LAGLA) membership is made up of solicitors, barristers, judges and academics. LAGLA is not a lobbying organisation, but a group of lesbian and gay lawyers who meet for seminars, conferences and social gatherings. We have members with a wide variety of legal backgrounds and feel, therefore, that we are uniquely placed to respond to the Government's proposals.

We have formed a working group of lawyers with expertise in family law as well as in other areas of law that the proposals affect. A list of names is included in Appendix C.

We have also benefited from help from non-members especially our straight colleagues and would like to thank them wholeheartedly. We are particularly grateful to James Pirrie, a partner of Family Law in Partnership for his contributions on the CSA.

We welcome the Government's proposal to create an institution that brings an end to discrimination against same-sex partnerships. We also welcome the fact that the proposals closely follow the rights and duties of marriage. If an institution were created which offered only partial rights and responsibilities to same-sex couples, this would create fresh discrimination against opposite-sex couples wishing to obtain some legal recognition of their relationship, but who did not wish to marry. This proposal avoids that charge: same-sex couples will be entitled to register their partnerships and opposite-sex couples may marry.

For simplicity we argue that drafting should be simple and the Bill should refer to existing legislation wherever possible.

We acknowledge that only a minority of same-sex couples will register their partnership and urge the Government to take the opportunity to end discrimination between unmarried opposite-sex couples and unregistered same-sex couples in areas like domestic violence legislation and inheritance claims.

We do not think that the Government's proposals adequately prevent someone being married to one person while being in a registered partnership with another and we make proposals on how this could be avoided.

We further make proposals on how immigration law and the situation of expatriates could be addressed in order to avoid discrimination and we suggest other measures that could be taken in order to avoid problems in private international law.

We acknowledge that for income-related benefits and state pensions registered partners should be regarded as a family unit and we respond to the Government's request for proposals on how unregistered same-sex couples should be treated. With these concessions, which would save public money, we also urge the Government to create full equality on issues of tax, especially capital gains and inheritance tax.

We also make proposals on how children's welfare could be promoted by strengthening the bond between children and those who look after them. We propose ways in which financial responsibility for children will extend beyond the birth mother alone, which would also save public funds.

We clarify the steps that must be taken in order to ensure that all pension schemes end discrimination. Since members of pension schemes have always been treated as heterosexual for risk assessment and therefore the risk of widows' pensions has been built into the contributions, this should not be a financial burden on pension funds. We take the view that it would be grossly iniquitous if dependant's rights were not be backdated for the full time of membership of contributions for the state pension scheme, S2P/SERPS and occupational public and private sector pension schemes.

2. The Government's Proposals

We welcome the Government's proposals for the Registration of Civil Partnership. The proposals are based on the recognition that same-sex partners in committed long-term relationships are discriminated against in a large number of situations because they cannot marry. Accordingly, the Government has, correctly in our view, compared the situation of married couples with the situation of same-sex couples and shaped the new institution to bring an end to this discrimination.

Whilst we are also in favour of increasing the protections afforded to cohabiting partners (whether opposite-sex or same-sex), we acknowledge the importance of making special provision for those who are willing to make the commitment which registration involves. Given the extent of that commitment, which is the same as that required of married couples, we agree with the Government that the provisions relating to registered civil partnerships should be as close as possible to those relating to marriage.

We accept that the Government has chosen not to extend marriage itself to same-sex couples. However, civil registered partnership will be a very similar institution. Not only will that be of inestimable benefit to those taking it up, it will also strengthen marriage by extending many of its provisions, both its rights and its responsibilities, to same-sex couples. Every registration of civil partnership will be an endorsement of the principles underlying marriage.

Legal Certainty

Registered partnership legislation should also closely follow the law of marriage for the sake of simplicity and legal certainty. If a new institution were created with entirely new rules, this would lead to confusion for those considering registration, those advising them and indeed the courts who will have to interpret the law.

The more legal uncertainty there is, the more difficult it will be for lawyers to advise. This will lead to increased litigation and therefore legal costs, including court costs and costs of public funding, to the detriment of the public purse. This will be most acute with respect to the financial provisions on dissolution, but will apply to a significant extent to all aspects of the legislation.

Looking at the models used in other countries, we see that, for instance, in Norway, the law of registered partnerships closely follows the law of marriage. Indeed the Act is short and concise and simply lists the areas where the two institutions differ (see Appendix F for an English translation). This enables everybody to understand the obligations, rights and consequences of the institution easily. It allows all family lawyers, rather than only a small group of enthusiasts, to advise couples. Moreover, in England where the legal system is based on precedent case law, it allows legal certainty because existing case law is applicable to the new institution.

By contrast, in Germany an entirely new institution was created. It has only become apparent since the new law came into force that there are a number of uncertainties, anomalies and legal lacunae, e.g. it is more difficult for registered partners to

dissolve their partnership and it will take up to a year longer than for married couples to obtain a divorce.

Undermining Marriage?

The new institution will not undermine marriage, because it simply seeks to allow same-sex couples a way to register their committed relationships; it does not provide an alternative to marriage for opposite-sex couples. In Germany, Parliament created a different institution because it took the view that otherwise the new law would be struck down by the Constitutional Court for undermining marriage, which is protected by the German Constitution. Indeed the new law was challenged and the Constitutional Court came to the view that Parliament could have created a new institution effectively along the lines of marriage without undermining marriage. The reason was that as registered partnership was only available to same-sex couples who were of course unable to marry, such a new institution did not undermine marriage. We agree with the view of the German Constitutional Court.

Equality

It is vital that any difference of substance between civil partnership and marriage should be fully justified and proportionate. Article 14 of the European Convention of Human Rights prohibits discrimination. Although discrimination is often allowed between cohabitants and married persons, it will be much more difficult to justify such discrimination between registered civil partners and married persons. We therefore strongly urge the Government against allowing any significant difference to be created between the provisions for marriage and for registered civil partnership. Any amendment tending towards creating such difference should be subjected to rigorous audit.

Discrimination

We agree with the Government that it is likely that a smaller proportion of same-sex couples than opposite-sex couples will take up the new institution. This does not mean that it is not vital for those who do take it up.

However, it also shows that there will still be a large number of same-sex couples, who will not register their relationships and who will be disadvantaged even under the new law. Some of these disadvantages also apply to opposite-sex couples who do not marry. We generally agree that this is an area for law reform and acknowledge the proposals made by the Solicitors Family Law Association (SFLA) and the Law Society in this area.

However, there are currently a number of areas of discrimination between opposite-sex and same-sex cohabitants. Some of these areas have been challenged in the courts recently under the Human Rights Act and Articles 8 and 14 of the Convention, such as in the case of in *Ghaidan v Mendoza*, but a large number remain. We take the view that it should be part of the current proposals to bring an end to this discrimination by extending the definition of “living together as husband and wife” to same-sex couples. This will create parity between all categories of cohabitants. In some cases this will bring rights - in others it will mean that some same-sex couples

would be worse off than they are now (such as in relation to social security benefits). We acknowledge that this would be the logical consequence of abolishing the current discrimination, but we oppose extending any joint assessment for social security benefits or tax credits to unregistered same-sex couples without abolishing all discrimination between unmarried opposite-sex cohabitants and unregistered same-sex cohabitants at the same time. If this is not done in the present Bill we envisage further litigation on the point.

Although the proposals extend rights and responsibilities that are enjoyed by married couples to registered partners, they do not currently seem to put obligations on private organisations, who could continue to ignore the relationship whether registered or not. We are thinking in particular about private hospitals, private life insurance and pension providers and so on (see our comments on Hospital Visiting and Medical Treatment 7.17-7.18 on page 26 below). The only way to remedy this would be to incorporate in the Bill a general non-discrimination provision binding everyone, not just the Government, and prohibiting discrimination on the ground of sexuality between same-sex registered partners and opposite-sex married partners.

The aim of the Government's proposals is of course to end discrimination and this should explicitly be stated in the Bill in order to make it clear for the overall interpretation of the Act.

Drafting

When drafting the Bill, we prefer the route taken by Norway, namely to refer to existing legislation for marriage whenever possible. This will have three main benefits:

1. Ease of understanding and legal certainty.
2. Ease of drafting and less likelihood of issues being omitted.
3. No new secondary legislation, such as court rules, need be drafted as the existing rules can be used and amended as appropriate.

This Response

We will follow the structure of the Government Consultation Paper commenting on those points that we considered need to be addressed. We will then highlight some other issues.

Going through the proposals we felt slightly uneasy with the concrete proposals in some areas, for example, a system for dissolution that is essentially fault-based. However, we feel that for the reasons set out above it is of much greater benefit for the new law to follow the law of marriage closely and for future reform to encompass both institutions.

Some issues that are particularly unclear in the Government's Proposals are domestic violence protection, international issues, simultaneous registration with one partner and marriage to another, pensions and tax issues.

3. Formal requirements

We largely support the Government's proposals. However, there seem to be three areas that have not been addressed:

1. Marriage by a registered partner
2. International mutual recognition
3. Marriages and partnerships of transsexuals

Marriage by a Registered Partner

We support the Government's aim to prevent any individual from being party to more than one marriage or civil partnership at any one time as this would undermine the institutions of marriage and civil partnership. It would also create an unacceptable level of confusion of legal obligations.

We agree with the measures proposed in paragraphs 3.3 – 3.7 (Exclusivity of Partnerships) and 5.8 (Void and Voidable Registered Partnerships). However, the proposals as set out, although preventing a civil partnership from being registered where a party was already married or in a civil partnership, would not prevent someone who is already in a registered partnership from marrying a person of the opposite sex (or of the same sex in countries where this is possible). If one person were to be in a registered partnership with one partner and married to another, it would create a number of legal uncertainties, injustices and pitfalls and should be prevented if at all possible.

The creation of an offence of making a false declaration as to one's civil status under a new law of perjury would not prevent a person from going abroad and marrying there. Such a marriage may well be valid in one country and not in another.

For example if Nick is in a registered partnership with James but moves to Germany and marries Monika, both James and Monika would have rights that may conflict with each other. Monika would have guaranteed inheritance rights under German law, whereas under English intestacy law James would inherit. Either may have claims for maintenance or financial provision.

The solution is not to create a hierarchy in which the new marriage automatically ends the registered partnership. This would be unjust to the registered partner who may not even know about the marriage and indeed not find out about it for years. Making the later marriage void would protect persons who tried to get married in any part of the UK (this may need legislation in other parts of the UK). It would not, however, necessarily protect the people involved in international situations.

Under German law Monika on finding out about Nick's registered partnership could do nothing but divorce. If both Monika and Nick now live in Germany the English courts would have no jurisdiction under European law (see Appendix) to hear an

application by Monika to declare the marriage void under English law. Her only option would be divorce.

Nevertheless it seems that the best solution would be to make the first legally recognised relationship in time the one with priority as the innocent party of that relationship is likely to be the most vulnerable and as the English courts would be likely to have jurisdiction to protect that party, even if only by way of taking the conduct into account on financial provision.

The most effective way of preventing these situations would be to make it an offence for anyone who is in a registered partnership to marry or to enter into a registered partnership with another person anywhere in the world before the dissolution of the partnership.

We accordingly agree that upon marriage, as upon civil registration, each party should have to declare any existing registered civil partnership. We further propose (as may be intended by the Government) that the Marriage Act 1949 be amended so that a marriage contracted anywhere in the world should be void if either party was at the time of the celebration of the marriage already party to a subsisting civil partnership.

We do not think that a perjury type of offence would be appropriate because perjury requires corroboration whereas it would be clearer and more straightforward to create an offence analogous to bigamy (or just to extend the definition of bigamy).

International mutual recognition

We note that there are a variety of different institutions in other countries for registered partnerships for same-sex couples. In some countries these have only symbolic significance whereas in other countries these are akin to marriage or marriage is even open to same-sex couples. We agree that there should not be blanket automatic recognition of all institutions. However, in order to promote the free movement of people in the European Union and elsewhere we strongly urge the Government to enter into bilateral or multi-lateral agreements with countries that have institutions that are closely modelled on marriage. We note that such a multilateral agreement exists in the Nordic countries already. This would enable free movement of people and avoid them having to register in a multitude of jurisdictions.

Jeroen and James live in Amsterdam. Jeroen is Dutch and James is English. They marry in Amsterdam Town Hall. When they are on holiday in England to visit James' parents, Jeroen is hit by a bus and admitted to hospital. Without recognition of the Dutch marriage as a registered partnership here, James would not be regarded as a "Next-of-Kin". Two years later they move to England. They then register their partnership here in order to achieve recognition. Five years later they move back to Amsterdam and a year later they separate. They will now have to divorce in the Netherlands as well as dissolve their registered partnership in England.

These legal dual and limping relationships would be avoided if there were mutual recognition of the institutions.

We agree, however, that each country has to have jurisdiction to dissolve its own institutions and that the provisions of Brussels II, which regulate the jurisdiction of courts within the EU for divorce and is largely based on habitual residence cannot at this stage apply.

We note that it is currently possible to marry in some British diplomatic missions, namely in countries where there is no civil marriage, for example in Saudi Arabia. The reasoning behind this is that without this opportunity it would be necessary for expatriates to travel to the UK to marry, which may not in all cases be possible, for example if one party does not have leave to enter under immigration law (and it would be wrong to travel on a visitor's visa when the intention is to get married in England) or indeed is too ill to marry.

Even with some mutual recognition it will not be possible in the vast majority of countries to register a same-sex relationship. This should therefore be possible in all British diplomatic missions.

Georgina has lived in Sydney for 3 years and been in a stable relationship with Nicola, an Australian citizen for the last 2 years. Georgina now wants to return to the UK together with Nicola. Rather than having to apply as a fiancée for leave to enter or breach the immigration rules by travelling on a visitor's visa, they should be able to register their partnership in Australia at the British High Commission and then move as a couple, which would reflect the true state of affairs.

Donald, a British Citizen, has lived in Spain for 5 years and has been in a committed stable relationship with Fernando for 16 years. They live in a rented house paid for by Donald from his English pension, but Donald owns a large house in London, which is currently rented out. His pension has provisions for widower's benefits. Donald has now been diagnosed with a terminal illness. He has a month to live and cannot travel to England. If Donald dies in Spain, even if he has made an English will leaving everything to Fernando, Fernando would not receive any widower's benefits under Donald's pension. He would also have to pay Inheritance Tax on the estate. If Donald and Fernando could formalise their long-term relationship by registering it at the British Consulate, Fernando would be protected.

Marriages and Partnerships of Transsexuals

We note that the Government intends that only persons of the same sex should be allowed to register a civil partnership, arguing that this does not discriminate against heterosexual people as the institution of marriage is open to them. We agree with those proposals.

The Government does not, however, propose that a registered partnership should be void where the parties are of opposite sex (whereas a marriage is void if the spouses are of the same sex). In the light of the difficulties which have arisen with respect to transsexuals and those of indeterminate sex, and the complex problems of definition which arise in this area (see *Bellinger (FC) (Appellant) v. Bellinger* [2003] UKHL 21), we propose that Section 11 of the Matrimonial Causes Act 1973 be amended to provide that where persons of the same sex purport to celebrate an otherwise valid marriage, the same shall take effect as a civil partnership; and that where persons of

the opposite sex purport to register a civil partnership, the same shall take effect as a marriage.

We support the intention behind the Government's Draft Gender Recognition Bill to allow transsexual people to be formally recognised in their chosen gender. However, married transsexuals may not necessarily want to end the relationship to their spouse when they change gender, which is required by the current draft legislation. It would be fairer if on legal recognition of the change of sex a marriage which the parties wished to continue would be transformed automatically into a registered partnership and vice versa.

James has been married to Catherine for 10 years. He has now undergone gender reassignment treatment and lives as Jane. He will now want this legally recognised. Catherine has accepted James' situation and they have decided to continue their relationship.

Equally, transsexual people may be living in their new gender for some time before formal treatment and legal recognition of their new gender. During this time they may form relationships which they may want to have legally recognised.

Amanda was born Adam but has been living as a woman for some years. She is undergoing gender reassignment treatment and has been in a relationship with Trevor for a year. They want to get married. At the moment Amanda is still legally a man and therefore the two could register their partnership as a same-sex couple. When Amanda is eventually recognised as a woman, this relationship should continue to be recognised.

This would have several advantages, as follows:

1. It would reduce formalism: whether the parties are of the same or different sex, they still are entitled to state recognition of their relationship and that should not be withheld merely because they have chosen the wrong formal procedure.
2. It would redress or mitigate the breach of the European Convention identified in *Bellinger*. For this reason, it should be retrospective in effect: all existing marriages which are void on the grounds that the parties are of the same sex should take effect as civil partnerships. If there were concern about this provision applying automatically, parties could opt out.
3. It would recognise relationships of transsexual people who would otherwise fall in between one or the other status.
4. It would deter persons of different sex misguidedly seeking to register a civil partnership, as the effect of doing so would be the same as if they had made the appropriate decision to marry.
5. It would protect the innocent party who may not be aware of the other's legal sex (for example if a transsexual has not yet, as envisaged under proposed law, legally formalised his or her new sex).

We therefore propose the following additional provisions:

1. The creation of an offence for a person who is married or in a registered partnership to enter into a registered partnership.
2. The creation of an offence for a person who is in a registered partnership to marry a person other than their registered partner anywhere in the world.
3. Marriages contracted anywhere in the world by a person who is in a registered partnership should be void.
4. If, or when, persons who have contracted a marriage anywhere in the world are of the same sex, they should be treated as registered partners.
5. If, or when, persons who have entered into a registered partnership are of opposite sex, they should be treated as a married couple.
6. A provision in the new law that allows the Secretary of State to add countries to a list of countries whose institutions would be mutually recognised when a multilateral or bilateral agreement has been entered into.

4. The Registration Process

[4.1-4.17] We agree with the Government's proposals in the area in general.

There is no reason why registration should only take place in register offices; it would help the domestic tourist and leisure industry to extend the provisions. It is likely that hotels, country houses etc. would want to be venues for the registration ceremony and it would be in the interest of the leisure industry to allow registration in venues that have a licence to be venues for marriages and benefit from the Pink Pound.

Some religious groups who are now able to solemnise marriages would want to be able to conduct registration ceremonies. There is no reason why this should not be allowed. It should not, however, be mandatory for all religious groups who currently conduct marriage ceremonies to conduct civil partnership registrations. The new law should therefore allow groups to register to be permitted to conduct registrations ceremonies in the same way as they can currently do so in order to conduct marriage ceremonies.

We agree that it would not be feasible to have a secret register for registered partnerships. However, this may mean that some couples will chose not to register for fear of homophobic attacks from neighbours. This shows the continuing need to bring an end to discrimination between unregistered same-sex couples and unmarried opposite-sex couples.

Homophobic abuse must be recognised as a hate crime and treated accordingly by the criminal law and the law enforcement agencies. It is also vital to provide for a general non-discrimination law on the grounds of sexuality.

Recognition Elsewhere in the UK of a Civil Partnership Registered in England and Wales

[4.18-4.20] We agree that partners who have registered their partnership in England and Wales should continue to enjoy the rights attached to it when they move to other parts of the UK in reserved areas (non-devolved areas). It would in our view be iniquitous, however, if a couple moving to Northern Ireland continued to have the same obligations without having the rights and therefore we agree that the areas of pensions, social security and child benefit should be extended to those couples to achieve parity across the UK.

If there are systems of registered partnership elsewhere in the UK in the future, these should be mutually recognised with the English system as far as possible.

Recognition in England and Wales of Partnerships Registration schemes Operating in Other Countries

[4.21] We have already set out (on page 9 above) that there should be the option of mutual recognition with schemes which are largely similar in its extent.

Other Local Partnership Registration Schemes

[4.22-4.25] We agree with the Government that it would not be fair automatically to enter couples into the new scheme who have registered their partnership in an informal way with the knowledge that there are no or hardly any legal consequences attached to the registration.

5. The Dissolution Process

Dissolution Procedure

[5.1-5.3] We agree with the Government that there is a need for an appropriate formal dissolution process for registered partners and that this should be akin to divorce proceedings terminating marriage. Accordingly the same standard of proof required to substantiate a divorce should be applied, namely to show the marriage has broken down irretrievably. The only question arises as to how this should be proved.

The family lawyers amongst us see the need for reform of the divorce system to set divorce on a no-fault footing. We therefore initially felt uneasy about replicating a system that we regard as detrimental to the process of a non-confrontational settlement of the problems arising out of relationship breakdown. We also generally feel that the two and five year periods for separation are too long.

However, we acknowledge that the need for legal certainty argued earlier outweighs the reservations we have and it would not be beneficial to try to create a new system that is different from divorce law at the moment. We therefore generally agree with the Government's proposals in this section. There is, however, scope for future reform in this area and this should be enacted for both divorces and the dissolution of registered partnerships.

In the law relating to marriage, "dissolution" is the umbrella term used for divorce and nullity proceedings. It may therefore lead to confusion if the process that is analogous with divorce was called "dissolution" and the Court Rules would have to be separately redrafted to clarify the issues. We have thought about other words that could be used but rejected them all. "Severance" may be too wide, "separation" or "judicial separation" could lead to confusion with a different process and "de-partnering" or "de-registering" seems beyond the pale. We did not think that statements like: "I am de-partnering/terminating/dissolving her." would be conducive of a non-confrontational process, which we support.

By contrast we can see no reason why the word "divorce" should not be used. Although it is now exclusively used for marriages, it has no religious connotations and does not imply privileges exclusive to marriage. It would accurately describe the process and has derivatives that can be used to say: "We are divorcing."

Grounds for Dissolution

[5.4-5.6] The facts relied on to show that the partnership had broken down irretrievably are consistent with divorce. It would be inappropriate to add adultery to the grounds as this is clearly defined as sexual intercourse with a member of the opposite sex and would not be appropriate. In any event, sex with another person could form the basis of a dissolution based on unreasonable behaviour.

What has not been mentioned, however, is whether similar provisions to delay the final decree until a financial settlement or order, as exist under Section 10(3) of the Matrimonial Causes Act 1973, will apply in dissolution cases involving either two or five year periods of separation. We believe it is appropriate for the court to have the power to delay the final stage of the dissolution from going through depending on the financial position of the couple as expected after the dissolution.

[5.5] We agree that time should be given to the couple to attempt reconciliation if appropriate and an adjournment of proceedings should be permitted.

[5.6] We agree that whilst the fault-based system remains for divorce, the court should properly enquire into the alleged grounds presented by registered partners for dissolution in the same way as for divorce. We would therefore agree with the proposals, if it read “the court would be required to inquire so far as it reasonably can”. In divorce, the particulars of unreasonable behaviour are usually neither challenged nor accepted by the respondent and no special inquiry into the truth of the allegations is made. This reduces both the costs and acrimony of divorce, to the benefit of the parties, their families and the taxpayer. It would be inappropriate for a more intrusive inquiry to apply in respect of civil partnerships. The difference in wording may very well be an oversight.

For the vast majority of applications, which are not expected to be opposed, the special procedure rules that now apply to divorce should equally apply, to allow the process to take place on paper and to avoid costly court attendances.

[5.7] We agree with the provision that no application for an order for dissolution should be accepted until at least one year has passed from the date the partnership was registered which is analogous to divorce proceedings.

Void and Voidable Registered Partnerships

[5.8-5.10] We are generally in agreement with the provisions for void and voidable registered partnerships.

In relation to the partnerships that will be void our comments are:

1. The parties were within prohibited degrees of relationship – we do not object to this provision although the reason for including wider degrees of relationship may not be as necessary as it is in the case of an opposite-sex couple.
2. Either party under the age of 16 – agreed.
3. The parties had disregarded the requirements for registration of the partnership – agreed. It would be helpful if the government clarified whether the lack of parental consent to a registration of a partnership if the parties were aged 16 or 17 would be sufficient to make the partnership void, especially if the partners are of age by the time the question arises.
4. At time of registration either party was lawfully married or was a party to another civil partnership – agreed although we consider it important to ensure that there is

also recognition of foreign marriages and other civil registered partnerships, as mentioned above (page 9). In order to avoid specific problems in recognising civil partnerships in other jurisdictions we have made proposals for a list of countries whose systems are recognised. Therefore the existence of a recognised overseas registered partnership would have the same consequences as the existence of a domestic registered partnership. It would, of course, follow that if the foreign marriage or civil partnership has properly been terminated in any jurisdiction this should be recognised in this jurisdiction.

As mentioned above (page 11) rather than making partnerships and marriages void on the grounds of the partners' gender, such partnerships should be regarded as marriages and vice versa.

In respect of voidable partnerships our comments are:

1. Duress, mistake and lack of mental capacity – we propose that this should follow more closely section 12(c) of the Matrimonial Causes Act 1973 namely that a partnership will be voidable on the grounds that either party of the partnership did not readily consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise. This would include intoxication and drugs.
2. One partner being pregnant without the others' knowledge – agreed and a good provision consistent with voidable marriages. The reference to a "third party" is of course superfluous for biological reasons.
3. We now understand that the Government intends that if one partner has a venereal disease and does not tell the other about it, the partnership will also be voidable. Whilst we understand that civil partnership is closely modelled on marriage, we also support the Government that those discrete legal provisions are not copied, which exist on the statute book for historical reasons and are closely linked to heterosexual intercourse. Therefore the Government correctly in our view does not propose to include adultery as a fact to prove irretrievable breakdown or non-consummation as a ground for nullity. We take the view that venereal diseases fall into the same category because in marriage procreation is at least historically a vital component. We can, however, envisage a same-sex couple who have a fulfilled sex life while practicing safe sex. Then the fact that one partner is HIV positive (possibly without knowing so) does not prevent this. If he intentionally or recklessly misleads his partner and infects him, this could be behaviour for dissolution. We do not see that there is a stigma on dissolution as there is on divorce in marriage.

Order for Separation

[5.13] Although we can see no material benefit in this provision, there does not seem to be any harm in including it for the sake of consistency with marriage law. There will not be the same stigma attached to dissolving a partnership as there is to divorce for religious reasons. Such provision therefore seems superfluous at present.

PART B - RIGHTS AND RESPONSIBILITIES

6. Introduction

We welcome a system which will grant same-sex registered partners appropriate rights and at the same time impose appropriate responsibilities. Care should be taken to ensure that these two processes go hand in hand. The Government warns against any rights being given without imposing the attendant responsibilities. We do not seek preferential treatment for same-sex couples, but would resist any introduction of responsibilities without the rights.

[6.1-2] We support the proposal that the commitment to a registered partnership would involve financial and emotional support, sharing financial resources and being treated as a single family unit.

[6.3-5] As pointed out, in many areas changes to legislation will be required to give effect to the intention of the legislation introducing civil partnership. The Government has decided not to introduce legislation to recognise same-sex marriage, which would require relatively simple legislation to introduce an interpretation of “spouse” in all legislation as including registered partners. We follow the reasoning behind that decision, but it needs to be recognised that in order to give all intended rights and responsibilities to registered partners, great care will need to be taken in drafting. Omissions may lead to serious and unintended inequalities.

Tax

[6.6] The statement of intention regarding the tax system is disappointingly vague. The consultation document does not deal with the tax implications of the proposed partnerships. Further clarification - and more detailed proposals - is therefore required.

Although we now understand that for legislative reasons the tax legislation will be found in a separate Bill, we urge the Government to state its intention clearly on this point and to ensure that the provisions will come into force at the same time. If this is not possible, the tax provisions should at least be backdated to the date that the Civil Partnership Act comes into force.

Married Couple’s Tax Allowance

This continues to exist for those born before 6 April 1935. We see no reason why this allowance should not be made available for those couples who register their relationship and satisfy the age criteria.

Joint incomes

Income from sources that are held in both spouses’ names, such as interest from bank or building society accounts, dividends from shares and rent from property and so on, is treated as if owned in equal shares. Each spouse is taxed on half of the

income unless the tax office is told otherwise. This applies even where the asset is owned in unequal shares unless an election is made to split the income in proportion to the ownership of the asset. The consultation document does not state whether these rules will apply to registered partners but there appears to be no reason why the same rules should not apply.

Capital Gains Tax

There is no reference in the consultation document as to whether the CGT rules that apply to married couples will extend to registered partners. These rules include:

1. The transfer of an asset from one spouse to the other attracts no CGT because the recipient takes over the donor's base cost.
2. The Principal Private Residence Relief, which normally applies to the family home.
3. The extra statutory concession when one spouse leaves the family home several years prior to transfer to the other spouse
4. The provision in the Chargeable Gains Act 1992, which applies if a property ceases to be a couple's main residence but is not disposed of immediately whereby the couple are treated as if they still occupied the property for the purposes of the principal private residence relief for a period of 36 months.

Once again, there would appear to be no reason why registered partners should not be subject to the same rules as spouses and we urge the Government to make the law non-discriminatory.

Tax Credits

Our observations on income-related benefits (see below) should equally apply to tax credits.

Inheritance Tax

We have set out our observations on Inheritance Tax below in our comments on Inheritance in paragraphs 9.25 and 9.26.

7. During the Relationship

Immigration

[7.1-7.3] We welcome the Government's proposals in relation to immigration. However, in addition to the change to the immigration rules allowing registered partners to apply for leave to remain in the United Kingdom on the basis of their partnership, other changes will be required in order to avoid discrimination and treat registered partners similarly to married couples. These changes include the following:

Foreign nationals in relationships abroad who intend to enter into a registered partnership with a British Citizen or a person who has indefinite leave to remain

An addition to the immigration rules will be required in order to assist couples in committed relationships where one member of the couple is a British Citizen or has indefinite leave to remain in the United Kingdom and the other is a foreign national abroad. Unless there is the possibility to register in British overseas diplomatic missions, it will not be possible for the foreign partner to enter into a registered partnership until he or she reaches the United Kingdom. Therefore, provision will be needed to allow the foreign partner to enter the United Kingdom in order to register the partnership and then make an application for leave to remain on the basis of that partnership.

Even if registration in overseas missions is possible, this may still be necessary for people who want to avoid registering in a country where they may face persecution as a result. There is a category in the immigration rules relating to fiancés and fiancées which performs this function for those who wish to enter the United Kingdom with the intention of marrying a British citizen or a person who has indefinite leave to remain (paragraph 290 of the Immigration Rules). A similar category would indeed be *more crucial* for those who wish to enter into a registered partnership since they would not have the option of entering into such a registered partnership before arrival.

John and Maria live in Argentina. John is a British citizen and Maria is an Argentine national. John wishes to return to the United Kingdom with Maria. If John and Maria are already married, Maria can simply apply for leave to enter the United Kingdom as the spouse of a British national. If John and Maria are not yet married but wish to marry in the United Kingdom, Maria can enter the United Kingdom as a fiancée and marry when she reaches the United Kingdom and then apply for leave to remain in the United Kingdom on the basis of her marriage. They could also marry in Argentina and then Maria could apply for leave to enter as a spouse.

Julia and Maria also live in Argentina. Julia is a British citizen and Maria is an Argentine national. Julia wishes to return to the United Kingdom with Maria. It will not be possible for Julia and Maria to enter into a registered partnership in Argentina and therefore Maria will not be able to apply for leave to enter as a registered partner. A

category in the immigration rules allowing Maria to enter with the intention of entering into the registered partnership will be crucial.

(The above examples do not deal with the rules relating to unmarried partners referred to below.)

An alternative solution to the problem outlined above would be to allow couples to register their partnership at the overseas post, though we would submit that the change to the immigration rules referred to above should still be made so that registered partners have the same option as married partners.

The recognition of other states' same sex partnerships would also assist in this area.

Leave to enter or remain for the same-sex partners of those who have status in the United Kingdom other than British Citizenship or indefinite leave to remain

The immigration rules allow for a number of situations where foreign nationals who are entering the UK can bring in their spouses (e.g. students, work permit holders). It would be desirable for this to be extended to same-sex partners.

Allowing couples where one member of the couple has leave to enter or remain in the United Kingdom (even in a temporary category) to register their partnership in the United Kingdom would bring equality between same-sex and opposite-sex couples. Of course, this registration of partnership in itself would not confer a right to remain in the United Kingdom beyond that given to the partner who was initially granted leave in the United Kingdom.

Juan and Maria are a married couple living in Argentina. They are both Argentine nationals. Maria is a talented chemist who has been offered a place studying for a PhD at Cambridge University. She is granted leave to enter the United Kingdom as a student for three years in order to undertake her PhD. Under the immigration rules, Juan can apply for leave to enter the United Kingdom as Maria's spouse. After she finishes her PhD, Maria returns to Argentina and Juan will not be able to apply for further leave to remain in the United Kingdom on the basis of the marriage.

Julia and Maria are a same-sex couple who live in Argentina. They are both Argentine nationals. Maria is a talented chemist who has been offered a place studying for a PhD at Cambridge University. She is granted leave to enter the United Kingdom as a student for three years in order to undertake her PhD. Unless Julia is allowed to enter the United Kingdom in order to enter into a registered partnership with Maria and then make an application for leave to remain as the registered partner of a student, the couple may be separated or more likely the United Kingdom will be deprived of Maria's talents. If Julia is allowed to enter and register her partnership but Maria returns to Argentina after she finishes her PhD, Julia will not be able to apply for further leave to remain in the United Kingdom on the basis of the relationship. The registered partnership itself will not confer any right to leave to remain beyond that granted to Maria.

Again, the recognition of other states' same sex partnerships would assist in this area as would be the option to register a partnership at an overseas post.

Naturalisation as a British Citizen

Generally, naturalisation as a British citizen requires five years' lawful residence in the United Kingdom, at least one year of which must have been completed as the holder of indefinite leave to remain. This is a very simple summary.

However, the spouse of a British Citizen can naturalise after three years' lawful residence one year of which must have been with indefinite leave to remain. The immigration rules should be amended so that registered partners can naturalise in the same way as spouses.

Bereavement and domestic violence

The present provisions relating to foreign spouses (and opposite-sex unmarried partners) who are bereaved or victims of domestic violence during the probationary period should also apply to those in a registered partnership as well as to unregistered same-sex partners.

Home Office policies

Home Office policies outside the immigration rules should cater for registered partners where they deal with spouses. There are a number of these. An important example is DP3/96, which deals with the spouses of overstayers and illegal entrants and sets out a general presumption against enforcement action if none is started for two years after the marriage. A simple policy that all Home Office policies outside the immigration rules which mention 'spouses', should be interpreted as including registered partners would deal with this point.

Retention of unmarried partners rules

The unmarried partners rules should remain. As the consultation paper acknowledges, registered partnerships, like marriage, will confer responsibilities as well as rights. Not all couples, whether same-sex or opposite-sex, will wish to formalise their relationship. The immigration rules relating to unmarried partners require that a couple have been in a relationship "akin to marriage which has subsisted for two years or more". The rules apply to both same-sex and opposite-sex partnerships and should be retained.

Elections

[7.4] We welcome the Government's proposals in this area.

Giving Evidence in Court

[7.5] We welcome the Government's proposals in this area.

Making Financial Decisions on Behalf of Adults with Mental Incapacity

[7.6-7.9] We agree with the proposals that all partners, whether married, registered or neither, will have the same rights under the proposals for new legislation.

Prison Visiting

[7.10-7.11] We welcome the Government's proposals in this area.

Protection from Domestic Violence

[7.12] We agree with the Government that registered partners should have the same protection under Part IV of the Family Law Act 1996 as spouses and that unregistered same-sex partners should have the same protection as unmarried opposite-sex partners. People need protection from violence and molestation and security of occupation of their home regardless of whether they are in an opposite-sex or same-sex relationship. Following *Mendoza v Ghaidan*, it is clearly a breach of Articles 8 and 14 of the European Convention that persons in same-sex relationships do not have these protections.

However, the Government's proposals need clarifying as to both the nature of the existing discrimination and the proper response. At present, same-sex partners may be "associated persons" under Section 62(3)(c) of the Act and can apply for a non-molestation order under Section 42. However, they are not "cohabitants" under Section 62(1)(a) and therefore cannot obtain any of the property-related rights and orders under the Act, namely

1. an occupation order under Sections 33-36,
2. a transfer of tenancy under schedule 7 and
3. matrimonial home rights under Sections 30-32 and s. 36(13).

With the exception of some matrimonial homes rights, all these are open to unmarried opposite-sex cohabitants (regardless of whether they have children).

The Home Office consultation paper "Safety and Justice" proposes to amend the definition of "associated persons" to include same-sex partners. Unfortunately, this does not go far enough. What is required to avoid discrimination is the amendment

of the definition of “cohabitants” under Section 62(1)(a) to give same-sex cohabitants the same protection as opposite-sex partners.

In addition, registered civil partners should have the same rights as married persons in relation to the shared home. This goes to the heart of civil partnership, just as it does in marriage. One partner should not be allowed to exclude the other from the home without a court order, regardless of which party formally owns it and the registration of matrimonial homes rights is a vital protection against one party selling the family home over the other’s head and disposing of the proceeds. The same should apply to civil partnerships, given that the property rights of partners between themselves will be similar to those between spouses. The Government may be concerned at the appellation “matrimonial” being applied in connection with civil partners. However, it is already so applied in connection with opposite-sex cohabitants via Section 36(13) of the Act and an alternative title could be found.

The appropriate change to the definition of “cohabitants” could be made either in the bill proposed by the Home Office in “Safety and Justice” or in the civil partnerships bill. We would urge the Government to choose whichever route is quickest, especially as the present position amounts to a serious breach of human rights.

Irene gave up her council flat 8 years ago to live with Martina in her Housing Association house. Each has a daughter, who are now aged 12 and 13 respectively. Martina has a well-paid and demanding job. Most of the childcare has fallen to Irene. Martina has developed an alcohol problem and has become violent to Irene. Irene obtains a non-molestation order against Martina and in due course a residence order in respect of both children. As a same-sex partner she cannot obtain an occupation order to exclude Martina from the house and the situation at home is extremely stressful and affect the children while Martina continues to live there. Eventually Martina moves out but Irene cannot apply for a transfer of tenancy into her name because she does not count as a “cohabitant” under the Family Law Act. Martina surrenders the tenancy and Irene and the children are left homeless and are rehoused out of borough in temporary accommodation. The children have to change schools.

George and Sheila are an elderly couple. A year ago, George moved into Sheila’s council flat after their respective spouses died. Sheila has become disillusioned and has decided to move to live with her daughter. George applies to the court under the FLA and obtains an occupation order allowing him to continue to live in the flat and a transfer of the tenancy into his sole name.

The extension of matrimonial homes rights to include civil partners should obviously be part of the Civil Partnership Bill. However, it would be anomalous if the definition of “cohabitants” were not also extended at the same time or earlier and might well cause serious difficulties with the regime under the Act.

Adoption

[7.13-7.14] We welcome the changes that were brought in last year under the Adoption and Children Act 2002. Same-sex couples will have the opportunity to adopt as a couple, regardless of whether they have entered a civil partnership, subject to approval. The law will recognise that a child may have two fathers or two mothers. We also welcome the provision allowing step-parents and registered partners to adopt their partner's children. It will provide important recognition of the commitment to bringing up children and will strengthen families.

Parental Responsibility

[7.15-7.16] It is important for the welfare of a child that those people who in fact look after the child do have legal parental responsibility for the child so that the de-facto connection with that adult is recognised in law. We therefore welcome the proposal to allow a partner within a civil partnership to obtain parental responsibility for a child in the same way as a step-parent.

Under The Adoption and Children Act 2002 married step-parents will be able to apply to the court for a parental responsibility order in respect of their partner's child or may obtain parental responsibility by entering into a formal agreement with the child's parent (or parents, if both have parental responsibility).

Registered partners should be able to obtain parental responsibility in the same way, by either agreement or court order. The wording of the current proposal does not refer specifically to the possibility of a parental responsibility agreement between the partner and parent (or parents). This should be included to avoid the necessity for application to the court where agreement exists.

Currently the only way for same-sex partners to obtain parental responsibility is to apply for a joint residence order, which grants a slightly diminished form of parental responsibility (for example, in relation to capacity to consent to adoption and in relation to appointment of guardians). There may be no question over the child's residence which would require a residence order and it would be more appropriate to apply for the correct order, i.e. one specifically granting parental responsibility.

Human Fertilisation and Embryology Act

Many lesbian women have children, some from previous marriages or relationships, some through private arrangements with male friends. Others, however, receive donor insemination through clinics licensed by the Human Fertilisation and Embryology Authority. A child now born as a result of the latter arrangement will only ever have one parent, unless adopted by the mother's partner under the provisions of the Adoption and Children Act 2002 in which case the child would have two mothers. This would be a lengthy and, in our view, artificial procedure.

The Human Fertilisation and Embryology Act 1990 provides in Section 28 for the male partner of the woman treated to be legally regarded as the father, even if the sperm used is not his and therefore there is no biological connection with the child.

In our view these provisions should be extended to the female partner of a woman who receives treatment in licensed clinics. Section 28 applies in somewhat different ways to married and to unmarried male partners and the Civil Partnership Bill should extend these provisions analogously to registered and unregistered same-sex female couples.

It is in the best interest of the child to have a legal connection with those people it grows up with and who take responsibility for the child. There is a public interest for children to have two parents who are financially responsible for the child. If the birth mother falls into financial hardship she can apply to the CSA for the other parent to pay child maintenance (whether or not the parents are in a registered partnership or married) and therefore the chances that she will have to have recourse to social benefits is diminished and taxpayer's money is saved. Having two parents therefore promotes child welfare and prevents child poverty.

Jane is married to Patrick, who is infertile. Jane and Patrick seek the help from a licensed fertility clinic and Jane becomes pregnant and gives birth to Alice by way of donor insemination. Patrick is automatically recognised as Alice's father.

Jane is in a registered partnership with Patricia. Jane and Patricia decide to have children and Jane becomes pregnant and gives birth to Alice by way of donor insemination from a licensed clinic. Unless the law is adapted, Alice will only have one legal parent. Jane and Patricia would have the option of going through the lengthy process of adoption, when Alice would legally have two mothers. If they do not go through the process, or if Jane dies before the adoption is completed, Alice will have no parent and no legal connection with Patricia, who has brought her up.

Surrogacy

Similarly the provisions relating to surrogacy should be amended to extend the provisions for legal surrogacy arrangements and parental orders for married couples to registered partners.

Hospital Visiting and Medical Treatment

[7.17-7.18] We are concerned at the vague nature of the current law regarding medical treatment and hospital visiting and in particular the use of the term "Next-of-Kin" which is not consistently or exclusively applied. There is sometimes confusion with the term "nearest relative" which has a specific meaning under the mental health legislation.

The law does not allow a person at will to appoint another as their next-of-kin for all purposes. For cohabitants specific provision must be made for a particular circumstance (i.e. a will for inheritance). In marriage a spouse often assumes this role by virtue of their status.

Many same-sex couples have experienced painful discrimination in hospitals at times of great stress when their relationship with a seriously ill partner is not

recognised, sometimes to the extent of visiting being prevented. In many cases an estranged relative is given more decision-making power than a partner of 20 years.

The use of the term “Next-of-Kin” is not limited to situations regarding hospital visiting and medical treatment. It is often applied to a generality of situations including contact, emergency, visiting and representation. It also applies to the payment of certain benefits in the event of death (next-of-kin status is given in these circumstances to those who would inherit under the intestacy rules).

We consider that ambiguity in the law can only lead to inconsistency in the application of the law. This ambiguity and inconsistent application may leave the possibility of discrimination open.

Proposals to rely on the concept of cultural change or guidance do not adequately address this problem, because of the wide range of situations in which the problems may arise, the difficulty of enforcing guidance and the fact that NHS guidance would not in any event bind private hospitals.

Paula and Jane have been partners for 20 years. They were one of the first couples to register their partnership under the new law. Paula is now terminally ill. While she is treated in an NHS hospital, Jane is regarded as her Next-of-Kin. Paula needs care that Jane is physically unable to provide and therefore moves to a hospice that has been recommended to her. However, this is run by a religious institution that passionately opposes homosexuality and Jane is ignored and cannot even visit Paula in her last days.

The only way to remedy this situation would be to include in the Civil Partnership Bill a provision that prohibits discrimination against civil partners in such circumstances.

We note, however, that even this does not address the difficulties faced by non-registered same-sex couples or indeed unmarried opposite-sex couples.

Income-related Benefits

[7.19] We agree that registered partners should be treated as a family unit for the purposes of claiming income-related benefits. However, if all couples who register their relationship are immediately treated as a family unit and therefore their benefit entitlement is reduced, they would benefit from not formalising their relationship, which would go against the aim of the Government’s Proposals. Therefore, we propose that transitional regulations be introduced so that same-sex couples currently claiming benefits as individuals maintain this status until either their entitlement to income-related benefit ends or cohabitation ceases. Such transitional provisions are in force for other groups who would otherwise suffer hardship from changed law and there is therefore no conceptual problem with this proposal.

[7.20-7.21] As we set out elsewhere, we propose that all unregistered same-sex couples are treated the same as unmarried opposite-sex couples (for example for domestic violence protection or under the Inheritance (Provision for Family and Dependents) Act 1975). This would of course have to go hand-in-hand with

unregistered same-sex couples having the same obligations as unmarried opposite-sex couples.

We therefore agree in principle that unregistered same-sex couples should be treated as a family unit for the purposes of claiming income-related benefits. Again, however, changing the status of existing cohabiting same-sex couples will cause financial hardship. We are also conscious that benefits legislation would apply to other parts of the United Kingdom where the Government's Proposals would not at the same time bring the rights that unmarried opposite-sex couples now have to unregistered same-sex couples.

Therefore we would only agree to unregistered same-sex couples to be treated as a family unit for income-related benefits if:

1. Rights are extended at the same time.
2. There are transitional provisions.
3. The changes will only take effect in England and Wales unless and until rights are correspondingly extended in other parts of the UK.

For simplicity, therefore, it may be prudent to postpone treating unregistered same-sex couples as a family unit at least until the Scottish Parliament has implemented similar legislation to that in England and Wales.

At present, the Department of Work and Pensions does of course not keep records of cohabiting same-sex couples. Obtaining accurate information on this point will create logistical problems. Claimants should be given as much notice as possible of the need to record cohabitation with the DWP in order to receive protection under transitional regulations. The DWP will also need to make it clear that existing same-sex cohabitants will not lose entitlement to benefit as a result of declaring cohabitation.

In addition, the remit of Benefit Fraud Investigators will increase. We would urge the DWP to introduce safeguards to ensure that claimants suspected of same-sex cohabitation are not subjected to unnecessarily prurient investigations.

The observations on income-related benefits would of course equally apply to tax credits.

Dependency Increases

[7.22] Where same-sex couples are regarded as a family unit we support the proposal that Adult Dependency Increases are payable for registered partners (and unregistered same-sex couples, if they are to be treated as a family unit) in the same way as they are for spouses and persons looking after children.

State Pensions

[7.23–7.29] The main conditions for entitlement to the basic pension are that the claimant has reached pensionable age and has made (or been credited with) sufficient National Insurance contributions throughout his or her working life. The basic pension can be paid to married women or widows based on their husbands' National Insurance contributions record provided that record is better than their own and the husband is receiving his state pension.

The existing state pension system discriminates on the grounds of gender due to the outdated assumption of dependency by a wife upon her husband. This means that there are benefits available to married women or widows which are not available to married men or widowers in circumstances where the wife may have the better record of National Insurance contributions. We support the Government's proposals to end this discrimination.

We acknowledge that it would be inequitable to give more rights to same-sex registered partners than currently exist for married men. We urge the Government to ensure that the existing inequality is redressed as part of the forthcoming reform for the UK pension system. More clarity is needed in this area but we support the general principle that registered partners should be given the same state pension rights as married couples once there is equality for married couples in 2010.

We note that the state pension age is not due to be equalised until 2010 and that full equal rights will not be available until 2020 to people who are married.

We urge the government to overcome wherever possible all practical difficulties in extending state pension rights equally to men and women before 2010. Whilst we accept that same-sex registered partners should not enjoy a higher basic state pension entitlement than married partners we suggest that transitional arrangements are put in place for dependency increases in cases where only one partner receives a state pension.

Since currently either spouse may substitute the other's contributions record for their own on divorce, there is no reason why a corresponding procedure should not also apply immediately to same-sex couples who dissolve their partnership.

Pension Credits

From October 2003 a new payment called a Pension Credit will be payable at age 60. This will guarantee an income of at least:

- £102.10 per week for a single person; or
- £155.80 per week if the pensioner has a partner

For people aged 65 and over there will be enhanced benefits for those with savings (or presumably whose partner has savings).

The person applying for Pension Credit must be at least 60 but the partner can be under 60.

We point out that there will be a saving to the Treasury if same-sex partners are to be included. There is no reason in principle why this should not be extended to unregistered same-sex partners in the same way that it will apply to unmarried opposite-sex partners. There will otherwise be the prospect that pensioner aged same-sex partners who may have been together for very many years will have a disincentive to register their partnership.

However, as with all income-related benefits and credits, we have some reservations on extending these to unregistered same-sex couples without the rights that go with it and refer to our observations set out above (page 27).

Life Insurance

[7.30] We welcome the proposal that registered partners should be presumed to have an unlimited insurable interest in each other's lives.

8. When a Partnership is Dissolved

[8.1] This area covers issues, which are sometimes overlooked by those groups lobbying for reform, but the family lawyers amongst us are only too aware of the problems and the financial hardship that arise for one or the other partner on separation. We welcome the Government's proposals in this area.

Children – Residence and Contact

[8.2-8.3] We note that the existing law already covers this area and that the Court has powers to make all orders under Section 8 of the Children Act 1989, not only for Residence and Contact. Civil Partnership legislation would not alter the law.

We propose that the registered partner of a parent should be entitled to apply for residence or contact in relation to a child of the family without the leave of the court, by analogy with the step-parent provisions of section 10(5) of the Children Act.

Through adoption or our proposals for amendments to the Human Fertilisation and Embryology Act both partners of a registered partnership may of course be the parents of a child. We support a proposal that a court should be required to consider whether it should exercise its powers under the Children Act on an application for dissolution in the same way that it is so required on a petition for divorce.

Child Support

Liability to Pay Child Support

[8.4] We agree that the provisions of the Child Support Acts should apply to children who have two parents of the same sex whether through adoption or otherwise.

Assessment of Liability for Child Support

[8.5-8.6] Under the scheme established by Schedule 1 of the Child Support Act 1991 as amended, there is a discount in relation to children within the household of the non-resident parent. This applies equally to natural children and step-children. However, if the relationship is with a partner of the same sex as opposed to a partner of the opposite sex, step-children are ignored.

For example if Neil is paying maintenance of £100 per week and he forms a household with Patricia and her child of an earlier relationship then his payments will reduce to £85 per week. If however his relationship is with Patrick who also has a child within the household, then there will be no adjustment.

We endorse very strongly the Government's intention to take action to remove this discrepancy. However, for opposite-sex couples the exemption is not dependent on marriage. There is therefore no reason for limiting the recognition of such step-children to where there is a registered partnership. It ought to be extended whether the partnership is registered or not.

The second area is more complex as it involves an exception to an exception to a general rule. The relevant provisions are in the Child Support Departure Directions etc Regulations (1996 SI No 2907, regulation 25) for “old scheme” cases and in broadly similar form in the Child Support (Variations) Regulations 2001(SI 2001 No 156 regulation 20) for “new scheme” cases.

1. By these provisions a parent with care is permitted to apply for a departure or variation (= alteration to) the level of child support upon the basis that the non-resident parent has a lifestyle which is inconsistent with his declared income.
2. Such a non-resident parent may however defeat this application where he can show that (subject to yet more exceptions) his lifestyle is funded by his partner (married or not).
3. Yet again however we find “partner” as covering only opposite-sex relationships.

Thus it is that if Neil's lifestyle is funded by Patricia then it may be that there will be no increase to the level of payments made by Neil. However in identical circumstances where Neil is in a same-sex relationship with Patrick, this defence would not be available to him.

Whether the provision has merit or not, it is clearly inappropriate for there to be this discrimination and we urge the Government to take action to remove it from the scheme.

The same proviso applies; it is inappropriate to limit the term “partner” to where there is a civil registration. It should extend to all same-sex relationships to the same extent as it applies to opposite-sex relationships, married or unmarried.

Maintenance for Partners and Children of the Family

[8.7] We also support the principle that each party to a registered civil partnership should be obliged to maintain the other. This is one of the most basic obligations of registered partnership and one of the bases for the recognition to be afforded by the state to that relationship. In practice, maintenance orders are only made in about 10% of divorces. We expect fewer same-sex partners to be financially dependent on their partner than spouses are because we expect fewer same-sex couples to bring up children. Therefore it is likely that on dissolution of registered partnerships the figure is even lower.

Nevertheless, where one party is economically dependent on the other or has reduced earning capacity it is appropriate that the other party support them for as long as is necessary for them to recover their economic independence.

Maintenance applications to the magistrates' court during a marriage are extremely rare but we support the inclusion of a similar provision in the registered partnership legislation in order to protect vulnerable people.

[8.8-8.9] Other than in cases where both partners are the parents of the child, when the Child Support Act would deal with child maintenance, this should be in the

jurisdiction of the courts, who are a more flexible forum than the Child Support Agency and are better able to reflect the merits of individual applications for support by and against non-biological parents. Therefore, the provisions for child maintenance under the Domestic Proceedings and Magistrates' Court Act 1978 and the Children Act 1989 should be extended to cover same-sex step parents who are registered partners of the parent.

Equally they should be extended to cover same-sex parents, if this is not automatically the case, whether or not the parents are in a registered partnership.

Property Division on Dissolution of a Civil Partnership

[8.10-8.11] We agree with the Government's proposals for property division. We see no reason why there should be any difference between the powers of the courts to distribute assets on divorce and on dissolution of civil partnership, which are set out in Part II of the Matrimonial Causes Act 1973. Indeed, any differences would be likely to cause injustice and increase the cost of dissolution proceedings due to lack of legal certainty.

The system for financial provision on divorce is discretionary whereby the court is guided by the factors in Section 25 of the Matrimonial Causes Act 1973. This may be regarded as leading to uncertainty of law and the Government did of course some time ago make suggestions for reform. It would be possible to apply different financial rules to partnerships in order to reduce uncertainty of outcome, by allowing judges less discretion than upon divorce. However, this would increase unfairness as the rules would be applied with less sensitivity to the individual circumstances of any case. There is no good reason of principle why the rules for marriage and civil partnership should differ in this way. If it is thought appropriate to limit judicial discretion, this should apply to marriage just as much as to civil partnership.

Any additional legal certainty achieved by limiting the court's discretion would be outweighed by the added uncertainty due to lack of existing case law and experience by practitioners in this area, which will by its very nature only generate a small number of cases a year.

We therefore propose that the statutory powers of the court and the statutory criteria by which they are exercised should be identical for both marriage and civil partnership. Given the overwhelming considerations in favour of having identical financial regimes upon divorce and upon dissolution of partnership, we urge the Government to consider making express provision to that effect, namely that the criteria for financial orders shall be applied the same way regardless of whether the parties were married or civil partners.

The Need for Comprehensive Legislation

We also urge the Government to ensure that the ancillary provisions relating to finances upon divorce should also be applied equally to civil partnerships. Many of these are contained in the statutes which specifically deal with matrimonial law, for example the court's power to set aside transactions by one partner made to prevent the asset from being subject to the court's jurisdiction under Section 37 of the

Matrimonial Causes Act 1973. Many, however, are contained in widely different sources such the exemptions from capital gains tax in respect of the transfer of the family home between spouses and where only one spouse has ceased to occupy it and the exemption from repayment of the discount under the right to buy upon transfer or sale of property under the MCA 1973. It would be appropriate to have a general provision that financial orders upon dissolution of civil partnership are to be treated as if they were equivalent orders upon divorce.

At present the right to maintenance ends automatically upon remarriage. We would also urge the Government to consider whether it should also do so upon registration of a civil partnership.

Pensions on Dissolution

State Pension

Upon divorce either spouse to a marriage can appropriate the ex-spouse's contribution record if this will result in a higher basic state pension. It is not clear whether the Government proposes to extend this provision to registered partners but there is no reason in principle why registered partners should not have the same rights as married partners upon dissolution. Furthermore, there is currently no gender discrimination in this area (see paragraph numbered (iii) in 7.26 of the Consultation paper) and there is therefore no need to postpone implementation of this right until 2010.

Private and Occupational Pension Schemes and SERPS/S2P

Upon dissolution of the registered partnership, the Court should have the same powers to attach, offset or share pensions that it has on divorce.

We take the view that it should also be possible for to Court to delay formal dissolution of a registered partnership in the same way that it can stay an application for decree absolute in order to preserve widow's benefits pending final financial orders upon divorce.

Public Funding for Dissolution

[8.12-8.13] We agree with the Government's proposal to extend public funding to dissolution on the grounds both of equity and efficiency.

Family law is a technical area, requiring expertise. If parties are to enforce their rights, they usually require legal representation. With respect to the financial aspects, the financially weaker party is the one who most requires the assistance of the court but who is least able to obtain legal representation without public funding. Denying public funding in this one area of civil partnerships would be anomalous. It would also arguably create a breach of Article 6 of the European Convention. Insofar as there would be discrimination as against parties to a divorce, it would probably also constitute a breach of Article 14.

Without public funding, there would be more litigants in person, which would be a considerable drain on courts' resources. Most public funding for family financial applications is recouped by costs orders and/or the statutory charge against the family assets. It is therefore one of the most cost-effective areas of public funding.

In any event, we doubt that there would be a significant net increase in the cost to the public purse. Cohabitants at present often share property and have to seek court orders to divide it – usually pursuant to the Trusts of Land and Appointment of Trustees Act 1996. This is a complex and very technical area, which is relatively expensive to litigate. Public funding is available and we estimate that on average costs of such actions are roughly twice as high as those for applications for financial provision on divorce. It would therefore almost certainly be cheaper to fund an application for dissolution of civil partnership.

9. When One Partner Dies

[9.1] From experience in our practices, we can see that same-sex partners currently suffer major injustice and unfairness when their partners die, which is all the more distressing as it comes at a time when the person is suffering from bereavement. They may be ignored by the blood family of the deceased, they may be made homeless and lose a source of income in cases where the deceased maintained both partners. It is an important goal of the legislation to remedy this injustice. It will also mean that a number of people who now rely on State benefits will no longer need to do so.

Registering the Death of a Partner

[9.2-9.3] We support the Government's proposals in this area and note that wherever the law refers to the "relative" this should apply to registered partners. This should apply to all situations, including the registration of the death of a partner, although we support its explicit inclusion.

Inquests and Burials

[9.4-9.6] We support the Government's proposals in this area.

Post Mortems and Organ Retention

[9.7-9.8] We support the Code's statement in the Code of Practice on "Families and Post Mortems" that identifying the most appropriate person should not be based on presumptions. The Code identifies that making this identification is not always straightforward. However, we consider that the act of registering a partner provides sufficient confirmation that the civil partner should be treated as an appropriate person. Accordingly, registered partners should be treated identically in all circumstances where capacity to consent is granted by virtue of spousal status.

We have elsewhere stated our concerns regarding the use of the term "Next of Kin".

Bereavement Benefits

[9.9-9.10] We support the proposals to extend payment of bereavement benefits to registered partners.

Survivor Pensions – Private Pension Schemes

[9.11] The Government's proposals are unclear as to whether occupational pension schemes (whether defined benefit or final salary schemes) will be required to pay a survivor's pension to a registered partner in exactly the same circumstances as a widow's or widower's pension would be paid to the surviving spouse of a deceased member. We acknowledge that many UK schemes already make reference to unmarried partners and most refer to pensions for "dependants" at the discretion of the Trustees.

It is now permitted to exercise discretion in favour of any unmarried partner, whether same-sex or opposite-sex, where there has been financial "interdependence" without losing Inland Revenue approval. Nevertheless, it is in our experience still a struggle for surviving same-sex partners in many cases to obtain dependant's pensions from trustees, who may have their own prejudices against gay men and lesbians.

The Government's proposal for equal treatment of registered partners must remove the need for any exercise of discretion (which permits discrimination), but this will persist where unregistered same-sex partners are concerned and should be specifically prohibited in our view. It must also for all pensions remove the Inland Revenue requirement for financial dependency.

It is not clear whether the Government's proposals intend to pose an obligation on the trustees of occupational or private pension schemes to treat registered partners in the same way as spouses. We acknowledge that the level of pensions may not be the same for the surviving woman of a same-sex partnership than it would be for a widower due to different life expectancies for men and women. However, beyond this issue, which may be shown actuarially not to be discriminatory, there should be no further different treatment.

In order to put such an obligation on the trustees, we strongly urge the Government to include in the Bill a prohibition of discrimination between spouses and registered partners.

[9.12] Many people have contracted out so that funds are placed in personal pension funds. SERPS was replaced on 6 April 2002 with a re-branded version called S2P. 22% of people of working age are still contributing to SERPS/S2P.

SERPS/S2P benefits are protected as more restricted personal pension funds to include a compulsory widow's or widower's pension. As such they are non-commutable and we welcome the Government's proposal that the conditions for contracting out should be amended to include a requirement for survivor benefits to be paid to registered partners.

Survivor Pensions – Public Service Pension Schemes

[9.13-9.14] We welcome the Government's proposal for members of public service pension schemes to earn the same entitlement to survivor benefits for their registered partners as for married partners.

We also welcome the proposed consultation with the membership of public service schemes for possible extension of survivor pensions to members' partners who are neither married nor registered.

However, it is not entirely clear whether the Government proposes that the benefits that a surviving registered partner is entitled to should be based on the total benefit accrued to the member of the pension scheme, rather than benefits accrued after the implementation of the Civil Partnership Act.

Robert is a teacher aged 50 and has been a member of the Teachers Pension Scheme for 25 years. He has been in a stable relationship with Patrick for 10 years. They intend to register their partnership when the new law comes into force. Robert intends to retire at 65 when he will have 40 years of service. After Robert's death Patrick should be entitled to a survivor's pension based on the full 40 years of accrued rights rather than the 10 to 15 years since the new law came into force.

Unmarried gay and lesbian people have to date cross-subsidised those pension scheme members who have made use of widow's pension benefits. It would be grossly unfair therefore not to backdate the benefits in the same way that they are backdated for a member who marries at the age of 64.

We take the view that neither public nor private pensions schemes will have taken into account that they currently do not have to pay widow's or widower's pensions to partners a small number of gay or lesbian members. These members have paid the same contributions over the years as have their heterosexual colleagues and they should therefore be entitled to the same benefits. This should apply to occupational private sector as well as public sector pensions, SERPS/S2P and the State Pension.

It is our position that same-sex registered partners of any pension member should be treated exactly the same in law as spouses so that the issues should be simple:

- Upon registration of the same-sex partnership each partner should be treated as if they were the spouse of their partner within the rules of any pension scheme of which either partner is a member. Same-sex partners will therefore opt into those benefits on registration in the same way as a husband and wife do on marriage.
- There is no reason why rights should not extend retrospectively to all schemes because it is assumed in the calculation of pension benefits and therefore presumably in terms of long term pension fund management that members will marry and that a proportion will separate and divorce. It is our view that persons in registered partnerships should not be able to marry at the same time so there should be no duplication of costs.

Injury Benefits

[9.15] We welcome the Government's proposals to end discrimination in this area.

Fatal Accidents Compensation

[9.16-9.18] We welcome and support the Government's proposals to end discrimination in this area, although express concern that non-registered same-sex cohabitants will continue to be discriminated against. Opposite-sex cohabitant can claim even if they are not married and we reiterate that the Government should take the opportunity to end discrimination against same-sex couples throughout.

Criminal Injuries Compensation Scheme

[9.19-9.21] We welcome and support the Government's proposals to end discrimination in this area.

Intestacy

[9.22-9.24] We welcome and support the Government's proposals to end discrimination in this area. We note that unless the legislation contains measures to prevent marriage by a registered partner to a third party, whether in England and Wales or abroad, there would be considerable legal uncertainty in this area and it underlines what we have set out above.

Inheritance

[9.25-9.26] We welcome the Government's proposals to amend the Inheritance (Provision for Family and Dependents) Act 1975

1. to place registered partners in the same category as spouses
2. to place former registered partners in the same category as former spouses.

However, this would still continue discrimination between unmarried opposite-sex cohabitants and unregistered same-sex cohabitants and therefore there should either be a provision as set out above that would provide that same-sex couples would fall into the definitions of cohabitants throughout, or special provision should be made.

Inheritance Tax

In relation to married couples, in general terms, anything one spouse gives the other spouse during their lifetime or leaves in their will is free from inheritance tax. The home is most people's most valuable asset and therefore the most important consequence of the relief is that the surviving spouse will not have to sell their home in order to pay inheritance tax on it.

Susan and Michelle have been in a relationship for 20 years and have two children. They live in a property in Michelle's name in the Home Counties worth £350,000, which Michelle bought 25 years ago for £25,000. They have no other capital. Michelle dies after a long illness during which Susan looked after her and the children while working to finance the family. Michelle's estate is worth £330,000. The inheritance tax payable is £30,000 (at 2003/4 rates: 40% on the value of the estate above £255,000). Given that Susan has no other capital, would have no alternative but to sell her home in order to pay the tax bill at what would be a traumatic time for her and for the children.

If Susan had been married to Michael, no inheritance tax would be payable on Michael's death.

It is unclear from the Government's consultation document whether surviving registered partners will be obliged to pay inheritance tax after their partner dies. The proposals imply that they will not but the position is not spelt out. There is no justification for treating registered partners differently from spouses in relation to this issue and we therefore urge the Government to bring the new law in line with the law for married couples.

Inheritance tax is not a major consideration on separation or divorce as there is a spousal exemption which continues up until a divorce is made absolute. Also, transfers of assets and money on divorce in satisfaction of orders under the Matrimonial Causes Act 1973 are not gifts but are made in satisfaction of claims and thereby exempt from inheritance tax under section 10(1)(a) Inheritance Tax Act 1984. Given the Government's stated intention to give courts the power to order the transfer of assets on the dissolution of a registered partnership these provisions will need to be extended to registered partners.

For inheritance tax gifts made at the time of, or shortly before, marriage are exempt from tax. The exempted gifts are as follows:

1. £5,000 of marriage gifts made by a parent of the bride or groom;
2. £2,500 of marriage gifts made by the bride or groom or a grandparent;
3. £1,000 of marriage gifts by any other person.

Once again, we can see no reason why these exemptions should not be extended to gifts made at the time of, or shortly before, a civil registration ceremony and we urge the Government to make provision for this.

Whilst we acknowledge that the extension of the inheritance tax exemption to same-sex couples who have entered into a civil registered partnership will have revenue-raising implications for the Government, it should be borne in mind that the relevant property will, in due course, pass (either under the terms of a will or the law governing intestacy) to children or to other relatives when the tax will be payable. Therefore extending the exemption in this way will simply have the effect of delaying the payment of the tax rather than removing the obligation that it be paid. The situation is the same as in marriage: No tax is paid for a horizontal transfer in the same generation but full tax is paid when assets are passed onto the next generation.

Tenancy Succession

[9.27-9.30] We welcome and support the Government's proposals to end discrimination in this area, although express concern that non-registered same-sex cohabitants will continue to be discriminated against. Opposite-sex cohabitants can succeed to most tenancies even if they are not married and we reiterate that the Government should take the opportunity to end discrimination against same-sex couples throughout.

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The views expressed do not necessarily express the views of all members of the group.

D. Table of Cases

- German Constitutional Court's Decision on German Partnership Law: BVerfG, 1 BvF 1/01 vom 17.7.2002, <http://www.bverfg.de/entscheidungen> follow link to 17 July 2002 or FamRZ [2002] 1169
- Ghaidan v Mendoza [2002] 4 All ER 1162

E. Table of Statutes

Adoption and Children Act 2002
Chargeable Gains Act 1992
Child Support Act 1991
Children Act 1989
Domestic Proceedings and Magistrates' Court Act 1978
Family Law Act 1996
Human Fertilisation and Embryology Act 1990
Inheritance (Provision for Family and Dependents) Act 1975
Inheritance Tax Act 1984
Marriage Act 1949
Matrimonial Causes Act 1973
Trusts of Land and Appointment of Trustees Act 1996

F. Further Reading

- Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_160/l_16020000630en00190036.pdf
- Norwegian Law: Act No. 40 of 30 April 1993 relating to Registered Partnership: <http://odin.dep.no/bfd/engelsk/publ/handbooks/004071-120027/index-dok000-b-n-a.html>

Act No. 40 of 30 April 1993 relating to Registered Partnership

Section 1

Two persons of the same sex may register their partnership, with the legal consequences which follow from this Act.

Section 2

Chapter 1 of the Marriage Act, concerning the conditions for contracting a marriage, shall apply correspondingly to the registration of partnerships. No person may contract a partnership if a previously registered partnership or marriage subsists.

Chapter 2 of the Marriage Act, concerning verification of compliance with conditions for marriage, and Chapter 3 of the Marriage Act, concerning contraction and solemnization of a marriage, do not apply to the registration of a partnership.

A partnership may only be registered if:

1. at least one of the parties is a Norwegian national and one of them is resident in Norway. Being a national of Denmark, Iceland or Sweden is considered equivalent to being a Norwegian national. The King may decide that nationality of another country which has legislation on registered partnership that corresponds to Norwegian legislation shall be equivalent to Norwegian nationality.
2. at least one of the parties has been resident in Norway for two years immediately prior to registration.

Verification of compliance with the conditions and the procedure for registration of partnerships shall take place pursuant to rules laid down by the Ministry.

Section 3

Registration of a partnership has the same legal consequences as contraction of a marriage, with the exceptions that follow from section 4.

The provisions in Norwegian legislation dealing with marriage and spouses shall apply correspondingly to registered partnerships and registered partners.

Section 4

The provisions of the Adoption Act concerning spouses shall not apply to registered partnerships.

One of the registered partners may however adopt the other partner's child, cf. section 5 a, second paragraph, of the Adoption Act.

Section 5

Irrespective of the provision in section 419 a of the Civil Procedure Act, actions concerning the dissolution of registered partnerships that have been contracted in this country may always be brought before a Norwegian court.

Section 6

The Act shall enter into force on a date to be decided by the King.

- The Government's Consultation Paper can be found online: http://www.womenandequalityunit.gov.uk/research/civil_partnership_consultation_FINAL.pdf