

LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE

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LEGAL POSITION OF SAME-SEX COUPLES IN ENGLISH LAW¹

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1. INTRODUCTION

Eskridge comments that in relation to homosexual relationships:

One European country offering virtually no recognition is the UK, which has a culture which is both puritan and prurient and a politics periodically infused with doses of moralism.¹

This however seems somewhat exaggerated. The political climate has changed significantly over the last number of decades. The election of a Labour Government in 1997, which has also offered the United Kingdom its first openly homosexual cabinet minister, has certainly improved the situation and the future prospects of reform.² This paper will be divided into three main sections. The first will provide an overview of the current situation for homosexual couples as regards the law affecting their relationships as between themselves. The second section will proceed to deal with the current legal situation with respect to children affected by the relationship. This will include adopted children, children brought into the relationship and children born within the relationship. The third and final section deals with the new proposals in the House of Commons and House of Lords with respect to registered partnership schemes.

2. CURRENT SITUATION: THE PARTIES THEMSELVES

2.1. *Immigration*

The current position for same-sex couples under English law is reasonably favourable. Under a Government policy announced in October 1997, a

¹ Many thanks to Miss Rebecca Ebdon for her generous assistance in the preparation of this article.

¹ J. ESKRIDGE, *Equality Practice 2002* (Routledge, 2002, New York), p. 98.

² For a historical insight into attitudes in the United Kingdom towards homosexuality, see I. Sumner, "A comparative analysis and assessment of the gradual recognition of homosexuality with respect to The Netherlands and England" (2001) 9 *MJ*29-56.

same-sex partner is able to be granted permission to remain in the United Kingdom, subject to certain conditions.³ The policy allowed a partner in a stable relationship of four years or more to be granted entry to and remain in the territory of the United Kingdom. Up until June 1999 the period of cohabitation required had been set at four years, but by a concession this has been reduced to two.⁴ In all cases the couple must be unable to be married under English law and admission must be as a partner. On two separate occasions the English courts have had to consider whether or not these restrictions should be strictly enforced. In *ex parte McCollum* the court declined to show any flexibility.⁵ The case concerned a British citizen and his Brazilian partner. All the conditions of the *Concessions for Unmarried Partners* had been met apart from three matters:

- (1) that there would be adequate accommodation for the parties without recourse to public funds,
- (2) the ability of the couple to maintain themselves without recourse to public funds,
- (3) that the applicant held a valid entry clearance in the capacity in which he was seeking to enter the UK.

The position of the Secretary of State, on this application, was clear and straightforward, that is to say that if the only obstacle to the grant of exceptional leave is the absence of entry clearance, then it would be unfair to those who abide by the rules and make proper applications, if the requirement were to be waived in this particular case. In *ex parte Hashim*, on the other hand, the court had reached the conclusion that sending the applicant's partner back to Malaysia would be irrational and illegal as the couple clearly met all the substantive criteria for entry.⁶ The couple had had a serious, long term relationship and were not able to settle in Malaysia since under the Malaysian Penal Code homosexuality was a criminal offence with a sentence of up to 20 years imprisonment and a whipping. The applicant satisfied all the conditions of the *Concessions for Unmarried Partners* apart from not having an entry clearance for the United Kingdom. The judge felt "completely baffled as to what useful purpose would be served by requiring the applicant to travel to Malaysia and to participate in a purely bureaucratic procedure which could only have one outcome."⁷ It seems therefore that the policy will be strictly enforced unless there are overpowering reasons against such a literal application of the policy. Other

³ House of Commons Debate Volume 336 Columns 398-532 (16 June 1997).

⁴ Immigration Rules 2000, §§295^A - 295^V.

⁵ *McCollum v Secretary of State for the Home Department* [2001] EWHC Admin 40.

⁶ *R v An Immigration Officer, ex parte Hashim* [2000] Westlaw 824 112.

⁷ *R v An Immigration Officer, ex parte Hashim* [2000] Westlaw 824 112 at §32.

recent cases have also shown the court's reluctance to grant homosexuals asylum in the United Kingdom on the basis of perceived fear of homosexual persecution.⁸

2.2. Equalisation of the Age of Consent

In 2001, the United Kingdom finally ended the discrimination between homosexuals and heterosexuals in the age of consent for sexual activity. This was by no means a sudden and drastic change of policy. In fact, as early as 1994 an attempt had been made to equalise the age of consent at sixteen. This was, however, defeated in the House of Commons.⁹ Nevertheless, the age of consent was reduced to eighteen by section 145 Criminal Justice and Public Order Act 1994. In 1997 the European Commission of Human Rights resolved that,

There is no objective and reasonable justification for the maintenance of a higher minimum age of consent to male homosexual, than to heterosexual acts and that the application discloses discriminatory treatment in the exercise of the applicant's right to respect for private life under Article 8 of the Convention.¹⁰

The discriminatory age of consent was further criticised by the European Parliament in a resolution adopted initially by the Committee on Citizens' Freedoms and Rights and subsequently by the Parliament as a whole.¹¹ In response, the House of Commons introduced the Sexual Offences (Amendment) Bill on the 28 January 2000 with the aim of equalising the age of consent at sixteen.¹² It received three consecutive defeats at the hands of the House of Lords, before the House of Commons used the power invested in it by the Parliament Act 1911 and enacted the law on the 30 November 2000.¹³ The Act came into force on the 8 January 2001.¹⁴

⁸ *R (on application of Ragman) v Special Adjudicator* [2000] All ER (D) 1634; (2000) Westlaw 1841637.

⁹ A. BARLOW, *Advising Gay and Lesbian Clients* (Butterworths, 1999, London) p. 37.

¹⁰ *Sutherland v UK* (1 July 1997) No.25186/94, §67.

¹¹ European Parliament Resolution A5-0050/2000 p. 26.

¹² 17 in Northern Ireland.

¹³ Sexual Offences (Amendment) Act 2000.

¹⁴ Commencement provisions: section 7(3); Sexual Offences (Amendment) Act 2000 (Commencement No. 1) Order 2000, SI 2000/3303; Sexual Offences (Amendment) Act 2000 (Commencement No 2) (Scotland) Order 2000, SSI 2000/452.

2.3. Anti-Discrimination Legislation: Generally

There is currently no legislation that furnishes protection against discrimination on the grounds of sexual orientation. Nevertheless, attempts have been made to amend current anti-discrimination legislation to include sexual orientation. In May 1996 the Sexual Orientation Discrimination Bill, amending section 3 of the Sex Discrimination Act 1975 and section 1(3) of the Equal Pay Act 1970 passed through all stages in the House of Lords, but failed to achieve a majority in the House of Commons due to the Conservative party view that it was "neither necessary nor desirable".¹⁵ Some commentators, Wintemute being the most prominent, have recommended the introduction of a new Equality Act.¹⁶ Wintemute suggests that an Equality Act would help to consolidate and harmonise the existing protection of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995, as well as at the same time extending the existing protection to discrimination based on religion, age, sexual orientation and gender identity.¹⁷ Wintemute also recommends that the three current Commissions be merged into a single Equality Commission with four directorates (Sex, Race, Disability and Other Grounds) which could then be granted power to enforce the Equality Act.¹⁸ This Equality Act would then extend the same protection to sexual minorities and women, disabled people, religious minorities and older people as is already granted to ethnic minorities.¹⁹

2.4. Anti-Discrimination Legislation: Employment

Workers who are dismissed by an employer after more than one-year employment can bring a complaint of unfair dismissal to an employment tribunal with a right of appeal to the Employment Appeals Tribunal.²⁰ Decisions of this tribunal have established precedents that it can be reasonable for homosexuals to be dismissed because of public prejudice,²¹ the prejudice of colleagues or because their job requires them to work with children.²² Although many of the relevant cases date from over twenty years

¹⁵ House of Lords Debate Volume 571 Column 1731 (1 May 1996).

¹⁶ R. WINTEMUTE, "Lesbians and Gay Inequality 2000" [2000] *EHRLR* 603.

¹⁷ See Victoria (Australia) Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000. Act No. 52/2000.

¹⁸ R. WINTEMUTE, "Time for a Single Anti-Discrimination Act (and Commission)" (1997) 26 *ILJ* 259.

¹⁹ R. WINTEMUTE, "Lesbians and Gay Inequality 2000" [2000] *EHRLR* 603.

²⁰ Employment Rights Act 1996.

²¹ *Boychuk v HJ Symons Holdings Ltd* [1977] *IRLR* 395.

²² *Saunders v Scottish National Camps Association* [1980] *IRLR* 174.

ago, they have not yet been overruled. Trade Unions, on the other hand, have increasingly recognised the need to address homosexual equality, and some voluntary anti-discrimination policies and practices adopted by a wide range of employers have been a result of trade union initiatives.²³

In September 1999 two rulings of the European Court of Human Rights deemed that an outright ban on homosexuals in the armed services was discriminatory.²⁴ On the 12 January 2000, the Secretary of State for Defence told the United Kingdom Parliament that “we have decided that it is right that the existing ban should be lifted”.²⁵ A study conducted by the military itself concluded that the removal of the ban on homosexuals in the armed services had had “no discernible impact” either positive or negative.

At European level, the adoption of Article 13 EC, which contains explicit reference to sexual orientation, allows for the possible enactment of legislation to combat discrimination in a wider range of scenarios than previously endorsed. On the basis of this provision four proposals (two Directives, an Action Programme and a Communication) have already been adopted. By far the most controversial of these were the two Directives. The first implements the principle of equal treatment between persons irrespective of racial or ethnic origin²⁶ whilst the second establishes a general framework for equal treatment in employment and occupation.²⁷ The latter requires national legislatures to implement anti-discrimination legislation on given grounds, including sexual orientation before December 2003. It is said that discrimination on any of the grounds may “undermine the achievement” of EC Treaty objectives, in particular the attainment of “economic and social cohesion and solidarity”.²⁸

The substantive proposals prohibit direct and indirect discrimination and harassment based, *inter alia*, on sexual orientation in hiring, promotion, working conditions, vocational training, and participation in organisations of workers, employers and professionals. Within the United Kingdom, as is the case in a number of other European Union Member states,²⁹ this

²³ J. LEWIS, *Equality for Lesbians and Gay Men* (International Lesbian and Gay Association, 2000, London) p. 6.

²⁴ *Smith & Grady v UK* (1999) 29 EHRR 493; *Lustig-Prean & Beckett v UK* (1999) 29 EHRR 548.

²⁵ *Reuters* (12 January 2000).

²⁶ Directive 2000/43/EC.

²⁷ Directive 2000/78/EC.

²⁸ Recital 11, Directive 2000/78/EC.

²⁹ Germany, Austria, Italy, Greece and Portugal, along with the United Kingdom have no general anti-discrimination measures in place for combating discrimination against homosexuals.

directive is the first time the legislator has had to consider and take action with regard to the needs of gay men and lesbians at work.³⁰

2.5. Education

Section 28 of the Local Government Act 1988 prevents local councils from promoting or encouraging homosexuality through publications, campaigns or in schools. It was introduced under Margaret Thatcher PM in 1988, following tabloid articles about “loony left” councils spending taxpayers money on gay and lesbian groups. No local authority has ever been prosecuted under Section 28, but it has been invoked more than thirty times to prevent projects going ahead.³¹

In 2000, attempts were made by the Government to repeal the legislation.³² However, after a debate in the House of Lords on 24 July 2000, the Government decided not to press for the repeal of Section 28 in the passage of the Local Government Bill, even though the Minister for Local Government and the Regions stated,

We [the Government] are committed to repealing section 28. I have discussed that with colleagues throughout the Government today. We will continue to consider the precise way in which we intend to repeal the legislation.³³

The Local Government Act 2000 has subsequently been passed, without the repeal of section 28.

2.6. Property Law

Life insurance is required for most kinds of mortgage and men who are perceived as possibly homosexual are usually required to take an HIV test

³⁰ For a detailed evaluation of the scope of this provision, see M. BELL, “The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?” (1999) 6 *MJ5*; L. FLYNN, “Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination Be More Equal Than Others” [1999] 36 *CMLRev* 1127; C. BARNARD, “Article 13: Through the Looking Glass of European Citizenship” in: D. O’KEEFE and P. TWOMEY (eds) *Legal Issues of the Amsterdam Treaty* (Hart, 1999, Oxford); P. SKIDMORE, “Improving the Position of Lesbians and Gay Men at Work in the Light of the Framework Directive for Equal Treatment in Employment” in: A. DASHWOOD et al. (eds), *Cambridge Yearbook of European Legal Studies Volume III* (Hart, 2002, Oxford), p. 425-455.

³¹ *BBC News*, 25 July 2000, <http://news.bbc.co.uk>.

³² House of Commons Debate Volume 343 Columns 685 (28 January 2000), House of Commons Debate Volume 344 Columns 432-501 (10 February 2000), House of Commons Debate Volume 345 Columns 127-131 (28 February 2000).

³³ House of Commons Debate Volume 354 Column 1036 (25 July 2000).

before being provided with cover. Consequently, they are required to pay a higher premium on the grounds that they are members of a "high risk group".

The absence of any legal protection against sexual orientation discrimination permits providers of services, such as housing, to discriminate freely. Public housing provision is largely restricted to married couples and people with children. Married and unmarried heterosexual partners have the right to succeed to a local authority or private sector secured tenancy on the death of the tenant partner. In *Fitzpatrick v Sterling Housing Association*³⁴ the House of Lords permitted a homosexual couple to also fall within the definition in the Rent Acts, reversing the ruling of the Court of Appeal, which had held 2:1 in favour of non-recognition. The case revolved around a couple who had lived together for twenty-three years. The tenant of the apartment in which they lived suffered a serious accident and subsequently died. The partner sought to remain in the apartment as a protected tenant under the Rent Act 1977. The issue before the House of Lords was whether the same-sex partner could be regarded as living with the original tenant as "his or her wife or husband". If not, then could he be regarded as a "member of the original tenant's family"?

The House of Lords concluded that the partner was not "living as his or her husband or wife" but by a slim majority of 3:2 that he was a "member of the family" of the deceased partner. The court concluded that it was possible for a stable homosexual relationship to be a familial relationship and that, on the facts of the present case, there was no question that the relationship was indeed such a relationship (the couple had lived together in a stable relationship since 1976). This enabled the partner to remain in the apartment but not on exactly the same terms as a spouse of heterosexual cohabitee would have.

This case was undeniably seen as a turning point in the fortunes of same-sex couples. The House of Lords nonetheless insisted that the decision was simply one of statutory interpretation and not of any more far-reaching consequences. Although the House of Lords extended tenancy protection rights to same-sex couples in the private sector, the implications did not extend to the public sector.³⁵ Public sector housing legislation defines family members exhaustively as spouses, persons living together as husband and wife and relatives by blood or marriage.³⁶ The court also insisted that living together as husband and wife implies a heterosexual relationship. The court used a rather strained interpretation to reach the

³⁴ *Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 705.

³⁵ *Harrogate BC v Simpson* [1986] 2 FLR 91.

³⁶ Housing Act 1985, sections 87 and 113.

conclusion that “living with the original tenant as his or her wife or husband” means his wife or her husband – rather than his husband or her wife.³⁷ Thus the heterosexual paradigm of the legally recognised cohabiting partnership was maintained. The court reasoned that if Parliament had intended same-sex couples to benefit from this legislation then they would have explicitly stated this.

However, on the 5 November 2002, the Court of Appeal overruled the *Fitzpatrick* judgment using provisions laid down in the Human Rights Act 1998. The judgment concerned a flat in Kensington, West London.³⁸ The flat was rented by Mr. Walwyn-Jones from 1983 and shared by his partner, Mr. Mendoza, who had lived with him since 1972. When Mr. Walwyn-Jones died, the landlord wanted to end the statutory tenancy, which was subject to rent restrictions. A West London county court judge ruled that Mr. Mendoza, as a family member, was entitled to an assured commercial tenancy at market rate, but he could not take over the statutory tenancy because the Rent Acts barred same-sex partners from passing it on.

In delivering their judgment, the three Court of Appeal judges, led by Buxton L.J. used the Human Rights Act 1998 to overturn the *Fitzpatrick* decision. The court, bearing the burden of having to construe the European Convention of Human Rights as a living instrument, had to ask itself whether discrimination on the ground of sexual orientation was excluded from the discrimination protection of Article 14. It held,

Looking at that question in 2002, it seemed that there could only be one answer. Sexual orientation was now clearly recognised as an impermissible ground of discrimination, on the same level as the examples ... set out in the text of Article 14.

Using the decision of the European Court of Human Rights in *Salgueiro v Portugal*³⁹ the Court ruled that sexual orientation fell under the more general principles inherent in Article 14. The step thought necessary in *Grant v South West Trains*⁴⁰, of analysing discrimination on the ground of sexual orientation as a case of discrimination on grounds of sex, was therefore not necessary. Parliament had already removed the requirement that heterosexual partners needed to be married to inherit tenancies and it was thus deemed not “for this court to strain at the gnat of including such partners who are of the same sex as each other”.⁴¹ This decision could well

³⁷ *Fitzpatrick v Sterling Housing Association* [1999] 1 AC 27 at 57 *et seq.*

³⁸ *Ghaidan v Mendoza*, 14 November 2002, *The Times Law Reports*.

³⁹ Application Number 33290/96 (2001) 31 EHRR 47.

⁴⁰ Case Number 249/1996, *The Times*, 23 February 1998 [1998] ICR 449.

⁴¹ *Ghaidan v. Mendoza*, 14 November 2002, *The Times Law Reports*.

mean that many claims by homosexuals involving inheritance, property and family matters will have to be revisited by the courts.

2.7. Pensions and Fringe Benefits

All major statutory public sector pension schemes discriminate against unmarried partners. All private sector pension schemes, on the other hand, must conform to Inland Revenue rules. In May 1996 the Inland Revenue issued a Practice Note which clearly stated that survivors' benefits could be payable to unmarried partners, including same-sex partners.⁴²

Employers who provide fringe benefits to partners may, and often do, refuse to provide the same benefits to same-sex partners. The legality of this practice was endorsed when Lisa Grant referred her case to the ECJ on whether her employer was able to refuse the benefit of free travel to her lesbian partner.⁴³ The ECJ held that European law did not prohibit employment discrimination based on sexual orientation.

2.8. Death, Injury and Violence

Upon the death of a partner, English law seems rather unwilling to extend to homosexual cohabitants the same rights which it extends to married couples and heterosexual cohabitants. The Inheritance (Provision for Family and Dependants) Act 1975 allows a party who has lived as the deceased's cohabitant in the same household for at least two years to submit an application for provision from the deceased's estate.⁴⁴ However this provision has been interpreted as confined to heterosexual cohabitation.⁴⁵ A same-sex partner can claim under section 1(1)(e) of the Act as a person who "was being maintained wholly or partly by the deceased".

General provisions in the Fatal Accidents Act 1976 permit certain dependants of a person killed as the result of the defendant's wrongdoing to recover financial loss suffered as a consequence of death. In order to substantiate a claim one must fall within the categories laid down in section 1(3), which include the relationship of husband and wife, as well as "living together as husband and wife". This phrase has consistently been given a heterosexual interpretation.⁴⁶ The Law Commission's proposed reform of the Fatal Accidents Act provides a possibility for homosexual recogni-

⁴² J. LEWIS, *Equality for Lesbians and Gay Men* (International Lesbian and Gay Association, 2000, London) p. 7.

⁴³ *Grant v South West Trains* [1998] ECR I-621.

⁴⁴ Inheritance (Provision for Family and Dependants) Act 1975, section 1(1)(ba).

⁴⁵ A. BARLOW, *Cohabitants and the Law*, (Butterworths, 1997, London) 2nd Edition.

⁴⁶ *Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 705.

tion.⁴⁷ Section 2(2)(c) states that “any person of the same gender as the deceased who has lived with the deceased for such a period in a relationship equivalent to that described in paragraph (b) [*i.e.* 2 years]” will obtain *locus standi* to bring a claim. If this provision is enacted, it will for the first time in England result in the same interpretation being given to equivalent homosexual and heterosexual cohabitation, as long as the above criteria are satisfied.

The Criminal Injuries Compensation Scheme, which allows the partner of the victim of crime to claim compensation, has now been extended to partners of the same sex.⁴⁸ Inheritance tax concessions available to married couples are not accessible. This means that many same-sex couples who have made extensive and thoughtful provision for their partner in their will are unable to avoid a hefty tax bill being presented to the bereaved partner.

Non-molestation and occupation orders are available under Part IV of the Family Law Act 1996.⁴⁹ These are open to entitled and non-entitled applicants.⁵⁰ Under section 36 a cohabitant or former cohabitant with no existing rights to occupy may apply for such an order. However, in accordance with section 62(1)(a) these rights are restricted to couples who live “as husband and wife” and thus, at the moment, given a heterosexual interpretation. Bailey-Harris sees this as a further indication of the hierarchical approach with which family forms are treated under English law, a viewpoint ardently supported by the author.⁵¹

2.9. Problems upon Separation

In the United Kingdom there is no statutory jurisdiction for the reallocation of assets between an unmarried couple on the breakdown of their relationship. There is therefore no equivalent for unmarried couples of Part II provisions of the Matrimonial Causes Act 1973, which operate on divorce. Consequently on the breakdown of an unmarried relationship, a party who desires a distribution of property must invoke general principles of property law, including the equitable doctrines of trust and

⁴⁷ Number 263, Law Commission Report.

⁴⁸ Criminal Injuries Compensation Scheme 2001, §38(a)(i). Available on <http://www.cica.gov.uk>.

⁴⁹ Family Act 1996, sections 33–42.

⁵⁰ Family Law Act 1996, section 33(1)(a).

⁵¹ R. BAILEY-HARRIS, “Same-Sex Partnerships in English Law” in: R. WINTEMUTE and M. ANDENÆS (eds), *Legal Recognition of Same-Sex Partnerships* (Hart Publishing, 2002, Oxford/Portland, Oregon).

proprietary estoppel.⁵² These equitable doctrines are highly intricate, complex and often reasonably expensive to access. These equitable principles were never designed to be used to deal with these complex and intricate situations and place heavy emphasis upon the financial contribution.⁵³

2.10. Marriage

According to section 11 (c) Matrimonial Causes Act 1973, a marriage is void unless consecrated between one man and one woman. This section has created problems for the courts, not just in the area of homosexuals, but also with transsexuals where the courts have continually regarded the gender of a person as that deemed at birth.⁵⁴ However, with the recent decisions in *Goodwin v United Kingdom*⁵⁵ and *I v United Kingdom*⁵⁶ the fixed stipulation of a person's gender on a birth certificate as at birth will be to be reconsidered. Whether this will have further repercussions for the opening-up of marriage to couples of the same-sex is debateable.⁵⁷

2.11. Scotland

Some of the recent dynamism in the past few years seems to have originated from the Scottish Parliament. With an enactment already endorsed giving recognition to homosexual couples⁵⁸ and a White Paper published a few years ago setting out possible further reforms,⁵⁹ it would seem that there is substantial potential for nation-wide reform. Even though the repeal of Section 28 was not successful in the United Kingdom as a whole,

⁵² For more on Equity law see, amongst others, A.J. OAKLEY (ed), *Parker and Mellows: The Modern Law of Trusts* (Sweet and Maxwell, 1998, London, 7th Edition) or P. PETTIT, *Equity and the Law of Trusts* (Butterworths, 1997, London, 8th Edition).

⁵³ *Burns v Burns* [1984] Ch 317 and *Lloyds Bank v Rosset* [1991] AC 107. However attention must be paid to the liberalising case of *Midland Bank v Cooke* [1995] 2 FLR 915. However these principles only apply when an initial contribution to the purchase price has been made. *Corbett v Corbett* [1971] P 83.

⁵⁴ Application Number 28957/94 [2002] 2 FLR 487.

⁵⁵ Application Number 28957/95 [2002] 2 FLR 518.

⁵⁶ MyGlynn believes it could have an impact: C. MYGLYNN, "Families and the European Charter of Fundamental Rights: Progressive change or entrenching the status quo?" (2001) *ELR* 582, whilst the current author believes it will not: I. SUMNER, "The Charter of Fundamental Rights of the EU and Sexual Orientation" (2002) *IFL* 156 at 159.

⁵⁷ Adults with Incapacity (Scotland) Act 2000, Section 87(2)(b). This section provides express statutory recognition of same-sex partnerships for the first time in the UK, although this provision has application only in Scotland.

⁵⁸ Scottish Executive White Paper on Family Law, 52/90D, (14 September 2000).

the Scottish Parliament was successful in repealing this provision, with an overwhelming majority of 99 to 17 votes.⁶⁰

In a case brought on appeal to the Court of Session, a former Royal Air Force (RAF) officer brought an application to an employment tribunal for a finding that he had been a victim of sexual discrimination under the Sex Discrimination Act 1975 when forced to resign from the RAF because of his homosexuality.⁶¹ The applicant founded his case on the basis of the 1975 Act as well as Article 8 and 14 of the European Convention on Human Rights. The Employment Tribunal dismissed the applicant, but the Employment Appeals Tribunal, which delivered its judgment just before the coming into force of the Human Rights Act 1998, held that it was entitled to take account of the European Convention on Human Rights. It held that an interpretation consistent with the Convention should be favoured, that the word “sex” in the 1975 Act was ambiguous and that it should be interpreted to include sexual orientation.

Although the Court of Session reversed this decision it is interesting to note the dissenting judgment of Lord Prosser who stated:

If a male officer X wished or had a partner Y, and indeed if a female officer Z wished or had the same partner Y, the Royal Air Force would require to know the gender of Y before it could say whether that was an acceptable partner for X or an acceptable partner for Z. However, one describes the policy, they would in fact discriminate between X and Z on the basis of the male gender of X and the female gender of Z, and in each case on the basis of whether Y's gender related to X's or Z's by being the same or opposite.⁶²

This dissenting opinion is not only in direct conflict with an earlier decision of the English Employment Tribunal on the same matter⁶³ but also with the case-law from the European Court of Justice.⁶⁴

3. CURRENT SITUATION: CHILDREN

3.1. Adoption

Although it had been held that a homosexual should not be prevented from adopting as an individual under section 15(1) Adoption Act 1976,⁶⁵

⁶⁰ Scottish Parliament Official Report, Session 1, Volume 7, Number 5, Column 601.

⁶¹ *Advocate General for Scotland v MacDonald* (2001) SLT 819.

⁶² *Advocate General for Scotland v MacDonald* (2001) SLT 819 at 827.

⁶³ *Smith v Gardner Merchant* [1998] 3 All ER 852. Also see later case of *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198.

⁶⁴ *Grant v South West Trains Ltd* [1998] ICR 449.

⁶⁵ *Re W (A Minor) (Adoption: Homosexual Adopter)* [1998] 2 Fam 58.

homosexuals were still prevented from submitting a joint application.⁶⁶ An unmarried partner (whether homosexual or heterosexual) was then able to apply for a joint residence order thus conferring parental responsibility on the other partner.⁶⁷ However, single-parent adoptions were not generally regarded by the agencies as favourably as adoption by a married couple, and tended to be used to care for children with special needs who were otherwise difficult to place.⁶⁸ The previous practice in Scotland of the Official Solicitor insisting that homosexual applicants see a psychiatrist has now also been stopped.⁶⁹

Nevertheless, the British courts have adopted an increasingly progressive approach, emphasising the parenting commitment of the same-sex adopters, and has increasingly stressed the need to interpret adoption legislation in a non-discriminatory way.⁷⁰ In one noteworthy case, an adoption order was made in favour of a gay made living in a long-term relationship.⁷¹ The judgment of the Scottish Court of Session was notable for its rejection of homophobic preconceptions, and for taking of judicial notice of the lack of evidence on negative aspects of the same-sex parenting *i.e.* the lack of substantiation for assertions that children will be stigmatised by peers that they are more likely themselves to be homosexual, or that same-sex families are intrinsically less stable or supportive than their heterosexual counterparts.

The recent enactment of the Adoption and Children Act 2002 has been the first major overhaul of English adoption law since the passing of the Adoption Act 1976. The new law provides for joint adoption by unmarried couples, whether of the same or different sex. This change in policy will now bring the United Kingdom into line with the situation in Denmark, Iceland, Sweden and The Netherlands, where joint adoption by homosexual couples is already allowed.⁷² Although the bill was eventually passed by the House of Lords,⁷³ the debate surrounding the passage of the legislation

⁶⁶ Adoption Act 1976, section 14(1A).

⁶⁷ Children Act 1989, section 8.

⁶⁸ R. BAILEY-HARRIS, "Same-Sex Partnerships in English Law" in: R. WINTEMUTE and M. ANDENÆS (eds), *Legal Recognition of Same-Sex Partnerships* (2002, Hart Publishing, Oxford/Portland, Oregon).

⁶⁹ *Re W* [1997] 2 SLR 406.

⁷⁰ *Re W (Adoption: Homosexual adopter)* [1997] 2 FLR 406; *Re E (Adoption: Freezing Order)* [1995] 1 FLR 382.

⁷¹ *AMT (Known as AC) (Petitioner For Authority to Adopt SR)* [1997] Fam 225; [1997] SLT 724.

⁷² Euroletter Number 103, December 2002. http://www.steff.suite.dk/eurolet/eur_103.pdf.

⁷³ By a majority of 215 votes to 184. House of Lords Debate Volume 640 Columns 567-634 (5 November 2002).

was fervent with one Cabinet Minister resigning over the use of the three-line whip.⁷⁴

3.2. Artificial Reproduction

Although attempts to explicitly prevent lesbians and single women having access to donor insemination services were defeated, the Human Fertilisation and Embryology Act 1990 contains provision that clinics are not allowed to provide donor insemination services without taking into account “the welfare of any child who may be born as a result, including the need of that child for a father”.⁷⁵ This provision obviously has a detrimental effect on an application by a lesbian. Since 1995, the Code of Practice of the Human Fertilisation and Embryology Authority has been liberalised in order to focus on the individual clinic’s assessment of the particular case. Although this inevitably has improved the situation somewhat, there still remains a discrepancy in practice, as Bailey-Harris states “a same-sex couple’s access to reproductive technology services is permitted but not guaranteed”.⁷⁶

3.3. Parenting after Separation

The welfare of the child is the “paramount interest” for the courts when deciding issues relating to the parental roles after a family breakdown.⁷⁷ Under the Children Act 1989, provision is also provided for a number of orders.⁷⁸ Previously, the courts had been known for their reluctance to acknowledge the parenting capacity of same-sex couples. For example in *B v B (Minors)(Custody, Care and Control)* it was held that in determining whether as a matter of principle a child should be brought up in a lesbian relationship, the effect upon the sexual identity of the child and the effect of stigmatisation should be considered.⁷⁹ The court’s homophobic assumptions are even further clearly demonstrated when it was stated that since the child in this case had a boyish appearance and manner, and the father continued to play a role in his life, the fears raised concerning the

⁷⁴ “Three-line whips” are imposed on important occasions, such as second readings of significant Bills and motions of no confidence. Failure by MPs to attend a vote with a three-line whip is usually seen as a rebellion against the party and may eventually result in disciplinary action, such as suspension from the parliamentary party.

⁷⁵ Human Fertilisation and Embryology Act 1990, section 13.

⁷⁶ R. BAILEY-HARRIS, “Same-Sex Partnerships in English Law” in: R. WINTEMUTE and M. ANDENÆS (eds), *Legal Recognition of Same-Sex Partnerships* (2002, Hart Publishing, Oxford/Portland, Oregon) p. 610.

⁷⁷ Children Act 1989, section 1.

⁷⁸ Children Act 1989, section 8.

⁷⁹ *B v B (Minors)(Custody, Care and Control)* [1991] 1 FLR 402.

distortion of his psychosexual development or that he would be subjected to taunts or ostracism were not supported by research or the facts.

However, the recent trend towards a more informed approach when dealing with cases involving homosexuals can also be seen in this field too. In *G v F (Contact and Shared Residence)*,⁸⁰ Bracewell J commented that it would be wholly wrong and unsustainable for the nature of the mother's lesbian relationship to reflect against her. The case concerned a child born through assisted reproduction to two committed lesbians who had lived in an established relationship for five years. Bracewell J granted the non-biological parent's post-separation application.

4. NEW PROPOSALS FOR REGISTERED PARTNERSHIP SCHEMES

4.1. *Specific Partnership Legislation*

In recent years there has been an increasing trend in legislation, case-law and socio-political policy towards broader recognition of cohabiting couples who live "as husband and wife".⁸¹ However, although this trend is far-reaching with respect to heterosexual cohabiting couples, this tendency has generally not been witnessed in relation to same-sex couples.⁸² Homosexual partners face discrimination in many areas of their lives, some of which is also experienced by unmarried heterosexual couples.⁸³ However, a number of local authorities across the country have begun to introduce forms of commitment ceremony.⁸⁴

The move by the Greater London Authority to create a partnership register has fuelled the debate as to whether statutory partnership recognition is needed in England and Wales. The register, which has since been used as a basis for the registration schemes in other parts of the country, can be signed by both homosexual and heterosexual couples, but

⁸⁰ *G v F (Contact and Shared Residence)* [1998] 2 FLR 799.

⁸¹ *Harrogate BC v Simpson* [1986] 2 FLR 91.

⁸² See above with relation to the Fatal Accident Act 1976.

⁸³ J. LEWIS, *Equality for Lesbians and Gay Men* (International Lesbian and Gay Association, 2000, London) p. 7.

⁸⁴ At present, the Greater London Authority and Manchester City Council are the only local authorities to operate a register. Other local authorities including Bath & North East, Blackburn, Brighton, Caerphilly, Darwen, Luton, Newport, North Lincolnshire, Richmond-Upon-Thames, Suffolk, Sutton, Swansea and Thurrock have joined up with the Civil Ceremonies Ltd to offer commitment ceremonies to couples of any gender who wish to celebrate their commitment to each other and are unable or do not wish to go through a ceremony of marriage.

has no legal consequences. Even so, it is seen as the “first step” on the road to full equality.⁸⁵

4.2. House of Commons

On 24 October 2001, Jane Griffiths (Member of Parliament for Reading East) sought the leave of Parliament to introduce a bill that would allow any couple, homosexual or heterosexual, to register their relationship. The House approved the motion, introduced under the Ten Minute Rule in which a Member of Parliament is allowed to deliver a speech lasting ten minutes in support of a proposal.⁸⁶ Although the bill was scheduled for second reading on the 10 May 2002, the debate was postponed and the bill has since been dropped.⁸⁷ Although there is only an extremely small chance that the bill will be reintroduced, the tabling of such a motion deserves mention here.⁸⁸

4.3. House of Lords

On the 9 January 2002, Lord Lester of Herne Hill, one of the sixty-five Liberal Democrat Peers, submitted a Bill to the House of Lords for first reading.⁸⁹ The first and most noticeable difference between this proposal and its counterpart in the House of Commons is in the chosen terminology. The House of Commons’ proposal uses the term “civil registration” whereas the House of Lords’ proposal uses the term “civil partnership”. The linguistic difference reveals the uncertainty surrounding even the fundamental questions of what label ascribe to such non-married registered partnerships. In the explanatory notes which accompanied the bill it is stated that the bill is “designed to remedy the lack of protection for cohabiting couples (whether of opposite or same sex) in English law and to give them the opportunity to register a civil partnership. This will enable them to live together within a stable and coherent framework of rights and responsibilities”.

On the 25 January 2002 the bill received a lengthy and emotional debate in the House of Lords.⁹⁰ From the outset it must be noted that the bill received a much warmer reception than the previous debate on the

⁸⁵ Angela Mason, executive director of Stonewall, *Stonewall Press Release* (5 September 2001).

⁸⁶ The vote cast was 179 votes for to 59 votes against.

⁸⁷ House of Commons Debate Volume 373 Column 327 (24 October 2001) and House of Commons Debate Volume 375 Column 640 (23 November 2001).

⁸⁸ See I. SUMNER, “Will the sky fall in above England? The proposed registered partnership bill” (2002) 1 *Tijdschrift voor Familie en Jeugdrecht* 24.

⁸⁹ House of Lords Debate Volume 630 Column 561 (9 January 2002).

⁹⁰ House of Lords Debate Volume 630 Columns 1691-1746 (25 January 2002).

adoption of the Sexual Offences (Amendment) Act 2000.⁹¹ Emphasis was placed upon upholding, supporting and strengthening the institution of marriage, but at the same time many Peers acknowledged the weaknesses in the current legal protection provided for homosexual couples. Particular emphasis was placed upon the inability of cohabiting couples to take advantage of inheritance tax exemptions as provided for married couples. The improvement of the legal status of homosexual couples was undoubtedly apparent throughout the debate, as the majority of Peers felt that it was discriminatory and unjust that homosexual couples were unable to obtain many of the legal consequences attached to the institution of marriage.⁹² This belief was endorsed by those who opposed the bill on grounds that it undermined the institution of marriage⁹³ or failed to provide adequately for children within the relationship.⁹⁴ In response to those who opposed the bill on the basis that it would undermine the institution of marriage, Lord Lester retaliated by saying that this bill would in actual effect support marriage by allowing couples to enter into a civil partnership as a prelude to marriage.⁹⁵

Both in the Lords and also in an article by Lord Rees-Mogg in *The Times*⁹⁶ attention has been drawn to two particular problems with the bill. The first deals with the situation of "close relatives". Lord Rees-Mogg highlighted that in accordance with section 2(1)(d) of the Bill close relatives are excluded from the scope of the proposed legislation. He believes that this bill has "an illiberal prohibition" against close relatives in forming such partnerships and believes that this prohibition should be struck out before the bill gets to Committee Stage. This was echoed by a number of Peers in the House of Lords most notably Lord Williams of Mostyn.⁹⁷ Lord Lester in response to such criticisms proffered two main grounds for the inclusion of such a prohibition. Firstly, the issue of multiple partnerships. "If there are many brothers and sisters, how does one pick out who will be the civil partner? How will one stop them from squabbling with one another and how will one stop abuse?"⁹⁸ The second

⁹¹ House of Lords Debate Volume 619 Columns 9-63 (13 November 2000).

⁹² For example see the speech of Lord Alli: House of Lords Debate Volume 630 Columns 1697-1699 (25 January 2002).

⁹³ Baroness of Buscombe, House of Lords Debate Volume 630 Columns 1736-1740 (25 January 2002).

⁹⁴ See for example the speeches of The Lord Bishop of Winchester, House of Lords Debate Volume 630 Column 1704 (25 January 2002) and Lord Elton, House of Lords Debate Volume 630 Column 1714 (25 January 2002).

⁹⁵ House of Lords Debate Volume 630 Column 1744 (25 January 2002).

⁹⁶ Lord Rees-Mogg, "Caring, sharing and very nearly good law" (21 January 2002, *The Times*).

⁹⁷ House of Lords Debate Volume 630 Column 1741 (25 January 2002).

⁹⁸ House of Lords Debate Volume 630 Column 1745 (25 January 2002).

specified reason was in a belief that the Government would, by not including such a prohibition, be promoting incestuous relationships. However, even with these two problems in mind Lord Lester held himself to be open-minded to the possibility of removing the prohibition at a later stage.

In dealing with the issue of children, Lord Lester believed that this would be better dealt with through specific child orientated legislation.⁹⁹ He acknowledged that the question of children is indeed a vital one but recognised that there must be “dove-tailing” between this Bill and legislation relating to children. It was also recognised and indeed highlighted that the House of Lords and the Government in general must look outside the borders of the United Kingdom. Special attention was given to the situation in The Netherlands, where since 1998 registered partnership has been available for heterosexual and homosexual couples alike and since 2001 marriage has also been opened to homosexual couples.¹⁰⁰

Although the bill has now been removed from Parliamentary business, it is worth paying detailed attention to the provisions since it will no doubt serve as a basis to for any future Government bill submitted in the near future.¹⁰¹

4.3.1. Content of the Bill

The bill itself in comparison to the House of Commons proposal is much longer in length consisting of forty-six sections divided into four separate parts. The first part deals with the formation of a civil partnership, and the second with its legal consequences. The third section lays down a set of regulations concerning the ending of such a civil partnership, whilst the fourth and final section simply explains supplementary definitions, jurisdiction and commencement details. The following sections will clarify some of the most important provisions of the new proposal.

4.3.2. Formation of a Civil Partnership

Section 1(1) of the bill is gender non-specific and therefore allows both homosexuals and heterosexuals to enter into such a partnership. Similar

⁹⁹ For example the Children Act 1989.

¹⁰⁰ Statistics show that 3.8% of all registered partnerships and marriages (2,392 out of 63,176) between April and October 2001 were between homosexual couples but that 80.8% of registered partnerships in the same period were celebrated between heterosexual couples, showing the need for a system outside of marriage to regulate heterosexual partnerships: <http://www.cbs.nl>.

¹⁰¹ *BBC News*, “Gay couples to get equal rights” (6 December 2002). Although a notable difference is that any new proposal will probably only regulate same-sex couples.

conditions to that of marriage are imposed in that bigamy is prohibited, as is the formation of a new civil partnership if one is already in existence. In a marriage both parties must be over the age of 16,¹⁰² whereas the eligible age for a civil partnership is somewhat higher at 18.¹⁰³ A couple wishing to enter into a civil partnership will also have to fulfil an additional cohabitation requirement. Section 2(1)(c) states that the couple must have “for the period of six months ending, with the date of the application for registration of the civil partnership” lived together “(otherwise than merely by reason of one of them being the other’s employee, tenant, lodger or border)”. Civil partnerships between of the prohibited degrees of marriage are also forbidden, although the extent of the prohibition is somewhat less than the list given in the First Schedule to the Marriage Act 1949.

The subsequent five sections detail all the requirements associated with the actual registration of the civil partnership. It can be seen here that this proposal has opted for a somewhat different approach than that proposed in the House of Commons. The Commons proposal uses the present marriage system and simply refers to the provisions in relation to marriage. The Lords’ proposal instead duplicates all the relevant provisions in association with marriage and adapts them to the civil partnership scheme. Therefore, no reference to the term “spouse” is made, which in turn avoids ambiguity in the judicial construction of the term “spouse”. Even with the passage of such a bill the term spouse remains heterosexual. This is equally important when one begins to look at the subsequent provisions related to the legal consequences of civil partnerships.

4.3.3. Legal Consequences of Civil Partnerships

Section 8 of the bill enumerates all rights and responsibilities which the proposed civil partnership would entail. It is stated that this part “has effect for the purposes of establishing a framework for the mutual care and support of the partners to a civil partnership”. Before, one proceeds to the provisions themselves it is worth noting here the absence of immigration rights as well as rights and responsibilities concerning children. However, as already stated in section 2.1, England already recognises cohabiting homosexual couples for the purposes of immigration and therefore the only major difference between married couples and those people having entered a civil partnership would relate to the area of children.¹⁰⁴ The

¹⁰² Marriage Act 1949, section 2.

¹⁰³ Civil Partnerships Bill 2002, section 2(2)(a). This seems somewhat strange since the Sexual Offences (Amendment) Act 2000 recently equalised the age of consensual sex at 16 and there therefore seems little reason for this age difference.

¹⁰⁴ See section 4.3.

following paragraphs outline some of the most significant rights attached to the contract of civil partnership

(1) **Property arrangements:** The bill would give increased rights to those who chose to register their partnership, but would not give equivalent rights as married couples. It is stated that, regardless of whether property was acquired before or after the civil partnership was registered, in accordance with section 9(1) any “dwelling house which either or both of them are entitled to occupy by virtue of a beneficial estate of interest and which the partners occupy” and “any furniture or other functional domestic item which belongs to the partners and which they acquired for the purposes of living together in the same household” will be treated as “communal property”. This means that such property would be treated as being held jointly by the partners in equal shares.¹⁰⁵ It would also, under this bill, be possible for couples to make a “property agreement” which sets out their respective entitlements.¹⁰⁶ In accordance with section 9(3)(a), the property agreement takes precedence over the presumption of property being held jointly by the partners in equal shares.

(2) **Taxation and financial benefits:** The bill would remove discrimination against unmarried couples in the field of inheritance tax,¹⁰⁷ taxation on the transfer of assets,¹⁰⁸ income-based jobseeker’s allowance,¹⁰⁹ working families’ tax credit and disabled persons’ tax credit¹¹⁰ as well as contributory benefits payable under the Social Security Contributions and Benefits Act 1992.¹¹¹

(3) **Pensions:** In respect of occupational pension schemes,¹¹² civil partnership would in accordance with section 26(1) of the proposed legislation, be placed on exactly the same footing as marriage. The same wording is also adopted for personal pension schemes and public sector pensions schemes. Section 28(1), which deals with public sector pension schemes, appears to be somewhat weaker in its terms of reference than the corresponding provisions with respect to occupational and personal pension schemes. However, the appropriate authority is still under a duty to “secure the payment of benefits under the [pension] scheme ... to the person who is the partner in a civil partnership”.¹¹³

¹⁰⁵ Civil Partnerships Bill 2002, section 9(2).

¹⁰⁶ Civil Partnerships Bill 2002, section 10(1).

¹⁰⁷ Civil Partnerships Bill 2002, section 24.

¹⁰⁸ Civil Partnerships Bill 2002, section 12.

¹⁰⁹ Civil Partnerships Bill 2002, section 15.

¹¹⁰ Civil Partnerships Bill 2002, section 16.

¹¹¹ Civil Partnerships Bill 2002, section 25.

¹¹² The definition of which is given in the Pension Schemes Act 1993.

¹¹³ Civil Partnerships Bill 2002, section 28(1).

(4) Occupation and non-molestation orders: The bill would give civil partnerships the same rights as entitled applicants. This is vitally important for homosexual couples who at present fall outside the ambit of the Family Law Act 1996 provisions, as cohabitants in section 62(1) has been given a heterosexual interpretation.¹¹⁴

(5) Rights in the event of death: There are a number of scattered provisions in the proposed bill which relate to the legal consequences after the death of one of the partners. Firstly in relation to fatal accidents. Section 29 would extend the provisions of section 1 of the Fatal Accidents Act 1976 to civil partnerships in exactly the same way as they are currently extended to married and heterosexual cohabiting couples. This would follow the suggestions of the Law Commission in its report "Claims for Wrongful Death".¹¹⁵ Secondly, in terms of intestacy, if one of the partners in a civil partnership dies without leaving a will then the provisions of section 22 would apply to the disposition of the estate. The conditions, provisions and entitlements are exactly the same as if the couples were married and the provisions of the Administration of Estates Act 1925 applied.¹¹⁶ And finally, under section 1 of the Inheritance (Provision for Family and Dependents) 1975 Act, spouses are entitled to bring an action to challenge dispositions made under their spouse's will if they feel that the will does not afford such provision as is reasonable. Civil partnerships would, by virtue of section 23 of the Bill, be placed in exactly the same situation as their married counterparts.

4.3.4. Private International Law Aspects

In contrast with the House of Commons proposal, the House of Lords proposal has avoided a conflict of laws problem by insisting on domicile in England and Wales on the date of the application for registration¹¹⁷ or habitual residence in "England and Wales throughout the period of one year" ending with the date of application for registration.¹¹⁸ These provisions in connection with section 44 which extends jurisdiction only to England and Wales sole jurisdiction to prevent the private international law problems associated with the House of Commons proposal. However, these movements in England and Wales have not gone unnoticed across

¹¹⁴ See section 2.8.

¹¹⁵ Law Commission Report Number 263.

¹¹⁶ See in particular Administration of Estates Act 1925, sections 33(1), 46 and 46(2^a).

¹¹⁷ Civil Partnerships Bill 2002, section 2(1)(b)(i).

¹¹⁸ Civil Partnerships Bill 2002, section 2(1)(b)(ii) and further discussion of the private international law problems with the House of Commons bill see I. SUMNER, "Will the sky fall in above England? The proposed registered partnership bill" (2002) 1 *Tijdschrift voor Familie- en Jeugdrecht* 24-28.

the border and on the 14 January, Robin Harper MSP urged the Scottish Parliament to instigate equivalent legislation to establish a register of civil partnerships in Scotland.¹¹⁹ Private international law provisions are not included in the bill and it would therefore remain to be seen whether the private international law provisions with respect to marriage would be directly applicable to civil partnerships and utilised when dealing with conflicts of law situations.

4.3.5. Ending the Partnership

Part 3 of the bill aims to deal with the ending of a civil partnership. Section 31 allows for the partners to apply for an order to end a civil partnership. This order is referred to as a cessation order and application may be made by one or both of the partners. In a similar way to marriage, a partnership could not be ended before the end of a period of first twelve months.¹²⁰ The order itself differs depending upon whether it is made by the partners jointly or whether made by one of the partners alone. If made by the partners jointly then in accordance with section 32(1)(a) the order can be made in the space of one month. However in the case of order being made by one of the partners the order cannot be granted until the end of a period of nine months.¹²¹ Subsequent provisions outline a number of “intervention orders” which can be made in relation to the entitlement to property,¹²² financial provision¹²³ and pension-sharing¹²⁴ upon the application for a cessation order.

In order for a divorce to be granted, the couples must prove that their relationship has “irretrievably broken down”.¹²⁵ This, in accordance with section 1(2), can only be proven on the basis of one of five established grounds. In relation to cessation orders, all these requirements are notably absent, and it would seem that as long as the required time periods are satisfied then a cessation order can be granted.

¹¹⁹ SIM-2596, Section F, Business Bulletin No 6/2002 (14 January 2002).

¹²⁰ With reference to marriage: Matrimonial Causes Act 1973, section 3(1) and with reference to civil partnerships: Civil Partnerships Bill 2002, section 31(4).

¹²¹ Civil Partnerships Bill 2002, section 32(1)(b).

¹²² Civil Partnerships Bill 2002, section 37.

¹²³ Civil Partnerships Bill 2002, section 38.

¹²⁴ Civil Partnerships Bill 2002, section 39.

¹²⁵ Matrimonial Causes Act 1973, section 1(1).

5. CONCLUSIONS

Whilst the rest of Europe begins to tackle questions of how to deal with the private international law aspects of the emerging forms of registered partnership,¹²⁶ the United Kingdom remains undecided as to what form a regulated partnership within the British Isles should take. The situation for unmarried couples in England and Wales remains poorly regulated, and whilst the courts are beginning to allow heterosexual cohabitants some of the protection offered to married couples, the exclusion of and refusal to extend these benefits to same-sex couples remains dubious. However, the tide is now turning. With decisions such as *Ghaidan v Mendoza*¹²⁷ being handed down by the courts, the future looks at least promising in terms of the possibility of extending current legislative protection to couples of the same-sex. The question now remains not if, but more likely when, will the Government introduce a system of registered partnership.¹²⁸ And when it does so, exactly what sort of scheme will be introduced? Will it be akin to the marriage like institution of The Netherlands,¹²⁹ or instead resemble the contract-based statutory cohabitation in Belgium?¹³⁰ Will it be open to couples regardless of gender as in France,¹³¹ or will it be restricted to couples of the same sex as in Sweden,¹³² Norway,¹³³ Denmark,¹³⁴ and Iceland?¹³⁵ These and many other questions remain open, but watch this space for future developments. It certainly seems that sooner or later the United Kingdom will join the ever increasing list of countries to legally recognise relationships between couples of the same-sex.

¹²⁶ See for example, the Dutch Standing Committee on Private International Law report on the private international aspects of registered partnerships (Ministry of Justice, May 1998). Available in Dutch at http://www.justitie.nl/Images/11_7639.doc.

¹²⁷ *Ghaidan v Mendoza* [2002] EWCA Civ 1533.

¹²⁸ In a recent TV appearance, Mrs Barbara Roche, Minister for Social Exclusion and Equalities, has stated that "gay men, lesbians and bisexuals would be granted many of the same rights as married couples" under a new Government plan for legally-recognised civil partnerships: *BBC News*, "Gay couples to get equal rights" (6 December 2002).

¹²⁹ *Staatsblad*, 1997, Number 324 *tot wijziging van boek 1 van het Burgerlijk wetboek en van het wetboek rechtsvordering in verband met opnemings daarin van bepalingen voor het geregistreerd partnerschap*.

¹³⁰ *Loi du 23 novembre instaurant la cohabitation légale / De wet van 23 November 1998 tot invoering van de wettelijke samenwoning*.

¹³¹ *Loi no 99-944 du 15-11-1999 relative au pacte civil de solidarité*.

¹³² *Lag* (1994:1117) amended by *Ändring* (1995:1245) and *Ändring* (2000:374).

¹³³ *Lov nr 40 af 30-04-1993* amended by *Lov nr 104 af 21-12-2000* and *Lov nr 36 af 15-06-2001*.

¹³⁴ *Lov nr 372 af 07-06-1989* amended by *Lov nr 821 af 19-12-1989*, *Lov nr 360 af 02-06-1999*.

¹³⁵ Act on Registered Partnership Number 87, 12-06-1989.

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