

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's response to the DTI's Women and Equality Unit consultation 'Civil Partnership: a framework for the legal recognition of same-sex couples'

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

INTRODUCTION

1. Liberty welcomes the opportunity to respond to the Department of Trade and Industry consultation. Liberty's belief is that gay men and lesbians are entitled to the same treatment in law as heterosexuals. Our view is that same-sex couples should be permitted to marry¹. The existence of a partnership registration only open to same sex couples effectively creates another official list of a minority group (in the same way that the trans persons register will). However, we accept that at the present time there may not be sufficient broad acceptance of the concept of same-sex marriage for this to be politically feasible. On that basis we welcome the Government's proposal to allow same-sex couples to enter into civil partnerships. We hope and expect that, as in the Netherlands and Belgium, this will be a staging post on the route to the extension of the right to marry to same-sex couples.

2. We welcome the Government's implicit acceptance that the rights and responsibilities attaching to civil partnerships should as far as possible be identical to those that attached to marriage. While we have reservations about some aspects of matrimonial law, we do not consider that this is the appropriate point to air them. It would be unfair to create an institution open to same-sex couples which is better in some regards than marriage.

3. We understand that a form of civil partnership may be of preference and value to a number of heterosexuals with qualms about "traditional marriage". However, if the present limited purpose in creating civil partnerships is to remedy discrimination against same sex couples by making available to them an institution akin to marriage, then we understand the decision not to make the institution available to heterosexual couples. Heterosexual couples already have the institution of marriage. The strength of this argument will diminish if the proposals for civil partnerships are watered down. The more civil partnerships differ from marriage, the more difficult it will be to justify not making the institution available to heterosexual couples.

4. We accept the Government's argument for an opt-in scheme. Couples should be able to make their own choices as to the level of recognition and mutual obligation that their relationship should attract. Just as there are many heterosexual couples who choose not to marry, there will undoubtedly be many same-sex couples who choose not to enter into a civil partnership. It is important that this freedom of choice is preserved for both heterosexual and same-sex couples. Liberty's view is that couples who choose not to marry or enter into a civil partnership should by and large be free to determine their own obligations to each other.

5. That said, Liberty is concerned that in creating civil partnerships the Government will neglect to address the ways in which same sex couples who choose not to enter into a civil partnership are discriminated against when compared to unmarried heterosexual couples. Although the Court of Appeal's judgment in *Mendoza v Ghaidan*² suggests the Human Rights Act may result in the effective neutralisation of many provisions that treat such couples less favourably than unmarried heterosexual couples, it would be distinctly preferable for this to be achieved by clear and consistent legislation. In calling for the Government to introduce such legislation we recognise that in some areas, particularly in social security law, differences in treatment work to the advantage of same-sex couples. The logic of our position is that these differences in treatment should be removed, even where they work to the advantage of same sex couples.

6. We also recognise that there is considerable popular confusion as to the legal status of unmarried heterosexual couples and, moreover, that in some regards the law fails to adequately protect one or both unmarried partners, for example in relation to property rights. We hope that the Government will take steps to deal with these issues. However, we do not consider that it would be appropriate to do so in legislation aimed at remedying discrimination against same-sex couples.

¹ Of course, it would be wrong to force religious groups who do not accept same-sex marriage to offer religious ceremonies, but civil marriage should be open to same-sex couples.

² [2002] 4 All ER 1162

PART A – CREATION OF THE NEW LEGAL STATUS OF REGISTERED PARTNER

Formal requirements

7. Liberty accepts that the same age qualification should apply as applies to marriage (para. 3.2). We also accept that civil partnerships should be exclusive and that a person should not be able to enter into a civil partnership if they are already married or already in a civil partnership. Someone should of course also be prevented from entering into a marriage if they are also in a civil partnership. We urge the Government to take steps to ensure that someone who has entered into the equivalent of a civil partnership abroad should not be able to enter into a civil partnership, or indeed a marriage, in England and Wales.

8. We have reservations about the prohibited degrees of relationship which apply to marriage, particularly that couples who have previously been related by a close relation's marriage should not be able to marry themselves. However, this is not the appropriate point to raise those issues and we accept that the same prohibited degrees of relationship should apply to civil partnerships as apply to marriage.

9. In relation to trans people Liberty has already submitted a response to the Government's draft Gender Recognition Bill. We argued that the conferral of a full gender recognition certificate should not be dependant on a trans person's marriage having been dissolved. We believe that married couples where one partner undergoes gender reassignment should be able to jointly elect for their marriage to be converted seamlessly into a civil partnership, and vice versa.

The registration process

10. Liberty broadly accepts the Government's proposals on the registration process. However, we ask the Government to bear in mind that couples entering into a civil partnership will view this as an important step. Many may well want to mark the occasion with a ceremony that goes beyond the signing of the register and/or a substantial celebration. We therefore urge the Government to ensure that couples will

be allowed to use the same range of licensed venues as are available to couples wishing to marry, and, within reason, to incorporate or append the signing of the register to a ceremony similar to that offered to those choosing civil marriage. The cost of a civil partnership should be the same as the cost of a civil marriage.

11. In relation to privacy issues we accept that it would both be impractical and run contrary to the spirit of civil partnerships to maintain a private register. As the consultation document raises the issue of homophobic assaults we suggest that it be made clear the courts that homophobic motivation is an aggravating feature to be taken into account when sentencing.

12. We hope that the Government will take appropriate steps to ensure that civil partnerships entered into in England and Wales are recognised throughout the United Kingdom, and in other countries besides, particularly across the EU. We also see no reason why English law should not recognise equivalent registered partnerships entered into abroad as civil partnerships in this country. This may involve a detailed analysis on a country-by-country basis of the nature of each country's registered partnership in order to ascertain whether they are equivalent. While it would be wrong not to recognise a broadly equivalent registered partnership entered into abroad, it would also be wrong to impose the rights and responsibilities of a civil partnership on people who have entered into a registered partnership which entails fewer rights and responsibilities. We wonder whether it might be possible, now that a majority of EU countries recognise some form of same-sex partnership, to seek an EU consensus on this issue, which would make cross-border recognition much easier. We also urge the Government to recognise as marriages, marriages legally contracted abroad by same-sex couples.

13. We agree that partnerships which have been entered into under local authority run schemes should not automatically be converted into civil partnerships. Those registering their partnerships under such schemes will have been aware that registration conferred no legal status. It would be wrong to impose the rights and responsibilities of civil partnership on them. However, some couples may have viewed registering their partnership under a local scheme as entering into an important commitment and may be emotionally reluctant to repeat the process. We

therefore suggest that couples who have already registered their partnerships under a local scheme should be allowed to jointly elect to convert their registered partnership into a civil partnership. Only when such a conversion takes place would the rights and responsibilities of civil registration come into being.

The dissolution process

14. Liberty considers that divorce law is currently far too focused on fault and hopes that it will at some stage be reformed to allow married couples to divorce speedily, and hopefully without acrimony, where both agree, without one party having to allege fault on the other's part. Subject to that reservation we accept that the procedures for the dissolution of civil partnerships should, allowing for the dictates of biology, replicate those for marriage.

PART B – RIGHTS AND RESPONSIBILITIES

(We only propose to comment on those areas within this part of the Consultation document where we take issue with the Government's proposals or have other useful comments. Where we make no comment on an area, we can be taken as welcoming the Government's proposals.)

Introduction

14. We are concerned by the Government's failure to address the issue of tax in this consultation. A civil partnership scheme which fails to give civil partners the same rights in tax law as married partners would fall far short of the equality that the Government aspires to. We are particularly concerned about inheritance tax. At present the survivor of a same-sex couple cannot claim the spousal exemption which is available to a surviving spouse. Given the escalation of property prices this frequently results in the surviving partner of a same-sex couple having to sell the home which they and their partner have shared for years. It is vital that the Government address this issue by allowing civil partners the same exemptions as spouses.

During the relationship

15. Liberty welcomes the Government's proposal to give the non-British partner in a civil partnership the same right to enter the UK as the non-British partner to a marriage. However, it needs to be borne in mind that, where the non-British partner is applying to enter the UK from abroad, it may not be possible for the couple to enter into a civil partnership or an equivalent foreign registered partnership before coming to the UK. In order to make this equalisation effective, the non-British partner in a same-sex couple intending to enter into a civil partnership once in England and Wales must be allowed to enter the UK.

16. We note that the consultation document makes no mention of the partners of those allowed to enter the UK on work permits or student visas. We assume that the Government intends to give the civil partners of those entering on work permits and student visas the same rights of entry as spouses. We also hope that, for similar reasons to those in the previous paragraph, the Government will also give a right of entry to those intending to enter into a civil partnership once in the UK with a person holding a work permit or student visa.

17. We also urge the Government to consider the position of refugees. Currently, the law recognises that refugees are entitled to family reunion rights, including being joined by their spouse from abroad. The marriage must have been entered into before the refugee left their country of origin. Civil partners or their foreign equivalent should be given the same rights. However, for the same reasons as before, these rights should also extend to same sex partners who confirm that they intend to enter into a civil partnership once in the UK. Clearly, in many instances the non-refugee partner may be able to claim asylum in their own right.

18. In relation to the question of domestic violence, Liberty endorses the points made about the definition of "cohabitant" by the Lesbian and Gay Lawyers Association (LAGLA) in their response to the Consultation. This is clearly an area where steps are urgently needed to protect the rights of those in same sex couples who choose not to enter into a civil partnership.

19. Regarding parental responsibility, we see no reason why the civil partner of a woman who has a child during the currency of a civil partnership should not automatically have parental responsibility for the child in the same way that a married father would have. This should apply however the child was conceived and whether there is also a known father who might also apply for parental responsibility. The presumption has to be that both partners wanted and planned the child where a child is born to one partner in a civil partnership, and that both partners will bear responsibility for the child's upbringing.

20. As indicated in the introduction, we accept that cohabiting same-sex couples who choose not to enter into a civil partnership should have their income aggregated in the same way as cohabiting heterosexual couples when their entitlement to means-tested social security benefits is being assessed. However, we do not feel it would be fair to remove this advantage that a same-sex couple has while same sex couples remain disadvantaged in relation to unmarried heterosexual couples. To repeat a point made in our introduction, we call on the Government to legislate to remove all discrimination as between same-sex couples who choose not to enter into a civil partnership and unmarried heterosexual couples.

21. Liberty accepts, but regrets, the reasons why the Government cannot place civil partners in the same position in relation to state pensions as married couples until 2010

When a partnership is dissolved

22. In relation to child support we welcome the Government's proposal to treat civil partners in the same way as a married couple. In line with our submission in relation to income related benefits, we take the view that the Government should also ensure that cohabiting same-sex partners who choose not to enter into a civil partnership are treated the same as a cohabiting unmarried heterosexual couple. Regarding property division our view is that the courts should have the same powers to grant ancillary relief on the breakdown of a civil partnership as they have on breakdown of a marriage. We endorse the points made by LAGLA in their response to the Government's consultation.

When one partner dies

23. If and when the current law is amended to allow a “partner” to register a death, this should include a same-sex partner who was not in a civil partnership with the deceased if it is also to include a heterosexual unmarried partner.

24. We endorse the points made by LAGLA regarding survivor pensions in their response to the Government’s consultation. Pension rights are a very significant issue and same sex couples, whether they have entered into a civil partnership or not, are entitled to be treated in the same way as heterosexual couples. We also welcome the proposal to extend the right to claim bereavement damages to civil partners. Not only civil partners but also cohabiting same-sex partners who did not enter into a civil partnership should be entitled to make a dependency claim under section 1(3) Fatal Accidents Act 1976.

25. We welcome the Government’s inheritance proposals in relation to civil partners, but again call for the same rights to be given to a surviving same-sex partner who was not in a civil partnership with the deceased as the law currently gives to a surviving unmarried heterosexual partner.

26. Regarding tenancy succession, we accept that the Government has already shown its commitment to giving same-sex couples the same rights of succession as unmarried heterosexual couples. The rights of same-sex couples who choose not to enter into a civil partnership should not be overlooked when steps are taken to give civil partners the same rights as a married couple.

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