

# Will the sky fall in above England?<sup>1</sup>

The proposed registered partnership bill

Ian Sumner

This article addresses the issue of partnership registration with respect to the jurisdiction of England and Wales. A recent proposal, due to be debated in the House of Commons on the 10th May 2002<sup>2</sup>, would allow for the registration of both homosexual and heterosexual cohabitants adhering to the scheme adopted in The Netherlands. It is proposed in this article to first outline the current situation as regards cohabitants in England and Wales, before briefly outlining the proposed legislation and its possible legal consequences. Although the proposed legislation relates to homosexuals and heterosexuals, the primary focus of this article will be the impact of such legislation on homosexual couples.

## Towards full equality for homosexuals in Britain

In 1997, Stonewall (a British homosexual lobby group) launched its Equality 2000 campaign with the ambitious target of full equality for homosexual Britons by the year 2000.<sup>3</sup> With a distinct lack of any coherent anti-discrimination legislation<sup>4</sup>, a furious debate over the equalisation of the age of consent<sup>5</sup> and a battle between the United Kingdom and its overseas territories over the legalisation of homosexuality<sup>6</sup>, it would seem that these aims are far from being achieved. But this situation is changing. The Government has committed itself to broad principles of equality, emphatically underpinned by the adoption of the Human Rights Act 1998. This Act offers a glimmer of hope for homosexuals, as does the inclusion of a general 'equality' clause in the Northern Ireland peace agreement. Government bodies will, as a result of the peace agreement, be committed to the promotion of equality in relation to various forms

of discrimination, including sexual orientation.<sup>7</sup> When one considers these reforms in combination with the recent legislative proposals in the House of Commons concerning the introduction of civil registration and the establishment of a registered partnership scheme in Greater London<sup>8</sup>, it emerges that the legal situation for homosexual couples is not only changing, but also changing rapidly.

## Marriage

The English legal concept of marriage can be clearly identified in 1866 in the case of *Hyde v Hyde*<sup>9</sup> where Lord Penzance defined marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others'.<sup>10</sup> Even today the courts still draw on this definition. Yet little legal knowledge is required to understand that this definition is, at the very least, a legal fiction. The recent meteoric rise of divorce has prevented marriage from retaining its status as a 'lifelong union'.

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Figures indicate a steady increase in the divorce rate in England and Wales since the turn of the last century, with a peak of thirteen divorces per 1,000 married people in 1999.<sup>11</sup>

Yet marriage prevails as a powerful legal and social concept that protects and supports intimate family relationships through the provision of a unique set of rights, privileges and benefits. It is these benefits that must be examined before one can fully appreciate the legal significance that the denial of marital status imposes upon homosexuals.

### Non-marital relationships

One of the most significant historical effects of marriage was that it fused the legal personalities of husband and wife. Yet the fact that the doctrine ever existed was vehemently criticised, especially by Lord Denning who asserted that 'nowadays, both in law and fact, the husband and wife are two persons, not one'.<sup>12</sup> Nevertheless, there is still evidence of affiliation between marital status on the one hand and special benefits on the other. Even though many of these benefits have also been extended to non-marital relationships, the emphasis placed on marriage remains.

There are far too many areas where a distinction, which subsequently confers a legal privilege, is maintained between cohabitants on the one hand and married persons on the other to be discussed in this article. Therefore, it is aimed to outline just a few of the most important distinctions and indicate some of the more recent trends in assimilating the legal status of cohabitants and spouses.

The relationship of husband and wife has been held to satisfy the requirement of an obligation of confidence necessary to initiate a claim for breach of confidence.<sup>13</sup> A homosexual couple in *Stephen v Avery*<sup>14</sup> has recently satisfied this requirement, with Lord Browne-Wilkinson holding that an injunction could be granted to prevent disclosure of information recounted during a lesbian relationship. Spousal privilege in criminal trials has lessened with the enactment of section 80 of the Police and Criminal Evidence Act 1984, which treats spouses as competent witnesses, but compelling only for the defence, subject to section 80(4).

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 the 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, used in legislation as wide ranging as the

Child Support Act 1991<sup>15</sup>, the Housing Act 1996<sup>16</sup> and the Mobile Homes Act 1983<sup>17</sup>, is consistently given a heterosexual interpretation.<sup>18</sup> The Law Commission's proposed reform of the Fatal Accidents Act provides a possibility for homosexual recognition.<sup>19</sup> Proposed 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.

Under the Family Law Act 1996, both entitled and non-entitled applicants<sup>20</sup> may seek an occupation order containing one of a number of specified provisions.<sup>21</sup> 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.

In the area of home ownership, division of a cohabiting couple's property is governed by reference to

1. Jane Griffiths MP identifies this question, HC Debate volume 373 column 322 (24.10.2001).

2. HC Debate volume 373 column 327 (24.10.2001) and HC Debate volume 375 column 640 (23.11.2001).

3. R. Wintemute, *Lesbian and Gay Equality 2000* (London, Fourth Stonewall Lecture 2000), p. 2.

4. Attempts were made in May 1996 to introduce a Sexual Orientation Discrimination Bill, which would have amended section 3 of the Sex Discrimination Act 1975 and section 1(3) of the Equal Pay Act 1970, but it failed to achieve a majority in the House of Commons: HL Debate volume 571 column 1731 (01.05.1996).

5. HL Debate volume 619 columns 19-63 (13.11.2000).

6. Order in Council of the Privy Council (13.12.2000).

7. First enforcement agency in the United Kingdom with a duty to address homosexual discrimination.

8. The scheme introduced in the Greater London Authority does not however have any legal consequences. It merely serves as evidence of commitment in a stable relationship. This may well be a possible factor that may be used by the courts when deciding whether or not a homosexual couple fulfils the definition of 'living as husband and wife'. For more information about the registration scheme see <http://www.london.gov.uk/mayor/partnerships/index.htm>.

9. (1866) LR 1 P&D 130.

10. *Ibid.* at 133.

11. Her Majesty's Stationery Office (HMSO), 'National Statistics on Marriage and Divorce' (2001, <http://www.statistics.gov.uk>).

12. *Midland Bank Co. Ltd v. Green* (No. 3) [1982] Ch. 529 at 538-9.

13. *Argyll v. Argyll* [1967] Ch. 302 at 322.

14. [1988] Ch. 449.

15. Schedule 1, Part I.

16. Sections 62, 140 and 178.

17. Section 5.

18. *Fitzpatrick v. Sterling Housing Association* [1999] 4 All E.R. 705.

19. Law Commission 'Claims for Wrongful Death' (November 1999, Report Number 263).

20. Section 33(1)(a).

21. Section 33(1)(b).

the rules of trust law rather than family law, as would be the case with married couples. This means that the court's jurisdiction is declarative rather than adjustive, since if a dispute over the ownership of a house arises between cohabitants the first point of reference is the deeds. If the deeds declare in whom the legal estate and beneficial interest is vested then this is conclusive in the absence of either fraud or mistake, restricting the court to a declaration as opposed to an adjustment of the parties' interests in the property.<sup>22</sup> On the other hand, the law protecting married couples applies automatically as soon as they marry and no additional action on their part is required. Furthermore, the provisions of the Matrimonial Causes Act 1973 give married couples retrospective protection as, when a claim is made, the court is empowered to consider all the financial resources of the parties irrespective of the time, method or purpose of their acquisition. These provisions obviously mean that married couples are placed in a significantly better position as regard property acquired during or brought to a relationship than their cohabiting counterparts.

Legal reforms in the late 1980s aimed at equating the legal situation of children born inside and outside of marriage. The Family Law Reform Act 1987 sought to remove the legal disadvantages of illegitimacy<sup>23</sup>, whilst the Children Act 1989 provided a uniform legal code relating to the upbringing of children in both the private and public law.<sup>24</sup> The only areas where children continue to be discriminated against on the ground that their parents were never married relate to hereditary titles, nationality and immigration.<sup>25</sup>

### Current reform

After Denmark became the first country in the world to introduce a system of registered partnership for homosexuals in 1989<sup>26</sup>, many other European countries have begun to adopt similar legislation. By the end of 2001 no fewer than ten countries across Europe have allowed for the regulation or registration of such relationships.<sup>27</sup> Many are modelled along the lines of the Danish system and only allow for the registration of homosexual relationships.<sup>28</sup> Only The Netherlands differs in this respect by allowing for the registration of homosexual and heterosexual cohabitants.<sup>29</sup>

On 24th 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 propo-

sal.<sup>30</sup> The bill will now proceed to a second reading on the 10th May 2002.<sup>31</sup> The Bill itself is extremely short in comparison to a majority of Bills put before the House of Commons, and in that respect compares well with the statutes issued by Denmark and Norway.

### I. Private international law aspects

There are a number of initial points of interest when the Bill is analysed. Firstly, the Act would only cover the jurisdiction of England and Wales.<sup>32</sup> The private international law aspects associated with this are complicated. Section 1(1) states that one of the parties to the registration needs to be resident in the United Kingdom. In accordance with the Interpretation Act 1978<sup>33</sup> this means the jurisdictions of England and Wales, Scotland and Northern Ireland. Let one proceed with the hypothetical situation of two people wanting to be registered under this new Act, one resident in Scotland and the other resident in Northern Ireland. In accordance with section 1(1) they both will have satisfied the residency conditions. However, due to the territorial limitation clause in section 5(3), this registration would only have effect within the jurisdiction of England and Wales. Consequently, as far as the legal text indicates a partnership such as this (*i.e.* between those 'resident' within the United Kingdom, but from parts outside the jurisdiction of the Act) would only be recognised within England and Wales. It is submitted that Scotland would indeed recognise partnerships registered in England and Wales, but this would be a matter for the Scottish Parliament to decide. It would probably be the case that the Scottish Parliament would enact a similar statute along the lines of this proposed bill. The sections have been drafted in this way due to the provisions of the Scotland Act 1998, which reserves such matters to the Scottish Parliament. Therefore, although Westminster can legislate for Scotland, on this particular matter legislative competency has been transferred to Scotland.

The question of what the term 'residence' requires is also a difficult issue for private international lawyers. Although the word has been used in previous statutes, the courts have had immense difficulty in defining exactly what is meant by the term. It seems accordingly that the only useful guidelines are that the word should be given its natural and ordinary meaning and not an artificial legal construction.<sup>34</sup> The term 'ordinary residence' does not connote continuous physical presence, but physical presence with some degree of continuity, notwithstanding occasional temporary absences.<sup>35</sup> The concept used by the Hague Convention of 'habitual residence' has been deemed to be no different to that of 'ordinary residence'.<sup>36</sup> Whether a

person is said to be habitually resident in a particular country is said to be a question of fact to be decided by reference to all the circumstances of any particular case.<sup>37</sup> Although the majority of cases have arisen in the context of child abduction and wardship cases, it does seem that the same definition of habitual residence is used in other contexts.<sup>38</sup> One would hope that the Parliament would delineate the exact boundaries of such a term.

## II. Legal consequences

The bill is divided into five sections. The first deals with the registration of civil relationships, the requirements of residency, the formalities that must be fulfilled before a partnership can be registered and the definition to be used for terms such as registrar.<sup>39</sup> Section 2 states that only those rights detailed in the annexed Schedule will be extended to registered partnerships, whilst section 3 deals with the dissolution of the relationship.<sup>40</sup> The bill itself does not specifically enumerate that this bill will be open to both homosexuals and heterosexuals, but as the gender is left undetermined and the parliamentary discussion includes discussion of homosexual couples as well as heterosexual couples, the parliamentary intent is that this bill should extend to homosexual and heterosexual cohabitants.<sup>41</sup>

The legal consequences of the bill are detailed in the annexed Schedule. The bill enumerates all the legal rights that are extended to registered partners, and in this way differs from those countries which have opted for a subtraction method (i.e. stating that 'registered partnership shall have the same effects as marriage, apart from ...'<sup>42</sup>). In relation to inheritance, section 46 of the Administration of Estates Act 1925 and section 1(1) of the Inheritance (Provision for Family and Dependents) Act 1975 would apply equally to registered partners as to married couples.<sup>43</sup> This is in addition to the extension of the inheritance tax exemption afforded to married couples under section 18 of the Inheritance Tax Act 1984.<sup>44</sup> The same legal status is also afforded registered partners in relation to housing succession<sup>45</sup>, incapacity<sup>46</sup>, pensions and social security<sup>47</sup>, domestic violence<sup>48</sup> and immigration.<sup>49</sup> The recommendations of the Law Commission in its report on claims for wrongful death would also be adopted under section 6 of the Schedule to the Act.<sup>50</sup>

The bill however did not pass its first reading without opposition. Mr. Stuart Bell (Member of Parliament for Middlesbrough) opposed the bill on the basis that marriage in the Church's opinion is between one man and one woman.<sup>51</sup> He believed that the bill was not needed for heterosexuals and that it should not be allowed for homosexuals

22. *Pettit v. Pettit* (1970) A.C. 777.

23. Section 1 lays down two basic principles. Firstly, any subsequent legislation should be construed without regard to the fact that the parents were never married and secondly that any references to a person whose parents were married will include references to a person whose parents were not married.

24. Except in relation to adoption which is still governed by the Adoption Act 1976.

25. The basic rule in the British Nationality Act 1981 is that a child cannot take advantage of his or her father's British nationality unless the child's parents were married to reach other at the time of the child's birth.

26. LOV nr. 372 af 07-06-1989, amended by LOV nr. 821 af 19-12-1989 and LOV nr. 360 af 02-06-1999.

27. The countries and regions to introduce legislation on this issue are: Belgium (statutory cohabitation); Denmark (registered partnership); Finland (registered partnership); France (pacte civil de solidarité); Germany (Lebenspartnerschaftsgesetz); Iceland (confirmed cohabitation); Hungary (common law marriage); Norway (registered partnership); Portugal (de facto unions); Catalonia, Spain (domestic partnership); Aragon, Spain (domestic partnership); Valencia, Spain (de facto unions); Sweden (registered partnership).

28. See for example, Sweden: LAG 1994:1117 amended by Ändring 1995:1245 and Ändring 2000:374; Norway: LOV nr. 40 af 30-04-1993 amended by LOV nr. 104 af 21-12-2000 and LOV nr. 36 af 15-06-2001; Iceland: Act on Registered Partnership, number 87 of 12-06-1996.

29. Staatsblad nr. 324, Wet van 5 juli 1997 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijke Rechtsvordering in verband met opnemng daarin van bepalingen voor het geregistreerd partnerschap.

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

31. HC Debate volume 373 column 327 (24.10.2001) and HC Debate volume 375 column 640 (23.11.2001).

32. Section 5(3), Relationships (Civil Registration) Bill.

33. Section 5 and schedule 1, Interpretation Act 1978.

34. *Gateshead Metropolitan Borough Council v. L* [1996] 3 All E.R. 264 at 267.

35. *Levene v. Inland Revenue Commissioners* [1928] A.C. 217 at 232; *Shah v. Barnet London Borough Council* [1983] 2 A.C. 309 at 341; *R v. Immigration Appeal Tribunal, ex parte Siggins* [1985] Imm A.R. 14; *Re Vassis* (1986) 64 A.L.R. 407.

36. Lord Scarman in *Shah v. Barnet London Borough Council* [1983] 2 A.C. 309 at 343-344, 349.

37. *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 A.C. 562 at 578 (per Lord Brandon); *Re M (Abduction: Habitual Residence)* [1996] 1 F.L.R. 887 at 895, *Re M (Minors)(Residence Order: Jurisdiction)* [1993] 1 F.L.R. 495 at 499; *Re A (Abduction: Habitual Residence)* [1998] 1 F.L.R. 497; *Re B (Abduction: Children's Objections)* [1998] 1 F.L.R. 667; *Re A (Minors)(Abduction: Habitual Residence)* [1996] 1 W.L.R. 25.

38. P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law* (London: Butterworths 1999).

39. Section 1.

40. Sections 4 and 5 are merely explanatory and deal with the short title, the commencement date and the territorial extent as outline previously in this article.

41. HC debate volume 373 column 323 (24.10.2001).

42. Denmark: LOV nr. 372 af 07-06-1989, §3, Stk 1; Sweden: Lag 1994:1117, Chapter 3, §1, Stk 1.

43. These provisions allow for a spouse of the deceased to apply to the court for an order stating that the financial provision allowed for under a will is insufficient to make reasonable financial provision for the applicant.

44. Schedule, section 5.

45. Schedule, section 2: Treated in same manner as spouse for purposes of § 2, Schedule 1 of the Rent Act 1977, Part 4 of the Housing Act 1985 and section 17 of the Housing Act 1988.

46. Schedule, section 3(1): A registered partner shall be treated as next of kin.

47. Only in certain respects will registered partners be treated in the same manner: Schedule, section 4.

48. Schedule, section 7.

49. Schedule, section 8.

50. See note 18 above.

51. HC Debate volume 373 column 324 (24.10.2001).

because 'couples who have a civil registration will, in reality, have all the rights of a married couple'.<sup>52</sup> Consequently the institution of marriage would be undermined and as the Government's position is that marriage is the 'surest foundation for raising children',<sup>53</sup> the bill should not be allowed to continue further. He further argued that the Home Secretary, Mr. Straw MP had given assurance to Parliament that 'no legislation that suggested an acceptance of homosexual marriages would be proposed by the government'.<sup>54</sup>

### A step forwards

The bill, although remarkably similar in scope to the Dutch Registered Partnership Act<sup>55</sup>, it differs in one noteworthy respect. All those rights that are extended to registered partnership are listed and any right that is not listed is not extended.<sup>56</sup> Thus as the number of legal privileges extended to married couples extend far beyond the list given in the schedule to the bill, it can be surmised that the legal consequences of this bill will be less ex-

tensive than the legislative changes in The Netherlands.

The introduction of this bill, whatever the eventual outcome of the debate in the House of Commons, can only be seen as a step forwards. Not only does it show that the English legislature is keen to ensure that its homosexual citizens are legally protected, but also caters for the substantial number of heterosexual citizens who are and have been living in stable relationships without legal recognition.<sup>57</sup>

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52. Mr. Stuart Bell MP, HC Debate volume 373 column 324 (24.10.2001).

53. *Ibid.*

54. HC Debate volume 324 column 22 (25.01.1999).

55. See note 28 above.

56. For example the right for married couples to jointly adopt under section 14 Adoption Act 1976.

57. Approximately 25% of unmarried men and women in the United Kingdom aged 16-49 were cohabiting in 1999: Social Trends 29 (London, HMSO, 1999).