

**The consultation on Civil  
Partnership Registration:  
analysis of the responses**

**THE CONSULTATION ON CIVIL PARTNERSHIP  
REGISTRATION:  
ANALYSIS OF THE RESPONSES**

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# CONTENTS

EXECUTIVE SUMMARY	4
CHAPTER 1: OVERVIEW OF RESPONSES TO THE QUESTIONS RAISED IN THE CONSULTATION	5
CHAPTER 2: THE CONSULTATION	8
<b>PART 1: CIVIL PARTNERSHIPS IN PRINCIPLE</b>	11
CHAPTER 3: AGREEMENT IN PRINCIPLE	12
CHAPTER 4: MARRIAGE AND PARTNERSHIP	16
<b>PART 2: UK AND SCOTS LAW</b>	23
CHAPTER 5: THE PROPOSED LEGISLATIVE MECHANISM	24
CHAPTER 6: RESERVED AND DEVOLVED ISSUES	31
<b>PART 3: DETAILED PROVISIONS</b>	35
CHAPTER 7: REGISTERING AND DISSOLVING A PARTNERSHIP	36
CHAPTER 8: LEGAL AND POLICY CONSEQUENCES	44

## EXECUTIVE SUMMARY

**1. The consultation.** The consultation on civil partnerships put thirteen questions to the public. The responses are presented in this report. 323 responses were received, including 222 from individuals and 101 from organizations, including LGBT organisations, religious organisations, local authorities, registrars, legal sector, NHS bodies and others.

**2. Agreement in principle.** 279 respondents (86% of all responses) agreed in principle with the proposed reform. Several felt it did not go far enough. It was seen as promoting equality through parity of esteem for same-sex couples and the reduction of disadvantage. It was also thought to promote long-term, stable relationships. Opponents, beyond the scope of civil partnership registration, expressed general concern about the expression of gay and lesbian sexuality.

**3. The proposed legislative mechanism.** 74% of identifiable responses agreed to the proposal to introduce a Sewel motion. Respondents' support for this approach is based on pragmatism and speed of legislation, while those opposing it emphasise the need for detailed scrutiny and debate of the proposed legislation in the Scottish Parliament. Some disappointment at the shifting of responsibility to Westminster was expressed by supporters and opponents of the proposals.

**4. Devolved and reserved issues.** Over 80% agreed that couples should be able to register their partnership in Scotland, and that there should be mutual recognition of partnerships throughout the UK. Devolved aspects should be based on Scots law. Many felt that the appropriate comparison was with married couples in Scotland, not same-sex couples in England.

**5. Marriage and partnership.** Only 40% of respondents agreed that civil partnerships might undermine marriage. The exclusion of mixed sex couples was often seen as implying inequality, both for mixed sex and for opposite sex couples. It also implied future problems for trans-gender relationships. Some respondents saw the proposal as equivalent to marriage; many of those who did not felt it implied a second-class relationship. Others suggested that equivalent rights should also be available to people in other types of relationship, such as carers and other household members. Opponents of the reform indicated that a broader recognition of caring relationships would more acceptable to them than the current proposal.

**6. Registering and dissolving a partnership.** Though more than 75% of the respondents approved of the detailed proposals in general terms, comments on the provisions yield a range of concerns about the operation and legalities of the scheme. There was uncertainty as to whether registrars were to be asked to perform a ceremony, and if so where such ceremonies might take place. The proposed provisions for dissolution, including minimum waiting periods, judicial separation and provisional orders, were felt to include inappropriate imports from English law.

**7. Legal and policy consequences.** The consultation touches on complex issues of family law. Over 80% of responses approved the related questions in general terms. Responses were guided by principles of equality in such areas as child care. There was some concern that the proposals would lead to serial multiple parental rights. The lack of detail on aliment, property division and succession was noted.

**8. Implications for Scots law.** Recognition of the status of partners in Scots law implies changes relating to many public services. Respondents highlighted issues in medical care, employment rights and the rights of survivors. Other comments identified detailed areas of law requiring consideration for amendment, including criminal law (e.g. bigamy, incest and sexual offences), delict (damages), domestic violence, discrimination and employment law, housing, and rules of evidence. Some general residual provisions would be required.

## CHAPTER 1

### OVERVIEW OF RESPONSES TO THE QUESTIONS RAISED IN THE CONSULTATION

1.1 The consultation on Civil Partnership Registration put thirteen questions to the public. A total of 323 responses were received. Answers to the specific questions are outlined in this chapter.

1.2 The quantitative data are based only on those who responded to the specific questions. Responses were not numerically representative, and some biasing factors are evident; about a third of respondents did not address the specific questions; and, because the questions are multi-faceted, the responses are sometimes ambiguous. They need in consequence to be treated with caution.

***Question 1. We propose that Scottish same-sex couples should be able to register their partnership in order to trigger access to a comprehensive package of rights and responsibilities in both reserved and devolved areas.***

86% of all respondents received agreed with the fundamental principle that same-sex couples should be able to register their partnership in order to trigger access to a comprehensive package of rights and responsibilities. Support for same-sex registration was mainly justified in terms of equality.

***Question 2. If we are to introduce civil partnership registration for same-sex couples, we propose asking the Scottish Parliament to agree to a Sewel motion so that Scottish provisions can be included in any Westminster Bill.***

74% of those who indicated a response agreed that the proposed mechanism for legislative reform, asking the Scottish Parliament to agree to a Sewel motion, provided a pragmatic solution to progress legislative reform in this area.

***Question 3. We believe that Scottish same-sex couples should be able to register their partnership in Scotland rather than having to travel to England or Wales.***

89% of identifiable responses agreed.

***Question 4. We believe that the UK Government should recognise partnerships registered by same-sex couples in Scotland for reserved purposes.***

88% supported the proposal for the recognition by the UK Government of civil partnerships registered in Scotland. The private international law impact of civil registration was also commented upon.

***Question 5. We believe that partnerships registered by same-sex couples in Scotland should trigger access to a comprehensive package of rights and responsibilities in devolved areas that largely mirrors those available to civil registered partners in England and Wales.***

82% of responses agreed. However, many were concerned to ensure that the proposed reforms were firmly based on Scots law, with the rights and responsibilities of civil partnerships being compared or equated with those of married couples in Scotland.

***Question 6. We believe that devolved aspects of civil partnership registration should be based on Scots law.***

87% agreed. Some comment was made regarding inappropriate imports from English law.

***Question 7. We believe that in order to achieve a comprehensive package of rights and responsibilities in reserved and devolved areas, and to avoid difficult cross border issues, that Westminster is best placed to legislate for civil partnership registration in Scotland through a UK Civil Partnership Registration Bill.***

64% agreed, a lower proportion than question 2, which it overlaps. Several respondents expressed concern that if Westminster failed to enact civil partnership legislation, Scotland should proceed regardless.

***Question 8. We recognise the role that marriage has in Scottish society and do not seek to undermine marriage by extending civil partnership registration to cohabiting couples.***

40% of responses agreed, 40% disagreed, and 16% agreed only in part. There was a mixed response as to whether the registration of civil partnerships would undermine marriage. A number of responses supported the widening of civil registration to other couples.

***Question 9. We do not seek to open up marriage to same-sex couples. Instead we are creating a new legal status of civil registered partner for same-sex couples.***

As with question 8, only a minority clearly agreed, with 45% agreeing, 36% disagreeing, and 17% accepting the question in part. There was some concern that the proposals did not go far enough. Others challenged the rationale for separating the concepts of marriage and of civil registration.

***Question 10. We propose that there are set formal requirements to be met by those wishing to register a partnership.***

78% of those that indicated a response supported the proposed formal requirements that would need to be met by those wishing to register a partnership.

***Question 11. We propose that there be a set process for the registration of a civil partnership, the dissolution of a civil partnership and that a civil registered partner be able to inform the registrar of the death of a partner.***

Many respondents considered that civil registration and marriage should be very similar and therefore the comments received focused on difference between the process of registration

and the related rights and duties, to that of marriage. Similarly the proposals for dissolution were also compared with those on divorce in Scotland.

Whether registrars would be required to perform a ceremony as part of the formal process generated an amount of comment. Opinion was divided on the desirability of requiring any form of ceremony.

***Question 12. We propose that civil registered partners are recognised in Scots family law. This covers, parental responsibility, children (residence and contact on dissolution), aliment, property division of dissolution, intestacy, inheritance and damages.***

82% of those that indicated a response supported the recognition of civil partnerships in Scots family law. Comments received highlighted the lack of detail provided in the consultation on exactly how family law would treat registered civil partners. The area that generated most comment was the issue of parental rights and responsibilities.

***Question 13. We propose that civil registered partners are recognised consequentially in other aspects of Scots Law. This includes council tax, local government elections, making financial decisions on behalf of adults with incapacity, hospital visiting and medical treatment, prison visiting, survivor pensions and injury benefits from public service pension schemes, fatal accident inquiry, burial, post mortems and organ retention.***

87% of those that indicated a response supported the need to recognise registered partnerships in other aspects of Scots law. A number of respondents commented on issues covered in the consultation proposals such as medical treatment and the practical importance of the position of next of kin.

## CHAPTER 2

### THE CONSULTATION

2.1 The consultation in England and Wales focused on the mechanics of registration, rights and responsibilities, based on nine questions about principles and practice.<sup>1</sup> The consultation in Scotland, by contrast, has focused on three main areas: the area of family law, the relationship of Scottish law to UK law, and the maintenance of balance between devolved and reserved powers. The consultation paper on Civil Partnership Registration asks questions about each of these areas, with particular emphasis on the resolution of cross-border issues.<sup>2</sup>

2.2 A total of 323 responses were received. The bulk of responses (222) came from individuals. Of the other 101:

- 18 came from LGBT (Lesbian, Gay, Bisexual and Transgender) organisations
- 20 came from religious organisations
- 15 came from local authorities
- 7 came from registrars (including one from the Association of Registrars)
- 9 came from the legal sector
- 7 came from health service organisations (including one from the Royal College of Nursing)
- The remaining 25 came from other organisations, including political parties, trades unions, advice bodies, charities and public sector agencies.

2.3 There is some indeterminacy in this classification: for example, some individual responses clearly came from people working in the legal sector or in religious bodies. Two local authority responses were composed of eight statements from councillors, rather than a corporate response : they have been classified as eight submissions. Four responses, from two individuals at the same address, an LGBT organization and another organisation, were identical. Twenty four individual responses included a standard submission made by those sympathising with Stonewall, an LGBT organization:

*I support the principles in the Scottish Executive's consultation paper on Civil partnership registration and wish to see a timely and effective implementation of the proposals outlined. I support Stonewall Scotland's campaign for same-sex partnership rights.*

2.4 In addition, a submission was received from the Equal Opportunities Committee of the Scottish Parliament. This submission is not equivalent to other responses to the consultation, and cannot be treated as a single consultation response. The EOC took evidence from 12 witnesses and written submissions from 37 others. 22 of those giving evidence to the EOC in writing also made submissions to the consultation. Responses in the EOC's report, and the recommendations of the EOC, have been collated with the thematic issues identified in this report.

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<sup>1</sup> Women and Equality Unit, *Civil partnership: a framework for the legal recognition of same-sex couples*, London: DTI.

<sup>2</sup> Scottish Executive, 2003, *Civil Partnership Registration: a legal status for committed same sex couples in Scotland*, Edinburgh: Scottish Executive.

## THE ANALYSIS OF THE CONSULTATION

2.5 It has been possible largely to classify responses in terms of the thirteen questions asked in the consultation. Respondents were offered a pro-forma which invited them to say whether they agreed, disagreed or agreed in part. Many respondents did not answer in terms of the specific questions, but about two-thirds of responses (the numbers responding to individual questions vary between 182 and 205) are still identifiable in these terms. The numbers and percentages are given in response to particular questions. The main exception to this method is for the first question, which can be taken as a general query as to whether or not respondents agreed with the reforms in principle. 315 respondents gave clear indications of their position, and 279 of those (89% of identifiable responses) approved of the proposals.

2.6 The consultation was not in any sense numerically representative, and caution should be exercised in interpreting the pattern of responses on the basis of majorities or minorities. The validity of a consultation depends, not on numerical representation, but on the extent to which it succeeds in representing and giving voice to diverse groups and shades of opinion. Despite the preponderance of favourable comments, the consultation seems to have been effective in reflecting such a range.

2.7 A quantitative analysis does not really do justice to the range and diversity of responses. Many responses did not follow the pro-forma. Some responses respond to one question with the answer to another; others try to shoehorn issues under ill-fitting headings. The standard form of qualitative analysis is the use of “grounded theory”, where categorisations are drawn from the data.<sup>3</sup> Where issues are raised by several respondents, this has the effect of cross-validation and reinforcement.

2.8 This is the primary basis of analysis. However, it is also true that isolated responses may raise issues of importance: in those circumstances, the weight that is given to them depends on an appraisal of their significance in context, with the possibility of cross-validation through other means. In this consultation, where there are complex legal issues to unravel, particular responses also pose specific problems, cite examples and identify conflicts. In these circumstances we have recorded these concerns and sought to report on issues which require resolution.

### **Ethical issues**

2.9 In the analysis and presentation of both qualitative and quantitative data, certain ethical issues arise. As a general proposition, consultation is an exercise in voice, and there is a strong argument for relaying views in the exact terms in which they are conveyed. Our duty is to relay comments coherently and appropriately, and the selection of material has to reflect the character of the original. This may include statements which go beyond the immediate scope of the consultation, where respondents have been concerned to extend the agenda or place issues in a broader context. The main exception to this principle is where statements act to disempower people. Although we received some intemperate comments on both sides of the argument, we have not relayed material which is insulting or degrading.

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<sup>3</sup> B Glaser, A Strauss, 1967, *The discovery of grounded theory*, Chicago: Aldine.

2.10 In its nature, a consultation is a public exercise, and most respondents have given permission for their identity to be made public. At the same time, several people in the course of the consultation expressed concern about exposure to prejudice and vilification. Consequently, although it may be possible to trace those responsible for responses within the electronic material made public by the Scottish Executive, we have opted not to do so in this report. The exception relates to organizations with a public function, such as the Law Society of Scotland or the Scottish Trades Union Council.

## **PART 1**

### **CIVIL PARTNERSHIPS IN PRINCIPLE**

The first part of this report is concerned with issues of principle. It is presented in two chapters:

Chapter 3. Agreement in principle

Chapter 4. Marriage and civil partnership.

The next chapter, considering agreement in principle, mainly consists of answers to question 1, though because the arguments in response to that question have been arranged thematically, several arguments have been brought together with other related points later in the report. The second chapter is mainly composed of responses to questions 1, 8 and 9, which addressed the relationship between civil partnership registration and marriage.

## CHAPTER 3

### AGREEMENT IN PRINCIPLE

*Question 1: We propose that Scottish same-sex couples should be able to register their partnership in order to trigger access to a comprehensive package of rights and responsibilities in both reserved and devolved areas. (paragraphs 3.1 to 3.11)*

3.1 This is a many-faceted question. It asks about a principle, and about what should be delivered. Respondents picked up on many possible issues. In this section, we have collated general statements of principle. Specific comments on, amongst other points, the focus on “Scottish” couples, confining partnerships to same sex relationships or the distinction between reserved and devolved areas, have been collated with related material in other sections.

3.2 Most respondents were in agreement with the general principle of civil partnership registration. If general expressions of support or disapproval are taken into account, 279 respondents expressed approval, 26 disapproval, and 7 approval in part, with 3 saying they did not know and 8 giving no identifiable response. This indicates general approval by 89% of respondents giving an identifiable response.

### EQUALITY

3.3 The central principle for many of the supporters was a belief in equality. This position was taken, amongst others, by the Equal Opportunities Committee of the Scottish Parliament, several local authorities and LGBT organisations. “Equality” is understood in two main senses: parity of esteem, and the reduction of disadvantage.

#### **Parity of esteem**

3.4 The change in the law was seen by both supporters and opponents as a means of legitimating the status of gay and lesbian relationships. The Equal Opportunities Committee argued that the legal position was closely related to negative public attitudes toward lesbian, gay and bisexual people. They cite a submission from Stonewall: “Although we still need to recognise that social attitudes take a little bit of time to catch up, legislation is without doubt the gateway to social change.”

*Changing the law won't immediately stop prejudice and unkindness, but it will at least take the unfairness and fear out of this particular aspect of our lives, and, like all such legislation, will eventually help to change the attitudes of the wider community. (Individual response)*

*The Committee recommends that the Scottish Executive emphasise the positive message given by the proposals to allow same-sex couples to register their partnerships as part of its wider strategy on mainstreaming equality and combating discrimination. (Equal Opportunities Committee)*

3.5 Some respondents were opposed to the expression of gay and lesbian sexuality, and consequently opposed civil partnerships as a way of legitimating such activity. Some of this opposition was expressed by religious organizations.

*We see it as our Christian and human duty to treat such individuals exactly the same as other men and women. We oppose any discrimination against them and encourage all our people to love, cherish and support such individuals fully. Such support would include encouraging them not to indulge in homosexual practice. (Religious organization)*

3.6 However, religious views were not the only source of objections.

*Few people are in favour of giving homosexuals marriage rights. The minority, of whom the "gay" people truly are, are very vociferous and get far too much attention. (Individual response)*

3.7 Equally, several submissions supported the principle of equality from a religious viewpoint.

*Jesus, in his ministry, quite clearly offered dignity, compassion and acceptance to many who were formerly outcasts in society and therefore denied basic rights. Some Christians argue that this supports these proposals because their intent is to correct injustices perpetrated towards homosexuals. They will help eliminate prejudice and injustice and be for the ultimate health of society. Very few of us would deny these rights and responsibilities to any adult living in any kind of stable, loving and committed relationship. (Religious organization)*

3.8 Religious organisations were divided about the proposals, with 11 supporting the first proposition, and 7 opposing.

### **The reduction of disadvantage**

3.9 Many respondents emphasised the disadvantages experienced by couples in same sex relationships.

*Few people realize how the current legal framework punishes same-sex couples across a wide range of issues in terms of inheritance, bereavement, healthcare, property ownership, maintenance, pension, insurance, personal injury etc. which the proposed scheme would deal with comprehensively. (Individual response)*

*The opportunity for my partner and myself to have legal recognition for our relationship will be important for many reasons. There are practical reasons of inheritance, pension and involvement in aspects of the other's health in later life and eventual burial. There are equality reasons which mean that at last our relationship will have a validity in law which is equivalent to that of heterosexual couples who have the option to become married. (Individual response)*

3.10 The concept of “equality” refers primarily to the removal of disadvantage. Equal treatment is not uniform treatment: it is treatment without bias, prejudice or stigma.<sup>4</sup>

*Our focus is to address the disadvantage faced by same sex couples and ensure legal recognition of those relationships. Whilst achieving equality is not necessarily about treating everyone the same - rather it is about ensuring equal outcomes in a way appropriate to those affected - it is important to ensure that the status of civil partnership is given due recognition and is not allowed to be sidelined as a 'second class' option. (LGBT organization)*

*The Royal College of Nursing welcomes and supports proposals by Government that aim to give equality to all people, and, at the same time, that removes stigma and prejudice, whilst outlawing hatred and discrimination. These rights are currently lacking in relation to people with non-heterosexual orientations and, in particular, in the associated partnership status and recognition for lesbian and gay people. To this end, the proposed legislation for ‘Civil Partnership’ is a significant contribution towards a fairer and more just society. (Royal College of Nursing)*

## **PROMOTING STABLE RELATIONSHIPS**

3.11 The other main argument given in favour of the proposal was that it would recognise and promote long-term, stable relationships.

*It is very important that same-sex couples should have access to a package of rights and benefits that demonstrate the importance of committed relationships in society as a whole. (LGBT organization)*

*I would like to express my love and devotion to a partner as much as a heterosexual couple would. I would like the same commitment and rights as I am just as much an integral part of society. (Individual response)*

## **THE LIMITATIONS OF THE PROPOSAL**

3.12 Supporters of the principle saw the measure as overdue. Many stressed the urgency of the proposals, in response to this and later questions.

*The need for change is long overdue. Governments have for long enough been well aware that the discrimination is unacceptable and frankly, something should have been done about it - on all levels - many years ago. (Individual response)*

3.13 At the same time, some supporters of the principle felt that the measures did not go far enough towards equality. It is unlikely that the qualified nature of civil partnership registration will be considered sufficient by lesbian, gay, bisexual and transgender supporters.

*We all felt that law reform in this area was long overdue and highly welcome the consultation and proposals to date. The general feeling was that these proposals*

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<sup>4</sup> P Spicker, 1988, Principles of social welfare, London: Routledge, ch 10.

*should be supported as far as they go, but merely as the beginnings of reform of marital law and not the end of it. (LGBT organization)*

*These proposals are cowardly and feeble. Anything less than full and equal access to civil marriage is an insult to all gay men and lesbians in the U.K. (Individual response)*

## CHAPTER 4

### MARRIAGE AND PARTNERSHIP

4.1 Discussion of the general principles continued in responses to propositions 8 and 9. There was considerable overlap between the responses to these questions and question 1, and the issues raised in response to all three questions have been collated thematically.

*Question 8. We recognise the role that marriage has in Scottish society and do not seek to undermine marriage by extending civil partnership registration to cohabiting couples. (paragraph 5.7)*

4.2 This is a double-barrelled question. The first part refers to the relationship that the proposals have to the protection of marriage; the second part, to the position of unmarried couples of different sex. These issues are separable, and they were addressed separately in the consultation responses.

4.3 This question was the most often rejected by respondents. Of 205 identifiable responses, 82 respondents agreed (40%), 81 disagreed, (40%), 32 agreed in part (16%), and 10 (4%) did not know. The extensive disapproval reflects the balance of support among respondents for LGBT rights.

#### **The protection of marriage**

4.4 A limited number of submissions supported the contention, notably including religious organisations of various denominations.

*We believe that the proposal will undermine marriage and would constitute a basic redefinition of marriage, which is the basic cell of society. Legal recognition of same-sex partnership would effectively be a redefinition of marriage, making it an institution devoid of essential reference to factors linked to heterosexuality; for example procreation and raising children. Such recognition will also expose the young to erroneous ideas about sexuality and marriage, undermine public morality and contribute to the spread of the phenomenon. (Catholic Church submission to the Equal Opportunities Committee)*

*Marriage has a unique and special place in society. ... Whilst we agree that two adults should be free to live together in the manner they choose and be able on a case by case basis to qualify for some rights, we do not believe that they should receive the endorsement of their relationship by the state. We believe that the introduction of a system of civil partnership registration effectively entails endorsement of the relationship (and) implies a moral equivalence to marriage. (Religious organisation)*

4.5 Many more respondents were dismissive of the premise. This reflects the strong representation of supporters in the consultation.

*We do not see how allowing civil partnership to couples who would not otherwise marry undermines anyone else's marriage, or the institution of marriage in general.*

*Civil partnership will encourage more stable relationships amongst those who would not otherwise be married. (LGBT organization)*

*Such a step would not, in our view, weaken marriage. If, as we believe, marriage is important and valuable, it will not depend on the exclusion of others from registered partnerships for its survival. (Religious organisation)*

## **Religion and marriage**

4.6 The understanding of marriage was seen by some in the main context of religion. Some respondents attributed the roots of opposition to religious organisations.

*We live in a secular state. (Individual response)*

*This is pandering to religious inspired discrimination. (Individual response)*

4.7 There were responses from religious organisations which sought to preserve the status of marriage, and some of these are reported above, but equally several religious organisations sought to establish support for the principle of single-sex marriage.

*Relationships are sacred, and honouring them does not necessarily mean hastening the demise of the family or the dissolution of civilised society, or the abdication of all moral responsibility. It can mean living more justly, more humanely, affirming what we know to be good. It is possible for Roman Catholics to support civil registration partnership legislation remaining in the Church and true to Christ. (Religious organisation)*

*Some Churches already refuse to recognise marriages that are perfectly legal under existing law (for example, the refusal of the Roman Catholic Church to allow divorced people to remarry in Church). Other faith communities (for example Islam, in certain circumstances) allow polygamous marriages which are, in general, not recognised in Scots law. ... Faith can be just as important in the lives of many LGBT people as it is for many heterosexual people. As a Church we seek to encourage all people to integrate their spirituality and their sexuality and/or gender identity. The proposal would be yet another step towards dividing these issues, to the serious detriment of many people of faith within the LGBT communities. (Religious organisation)*

## **THE POSITION OF COHABITING HETEROSEXUAL COUPLES**

4.8 The second part of proposition 8 refers to the position of “cohabiting couples”. The proposition raises two issues. The first is whether the measure should be extended to heterosexual couples; the second, what the effect would be on marriage. There were contrasting views. A minority were opposed in principle to the whole idea of civil partnerships; some people argued that this was not a priority, because marriage was otherwise available to such couples; but many others felt that there was no realistic possibility of equality unless couples of opposite sex were included.

## Extension to heterosexual couples

4.9 Some respondents felt that extension was unnecessary, because couples of different sexes have the option of marriage.

*Unfortunate though it may be for those persons within different sex relationships who cannot "face" the thought or act of marriage as it now stands I see that they do now have a choice of civil marriage or church weddings - and that is denied us and I don't want to subvert it. We wish our relationship to be recognised and for us to take mutual responsibilities in return for rights and prerequisites of a registered civil relationship. (Individual response)*

4.10 Rather more respondents felt that mixed sex couples should be able to enter civil partnerships.

*We support the provision of civil registered partnerships to cohabiting couples so that they may, if they chose benefit from the rights and responsibilities that this legislation will bring to same-sex couples (Unison)*

4.11 Extension to heterosexual couples was seen as a simple means of making the legislation apply consistently across different groups.

*If the aim is equality (and if it isn't, it should be) then civil registration should be available to opposite sex partners too. (Individual response)*

4.12 The primary argument for extension was equality. Some respondents were concerned that the proposed arrangements put heterosexual couples at a disadvantage:

*The proposals would appear to be discriminatory in that they exclude heterosexual couples, many of whom are in stable family relationships and do not wish to go through a formal marriage, they will be denied the opportunity to register their partnerships. There is surely a case to afford heterosexual couples the same rights and privileges as any other section of society, in fact this would consolidate the position of their relationships, their rights and the rights of their children. (Registrar)*

*More rights than cohabiting couples? Ludicrous! (Local authority councillor)*

4.13 Others felt that excluding heterosexual couples would imply inequality for same-sex couples. Such an arrangement would necessarily be different, and of lower status, than one which was available to others by choice.

*What current proposals will do is retain the two-tiers of society, with heterosexuals on one side and homosexuals on the other! These proposals are socially divisive. The only way around this is to give everyone the same rights. (Individual response)*

*Everyone who responded wanted to see equality in the law – one set of rights and responsibilities given to both same-sex and opposite-sex couples. Respondents felt that creating two different forms of union between couples avoided the central issue of equality. We felt that the general public will perceive this as a second-rate form of marriage, exacerbating existing prejudices. Everyone agreed that there should be*

*one set of rights for opposite-sex and same-sex couples and most respondents felt that the creation of a new distinct legal status creates new and unnecessary inequalities. (LGBT organization)*

4.14 The Equal Opportunities Committee recommended that these issues should be included in consultation on the Executive's forthcoming Family Law Bill. A religious organisation commented:

*If the answer is that this will be dealt with under future family law legislation we would argue that for reasons of equity as well as logic the "access" for same sex couples should also be dealt with under family law legislation. (Religious organisation)*

## **THE IMPACT OF THE EXTENSION ON MARRIAGE**

4.15 There was some scepticism as to whether extension to heterosexual couples would undermine marriage, on the basis that those couples who preferred civil partnership would be unlikely to marry otherwise.

*Extension of Civil Partnership to cohabiting heterosexual couples will not undermine marriage, it will simply give them more options. (Individual response)*

*The evidence from the Netherlands, where civil partnership has been open to mixed-sex as well as same-sex couples since 1998, is that the number of marriages does not fall, and the number of mixed-sex civil partnerships is relatively small. (LGBT organization)*

## **OTHER ISSUES**

4.16 Two other particular issues were raised. The first was the case of gender reassignment, which if civil partnerships were not available to mixed-sex couples would lead to civil partnerships being annulled.

*This brings particular difficulty when considering transgendered (trans) people. If proposed gender recognition laws pass, this will put some people in the position of having to legally dissolve their relationship before being able to be issued with a new gender recognition certificate, only to then have to go about getting the relationship legally recognised once more. ... Trans people in transition ... need all the stability available to them during this often unstable time. (Individual response)*

4.17 The second issue concerns what will happen to same sex cohabiters. The issue is double-edged. On one hand, there were potential problems arising from the rights of same-sex couples who have joint interests but have not entered a civil partnership. Two lawyers suggested that as the purpose of registration was to clarify the nature of such relationships, the complexities of such unregistered rights were to be avoided; others suggested that the rights should flow from the relationship.

*Every legal system abroad which has introduced civil partnerships for same-sex couples has at the same time also extended the rules of cohabitation to same-sex couples and we must not forget to do so in Scotland and in the UK also. (Legal sector)*

4.18 On the other hand, there are also liabilities which arise from cohabitation. The Scottish Law Commission pointed out that rules which apply to married and cohabiting couples of different sexes in relation to benefits and means-tests might also be expected to apply to cohabiting couples of the same sex.

***Question 9. We do not seek to open up marriage to same-sex couples. Instead we are creating a new legal status of civil registered partner for same-sex couples. (paragraph 5.8)***

4.19 This was another double-barrelled question. The first part raises the question of the difference between civil partnership and marriage; the second part refers to a new legal status for same-sex couples. Of 201 responses, 91 respondents (45%) approved, 72 (36%) disapproved, 35 (17%) agreed in part, and 3 (1%) did not know.

## **CIVIL PARTNERSHIP AND MARRIAGE**

4.20 Opinions about the relationship of civil partnership to marriage were divided. Some respondents, from both sides of the debate, did not accept that civil partnership was materially different to marriage.

*“We do not seek to open up marriage to same sex partners.” Bunkum! The only reason that the E&W legislation makes the distinction is because, as already practised in London and Manchester, it is just like a marriage ceremony - confetti for fertility and all! (Individual response)*

*The executive should have more guts to stand up to the bigots and call it what it is, marriage. (Individual response)*

4.21 Others did see a difference: civil partnership was a second-class option.

*There is a significant body of opinion in the LGBT communities in Scotland (approximately one third of our survey respondents) who feel that civil partnership, even if it carries very similar legal effects to marriage, is not a satisfactory solution. They see civil partnership as fundamentally unequal, because it is not marriage. It is, at best, a segregated ‘separate but equal’ status. (LGBT organization)*

4.22 Many respondents thought that marriage should be available to same-sex couples.

*The simplest approach from a technical point of view would be to amend the Marriage (Scotland) Act 1977 s 5 to extend marriage to same-sex couples. This latter approach could also deal with the arguably harder case of “married” transsexuals (cf., *Bellinger v Bellinger* [2003] AC 467); and it would offer a cogent solution to issues of jurisdictional comity worldwide, since marriage is a universal modality whereas “registered partnership” is not. (Faculty of Advocates)*

*I don't see why we should not be able to marry. Imagine: "Would you make me the happiest woman on Earth by becoming my civilly registered partner?" "She's having an affair with a registered woman. <shock>" It doesn't seem quite so serious somehow. (Individual response)*

4.23 Some gay people were not interested in “marriage”,

*There is also a significant proportion of LGBT people who do not want to enter a same-sex marriage. They are uncomfortable with marriage because they see it as potentially patriarchal, or based too much on religion. They seek civil partnership, as a gender-neutral and secular form of status providing the necessary legal framework of protection for their partnership and family (LGBT organization)*

and others did not think it mattered what the status was called:

*As long as the legal rights of same-sex civil registered partners are equivalent to those of married couples, it remains simply a question of semantics with marriage being what heterosexual couples do and civil registration is what same sex couples do. (Individual response)*

4.24 Several respondents considered that both marriage and civil partnership registration should be open to all parties, as they are in the Netherlands.

*We question why it would not be reasonable to offer either marriage by way of a civil ceremony to both same-sex and heterosexual couples or to offer only civil partnership agreements to all couples. (LGBT organization)*

*Let us stop the verbal semantics and create marriage for all and civil partnerships for all. (Individual response)*

4.25 Others suggested that the institution of marriage should be replaced in law by civil partnership, with marriage ceremonies reserved to religious organisations.

*Civil partnership registration should be very widely available to people setting up a household together. In part this would have the form of a legally enforceable pre-nuptial agreement (and very like the old marriage contract in Scotland before the mid 1700s). Those entering such an agreement, provided that it met several criteria to be specified (particularly regarding the acceptance of mutual responsibilities etc.) should enjoy the privileges currently accorded to "marriages". Thus Civil Partnership Agreements would become an integral part of all marriages and would, in effect, replace civil marriage (Individual response)*

## **NON-SEXUAL RELATIONSHIPS**

4.26 The presentation of civil partnership registration in the consultation leaves implicit the assumption that same-sex relationships are sexual in nature. Several respondents referred to information, not included in the consultation document, which suggested that neither consummation of the relationship nor sexual infidelity would be considered relevant to civil partnerships. The main exception is the inclusion of prohibited degrees, reflecting the status

of sexual partners in marriage. Apart from the specific issues relating to prohibited degrees, which are considered in a later section, several respondents made the case that civil partnerships should be available to others sharing households, who may also wish, like same-sex partners, to establish rights relating to property, succession and the rights of survivors.

*Justice will only be done if the legislation is sufficiently inclusive and specific: namely that there are no reasons to withhold these rights from persons in non-sexual partnerships. Without such exclusivity the present proposals are not sufficient. (Religious organisation)*

*If any other partnership, except marriage, is recognised then so should other partnerships. It is discriminating against e.g. carers if they are not included in this Bill. (Local authority councillor)*

4.27 Recent legislation elsewhere allows for other types of “significant and caring” unions to be registered, for example between people and their carers.<sup>5</sup> Several religious organisations intimated that analogous arrangements would be a more acceptable approach than civil partnership to dealing with inequalities between different types of couple.

*The consultation paper says homosexual couples “can face significant difficulties in their lives” and cites examples such as “following the death of one partner, the surviving member of a same-sex couple might not have any rights to the property they may have shared with their partner for a significant length of time.” But the fact is there are very many other people who face equally distressing situations who also deserve help. (An) other option which does not destroy the status of marriage is to create a broad legal status of “co-dependency” which carries with it certain rights addressing the economic and social dependency where it exists. (Religious organization)*

*Restricting (civil partnerships) only to those in same sex relationships does not appear to be just and inclusive. What of relationships where members of the same or opposite sex enter into a close long term relationship purely for platonic reasons or where a friend or relation takes on the role of carer? Surely these are equally deserving of the protection and security a Civil Partnership Registration could provide. Opening up Civil Partnership Registration ... would make it quite clear that this broader interpretation was not simply the legalisation of “Gay Marriages”. (Religious organisation)*

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<sup>5</sup> e.g. K Marks, 2004, Gay couples get equal legal rights in Tasmania, Independent 9<sup>th</sup> January p.12.

## **PART 2**

### **UK AND SCOTS LAW**

The second part of this report covers consultation responses to questions 2 through 7. Part 2 is presented in two chapters:

- Chapter 5 The proposed legislative mechanism
- Chapter 6 Reserved and devolved issues

The consultation asked for views on the proposed legislative mechanism of a Sewel motion (questions 2 and 7), which would involve Scottish provisions in a Westminster Bill. Chapter 5 analyses respondents' views on this mechanism, showing that various positions are taken on the proposed mechanism, for a number of different reasons. Chapter 6 analyses responses on registration, recognition and the division of reserved and devolved powers. The consultation sought views on whether registration of civil partnerships should be possible in Scotland; and whether the UK government should recognise such partnerships (questions 3 and 4). Consultation questions 5 and 6 asked for views on the proposed rights in devolved policy areas accruing on registration, and their accordance with Scots law.

## CHAPTER 5

### THE PROPOSED LEGISLATIVE MECHANISM

#### A SEWEL MOTION

5.1 The consultation proposes that legislation to allow civil partnership registration for same sex couples be made through the mechanism of a Sewel motion attached to a Westminster bill for that purpose. This would mean that Scottish provisions be included in an Act of the UK Parliament, rather than legislate separately for Scotland by introducing a bill in the Scottish Parliament. The consultation stresses the mix of devolved and reserved policy areas involved in providing for civil partnership registration for same sex couples; the undesirability of policy differences between Scotland and England/Wales; and the advantages of achieving policy parity in cross-border issues.

5.2 Responses to the consultation covered a range of views, from those supporting the Sewel motion approach to legislation on this issue to those who felt responsibility for legislating should be taken by the Scottish Parliament. In this chapter, the reasons for the variety of responses are outlined.

***Question 2: If we are to introduce civil partnership registration for same-sex couples, we propose asking the Scottish Parliament to agree to a Sewel motion so that Scottish provisions can be included in any Westminster Bill. (paragraphs 4.1 to 4.7)***

5.3 Of 182 respondents making identifiable responses, 133 supported the proposal, 21 were opposed, 25 supported it in part, and 3 did not know. This represents 73% in favour.

5.4 This proposal overlaps with question number 7, which suggests that “Westminster is best placed to legislate for civil partnership registration in Scotland”. Both the questions and the responses focus on a range of issues concerned with the division of labour between Scottish and UK legislatures. The issues include:

- making legislation consistent between different legal systems
- allowing for more rapid action
- whether the Scottish parliament should be scrutinising and debating the issue.
- avoidance of controversy in Scotland.

5.5 The sequence of the questions invited respondents to divide or repeat substantive comments; for the purposes of clarity, the themes have been brought together here. The issues which arise from Westminster taking the lead in legislation are considered in response to question 7.

5.6 Broadly, respondents’ support for the Sewel motion approach is based on pragmatism and speed of legislation, while those opposing the proposed mechanism emphasise the need for detailed scrutiny and high-profile debate of proposed legislation in the Scottish Parliament.

*The Committee seeks assurances from the Executive that sufficient time will be made available for the Scottish Parliament to scrutinise the draft legislation before a debate*

*on a Sewel motion. The Equality Network estimates that “a minimum of six weeks is required between the Scottish Parliament getting access to the proposed Scottish legislation, and the Sewel motion debate itself.” The Committee recommends that the Scottish Executive ensure that sufficient time is made available for the Scottish Parliament to scrutinise the Scottish provisions of the draft legislation before a debate on a Sewel motion. (Equal Opportunities Committee)*

## **Consistency across borders**

5.7 Support for a Sewel motion was strong among a range of respondents, many of whom believed this route to legislation would ensure consistency between Scotland and England / Wales in terms of policy and avoid inequality of rights and discrimination within Britain.

*The Law Society of Scotland cannot comment on whether the Parliament should or should not pass a Sewel motion - that is a political issue. However, the Society is of the view that one single Act covering this issue through the United Kingdom (or at least on a Great Britain basis), would have the advantages of avoiding inconsistencies between the jurisdictions, smoothing cross-border issues and ensuring a comprehensive location for the law on this issue. (Law Society of Scotland)*

5.8 Respondents stressed that geographical mobility across Britain is high and inconsistency of treatment would create problems for same sex couples. These views were nearly always qualified: respondents emphasised the need for legislation to recognise Scots law and fit with the founding principles of the Scottish Parliament.

*Equity of partnerships throughout the UK is important. People travel regularly between countries within the UK and to have your partnership valid within one country and then invalid when you cross the border appears to be a fragmented approach, and on a practical level would be confusing. Scottish provision within a Sewel motion would appear to be a practical approach to partnership rights, but must ensure that Scots law is reflected within the legislation. (LGBT organisation)*

5.9 Opposition to a Sewel motion approach also focused on consistency issues, but those opposed stressed the distinctive nature of Scots family law and questioned the need for consistency with provisions for England and Wales.

## **Urgency**

5.10 Supporters of the proposed mechanism saw it as the fastest way to introduce civil partnership registration for same sex couples, which many believed was overdue. Again, the support was qualified by many respondents who stated that Scottish legislation would be preferable if speed of provision was not at stake.

*Many of our supporters in Scotland who have been in touch with us have told us that they do not care where the legislation is dealt with, as long as it is dealt with quickly and correctly (Stonewall - submission to Equal Opportunities Committee)*

5.11 Those opposing a Sewel motion approach to legislation suggested that the Scottish Executive ought to take the initiative and that with the will to do so could pass legislation in the Scottish Parliament speedily.

## **Importance of the principle rather than the mechanism**

5.12 On the whole, respondents in favour of the proposed legislation were more concerned about the implementation of the principle that same sex couples should be able to register their partnerships, rather than the mechanism used to bring this about. Some reservations were expressed, however, in particular the need for the Scottish Executive to show leadership in equality issues in Scotland and the need for the Executive to guarantee action, whether or not the UK government decides to legislate on this issue.

*Scotland should be bringing forward this legislation itself. However, as a believer in equality, I would happily accept the 'UK route' if it delivers what is needed for Scottish same-sex couples. This support is however based on the fact that I believe such legislation is long overdue - rather than that I believe it is Westminster's job to produce it. (Individual response)*

5.13 Those respondents in favour of legislation, but not in favour of a Sewel motion, argued that Scotland could offer greater equality if legislation was entirely Scottish-fuelled and that Scottish legislation would be more likely to provide more extensive rights than those proposed in England and Wales.

*We accept that there are practical advantages to using the Sewel Motion. However in the past (such as when abolishing Clause 2A ahead of the abolition of Clause 28 in England & Wales) Scotland has proved more sensitive to the needs of the LGBT community. We regret the fact that using the Sewel Motion will not give Scotland the opportunity to introduce more positive equality such as offering civil partnership to heterosexual couples. (Religious organization)*

## **Scrutiny by the Scottish Parliament**

5.14 Respondents expressed strong concern about a Sewel motion leading to a lack of scrutiny and debate within Scotland.

*There is some concern at the proposal to allow Westminster to legislate for the devolved parts of Scottish civil partnership. The interests of Scottish people should be reflected in Holyrood's responsibility for this issue. The Scottish Parliament must have the opportunity to scrutinise and comment on the proposed legislation in detail. (Local authority)*

*The Scottish Parliament should have the opportunity to scrutinise and comment on the the proposed legislation in detail as this is where the expertise is based. If Westminster makes significant changes, this should be debated at Scottish Parliament as to whether to accept such changes or not. (Individual response)*

5.15 Among those supporting the mechanism, there were qualifications to their support, mainly that there must be sufficient time for the Scottish provisions of a bill to be scrutinised by the Scottish Parliament, particularly to ensure fit with Scots law. Respondents also noted that if Westminster introduced significant changes to the draft bill, then the Scottish Parliament needs to debate these fully.

5.16 Respondents also argued that there should be debate in the Scottish Parliament on whether or not to use devolved powers to introduce legislation in this area of policy.

### **Avoidance of controversy**

5.17 Both proponents and opponents of the proposals saw the mechanism of a Sewel motion as a means of avoiding the issues. Opinion among proponents was divided as to whether this was a good thing: some felt that it would facilitate the legislation, others that specific Scottish legislation may be more favourable to LGBT interests.

5.18 Even among those supporting the proposals, there were concerns that the Sewel motion approach was a way for the Executive to avoid controversy, with some citing the repeal of section 2A of the Local Government (Scotland) Act as a reason for Executive reluctance to progress civil partnership registration for same sex couples on its own.

*This seems the most pragmatic way to progress, so as not to have different paced changes across the UK. However a strong and vocal case needs to be made from the Executive that this is why they are using a Sewel, as the accusation will be levied that the Scottish Parliament is trying to duck the issue. A strong case for equality, which is written into the founding of the parliament needs to be re-emphasised, particularly after the way the proposals were announced in Scotland. (Individual response)*

*Most people in the LGBT community believe that the reason for asking the Scottish Parliament to agree a Sewel Motion is to avoid a negative campaign of the type encountered during the repeal of Section 2A in Scotland. We feel this sends out the wrong message. (LGBT organization)*

5.19 Other concerns included:

- lack of transparency if the Westminster route was followed;
- lack of high-profile debate on the issue in Scotland; and
- insufficient weight given to the founding principles of the Scottish Parliament (especially equality of opportunity).

### **Responsibility of the Scottish legislature**

5.20 Disappointment at the shifting of responsibility to Westminster was expressed both by supporters and by opponents of the proposals. A range of respondents took the view that legislation on equality issues should be the responsibility of the Scottish legislature, with co-ordination with Westminster on reserved matters. Some respondents stressed that the issue at hand is fundamentally a matter for Scots family law, and therefore should be dealt with in the forthcoming Scottish family law bill, or through distinct Scottish legislation.

*The consultation document suffers from the lack of a clear statement from Ministers recognising the inherent value and importance of Civil Partnerships. We need to know that Scottish Ministers are committed to the introduction of Civil Partnerships for Scotland. The document tends to read as if Civil Partnerships are only being introduced in Scotland because similar legislation has been proposed for England and Wales. (STUC)*

*Scottish laws, customs and traditions are different from those in England and in general people have a far healthier attitude to issues concerning the equality and well being of its citizens. The Civil Partnership issue is a classic case of such an issue and as such should be dealt with in Scotland. (Individual response)*

5.21 Opponents of the proposed policy on same sex civil partnership registration emphasised the importance of family life in civil society and called for full debate in Scotland on this matter. Respondents on both sides of the argument stressed the implications of legislation on this issue for other policy areas, for example education, health and the economy, and this underpinned their argument for Scottish responsibility for legislation. It was argued that expertise on devolved matters, and in particular family law, is in Scotland and that is where debate should take place.

## **THE DIVISION OF LABOUR BETWEEN WESTMINSTER AND HOLYROOD**

5.22 The consultation document proposes that a comprehensive package of rights and responsibilities across devolved and reserved areas is best achieved through the Sewel motion approach:

***Question 7: We believe that in order to achieve a comprehensive package of rights and responsibilities in reserved and devolved areas, and to avoid difficult cross border issues, that Westminster is best placed to legislate for civil partnership registration in Scotland through a UK Civil Partnership Registration Bill. (paragraph 5.6)***

5.23 Of 192 responses, 122 (64%) approved this proposal; 44 responses (23%) opposed. 21 (11%) agreed in part, and 5 respondents (3%) did not know. The question concerns:

- whether the UK Parliament should take the lead
- what the balance should be between reserved and devolved issues, and
- how cross-border issues can be resolved.

5.24 Respondents expressed stronger opposition on this point than on question 2, but on the whole many of the same arguments were made either in support or against this proposal as in responses to question 2.

### **This is appropriate to deal with reserved issues**

5.25 As in responses to question 2, many respondents accepted the Executive's arguments about the pragmatic reasons for legislating via the Sewel motion and agreed that in an environment of mixed responsibility for devolved and reserved areas this route is acceptable.

*As the Scottish Parliament does not have competence to legislate in reserved areas, it would make sense for one Bill to take forward legislation for the whole of Great Britain. (Local authority)*

5.26 Several respondents raised specific issues about the relationship of the proposed policy to existing legislation. In particular, there was concern that if the legislation was not made at Westminster, provisions in other legislation on reserved matters that would need amending would remain problematic until Westminster dealt with them.

*Matters devolved to the Scottish Parliament are too limited to allow for legislation of a meaningful package of rights and responsibilities. (Individual response)*

5.27 Nevertheless, subsequent changes to the legislation would still fall within the province of Scotland's devolved powers.

*It seems sensible, because of e.g. tax, social security and immigration issues, for the initial legislation to be Westminster based but, once it is accepted legally that CRP's attract marriage like consequences in public and private law, subsequent regulation and, in particular, subsequent possibilities for consolidation or codification should be firmly in the Scottish Parliament's hands. (Legal sector)*

### **Devolved issues should be dealt with in Scotland**

5.28 There was a great deal of support for the view that devolved issues should be dealt with in Scotland, notwithstanding the arguments for pragmatism and the mix of devolved and reserved issues in this policy.

*A majority of people voted for a Parliament that could address non-reserved issues. If the Scottish Parliament cannot deal with matters of family law then there is little it can deal with. If the Executive is consistent in its approach then this precedent would seem to mean that most family law matters should be dealt with on a UK basis. (Submission to the Equal Opportunities Committee)*

*We voted for devolution so that we could avoid the sometimes inadequate scrutiny given to Scottish matters at Westminster, and so that a Parliament that reflects the votes of the people of Scotland could legislate for the people of Scotland. It is not appropriate to hand back our powers to a Westminster Parliament that has grown unused to legislating on much of Scots law, and to an unelected and historically virulently homophobic House of Lords. (Individual response)*

5.29 Among those in favour of the Sewel motion approach, concerns were expressed about the need for increased input from the Scottish legislature

*A Sewel motion would result in a more concise and easier implementation and so is desirable, however in devolved matters the Scottish Parliament should not be reluctant to improve upon any measures enacted by Westminster. (Advice agency)*

5.30 Other responses rejected completely the Sewel motion approach, primarily because of the feeling that Scotland should take its own position from the start.

*Unclear why legislation must be passed to Westminster as most legislation that partnership legislation would cut across is devolved. We should take this opportunity to draft our own, better Bill – as has already been proposed by Patrick Harvie MSP. (Individual response)*

## **Westminster can lead but provision needs to be made if UK legislation fails**

5.31 Respondents in favour of the proposals expressed concern about this issue and many stressed that in the event of failure of Westminster proposals, the Scottish Executive should go ahead anyway.

*The Committee recommends that in the event that legislation on civil partnership registration is either not brought forward or fails at Westminster, the Scottish Executive make clear its commitment to bringing forward legislation within Scotland. (Equal Opportunities Committee)*

5.32 Others stressed that the Whitehall proposals did not go as far as they had hoped, and for that reason felt the Scottish Executive should take a more pro-active role.

*The Westminster Bill does not include provision for heterosexual couples to register a civil partnership, nor provision for LGBT people to marry. I therefore urge the Executive to consider keeping Scottish legislation in Scotland, and have the courage to embrace a system of equality of access to marriage and civil partnership registration for all. If this is not the route the Executive chooses to follow, then it is essential that the Westminster legislation is carefully scrutinised at every stage to ensure that the proposals are not further eroded. (Individual response)*

5.33 Still others were concerned about the timescale of legislation, fearing that the Westminster route may not prove as speedy as hoped.

*My concern is that if there is a delay in the UK legislation we in Scotland may have missed an opportunity for having our own registration scheme even if this was only for devolved areas. (Individual response)*

5.34 Concerns were also raised about potential ‘watering down’ of the proposals as they progress through Westminster and were keen for the Executive to re-consider use of the Sewel motion.

*Whilst I appreciate that it may be politically expedient to include Scotland within the Westminster legislation, I believe that this is the wrong thing to do. In the interests of equality I am keen for the recognition of same-sex partnerships to happen as soon as possible. I worry that obfuscation and delay in the Westminster parliament may deliver a weakened package, or no package at all. In that case - where would the Scottish Executive stand? I much prefer the model of concurrent legislation in Scotland that is complementary to that in Westminster. Indeed - I believe that the Scottish Parliament would likely treat this issue in a more progressive and fair way than Westminster. (Individual response)*

## CHAPTER 6

### RESERVED AND DEVOLVED ISSUES

#### REGISTRATION IN SCOTLAND

***Question 3: We believe that Scottish same-sex couples should be able to register their partnership in Scotland rather than having to travel to England or Wales. (paragraph 5.2)***

6.1 The question has two main elements. The first is the central principle that civil partnerships will be registered in Scotland. The second concerns whether people will then travel to register partnerships elsewhere. This is less important than the first part, but the form of the question prompted most people to respond to this aspect rather than the other. Of 195 responses, 174 respondents (89%) agreed, 3 (2%) agreed in part, 16 (8%) disagreed and 2 (1%) did not know.

6.2 Registration and recognition in Scotland was generally, if implicitly, supported by proponents of the legislation.

*This is essential not only to offer an appropriate service to same sex couples in Scotland but also to ensure that LGBT lives and relationships are recognised in the wider society as a part of Scottish life not as something 'imposed' or 'imported' from elsewhere. (LGBT organization)*

6.3 The idea of travelling to register produced indignation. It was considered “discriminatory” and “unthinkable”.

#### RESERVED ISSUES

***Question 4: We believe that the UK Government should recognise partnerships registered by same-sex couples in Scotland for reserved purposes. (paragraph 5.3)***

6.4 Of the 190 responses, 167 respondents (88%) agreed, 4 (2%) agreed in part, 13 (7%) disagreed and 6 (3%) selected ‘don’t know’. The force of the argument recommended itself even to opponents:

*If the UK government is establishing such a system and the Scottish Executive is determined to proceed along these lines it would seem logical that civil partnerships registered in Scotland should be recognised for reserved matters by the UK government. This does not alter our view that a registration scheme is unnecessary and should be resisted. (Religious organisation)*

6.5 There are more issues than the narrow question of recognition for reserved purposes. Other related issues include the question of whether a Scottish partnership would be recognised elsewhere in the UK, and whether an English partnership would be recognised in Scotland.

*I assume that a Scottish registration would continue to apply if the couple relocated to another country within the UK. It should not be necessary to re-register locally. (Individual response)*

*When Scotland finally introduce their civil partnership scheme, efforts should be made for reciprocal arrangements to grant recognition to the partnership schemes north and south of the border so far as they are relatively similar. (Individual response)*

6.6 The reserved issues that were most specifically raised were immigration and taxation. On immigration, respondents argued for equivalence to marriage.

*The DTI consultative document (June 2003) and its "responses" document (November 2003) confirmed proposals to: (a) amend British nationality law to put registered same-sex partners on the same footing as spouses. ... (and) b) elimination of the requirement same sex partners, who are registered same-sex partners, for two years' cohabitation prior to the application for Leave to Enter and Limited Leave to Remain. I think these will be very positive steps. However, rule 295G(i) of the Immigration Rules remains discriminatory between married and registered same-sex partners viz. that the current two year probationary period (instead of the one year period for married couples) will remain before the partner can apply for Indefinite Leave to Remain. (Individual response)*

6.7 Taxation is another reserved issue. Current arrangements make joint owners who are not married liable to taxation in circumstances where married couples would not be. The most important of the examples given here relates to inheritance tax.

*My partner and I have lived and worked together for 28 years during which time we have built up a successful business and acquired a reasonable amount of property. We have endeavoured to provide adequate pension funds for our retirement and to maintain a degree of self-sufficiency. When either of us dies, the other partner will face the prospect of having to close down the business and sell the joint home at short notice in order to pay inheritance tax and other taxation. Both of us, in view of our ages have lived most of our lives experiencing various levels of discrimination in private life and at work. We would earnestly hope that a few years of retirement could be spent together without the worry for each other about surviving after bereavement. (Individual response)*

## **International aspects**

6.8 Respondents made the case that recognition beyond the UK had also to be considered.

*The biggest single gap in the proposals is the lack of any proper consideration of private international law problems. What is meant by "Scottish" same sex partners? Is this facility to be available e.g. only to couples each of whom is habitually resident in Scotland? What is the relevance of the law of a party's domicile?. Suppose that one party is domiciled in a country which expressly prohibits entering into a registered same-sex partnership - or doing so when under the age of 21? Could such a person enter into a registered partnership in Scotland? What will be the rules on recognition of foreign impediments to entering into an RCP? What will be the extra-*

*territorial effect of any Scottish prohibitions on entering into an RCP? When will foreign RCP's or the equivalent be recognised in Scotland? Will there be rules on the recognition in Scotland of foreign dissolutions of RCP's? Will there be rules on jurisdiction to dissolve an RCP? (Legal sector)*

*There is also a case for according recognition to similar registration schemes operating in other countries (i.e. not U.K. nations) so far as they also have reciprocal arrangements to grant recognition to England & Wales and Scotland partnership registration schemes. (Individual response)*

## **DEVOLVED ISSUES**

***Question 5: We believe that partnerships registered by same-sex couples in Scotland should trigger access to a comprehensive package of rights and responsibilities in devolved areas that largely mirrors those available to civil registered partners in England and Wales. (paragraph 5.4)***

6.9 Of 192 identifiable responses, 158 respondents (82%) agreed, 16 (8%) disagreed, 17 (9%) and 1 selected 'don't know'. There was much agreement with the sentiment: respondents felt that if the provisions in Scotland were not better than those in England, they should certainly not be worse.

*It is not clear what is meant by 'largely mirrors those to civil registered partnerships available in England and Wales'. It is assumed that this relates to current differences in the relevant legal systems. Clearly any proposal to produce a lesser package of rights in Scotland would be opposed. (Unison)*

6.10 However, many respondents indicated that the question made the wrong comparison: equality implies that the package should mirror marriage in Scotland, not partnership in England.

*This is the wrong question and the wrong aim. The Scottish legislation should not aim to mirror the rights and responsibilities conferred on same-sex couples in England but rather on opposite-sex couples in Scotland. Married couples in England have different (if substantially similar) rights and responsibilities from married couples in Scotland and equality for Scottish same-sex couples is equality of choice and opportunity with opposite-sex couples here in Scotland. (Legal sector)*

***Question 6: We believe that devolved aspects of civil partnership registration should be based on Scots law. (paragraph 5.5)***

6.11 Of 190 respondents, 165 respondents (87%) agreed, 4 (2%) agreed in part, 12 (6%) disagreed and 9 (5%) did not know. This proposal attracted the least disagreement in the consultation.

*We have to be clear which aspect of Scots law the new registration scheme is to be based upon. There are at least three choices: Scots contract law (for registration will be based on mutual agreement), Scots law of commercial partnerships (for*

*registration will create a partnership) and Scots marriage law. But same-sex couples are more analogous to opposite-sex domestic partners than commercial partners or parties to a contract. In other words, it is Scots marriage law that the new system of registration for same-sex couples needs to be based upon. (Legal sector)*

*The rights of the individual which will flow from civil partnership registration will impact on a range of services delivered in accordance with a peculiarly Scottish set of regulations. It is therefore not just appropriate, but rather vital, that all devolved aspects of civil partnership registration are firmly based on Scots law. (Local authority)*

## **PART 3**

### **DETAILED PROVISIONS**

Part 3 includes two main sections. Chapter 7 covers the formation and dissolution of partnerships. Chapter 8 considers the legal and policy consequences of the proposals.

## CHAPTER 7

### REGISTERING AND DISSOLVING A PARTNERSHIP

#### REGISTERING A PARTNERSHIP

*Question 10: We propose that there are set formal requirements to be met by those wishing to register a partnership. These are explained in paragraphs 6.6 to 6.10.*

7.1 Of 194 respondents, 152 (78%) approved, 14 (7%) disapproved, 21 (11%) agreed in part, and 7 (4%) did not know. As this question refers to a wide range of procedures and rules, the general sense of approval can be taken to reflect the general support in responses for the principle of partnership registration rather than the specific points raised.

#### Formal Requirements

7.2 The range of comments received conclusively supported the position that there should be formal requirements. Most respondents thought that the formal requirements should be the same as those of marriage, albeit that the rationale for having the same requirements differed. The range of views expressed ranged from avoiding inequality and prejudice to avoiding making registration of civil partnerships less onerous.

*The formal registration of a relationship should not be entered into lightly by anyone.  
(Individual response)*

7.3 On technical legal matters two issues were raised. Firstly, the need to ensure that civil partnership registration is not rendered null and void due to some minor procedural breach of the formal requirements (as the position is under section 23A Marriage (Scotland) Act 1977). Secondly, and more fundamentally, whether the procedure for civil partnership registration, which as proposed will have no residence requirement, will be available to foreign nationals regardless of whether their national jurisdiction recognises same-sex partnerships.

#### Age

7.4 A few respondents expressed concern that the proposed age for civil partnership registration was 16. Erroneously one respondent viewed this as a reduction in the age of consent from 21 to 16, but other concerned respondents queried whether the age of consent needed to be the age for registration, suggesting that perhaps 18 might be more appropriate.

#### Exclusivity of Partnerships

*Para 6.8: A person should only be able to enter into one registered partnership arrangement at any time.*

7.5 The proposals for registration of civil partnerships assume that such partnerships will be between a same sex couple, and will be limited to this relationship. Two written responses challenged the view that civil partnerships should be limited to relationships with one partner, one respondent stating:

*Civil partnerships should be available to two or more partners of the same sex, or both sexes (Individual response).*

7.6 The other responses were from the legal and local authority sectors and they centred on the technical requirements to ensure exclusivity. Essentially these highlighted a need for amending the current term of ‘marital status’ to include civil partnerships, and for introducing some form of criminal sanction for attempting to enter into more than one civil partnership - such as by amending the definition of bigamy to prevent entering into more than one marriage or civil partnership at any one time.

### **Prohibited Degrees of Relationships**

***Para 6.9: We propose that the Forbidden Degrees provided in Section 2 of Schedule 1 to the Marriage (Scotland) Act 1977 would be what is required for Scotland. These differ in some respects to what applies in England and Wales, but achieve internal consistency with Scots law.***

7.7 The consultation does not consider the issue of whether a same-sex partnership is a sexual partnership. Issues such as sexual offences and the implicit consent to sexual relationships attributed to marital relationships have not been addressed. The assumption of “forbidden degrees” is based in prohibitions applying to sexual relationships, which are founded partly in relation to exploitation and abuse, and partly to concerns about procreation. Several respondents felt that the issue was inapplicable, either because sex was not an implicit element in civil partnership, or because of the emphasis on procreation. There is a question as to whether the rights available in a civil partnership could be available for (for example) a brother and sister, or grandparent and grandchild. This issue consequently overlaps with the question of non-sexual relationships, considered previously.

7.8 The crux of a number of responses regarding the issue of the relevance of the forbidden degrees, especially those based on consanguinity, was a challenge to the purpose of civil partnerships, and is well reflected by the following response:

*Removing this restriction would demonstrate that you are proposing something other than a gay marriage. (Individual response)*

### **FORMAL PROCESSES**

***Question 11. We propose that there be a set process for the registration of a civil partnership, the dissolution of a civil partnership and that a civil registered partner be able to inform the registrar of the death of a partner. These are explained in paragraphs 6.11 to 6.35.***

7.9 This section again relates to a large number of different propositions. Of 193 respondents, 145 respondents (75%) approved, 14 (7%) disapproved, 29 (15%) agreed in part, and 5 (3%) did not know.

7.10 Registration of the death of a partner is not considered in the stated sections, but in paragraph 6.41, which is also mentioned in question 12. Responses relating to the death of a partner have consequently been collated in that section.

## Registration

*Para 6.12: We believe that registrars are best placed to deliver civil partnership registration.*

7.11 The majority of respondents acknowledged the registrars as being the appropriate body to administer civil partnership registration, although a couple of respondents queried whether solicitors might be the more appropriate administrators of the process, especially if it were to be viewed as a contractual relationship rather than a marriage. The question of whether the purpose of civil partnership registration is intended to be a 'gay marriage' underpinned much of the comments. If registration was to be viewed as a formal administrative process, as it is for birth and death, this would affect the role of the registrar.

7.12 The role expected of the registrar in the registration process, and in particular whether they should be performing a ceremony, was not made explicit in the proposals. This aspect was considered by a number of respondents. Many respondents, including returns from the local authority sector and registrars, expressed strong reservations about the prospect that the legislation might require registrars to perform a ceremony. They questioned whether registrars would be compelled to perform a ceremony contrary to their moral or religious beliefs, and these objections were supported by some religious organisations. Certainly an obligation to provide a ceremony appears more like a marriage, and seems to make civil partnership registration equivalent to marriage.

*Many of those who did not agree with civil partnership registration or who agreed with a registration only process expressed the view that they would be unable to conduct a ceremony for religious or moral reasons and were concerned that this requirement would be imposed on them if included in the final legislation. ... for the majority of those who responded the preferred option would be a registration only process. (Association of Registrars in Scotland)*

7.13 The issue of ceremony was commented on further under 6.17, dealing with location, which is considered below.

## Notice and Waiting Periods

7.14 The nature of these provisions is to bring civil partnership registration into a format similar to marriage. It appeared to some respondents, including the Law Society of Scotland, that the period of notice of three months was excessive. However not all respondents accepted the need for a quasi-marriage procedure, and one respondent suggested that the transfer of legal rights and change in legal status which can be achieved through the registration of parental rights might be a more useful model.

*We would like to see a requirement that the legal implications of civil partnerships are made available to couples giving notice of their intention to register. We also believe that this would be equally beneficial for couples who give notice of intention to marry (LGBT organisation)*

## Location

7.15 The issue of location raised in 6.17 and by implication in 6.18 generated a large amount of comment and confusion. 6.17 implicitly suggests that civil partnership registration is to be more than an administrative process, likely to involve some sort of ceremony, and that it could take place in other locations than the registry office. This seems to make 6.18, about special provision for housebound people, redundant.

*At present, where a marriage takes place at an approved place, the registrar conducts a ceremony and the marriage schedule is signed by both parties, their witnesses and the registrar. A registration is not 'carried out' at the venue. A registration is carried out at the registration office where the marriage register is held. If a registration only process is intended this would only be possible in a registration office. (Association of Registrars in Scotland)*

7.16 Having raised the issue of ceremony, respondents from a variety of backgrounds, including religious organisations, the Equal Opportunities Commission and the Faculty of Advocates, commented on the omission from the proposals of provision to enable religious celebrants to perform a civil partnership registration ceremony. Some religious ceremonies, without legal status, already take place in Scotland.

*I already married my (same sex) partner 21 months ago in the City Chambers, Edinburgh. We were married by the recently retired Bishop of Edinburgh witnessed by all our families and friends (150) from across the globe. We had kilts, wedding cake, and huge reception for everyone at a large city centre hotel. The hotel treated us like any other wedding couple (including the cost!) The wedding was also witnessed by several friends from the police service and no one (including the Bishop) was arrested. Are we married? Yes, but the state is the only entity that doesn't know or cares to know. (Individual response)*

7.17 Failure to provide for religious celebrants, whose churches recognise same-sex unions, to deputise for registrars in a similar manner as under the Marriage (Scotland) Act 1977, was regarded as discriminatory.

*Given the very close similarity of the proposals to the present arrangements in Scotland for heterosexual civil marriage, it is regrettable that there is no proposal for religious celebrants, whose churches and consciences would allow them to do so, to deputise for registrars as they do under the marriage acts. I do hope that the Executive will enable this to happen. (Religious organisation)*

7.18 Some respondents argued that civil partnerships should be a completely secular matter with no religious element.

*Civil partnership should be completely secular, with no religious element. As is the case now, churches and other faith organisations should be able to bless a couple's commitment to each other, but they would have no role in conducting civil partnership ceremonies. (Individual response)*

## Steps to register a Civil Partnership

7.19 The steps proposed in 6.20 are based on the provisions for marriage. This is in keeping with the recommendations of the Equal Opportunities Committee:

*The Committee recommends that the Scottish Executive use the Marriage (Scotland) Act 1977 and the Divorce (Scotland) Act 1976 as the basis for the procedures for civil partnership registration and dissolution in Scotland and adapt the specific rules as required to reflect the realities of same-sex relationships. (Equal Opportunities Committee)*

7.20 However, the similarity with marriage generated an amount of criticism, primarily from the local authority and registrar sector. Step 6 in particular states that a registration will be “performed”, which suggests a ceremony taking place. They questioned whether it is desirable to create a process similar to marriage rather than a process similar to other forms of registration, such as that of births and deaths. Certainly there were other views that it would cause confusion or create a public perception that civil registration is the same as marriage.

7.21 On the procedural details the comments received focused on step 5. The issuing of a civil partnership schedule was regarded as superfluous and irrelevant as in terms of the proposals only registrars can perform the registration. In marriage, the marriage schedule is only released where the couple is being married by a religious celebrant. Step 5 should be removed unless provision is made for persons other than registrars to carry out the registration.

7.22 As regards step 7 the need for two witnesses was queried. This requirement again appeared to be justified solely on the basing the process on a marriage ceremony rather than other types of registration or indeed the general requirements for writing for the formation of contracts in Scotland.

## Privacy

7.23 Whereas the proposals suggest a public need for information outweighing any private desire for privacy, a number of responses from LGBT organizations as well as others, suggest the desire for privacy is rather a genuine concern that public registration may bring with it discrimination, bullying and harassment. It is therefore suggested that if registration is to be made publicly available then it should be supported by legislation to prevent discrimination, such as creating a duty on public bodies not to discriminate as has recently been created as regards racial discrimination. Other suggestions centered on the development of a process to ensure that access to registers is restricted to those who demonstrate a legitimate reason for such access.

*We currently live in a society in which LGBT people face verbal abuse and physical assaults from other members of the public. In big cities it is possible for LGBT people to have a degree of anonymity. This is often not true for those that live in smaller communities. Some LGBT people feel confident enough to be able to 'come out', others do not. The proposals as they currently stand force those that wish to register their partnership to 'come out' to society whether they wish to do so or not. It may therefore be the case that those who could benefit from registering their partnership may not feel able to do so - in effect a self-enforced form of exclusion.*

*By making registration a public record those on the list may be open to abuse. I am aware of significant numbers of LGBT people who have been subjected to homophobic graffiti, verbal abuse and physical attacks when their sexuality has become known to neighbours. ... The problem may be overcome by either by allowing a privacy option for those that do not wish their registration to be on public record or alternatively by restricting access to same-sex registration documents. (Individual response)*

## **DISSOLUTION**

7.24 Generally responses supported the principle that the registration of civil partnerships required a process for formal dissolution on a basis similar to current Scottish divorce law, with similar access to related rights such as Legal aid. As regards the financial implications of the procedure assuming legal aid is made available, the Scottish Legal Aid Board commented:

*Assuming that proceedings will be raised in the sheriff court and the Court of Session, civil legal aid will be available to qualifying individuals. The number of such partnerships being dissolved each year where one or other of the individuals would be financially eligible for civil legal aid, appears likely to be modest and so the legal aid consequences both in terms of staff resources and the Fund will not be substantial. In the absence of detailed information about the numbers of such partnerships that will be dissolved each year it is difficult to assess the total cost. The court cases would be broadly similar to those for divorce actions that, in the year 2002 to 2003, averaged £1,755 per case for a sheriff court family matrimonial matter. Comparable costs in the Court of Session were £4,461 per case. Revised procedures and fees for civil legal aid will increase this cost in the year 2003-2004. (Scottish Legal Aid Board)*

7.25 The majority of responses received focused on the difference in the procedure proposed with the current procedures for divorce. These differences are considered below under the headings of grounds for dissolution of partnership, provisional orders for dissolution and one year waiting time.

### **Grounds for Dissolution**

7.26 The proposals in 6.26 only provide for dissolution grounded on either irretrievable breakdown or separation, being two years with consent or five years without consent. Comment was also made as regards the desirability to reduce the time of separation required, for divorce and in consequence for the dissolution of civil partnerships. Respondents from a spectrum of legal and other organisations recommended the inclusion of a simplified procedure, similar to simplified divorce for couples where there is neither child issues nor financial provisions being sought.

7.27 Other omissions noted were the remaining two other grounds for divorce, that of desertion and of adultery. The ground of desertion was considered appropriate for the dissolving civil partnerships, however due to the heterosexual definition of adultery there was broad consensus that sexual infidelity need not be a separate ground, as it could be incorporated within unreasonable behaviour. Sexual infidelity should be covered under the

unreasonable behaviour ground and it was suggested that guidelines should be produced to explain the scope of unreasonable behaviour.

*While we would agree that adultery requires the parties to be of opposite sex at present and we agree that these can fall under the ambit of reasonable behaviour, we would welcome a clear statement to that effect in the legislation or the inclusion of these ways of proving irretrievable breakdown of the partnership. (LGBT organization)*

### **Provisional orders for dissolution**

7.28 A number of respondents from the legal, local authority, political and other organisations noted that the procedure proposed in 6.28 which requires an initial provisional order for dissolution of partnership introduced a procedural step not required under Scottish divorce procedure. This additional step was criticised for being unnecessary and being based on the procedure under English law (of *decree nisi* followed by a *decree absolute*) rather than the Scottish procedure in which a decree of divorce is final, subject only to appeal.

*I strongly oppose this English import. As for marriage there should be a single decree of dissolution, with financial matters being left over to a later date if necessary. (Law Society of Scotland)*

7.29 The Scottish Legal Aid Board highlighted that the effect of introducing an additional procedural step would increase the costs of dissolution to the Legal Aid Fund.

### **One year waiting time**

7.30 The final point to be commented on is the requirement for a period of at least one year to elapse after registration before a dissolution can be sought. This provision does not exist for married couples and it is suggested that as it is unnecessary in relation to marriage there is no justification to apply it to civil partnership. Indeed again this requirement appeared to echo English law rather than Scots law, to the frustration of some respondents.

*We agree with the procedures in the proposals, except the ones that have been snuck in from English law, such as having to wait six weeks or a year before applying for a divorce. (Submission to Equal Opportunities Committee)*

### **Void and voidable partnerships**

7.31 The responses received highlighted potential omissions from the grounds of invalidity. The main three grounds commented on were :

- (a) lack of true consent (e.g. because of mental incapacity or duress/coercion)
- (b) parties not of same sex; and
- (c) incurable impotency

7.32 There appears to be a need to further define the personal capacity necessary to enter a civil partnership and it would be anticipated that the Scottish courts would apply similar rules regarding lack of consent as apply to marriage. However the other potential omissions commented upon, those of parties not of the same sex and of impotency, again fundamentally

question the proposed purpose of civil partnerships. Only if such grounds for invalidity are adopted will civil partnerships be limited to same-sex, sexual partnerships.

7.33 The consequence of declaring a partnership void is not explored. One commentator suggested that the position should be similar to that for married couples:

*The rule in section 17 of the Family Law (Scotland) Act 1985 is often overlooked but must be extended to registered partnerships. This permits financial provision to be granted to parties whose marriage is declared void (as opposed to being brought to an end by divorce). If registered partnerships are declared void (as opposed to being terminated by dissolution) then the parties should, like their opposite-sex counterparts, be able to seek financial provision. (Legal sector)*

7.34 The responses from the legal sector supported the proposal not to have voidable civil partnerships especially in view of the recommendation of the Scottish Law Commission to remove the possibility of voidable marriages. Some respondents from LGBT organisations suggested that on the grounds of non-discrimination, as non-consummation renders a marriage voidable, civil partnerships should also be voidable. That view was not unanimous: indeed one LGBT organisation commented:

*Civil partnerships should not be voidable on any grounds, nor should there be any form of irregular civil partnership. (LGBT organization)*

### **Order for separation**

7.35 The responses on this point, which were primarily from the legal sector, were unambiguous. There was no support for judicial separation of civil partnerships, and indeed the responses received question the need for judicial separation in marriage. Judicial separation is only justified on the basis of enabling formal separation where a parties' religious belief prevents divorce.

## CHAPTER 8

### LEGAL AND POLICY CONSEQUENCES

#### FAMILY LAW

***Question 12: We propose that civil registered partners are recognised in Scots family law. This covers, parental responsibility, children (residence and contact on dissolution), aliment, property division of dissolution, intestacy, inheritance and damages. Our proposals are explained in paragraphs 6.36 to 6.42.***

8.1 The principle of recognition in family law was broadly welcomed by the majority of respondents, not least because it provides additional security for those families that comprise a non-married couple. Of 203 responses to this question, 167 respondents (82%) approved, 18 (9%) disapproved, and 16 (8%) agreed in part. The remaining 2 respondents did not know.

*I am in a same sex relationship. We have a joint mortgage on our home where we live with my 8 yr old son (whom I receive Working Tax Credits for as a single parent! Our joint income would take us out of qualifying). We do everything the same as other families in our street and we are 100% a happy family unit. We have no where near the same rights as same sex couples. Myself and my partner can't wait for the day when we can register our relationship and have the same rights as all our friends and family have. We are not asking for marriage only the same rights. (Individual response)*

8.2 There was not however unanimous acceptance of the principle that such relationships should have the same status in family law as that of marriage.

*Before we go down this route Scotland needs to debate the makeup of family which it has not done to my knowledge. (Individual response)*

8.3 It was suggested that in the legislation should, in addition to considering the impact of the new status on family law generally, establish the general family law duties that partners in a civil partnership would have to each other, such as that of aliment and mutual support.

#### **Parental responsibility; child residence and contact**

8.4 The issue of parental rights and responsibilities generated a large quantity of written comment. Apart from the responses debating whether same-sex couples are as appropriate as opposite sex couples for the role of parenting, the responses highlighted two main issues. The main issues were whether the current legal position under the Children (Scotland) Act 1995 requires alteration, and whether parental rights for a child conceived by lesbian couple via artificial insemination requires special treatment in law.

8.5 Firstly, there was concern that the proposals would lead to serial multiple parental rights and responsibility orders under the Children (Scotland) Act 1995 if the courts were required to give such orders merely as a consequence of their registering a civil partnership. Whilst supporting the principle that those in a registered civil partnership should be entitled

to apply for parental rights and responsibilities, many respondents suggested that the current tests in the Children (Scotland) Act 1995 should remain the main tests. The welfare of the child being paramount should remain the main test, rather than focusing on the relationship of the applicant to a biological parent. Whilst a number of respondents viewed the position of a registered civil partnership as differing from that of a step-parent, such views were not uniform.

*The mediators support the proposals to extend the right to apply for parental responsibilities to registered partners. This is assuming that the rights of the children and birth parents are legally safeguarded. Where child have formed the long term relations with committed stepparents, the courts should be able to make the necessary orders to protect these important relationships to maintain meaningful contact following dissolution of the partnership. Such legislation would affect the expectations of partners with parental roles and encourage the maintenance of contact in the event of a family break up. (Family Mediation, Central Scotland)*

8.6 The second main issue raised was whether the law should recognise automatically both women as having parental rights and responsibilities where they were in a registered civil partnership and agreed to have a child together via artificial insemination. Support for this special case was predominately from LGBT organisations, but not exclusively so.

*A distinction should be made between cases in which a person registers a partnership with someone who already has a child, and cases in which two women already in a civil registered partnership decide to have a child via artificial insemination by donor. The situation of such women would not be akin to that of parent and step-parent, it can be argued, since both would have made a joint decision to have a child which they will bring up together. In cases of donor conception at a registered fertility clinic, it would be appropriate, in our view, to accord full parental responsibilities and rights to both women in the civil registered partnership, provided that the civil partner of the woman undergoing the treatment gave her consent to this treatment taking place. (Children 1st)*

### **Aliment and property division.**

8.7 The lack of detail within the proposals was noted by several respondents.

*These proposals affect major areas of Scots family law and yet are hardly touched upon in this consultation document. (Individual response)*

8.8 Responses from the legal sector and others sought clarification that similar provisions to those that apply to married couples under the Family Law (Scotland) Act 1985 would apply. Clarification was also sought as to whether other legal rights available to spouses such as occupation of the matrimonial home under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 will be available to those in registered civil partnerships.

### **Adoption and fostering**

8.9 Although some respondents welcomed the the parallel consultation on adoption and fostering, a number of respondents expressed disappointment that the proposals adopted a neutral stance on this issue and did not provide a theoretical commitment to same sex couples

being able to adopt / foster in Scotland. Some respondents thought that there was no rationale for not extending adoption and fostering rights now.

*It can no longer be argued that gay or lesbian people cannot adopt (for the law permits them to do so) and it would be discriminatory to allow registered opposite-sex couples - i.e. married couples - to adopt but not registered same-sex couples. To resolve this discrimination in the partnership legislation rather than waiting a couple of years for new adoption legislation would serve one valuable political purpose and at the same time serve the interests of Scottish children - it would allow the Adoption Policy Review to concentrate on the substantive issues of adoption and child welfare, rather than have their attention diverted to the far less important issue of same-sex couples (Legal sector)*

### **Registering the death of a partner**

8.10 The registration of death by a partner is currently possible, and indeed individuals have complete freedom choosing whom to appoint as executors in their will. The important issue raised by registration of civil partnerships is whether civil partners will automatically be entitled to register the death and have their status as partner also recorded. The definition of partner would need to be refined so that the status of the partner informing of death is appropriately recorded.

*“Would this mean that there would be three categories of partner in the list of informants for a death registration?*

- (i) Civil Partner (where the partnership was registered)*
- (ii) Partner (where the partnership was not registered)*
- (iii) Business Partner” (Association of Registrars in Scotland)*

8.11 The proposals do not make it clear whether the intention is to have registered civil partners recorded as next of kin. From the responses received there was the assumption that whilst “next of kin” has no formal legal status, in practice it is fundamentally important. To be recognised as next of kin would assist in eliminating discrimination.

## **RECOGNISING THE RELATIONSHIP IN SCOTS LAW**

***Question 13: We propose that civil registered partners are recognised consequentially in other aspects of Scots Law. This includes council tax, local government elections, making financial decisions on behalf of adults with incapacity, hospital visiting and medical treatment, prison visiting, survivor pensions and injury benefits from public service pension schemes, fatal accident inquiry, burial, post mortems and organ retention. Our proposals are explained in paragraphs 6.43 to 6.53.***

8.12 Of 205 respondents, 179 agreed (87%), 15 (7%) disagreed, 9 (4%) agreed in part with this question, and 2 (1%) did not know. This level of approval was second only to that of question 1, indicating that rights in sickness and bereavement may be the least contentious of the various issues under consideration. Certainly many respondents commented that in times of illness and bereavement the current lack of rights afforded to same-sex couples can cause unnecessary distress, though some others pointed out that such additional distress is not limited to same sex couples. Although it is the general assumption that rights follow from

registration, one respondent raised the issue of whether it is the intention for the broader rights to apply retrospectively, which could be relevant for a registered partner in assessing damages for an incident which occurred before registration was possible.

8.13 The broader rights of civil partners also raised issues around employment law rights.

*There will be a need to review procedures where there is discretionary and compassionate leave in the event, for example, for the sickness or hospital treatment of the partner. (Local authority)*

8.14 Other broader rights relevant to the next of kin approach are those rights that are available to persons of the same household. A response from the Association of British Credit Unions indicated that the current legal provisions, which govern access to membership of credit unions, allow for members of the same household to join only if they are also the relative of a member. Currently this definition excludes same-sex partners from joining some credit unions. The range of responses on broader rights such as that from the association of credit unions highlights the difficulty that faces the legislature in implementing the necessary changes as many rights are dependent at least in part on common law principles and interpretations.

### **Hospital visiting and medical treatment**

8.15 The responses received on these points included several from health care professionals. The issue of acceptance of the status of a same-sex partner by other relations is at the root of a number of the difficulties faced by medical professionals and would, for example, ensure that same sex partners are treated the same way as a married couple when a partner is hospitalised. Several respondents emphasised the need to strengthen their rights as next of kin in the process. Legislation confirming that a registered civil partner could act as next of kin would help to clarify the process and strengthen their position.

*Although it is recognised that 'next of kin' has no legal definition there is a danger of discrimination if medical staff are allowed to decide whether a same sex partner is given this status. Under the Civil Partnership proposals training of all medical staff needs will be key in ensuring that same sex partners are treated the same way as a married couple when a partner is hospitalised. (Other organization)*

8.16 The Faculty of Advocates suggested that, for the purposes of health care, the issue did not require legislation and lay within the administrative authority of the Scottish Executive.

### **Pensions and survivor rights**

8.17 Some respondents described personal circumstances of perceived injustice and inequality resulting from failure to recognise same-sex partnerships for pension purposes. The proposals have the effect of extending similar rights of spouses to registered civil partners to those public sector schemes for which the Scottish Ministers has devolved powers. It is potentially possible that other pension scheme might not follow that approach, and indeed a number of respondents questioned the desirability for providing automatic dependants rights to all registered civil partners. The opposition to survivor rights was not purely cost based as it questioned whether in a same sex relationship one partner was likely to

be dependent on the other (it being suggested that the likelihood of dependence would be greater in a heterosexual marriage where one party may have left a career for the purpose of raising the family). Other respondents also maintained that there was no obligation even at European level to give rights to surviving civil partners.

*The EU Framework Directive for Equal Treatment in Employment 2000/78/EC does not appear to require the introduction of same-sex marriage or quasi-marriage for equal access to employment rights: the preamble para (21) expressly states: This Directive is without prejudice to national laws on marital status and the benefits dependent on them.” The UK government has already addressed potential discrimination issues — involving comparison between benefits for surviving same-sex and opposite-sex cohabitants — by introducing the Employment Equality (Sexual Orientation) (Amendment) Regulations 2003 coming into force on 1 December 2003. It is envisaged that the pensions industry will respond by reviewing the whole question of survivor pensions and will possibly adopt the Dutch model of enhanced benefits for scheme members with no survivor benefits as the norm. (Faculty of Advocates)*

### **Fatal Accident Inquiry, Burial and Post Mortem, Organ retention**

8.18 Responses received on this issue focused on the process of consent to post mortem and to the issue of organ donation. It was clear that for the respondents, mainly from the health care professions, that defining the ‘next of kin’ – discussed above – was crucial in determining how the processes would operate in practice. Guidance and training of health care professionals appears necessary to ensure that the proposed rights are delivered.

### **OTHER LEGAL ISSUES**

8.19 The general principles of the proposals appeared to attempt to create a legal process for the creation and dissolution of registered civil partnerships similar to that used for married couples. This would give a broad range of rights similar to those acquired by marriage. In consequence many of the responses focused on omissions, that is differences in the procedures and rights. A number of responses detailed areas of law that require to be considered for amendment to ensure that registered civil partnerships achieves equality with married couples, assuming that is the intention of the Scottish Ministers. The range of areas of law commented on included:

- **Criminal laws**, especially the law of bigamy and incest. Amendment was also suggested as being necessary for some statutory sexual offences:

*Relevant civil partnership should be a defence to a charge under s 3 of the Sexual Offences (Amendment) Act 2000, and s 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003. It should be a defence to a charge under s.13(5)(c) of the Criminal Law (Consolidation) (Scotland) Act 1995 that the man charged had reasonable cause to believe the other was his civil partner —cf s.5(5)(a) of the same Act. They might have entered a civil partnership abroad in a country that allows that at 15, for example. (LGBT organization)*

- **Delict**, such as the right to damages on death of a partner and on injury

- **Discrimination & employment law**
- **Domestic violence** protection should be provided and therefore the Matrimonial Homes (Family Protection) (Scotland) Act 1981 would need to be amended.
- **Evidence**, rules on giving evidence in civil and criminal cases including the compellability of spouses as witnesses and privileged marital communications
- **Housing** such as tenancy succession etc.
- **Legal aid entitlement and availability**

### **Residual clauses**

8.20 The general principles of the proposals appeared to attempt to create a legal process for the creation and dissolution of registered civil partnerships similar to that used for married couples which would give a broad range of rights similar to those acquired by marriage. In consequence many of the responses focused on omissions, that is differences in the procedures and rights. The general lack of detail and the potential other legal changes required in addition to those detailed in the proposals led to the suggestion of a full audit:

*There are various other consequences of marriage than those listed in the discussion paper and a careful audit of both statutory and common law needs to be undertaken in order to identify every single marital consequence in law. (Legal sector)*

8.21 In recognition that the fundamental changes inherent in the proposals might result in some matter being inadvertently left out of consideration, it was suggested that the legislation should provide some "sweep up" provision and also that there should be some provision for the future.

## THE CENTRE FOR PUBLIC POLICY AND MANAGEMENT

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