

I do, I don't or a happy medium: Extending the reach of civil partnerships to opposite-sex couples

"Marriage is a great institution, but I'm not ready for an institution." (Mae West, 1893-1980)¹

This essay explores society's changing approach to marriage and the fact that this is leaving many couples unprotected in the eyes of the law. It will argue that the current restriction on same-sex couples entering into civil partnerships is legally untenable and does little to reinforce the notion that the Marriage (Same Sex) Couples Act 2013 introduced equality for heterosexual and same-sex couples. Extending the reach of civil partnership to heterosexual couples would offer a middle ground for those who see marriage as a religious institution or patriarchal; it offers a chance to formalise the relationship which affords more protection than cohabitation alone. It would also reinforce that all relationships are equal, regardless of sexual orientation, and civil partnerships are not a second-rate alternative to marriage.

Background Context:

For many years, marriage has been seen as the primary means of formalising a relationship between two individuals but cohabitation is a fast-growing form of family emerging within England and Wales. A statistical bulletin published by the Office for National Statistics on 5 November 2015² shows that there are now 3.2 million cohabiting couple families in the United Kingdom and that there has been a significant increase in opposite-sex cohabiting couple families from 14% of all families in 2005 to 17% in 2015. Simultaneously, statistics published show that the number of people marrying has dropped dramatically over the past forty years; in 1975, 52.4 out of every 1,000 women were married annually whereas in 2009 only 19.2 out of every 1,000 women were married³.

¹ <http://www.telegraph.co.uk/books/authors/40-great-quotes-about-marriage/marriage-is-a-great-institution-but-im-not-ready-for-an-institution/>

² "Families and Households 2015", Office for National Statistics, 5 November 2015 (<http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-11-05#cohabiting-couples>)

³ <https://www.theguardian.com/news/datablog/2010/feb/11/marriage-rates-uk-data>

Another significant change to relationships and their formalisation in recent years was the passing of the Civil Partnership Act 2004⁴ which allows same-sex couples to formally register their relationship and consequently gain access to protection such as employment, pension and tax benefits. This protection for same-sex couples was enhanced in 2013 with the extension of marriage to same-sex couples under the Marriage (Same Sex) Couples Act 2013⁵. The Act legalises same-sex marriage in England and Wales subject to the condition that no religious organisation will be forced to conduct a same sex marriage against their will.

It should be noted from the outset that these changes and shifts in social attitudes towards marriage are by no means unique to England and Wales and similar trends can be seen in other countries across the globe. Governments have been forced to adapt and introduce new legislation and concepts to protect couples and provide options other than marriage. Most notably, in France, the development of the PACS scheme (*Pacte Civil de Solidarite*) has been highly successful. Introduced in November 1999 and open to both heterosexual and same-sex couples, the PACS system provides similar tax and financial protections as formal marriages but there are differences in inheritance rights and adoption rights. As it has developed over the years, the legal protection under the PACS scheme has grown to now almost mirror the protection afforded by marriage and they have risen in popularity over the past ten years with research from the Institut National d'Etudes Demographiques showing that in 2014, of the 173,728 PACS registered, 167,466 of those were entered into by heterosexual couples.⁶

Is there demand for change?

In March 2012, the Government launched a public consultation exercise entitled "Equal Civil Marriage: a consultation"⁷. The main focus of the consultation was how best to implement same-sex

⁴ <http://www.legislation.gov.uk/ukpga/2004/33/contents>

⁵ <http://www.legislation.gov.uk/ukpga/2013/30/contents/enacted/data.htm>

⁶ https://www.ined.fr/en/everything_about_population/data/france/marriages-divorces-pacs/pacs/

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133258/consultation-document_1_.pdf

marriages in England and Wales but there were three questions in the consultation focusing directly on civil partnerships. Most notably, question 8 asked whether the individual in question agreed or disagreed with the decision not to open up civil partnerships to opposite-sex couples. In the results published in December 2012, the Government reported that 61% of the 78, 556 people who answered question 8 disagreed with the suggestion that civil partnerships should not be made available to opposite-sex couples⁸.

The Government did not feel that such change to the civil partnership regime was necessary and it was not addressed through any express condition in the Marriage (Same Sex Couples) Bill 2013. However, as a result of concerns raised about the role of civil partnerships during Parliamentary debate on the Bill⁹, Section 15 of the Marriage (Same Sex Couples) Act 2013 includes an obligation to review the operation and future of the Civil Partnership Act 2004 in England and Wales as soon as practicable. This consultation began in 2014 and the results were published in June 2014, having received a much lower response rate than the earlier consultation in 2012. This time, from those that responded, 63% of currently unmarried heterosexuals said they would choose marriage and 20% indicated they would prefer a civil partnership, if it was available¹⁰.

In addition to the consultations carried out by the Government, a large campaign was started by a couple named Rebecca Steinfield and Charles Keidan who launched a Judicial Review claim in the High Court, arguing that the current restriction against heterosexual couples entering into civil partnerships in England and Wales is contrary to Articles 8 and 14 of the European Convention on Human Rights and seeking a declaration of incompatibility under section 4 of the Human Rights Act

⁸ Equal Marriage: The Government's Response", December 2012
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf)

⁹ See, for example, the comments of Mr Christopher Chope during the second reading of the Bill of 5 Feb 2013, Column 134: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130205/debtext/130205-0001.htm#13020551000002>

¹⁰ "Civil Partnership Review (England and Wales) – Report on Conclusions", June 2014
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324174/Civil_Partnership_Review_Report_PDF.pdf)

1998¹¹. Their application was dismissed by Mrs Justice Andrews but the case is due to be heard by the Court of Appeal in November 2016. When considering whether there is demand for change, one of the most notable aspects of this case is that a petition posted by the couple on the website [change.org](http://www.change.org), urging reform of the current law on civil partnership, has reached over 70,000 supporters.¹²

Why do we need reform?

Given both the background context showing the shift in societal attitudes towards marriage and the evident demand for change amongst citizens of England and Wales, the next question to address is why reform is needed and why such reform is desirable, practical and useful. The desirability of reform is evident from the equality concerns addressed below whilst the practical benefit and usefulness of such reform is evident from the family stability issues discussed.

Equality for opposite-sex couples:

The present legal position leaves England and Wales in a strange situation where same-sex couples can opt to have their relationship recognised either by a civil partnership or by marriage but opposite-sex couples have only the latter as an option. During the second reading of the Marriage (Same Sex) Couples Bill on 5 February 2013 Yvette Cooper argued in favour of reforming marriage by stating that "*Parliament should have pride in giving people equal rights to be respected and to have their relationships celebrated in the same way.*"¹³ A laudable position, which is not reflected in the current situation whereby individuals are excluded from particular means of formally recognising their relationship on the basis of their sexual orientation.

¹¹ [Steinfeld and Anor v Secretary of State for Education](#) [2016] EWHC 128

¹² <https://www.change.org/p/equalities-minister-justine-greening-govt-equality-open-civil-partnerships-to-all>

¹³ <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130205/debtext/130205-0001.htm#13020551000002>

The Applicants highlighted this differential treatment in Steinfeld and Anor v Secretary of State for Education¹⁴ but Mrs Justice Andrews dismissed their application on the basis that Article 8 was not engaged. Her judgment focuses on the fact that the state had provided a form of recognition for their relationship, namely marriage, and it was the Applicants' choice not to enter into that form of recognition. Further, she emphasised that the current difference in treatment between same-sex and opposite-sex couples was justified at present since the Government had already indicated that it intends to return to this issue and possible extension of civil partnerships to opposite-sex couples in the future. Most notably she found that:

*“the only obstacle to the Claimants obtaining the equivalent legal recognition of their status and the same rights and benefits as a same-sex couple is their conscience.”*¹⁵

This is echoed in Mrs Justice Andrews' conclusion where she states that:

*“opposite-sex couples are not disadvantaged by the hiatus because they can achieve exactly the same recognition of their relationship and the same rights, benefits and protections by getting married, as they always could.”*¹⁶

With respect, this view is incorrect as opposite-sex couples such as Rebecca Steinfeld and Charles Keidan are disadvantaged by the current difference in treatment. They do not consider marriage to be an option because they object to marriage as an institution.¹⁷ Some same-sex couples are opposed to marriage and choose instead to protect and recognise their relationship through civil partnerships. Opposite-sex couples opposed to marriage do not have this option. The key to the debate is therefore not, as Mrs Justice Andrews argues, whether the substance of the rights,

¹⁴ [2016] EWHC 128

¹⁵ [2016] EWHC 128 para 39

¹⁶ [2016] EWHC 128 para 86

¹⁷ <http://www.telegraph.co.uk/women/womens-life/11904708/Meet-the-heterosexual-couples-campaigning-to-have-civil-partnerships.html>

benefits and protections couples can achieve are the same but revolves around the freedom to choose how to gain those rights and benefits.

This misplaced focus on rights instead of choice seems to support the “separate but equal” principle and comparative case law shows that this has not been welcomed in the law courts. This principle focuses on the fact that the exclusion of opposite-sex couples from civil partnerships is a trivial harm or “of marginal impact”¹⁸ because it is a difference of title as opposed to unequal rights. That title itself can be of significance to individuals was recognised in the Canadian case of Egan v Canada¹⁹ where the court stated that:

“official state recognition of the legitimacy and acceptance in society of a particular type of status or relationship may be of greater value and importance to those affected than any pecuniary gain.”²⁰

Further, an argument based on the “separate but equal” principle was considered by the Ontario Court of Appeal in 2003 in Halpern v Canada (Attorney General)²¹ where the court considered legislation equalising the rights and obligations of unmarried opposite-sex couples and same-sex couples. In paragraph 134 of the judgment the Ontario Court found that:

“Same-sex couples and their children should be able to benefit from the same stabilising institution as their opposite-sex counterparts.”

It is submitted that a similar principle should be applied in the UK; civil partnership is clearly a stabilising institution as it affords protections beyond those available to co-habiting couples. As such, opposite-sex couples should have equal access to benefit from these protections. As detailed above, the recent government consultation found that 20% of opposite-sex, unmarried couples would prefer to enter into a civil partnership than to get married or cohabit. This 20% may be a minority

¹⁸Steinfeld v Secretary of State for Education [2016] EWHC 128 Para 83

¹⁹ [1995] 2 S.C.R. 513

²⁰ Ibid. at paras 86, 90

²¹ (2003), 65 O.R. (3d) 161

but there is no justification for disallowing them access to the institution of civil partnerships and excluding them is discriminatory in comparison to same-sex couples.

Equality for same-sex couples:

Opening civil partnerships to opposite-sex couples will also secure greater equality for same-sex couples. The current limitation on civil partnerships to same-sex couples could be seen as reinforcing the notion that marriage is primarily a heterosexual form of recognition for relationships whilst civil partnership is a secondary option designed to cater for the minority homosexual couples. This two-tier approach is arbitrary and clearly false because couples such as Rebecca Steinfield and Charles Keidan demonstrate that there are some for whom a civil partnership is the primary, and only, option for formal recognition of their relationship. Allowing individuals to choose emphasises that the institutions are equally valid and different couples will choose between marriage or civil partnerships based on their values and beliefs, as opposed to entering into a civil partnership as a back-up option.

Family Stability in England and Wales:

That greater equality would be achieved by opening civil partnership to opposite-sex couples illustrates the desirability of such reform for society. The practicality and utility of this reform is evident from the positive impact it would have on family stability in England and Wales. The fact that many opposite-sex couples opposed to marriage are prevented from entering into civil partnerships means that they have no other options available apart from to cohabit, which inevitably leaves them with little protection in the eyes of the law.

When an unmarried couple separate there are no laws governing the distribution of property or savings between the couple. This is particularly problematic in cases where the couple have been living in a property together over a period of time but it is registered under just one name; the starting presumption is that the property is 100% owned by the sole owner and their partner does

not have a share in the home²². In addition to losing their home, the partner may also find that they cannot make a maintenance claim against their former partner due to their status as an unmarried couple. By contrast, spouses and civil partners can apply to the family law courts for transfers of owner-occupied property and have other extensive rights such as short-term rights of occupation regardless of where the ownership lies.

This lack of protection is further emphasised by the disparity in inheritance laws since if one party dies from an unmarried couple then there is no automatic right to inheritance whereas a married survivor or civil partner has a right to the first £250,000 of the estate under intestacy rules²³. The final major difference is that of tax since civil partners or married couples do not pay Inheritance Tax or Capital Gain Tax if they transfer assets between themselves either during their lifetimes or upon death²⁴. Unmarried opposite-sex couples have no such benefits and are treated as unrelated for tax purposes.

The result is that couples who do not believe in or agree with marriage as an institution cannot gain access to these protections and are often left vulnerable. A recent study found that family breakdown in the United Kingdom costs approximately £46 billion per year²⁵. Further, research in 2010 from Harry Benson, on behalf of the Centre for Social Justice shows that, contrary to public opinion, divorce is not the main contributor to this cost. The study shows that of every £7 spent on family breakdown amongst young families, £1 is spent on divorce, £4 is spent on unmarried dual registered parents who separate and £2 is spent on sole registered parents.²⁶ This suggests that in fact it is the collapse of unmarried couples which contributes significantly to the cost of family breakdown within the United Kingdom. The key to addressing this would therefore be to provide

²² Stack v Dowden [2007] UKHL 17

²³ Administration of Estates Act 1925

²⁴ Inheritance Tax Act 1984

²⁵ <http://www.telegraph.co.uk/women/sex/divorce/10674267/Family-breakdown-could-cost-taxpayers-46bn.html>

²⁶ <http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/FamilyBreakdownIsNotAboutDivorce.pdf>

more stability for unmarried couples by providing options through which they can protect their relationship and demonstrate their commitment to each other and to family life. Civil partnership could be such an option and the increase in family stability is something which would not only benefit the individual family but society as a whole.

Proposed Reform:

In light of the analysis above, I suggest that the Civil Partnership Act 2004 should be amended to allow opposite sex couples to enter into a civil partnership. The suggested amendment largely mirrors that presented by Tm Loughton MP on 21 October 2015.²⁷

At present, a civil partnership is defined by s.1 of the Civil Partnership Act 2004 as

“a relationship between two people of the same sex when they register as civil partners of each other.”

Further, s.3(1)(a) of the Act provides that

“two people are not eligible to register as civil partners of each other if they are not of the same sex.”

The Act should be amended as follows:

- (1) In Section 1, subsection (1), remove the phrase *“of the same sex”*;
- (2) Remove Section 3, subsection (1)(a).

Such an amendment is simple, straightforward and would allow opposite-sex couples in England and Wales to enter into civil partnerships. The system of civil partnerships is already well established in England and Wales and it is not suggested that any technical reform to the system or administration of such partnerships is required. It is proposed that the same restrictions such as the prohibition on

²⁷ http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0083/cbill_2015-20160083_en_2.htm#l1g1

entering into civil partnerships with family members and the rules relating to termination of the partnership will remain in place.

Conclusion:

Reforming the Civil Partnership Act 2004 to allow opposite-sex couples to enter into civil partnerships is not only desirable in that it achieves greater equality between heterosexual and homosexual couples but it also provides practical, useful benefits to these couples and to society as a whole. The reform is not complicated and is designed to reflect the changing views on marriage and the traditional model of a family unit in today's society. There is no doubt that marriage is an institution but so too is civil partnership and individuals should have access to either institution regardless of their sexual orientation or the gender of the person they love. That marriage is not for everyone is evident from Rebecca Steinfield and Charles Keidan's statement that "*we want to raise our child as equal partners and believe that a civil partnership – a modern, symmetrical institution – best reflects our beliefs and sets the best example for her.*"²⁸ Whilst traditionalists may not support or understand this view, the bottom line is very simple; same-sex couples have two means of recognising, protecting and celebrating their relationship whereas opposite-sex couples have just the one. Equality dictates that every individual should have access to both.

Word Count: 2979

²⁸ <https://www.theguardian.com/lifeandstyle/2016/jan/19/couple-begin-court-fight-against-ban-heterosexual-civil-partnerships>