



The Law Society

Equal Civil Marriage

Response to the Home Office Consultation

June 2012



The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Family Law Committee. The Committee is made up of senior and specialist lawyers who practise in family law.

We welcome the government's consultation on how to legalise same-sex marriage. We participated in pre-consultation meetings with officials from the Home Office and the Ministry of Justice to explore the issues and legal ramifications. Our response is based on our commitment to equality before the law, and to equality and diversity in society and in the profession.

Question 1: Do you agree or disagree with enabling all couples, regardless of their gender to have a civil marriage ceremony?

The Law Society agrees with removing the ban on same-sex marriages to enable all couples, regardless of their gender, to have a civil marriage ceremony. The current situation prevents equal access to a civil contract for same sex couples. It therefore constitutes discrimination based on sexual orientation.

There is no single definition of marriage. Marriage means many different things to many different people. For some, marriage may be seen primarily in functional terms, as regulating the behaviour and personal affairs of those who are in a committed relationship; for others, marriage has emotional or psychological importance. For some, marriage is a political institution, while for others it is imbued with religious significance.

Whatever view of marriage is taken, the key issue is that marriage has legal consequences not just for those who are married to each other, but for society at large. As Lady Hale explains,

'Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not free to determine all of the legal consequences for themselves. They contract into a package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and the state.'

Radmacher v Granatino [2010] UKSC 42, para 132

Such an important societal institution as marriage should be equally accessible to all. From a legal perspective, there is no justification for discrimination and lack of equal access to remain in place. We therefore agree with the Government's proposals.

Question 5: The Government does not propose to open up religious marriage to same-sex couples. Do you agree or disagree with this proposal?

We disagree with this proposal and favour a permissive approach.

We respect the concerns of some religious groups about the legalisation of same-sex marriages. Many faiths hold the view that marriage can be between a man and a woman only. This should be respected and protected from legal challenge. We therefore welcome the government's commitment to preserving the right of religious groups not to perform same-sex marriage ceremonies on their premises. Doing otherwise would infringe religious freedom under Article 9 of the Human Rights Act 1998.

There are other faiths or religious groups for which the definition of marriage can comprise two men or two women. It is difficult to find any reason why faith groups should not be able to conduct same-sex marriages on their premises should they so wish, especially since they can already conduct same-sex civil partnerships. Imposing a ban on religious groups who wish to conduct same-sex marriage on their premises would also infringe on religious freedom.

While the Law Society respects the faith of those who oppose same-sex marriage, this should not infringe upon the rights of those who hold differing views. The issue is equal access and respect for differing religious views. Preventing religious groups from conducting such ceremonies on their premises could be interpreted as adversely affecting their right to manifest their religion under Article 9.

Question 6: Do you agree or disagree with keeping the option of civil partnerships once civil marriage is available to same-sex couples?

We agree with keeping this option.

The term 'marriage' has many connotations - religious, moral, historical, cultural. It is perfectly legitimate that some couples should wish to formalise their relationship for practical purposes without wanting to endorse these various connotations.

Some same-sex couples who opted for civil-partnerships might not have done so had they known that this would eventually translate into a 'marriage'. It would be unfair and legally tenuous for those couples to be faced with the choice of either being married or no longer being in a formalised relationship. We can see no practical benefit in dissolving civil partnerships. There would, however, be costs associated with forcing couples to choose between marriage and nothing at all.

The Law Society therefore agrees with keeping the option of civil partnerships once civil marriage is available to same-sex couples.

Question 8: The Government is not considering opening up civil partnerships to opposite-sex couples. Do you agree or disagree with this proposal?

The Law Society believes that not opening up civil partnerships would constitute discrimination against heterosexual couples by denying them equal access.

We cannot see any reason why civil partnerships should not be open to heterosexual couples who want to formalise their union without the connotations that the term 'marriage' can bring. The issue is equal access and non-discrimination. We therefore disagree with this proposal.

Question 10: Do you agree or disagree that there should be a time limit on the ability to convert a civil partnership into a marriage?

We disagree with imposing an arbitrary time limit on such a conversion. Couples should be free to decide in their own time if their relationship should be changed in this way. The process for doing so should be a simple, straightforward administrative task.

Question 11: Do you agree or disagree that there should be the choice to have a civil ceremony on conversion of a civil partnership into a marriage?

We agree with this proposal.

Question 14: Do you have any comments on the assumptions or issues outlined in this chapter on consequential impacts? Please respond within 1,225 characters (approx 200 words).

Question 16: Do you have any other comments on the proposals within this consultation? Please respond within 1,225 characters (approx 200 words).

Reform of the law to make civil partnerships available to both same sex and heterosexual couples will require consideration of a number of factors.

1. The existing law relating to the dissolution and annulment of civil partnerships and marriages.

Section 1(2) (a) of the Matrimonial Causes Act 1973 makes provision for the dissolution of a marriage because of adultery. This is not possible within civil partnerships as adultery is absent from s44 (5) Civil Partnership Act 2004. Section 12 makes provision for voidable marriages where the marriage

has not been consummated owing to the wilful refusal of the respondent to consummate it and also where at the time of the marriage the respondent was suffering from venereal disease in a communicable form. This is not possible within civil partnerships as such a provision is absent from section 50 of the Civil Partnership Act.

2. The effects of introducing legal obligations upon the parties upon separation or dissolution.

The recommendations of the Law Commission report *Cohabitation: the financial consequences of relationship breakdown* (law com no 307) 2007 are relevant - the Commission (paragraph 1.28 of the report) did not support an 'opt-in scheme' for the introduction of civil partnerships for heterosexual couples.

3. The courts (eg *Stack v Dowden* and *Kernott v Jones*) have had to develop trust law on the breakdown of unmarried heterosexual couples because Parliament has not legislated to regulate the financial consequences of the breakdown of such relationships.

If the government were to enact legislation to regulate the financial consequences of the breakdown of civil partnerships, that could mean in practice that former cohabitants in a civil partnership would have a legal framework for sorting out the financial consequences when they split up, but that unmarried heterosexual couples who are not in a civil partnership would not (see *Burns v Burns* 1984 or *Lloyds Bank v Rossett* 1990).

The Law Society therefore urges the government to take the opportunity to address reforms to the framework of cohabitation law.