# THE CIVIL PARTNERSHIP ACT 2004, SAME-SEX MARRIAGE AND THE CHURCH OF ENGLAND

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*The Civil Partnership Act 2004 enables same-sex couples to enter into a status that provides very many of the same rights and responsibilities that married couples have in respect to each other and the wider community. This paper first considers the extent of the legal similarities between civil partnerships and marriage; that is to what extent civil partnerships are 'same-sex marriage' in practical effect. Secondly it considers to what extent the conceptual understanding of civil partnerships within the Act reflects the current conception of marriage within English law; that is the extent to which civil partnerships are 'same-sex marriage' in theory. Thirdly, and finally, some of the specific dilemmas for the Church of England in the light of this are considered.*[1]

## INTRODUCTION

The Civil Partnership Act 2004 (c 33) came into force on 5 December 2005 and already many couples have 'tied the knot' at a ceremony before their local registrar, having booked their time-slots as soon as the commencement date of the legislation was announced. For some, as with many civil marriages, it was a simple affair to obtain legal protection for a long-standing relationship. But for others the fancy clothes, flowers, guests, reception, and honeymoon show that it was being treated by those involved as though it were a 'conventional' wedding.

It is clear that, culturally, civil partnerships are being seen as gay marriages. The 'Modern Life Exhibition 2005' in London in November was designed to give gay couples advice and ideas on how to plan their 'weddings'. This included legal and financial advice. An internet search under the term 'gay marriage' brings up links to any number of businesses looking to provide venues, photographers, flowers, etc to help same-sex couples plan their perfect 'wedding day'.

Prior to the introduction of the Civil Partnership Bill, the government was at pains to point out that civil partnership is not 'gay marriage'. For example, in the published responses to the white paper consultation the Department of Trade and Industry stated:

[1] This is a revised and updated version of a paper first delivered on 16 June 2004 as a contribution to the 2004 series of London Lectures of the Ecclesiastical Law Society and in a further revision at the Greenbelt Festival on 29 August 2005.

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> The Government has no plans to allow same-sex couples to marry. The proposals are for an entirely new legal status of civil partnership. Same-sex partnership registration schemes already operate alongside opposite-sex marriage in some other countries.

In an answer to frequently asked questions on the website of the Women and Equality Unit of the DTI the following statement appears:

> Civil Partnership is a completely new legal relationship, exclusively for same-sex couples, distinct from marriage.

However, what I shall explore below is the extent to which, despite such protestations to the contrary, it makes legal sense to regard civil partnerships as equivalent to gay marriage.

## THE LEGAL PRACTICALITIES OF MARRIAGE AND CIVIL PARTNERSHIPS

Part 2 of the Civil Partnership Act 2004 sets out the procedure for entering a civil partnership in England and Wales.[2] Notice must be given of an intention to form a civil partnership,[3] which notice must be publicised,[4] and the partnership cannot be entered into until fifteen days after the notice has been given.[5] The partnership must be entered into within twelve months of notice being given.[6] Provision is made for special procedures for people who are housebound,[7] detained,[8] serving abroad as a member of Her Majesty's forces or where one party lives in a different part of the United Kingdom to the other.[9] These preliminary provisions are broadly the same as for civil marriage under a superintendent registrar's certificate.[10]

The partnership itself is entered into by signing the civil partnership document at the invitation of and in the presence of a civil partnership registrar and in the presence of each other and two witnesses.[11] This is different to marriage which is entered into by the parties speaking prescribed words in the presence of a registrar and two witnesses. The signing of the marriage register is evidence of the marriage entered into verbally.

[2] The Civil Partnership Act 2004, Part 2, comprises ss 2–84. Similar arrangements are also provided for Scotland and Northern Ireland in Part 3 (ss 85–136) and Part 4 (ss 137–209).
[3] Ibid s 8.
[4] Ibid s 10.
[5] Ibid ss 11, 17(1). In exceptional circumstances the Registrar General may shorten the waiting period under s 12.
[6] Ibid s 17(3), (4).
[7] See ibid s 18.
[8] See ibid s 19.
[9] See ibid s 20.
[10] Amendments to the Marriage Act 1949 by the Immigration and Asylum Act 1999 (c 33), s 169(1), Sch 14, para 3, reduce the previous waiting period of 21 days to 15 days, subject to the power of the Registrar General to reduce this in exceptional cases.
[11] Civil Partnership Act 2004 s 2(1).

However the civil partnership document is not the same thing as the civil partnership register which must also be completed by the registrar after the civil partnership has been entered into[12] in the same way as the marriage registrar must complete the marriage register as soon as practicable after a marriage takes place.

A civil partnership may not be entered into on religious premises. No religious service may be used while the civil partnership registrar is officiating at the signing of a civil partnership document.[13] Similarly, marriages that take place in register offices or non-religious 'approved premises' are also prohibited from including any religious service.[14]

Like marriage, a civil partnership ends only on death, dissolution or annulment.[15] When dissolution, nullity and presumption of death orders are made they are at first 'conditional' before being made final no less than six weeks later.[16] This mirrors decree nisi and decree absolute procedure in respect of marriage. Like divorce, no order for dissolution can be made in the first year of the civil partnership[17] and when an application for dissolution is made a certificate is required confirming that the applicant's solicitor has considered the possibility of reconciliation.[18] The court must consider the interests of any children of the family and can make Children Act orders or in exceptional circumstances refuse to make a conditional order final where the welfare of the children requires that.[19] The court may also make a separation order, which functions in the same way as a decree of judicial separation in respect of marriage.[20]

The provision for financial relief for civil partners following dissolution, nullity, or separation orders is set out in Schedule 5 of the 2004 Act and mirrors the matrimonial ancillary relief jurisdiction in Part 2 of the Matrimonial Causes Act 1973. In particular the court may make the same types of orders for financial provision and property adjustment including pension sharing and pension attachment as can be made on divorce, declaration of nullity of marriage or judicial separation unless these remedies are limited in the specified actions.[21] The matters that a court must take into account when deciding what financial orders are fair and appropriate on the termination of a civil partnership are the same as when considering the breakdown of a marriage.[22] The very limited legal

[12] Ibid s 2(4).
[13] Ibid s 2(5).
[14] Marriage Act 1949 (12, 13 & 14 Geo 6, c 76), s 45(2), and ss 45A(4), 46B(4) (added respectively by the Marriage Act 1983 s 1(7), Sch 1, para 11, and by s 1(2)).
[15] Civil Partnership Act 2004, s 1(3).
[16] Ibid ss 37(2), 38(1).
[17] Ibid s 41(1).
[18] Ibid s 42.
[19] Ibid.
[20] Ibid ss 37(1)(d), 56, 57.
[21] See the Civil Partnership Act 2004, s 72(1), Sch 5, paras 2(1), 6(1), 10(1), 15(1). The Matrimonial Causes Act 1973 (c 18), Part II, comprises ss 21–40A.
[22] See the Civil Partnership Act 2004, Sch 5, para 21.

consequences of terminating an engagement to be married are replicated for persons who terminate an agreement to enter into a civil partnership agreement.[23]

The 2004 Act provides that civil partners are to be treated by law in the same way as married couples in respect to property disputes between them,[24] actions in tort between them,[25] insurance law,[26] social security law[27] and the law relating to wills, administration of estates and family provision.[28] For example one whose civil partner has died will be in the same position as a widow or widower with regard to the law of intestacy and the right to claim against a deceased's estate for provision out of it. The basis of and level of provision is expressed in the same terms as for widows/widowers. Time will show whether the courts exercising this discretionary jurisdiction in fact treat bereaved civil partners in the same way as bereaved spouses. Civil partners are to be treated in the same way as spouses in relation to housing and tenancies,[29] family homes and domestic violence,[30] and fatal accident claims[31] and cannot be discriminated against in employment by reason of being a civil partner.[32] People are also subject to penalties for offences and perjury in connection with entering into a civil partnership in the same way as in connection with entering marriage,[33] although no equivalent criminal offence to bigamy has been created.

The 2004 Act did not make provision to bring the taxation of civil partners completely into line with that for marriage. However, the government announced in the Budget on 16 March 2005 that it would legislate to ensure that civil partners will be treated the same as married couples for tax purposes and this was set out in section 103 of the Finance Act 2005. At the time of writing the Department of Trade and Industry was planning for the necessary orders to be laid before the House of Commons to make these amendments prior to 5 December 2005.

The Civil Partnership Act 2004 gives the Minister power to make changes to enactments relating to pensions, including Church legislation.[34] The Department for Work and Pensions has recently made amendments to the contracting-out rules to ensure that pension schemes provide survivor benefits for civil partners on the basis of deceased members' rights accrued

[23] See ibid ss 73, 74.
[24] See ibid ss 65–68.
[25] See ibid s 69.
[26] See ibid s 70.
[27] See ibid s 254, Sch 24.
[28] Ibid s 71.
[29] See ibid s 81, Sch 8.
[30] See ibid s 82, Sch 9, amending the Family Law Act 1996 (c 27), Pt 4 (ss 30–63), and related enactments.
[31] See the Civil Partnership Act 2004, s 83, amending the Fatal Accidents Act 1976 (c 30).
[32] See the Civil Partnership Act 2004, s 251, substituting the Sex Discrimination Act 1975 (c 65), s 3.
[33] See the Civil Partnership Act 2004, ss 31–33.
[34] See the Civil Partnership Act 2004, s 255.

from 6 April 1988, and thus to treat them on a par with widows/widowers. Whilst some small differences remain, particularly with regard to the mode of entry into a civil partnership or marriage, overall, in the vast majority of situations the legal consequences of civil partnerships and marriage are identical. It therefore makes sense to speak of civil partnerships as being the practical equivalent of marriage and therefore in that sense it is meaningful to refer to these partnerships as 'gay marriages'.

## CONCEPTUAL UNDERSTANDINGS OF MARRIAGE AND CIVIL PARTNERSHIPS WITHIN THE LAW

To determine the conceptual understandings contained within a legal structure is not a straightforward business. On the one hand there are the official pronouncements as to what is intended by the legislation, and on the other there are the reasonable implications that can be drawn from the practical provision that is in fact made. There can be dissonance between the official pronouncements and the actual effect of the legislation. There can of course also be more than one conceptual understanding that can be drawn from the actual provisions of the legislation, and part of the lawyers' task is to determine which of those should be preferred where a dispute leads to a different practical outcome.

Whether or not civil partnerships are conceptually the same as marriage is at the heart of much of the controversy about this legislation. Some of those who see the two statuses as conceptually alike welcome this and wish the law to go further and actually use the language of 'marriage' to describe civil partnerships in law, as is happening in popular discussion and in other European jurisdictions. Others see the statuses as conceptually alike and for that reason opposed the introduction of the Civil Partnership Act 2004 for fear of 'undermining marriage'. Of those who see the statuses as conceptually distinct, some could not see why, if they are not the same as marriage, they could not also be open to opposite sex couples. An attempted amendment in the House of Lords, introduced by Baroness O'Cathain and supported by some of the bishops in the Church of England wanted to make the differences between marriage and civil partnership more pronounced by attempting to open up the latter to other family members—for example two sisters who wanted to enter a civil partnership for tax planning reasons. Whilst initially successful in the House of Lords, the government rejected this amendment on the basis that the collection of rights and responsibilities provided by the Act were suitable for chosen life partners and would not be appropriate for family members generally. Indeed it is hard to see why it would be a good thing for sisters who have entered a civil partnership for tax reasons to have to go through a process identical to divorce in order subsequently to marry.

Below various aspects of a traditional Christian conception of marriage are identified, and consideration given to what extent these understandings are shown forth in the present English law of marriage and to what extent they are also present with respect to civil partnerships as created by the 2004

Act. A Christian understanding of marriage includes the expectations that it is a voluntarily entered, permanent, faithful, sexual relationship between one man and one woman. Marriage should also be mutually supportive and is regarded as the best context for the conception and nurturing of children.

*Voluntary*

A lack of valid consent to enter a marriage by either party, whether through duress, mistake, unsoundness of mind or otherwise makes that marriage voidable at the suit of one of the parties to the marriage.[35] In the same way a lack of valid consent makes a civil partnership voidable at the suit of one of the parties to the partnership.[36] In both cases a decree of nullity will not be granted after three years of marriage or civil partnership (save where leave is given) or where a party knew that it was open to him to obtain a nullity order/decree of nullity and conducted himself in relation to the other party so as to lead that other party reasonably to believe that he would not seek to do so and it would be unjust to grant the nullity order/decree.[37] Mental health disorders suffered at the time of entering the marriage or civil partnership can also provide grounds for obtaining a nullity order/decree.[38]

This concept of marriage or civil partnership as something that is entered voluntarily also lies behind some of the complex legal difficulties surrounding the issue of 'cohabitee's rights', that is, in determining what of the social and legal benefits of marriage (or civil partnership) should be provided to cohabiting couples in relationships where they could have married (or entered a civil partnership) but chose not to.

*Permanent*

The idea of a valid marriage being permanent in the sense of utterly incapable of termination save by death has not been part of English law since the introduction of parliamentary divorce in the seventeenth century. As only a very small number[39] of very wealthy people have obtained a divorce by Act of Parliament in the past 400 years, the practical reality for most people was that a valid marriage was effectively incapable of termination save by death until the introduction of judicial divorce by the Matrimonial Causes Act 1857. However, going back at least until mediaeval times divorce *a mensa et thoro*, roughly equivalent to the modern concept of judicial separation, has always been a possibility.

Modern divorce law regards marriage as permanent in the sense of being indeterminate. That is, it cannot come to an end other than by the specific judicial action of granting a divorce on the application of one of

[35] Matrimonial Causes Act 1973, s 12(c).
[36] Civil Partnership Act 2004, s 50(1)(a).
[37] Matrimonial Causes Act 1973, s 13(1); Civil Partnership Act 2004, s 51.
[38] Matrimonial Causes Act 1973, s 12(d); Civil Partnership Act 2004, s 50(1)(b).
[39] 317 couples.

the parties to the marriage on the grounds of 'irretrievable breakdown' of the marriage. Irretrievable breakdown must be proved by at least one of five specific facts: adultery, 'unreasonable behaviour', two years' desertion, two years' separation plus consent or five years' separation.[40] Although the special procedure for divorce means in practical terms that this is a largely administrative process where it is consensual, there is not divorce on demand. District judges can and do reject petitions that do not sufficiently prove any of the five facts and the Queen's Proctor can intervene in proceedings where it is appropriate to do so, to seek to prevent a divorce taking place.

The provisions for obtaining an order of dissolution of civil partnership, and the grounds for obtaining it are identical to the divorce provisions save for the absence of adultery as a ground.[41] Parties to a civil partnership may not end the partnership on demand any more than a married couple can obtain divorce on demand. Further, the ongoing obligations with regard to financial support after divorce or dissolution of civil partnership recognise to some extent that some practical aspects of a marriage or civil partnership do not necessarily stop upon divorce.

The understanding that civil partnerships are intended to be permanent, at least in the sense of being indeterminate, can be seen in sections 212 to 218 of the 2004 Act, dealing with the circumstances in which overseas relationships will be treated by English law as being a civil partnership. These include not only the specified relationships set out in Schedule 20 of the Act, for example a German Lebenspartnerschaft or a Belgian same-sex marriage but also other partnerships registered abroad under the law of another country, provided that certain conditions are met, including the condition that the relationship registered is of 'indeterminate duration'.[42]

The desirability of discouraging the termination of a marriage can be seen, for example, in the provision requiring the petitioner for a divorce to certify whether he or she has considered the possibility of reconciliation. This provision is duplicated in respect of civil partnerships. In the same way that no petition for divorce can be presented in the first year of marriage, no application for an order dissolving a civil partnership can be applied for within the first year of the civil partnership. The fact that much provision is made for the surviving civil partner on the death of the other partner shows that it is envisaged that the partners, like spouses, will for the most part stay together for their whole lives.

*Faithful*

The expectation that the parties to a marriage will be sexually faithful to each other is clear from the fact that adultery is one of the grounds for

[40] See the Matrimonial Causes Act 1973, s 1(2).
[41] Adultery is considered further below under the subheading 'Faithful'. Even the provision for the intervention of the Queen's Proctor is replicated in the Civil Partnership Act 2004: see s 39.
[42] Ibid s 214(b).

divorce. Adultery, however, has a very specific, technical definition that is essentially heterosexual. It requires 'some penetration of the female organ by the male organ'.[43] For this reason adultery is not included as one of the grounds for the dissolution of a civil partnership. No alternative form of words, whether a general one of 'sexual infidelity' or a specific list of specific sexual practices with someone other than the civil partner, takes the place of adultery.

This makes it less obvious that sexual fidelity is presumed to be a characteristic of civil partnerships. The governmental response to this point, raised as part of the responses to the white paper, was that:

> Adultery has a specific meaning within the context of heterosexual relationships and it would not be possible nor desirable to read this across to same-sex civil partnerships. The conduct of a civil partner who is sexually unfaithful is as much a form of behaviour as any other. Whether it amounted to unreasonable behaviour on which dissolution proceedings could be grounded would be a matter for individual dissolution proceedings.

In a divorce petition, other forms of sexual misconduct or infidelity falling short of the precise definition of adultery must be included within an 'unreasonable behaviour' petition. In practice, the phrase 'inappropriate association' is often used and this can be the basis of a successful behaviour petition. Therefore, provided that the district judges who consider applications for an order for dissolution of a civil partnership regard the sexual infidelity of the respondent as amounting to sufficient grounds for such dissolution under the category of 'unreasonable behaviour', an expectation of sexual fidelity can be protected.

The intended exclusivity of relationship within a civil partnership can however reasonably be inferred to some extent from the monogamous character of the relationship which will be considered below. Nevertheless, there is a difference between a bigamous marriage and an adulterous affair within the heterosexual context, which distinction can be applied across easily within the homosexual context. Clearly if both parties to a marriage or a civil partnership are happy with, or at least prepared to tolerate, sexual behaviour outside the marriage or civil partnership relationship, that is not something that the civil law seeks to regulate or prohibit. The issue does not then arise until one party is sufficiently unhappy at the infidelity so as to seek the dissolution of the marriage or civil partnership.

For the above reasons, it may be said that the presumption of sexual fidelity, which is part of a Christian definition of marriage, is not obviously carried over into the conceptual understanding of civil partnerships as appears from the words of the Act itself. However, if, as anticipated, applications for dissolution of civil partnership based on sexual infidelity are successful,

[43] *Dennis v Dennis (Spillett cited)* [1955] P 153, [1955] 2 All ER 51, CA.

without further grounds for dissolution being required, then this element of the Christian understanding of marriage will also be part of the conceptual understanding of civil partnerships.

*Sexual Relationship*

Whilst there may be some initial ambiguity as to whether civil partnerships are intended to be sexually exclusive, there can be no ambiguity that they are intended to be sexual. This may seem obvious, but it is not so obvious to the House of Bishops of the Church of England. The Pastoral Statement issued on 25 July 2005 states:

> The legislation does, however, leave entirely open the nature of the commitment that members of a couple choose to make to each other when forming a civil partnership. In particular, it is not predicated on the intention to engage in a sexual relationship. Thus there is no equivalent of the marriage law provision either for annulment on the grounds of non-consummation or for its dissolution as a result of sexual infidelity.

Consideration of the absence of adultery as a ground for divorce is given above. It is also the case that non-consummation is not included as a ground for a nullity order in respect of a civil partnership.[44] Again, it was assumed by the government that refusal of sexual activity may provide grounds for dissolution of a civil partnership in the same way that it does provide grounds for a divorce under the heading of 'unreasonable behaviour'.[45]

Whilst these two omissions do provide a superficial basis for assuming that civil partnerships are not intended to be sexual, other provisions undermine that assumption. First, there is the range of persons within prohibited degrees of relationship with whom it is not possible to enter a civil partnership.[46] This range is the equivalent to that for marriage, but with the necessary changes of gender[47] and includes relationships arising by reason of both marriage and civil partnership. The prohibited degrees of marriage are also amended by the 2004 Act to include relationships of

[44] Indeed, another ground for nullity of marriage, the fact that the respondent was, at the time of the marriage, suffering from a venereal disease in a communicable form, is also not carried over to civil partnerships. This was because the government was aware of medical evidence that people can carry venereal disease for many years without their knowledge and that therefore it is not appropriate for a ground for nullity; however, deliberate transmission of a sexually transmitted disease would be considered as a basis for dissolution as a fact proving unreasonable behaviour. Whilst this approach has some logic, it is surprising that the government has not therefore removed this ground in respect of nullity of marriage. In practice, the use of nullity procedure generally, and this ground in particular, is extremely rare.

[45] This raises the interesting question whether the civil partner of an Anglican priest can regard it as sufficiently unreasonable to justify a dissolution that his or her partner refuses to engage in sexual activity because of the teaching set out in *Issues in Human Sexuality.*

[46] Civil Partnership Act 2004, s 3(1)(d), Sch 1.

[47] Eg a man cannot marry his mother or sister and cannot enter a civil partnership with his father or brother.

affinity arising by reasons of civil partnership. If civil partnerships are not assumed to be sexual, there can be no reason to restrict close family members from entering them. But because they are presumed to be sexual, it would not be appropriate for the law to legitimise 'incestuous' relationships. The overturned House of Lords amendment serves to underline this point.

The 2004 Act also provides that the term 'in-law' where it appears in legislation also includes relationship by reason of civil partnership in addition to relationship by marriage and that 'step-parent' and 'step-child' relationships are also recognised for civil partners as they would be for spouses. Again, the acquisition by one spouse or civil partner of the family relationships of the other through the concept of 'in-laws' and 'step-parents' only makes sense if the biological connections of the family are being extended by the sexual relationship of the spouses or civil partners.[48]

The implication that the relationship is intended to be sexual can also be drawn from one of the more arcane aspects of marriage law that has been transferred across to civil partnerships. A civil partnership is voidable on the ground that at the time of its formation the respondent was pregnant by some person other than the applicant.[49] Of course some parties entering a civil partnership may not in fact have a sexually intimate relationship. This is true also of some marriages—people can marry for convenience, or for companionship. However, the fact that some people do not engage in genital sexual activity within their marriage does not prevent marriage from being the legal regulation of an essentially sexual relationship. The same applies to civil partnerships.

*One Man and one Woman*

In so far as this aspect of the concept of marriage is about heterosexuality it is clear that it does not apply to civil partnerships. A marriage is void if the parties are not respectively male and female[50] and a civil partnership is void if the parties are not of the same sex.[51] Indeed the entrenchment of the division between marriage for heterosexuals and civil partnerships for homosexuals can be seen in the effect of the Civil Partnership Act 2004, taken together with the Gender Recognition Act 2004 which received royal assent on 1 July 2004. The effect of these two Acts together will require a married couple who wish to maintain their relationship after one of the couple undergoes gender reassignment to have their marriage annulled or dissolved and enter a civil partnership. Similarly, civil partners wishing to maintain their relationship after one party undergoes gender reassignment will have to dissolve their partnership and enter into a marriage.[52]

[48] This is an outworking of the biblical concept of spouses being 'one flesh' and therefore taking on each other's family relationships as their own.
[49] Civil Partnership Act 2004, s 50(1)(c).
[50] Matrimonial Causes Act 1973, s 11(c).
[51] Civil Partnership Act 2004, ss 3(1)(a), 49(a).
[52] See the Gender Recognition Act 2004 (c 7), s 11, Sch 4, and the Civil Partnership Act 2004, s 250. See also s 50(1)(d), (e).

The concept of marriage being between one man and one woman is also an indication that marriage is monogamous. Civil partnerships are also designed to be monogamous. It is not possible for a person to enter a civil partnership if he or she is already a civil partner of someone else. It is not possible to enter a civil partnership if a person is already married. Nor is it possible for a person to marry if he or she is already in a civil partnership that has not been dissolved, annulled or terminated by death. This mutual exclusivity of marriage and civil partnership has the effect of putting civil partnerships firmly in a position equivalent to marriage.

*Mutual Support*

Generally the law does not seek to compel the parties to provide support for one another, save in a financial context. The mutual support that society expects married couples to give each other is of course far more extensive than merely financial. However, gone are the days when courts used to impose orders compelling spouses to live together, or requiring wives to submit to their husband's sexual advances. The law can and does, however, require financial support of the weaker party by the stronger during the marriage and following death or dissolution of the marriage. This is reflected both in the changes to the benefits law to take account of civil partnerships, and in the fact that the Domestic Proceedings and Magistrates Court Act 1976 is amended to permit civil partners to seek financial support from errant civil partners as well as errant spouses.

A failure to provide the level of support for one's spouse that she or he expects can form the basis of an unreasonable behaviour petition, as indeed the same would be true with respect to an application for an order for dissolution of a civil partnership. As indicated in detail above, the provisions for financial support on dissolution of civil partnership and upon the death of a civil partner are the same.

*The Conception and Nurture of Children*

Whilst the conception and nurture of children is seen as one of the goods of marriage within Christian doctrine, in neither Christian doctrine, nor the law of England, is the conception or nurture of children a prerequisite of a valid marriage.[53] Further, the law setting out the rights and responsibilities of parents towards their children applies irrespective of whether their parents are married. Save for very limited matters in connection with the inheritance of peerages, the legal distinction between legitimate and illegitimate children has been abolished.

The law does recognise, however, that many married couples do have children and that the law relating to marriage may impact upon children. In the same way, many of the details of the 2004 Act anticipate that children will be a feature of the family life of some civil partnerships.[54]

[53] Otherwise the church would refuse to marry the infertile and infertility would be a ground for nullity.
[54] See the Civil Partnership Act 2004, ss 75–79.

For example, civil partners are given the same legal rights over the children of their partners as married people are given over their spouses' children. They will be able to apply to the court for residence and contact orders, they may acquire parental responsibility over their civil partner's children in the same circumstances that spouses can and they will have financial responsibilities towards those children if the civil partnership breaks down. The fact of the civil partnership is taken into account when calculating a Child Support Act liability in the same way that the fact of a marriage is. The 2004 Act amends the Children Act 1989 to provide that the expression 'child of the family' applies to civil partnerships as well as marriages.

Whilst a same sex couple cannot conceive a child together in the ordinary way, in unrelated medical and legal developments assisted conception is beginning to be available to lesbian couples who would be treated legally as the parents of any child so conceived. Further the Adoption and Children Act 2002 (c 38) (most of which has not yet come into force) is amended by the Civil Partnership Act 2004[55] to enable civil partners jointly to adopt children if they are otherwise suitable to do so. Therefore the law does recognise that civil partnerships are relationships within which children can be nurtured and parented, if not conceived.

*Conclusion on Conceptual Basis of Civil Partnership*

In my view, the 2004 Act has an understanding of civil partnerships that are voluntary, permanent, sexual, monogamous, potentially mutually supportive and potentially nurturing of children in the same ways that a marriage is understood to be within English law. A civil partnership is probably also understood as requiring sexual fidelity in the same way marriage does, although confirmation of this will only be obtained once judicial implementation of the provision takes place. In these ways then, civil partnerships are conceptually the same as marriage.

The key conceptual difference between civil partnerships and marriage is that one is essentially same-sex and the other is essentially opposite-sex, with the corollary that children cannot be conceived naturally by the partners. There are some practical differences in law relating directly to that physiological difference, namely the absence of provision regarding non-consummation and adultery and, in the usual run of things, the conception of children. Therefore whether it is correct to regard civil partnerships as same-sex marriage depends on whether one regards those aspects of marriage that are the same as civil partnerships—voluntary, permanent, sexual, monogamous, mutually supportive, nurturing of children and probably sexually faithful—as more or less vital to the definition of marriage than the key difference, which is the sex of the persons entering the status. Is heterosexuality *the* essential conceptual component of marriage, or is the term 'marriage' in danger of becoming cheapened by this narrow focus on the gender of the participants?

[55] See the Civil Partnership Act 2004, s 79.

*Religious Element*

There has been no consideration above of any religious element in the definitions of marriage. This may appear superficially important as one of the differences between marriage and civil partnership is that marriage may be entered into on religious premises with a religious ceremony whereas a civil partnership may not. There is, of course, nothing in the civil law that prohibits a service of blessing after a civil partnership has been entered into, in the same way that a service of blessing after a civil marriage may be offered. Whether such blessing services are appropriate as a matter of church law and discipline is a separate matter considered briefly below.

The religious aspect of the mode of entry into marriage has not been considered because the law of England does not recognise any difference in the nature of marriage by reason of the method by which it was entered into. As was made clear in the case of *R v Dibdin*[56] the Church England does not have any law of marriage different to the law of England. As the Master of the Rolls said in this case:

> Marriage ... is one and the same thing whether the contract is made in church with religious vows superadded, or whether it is made in a Nonconformist chapel with religious ceremonies, or whether it is made before a consul abroad, or before a registrar, without any religious ceremonies. So far as I am aware the Established Church has never refused to recognise any marriage which by our law is valid as being otherwise than a good marriage for ecclesiastical purposes.[57]

## PARTICULAR PROBLEMS THAT CIVIL PARTNERSHIPS MAY RAISE FOR THE CHURCH OF ENGLAND

*Clergy Discipline and Employment*

It is reasonable to anticipate that, given the opposition to gay clergy in general and civil partnerships in particular by some in the Church of England, there will be pressure for disciplinary proceedings to be taken in respect of any clergy who enter into civil partnerships with their partners. Prior to formal public status being given to gay relationships it was easy for bishops to be officially ignorant of the precise nature of the relationship between a priest and his or her 'friend'. However, by entering a civil partnership the relationship becomes a matter of public record in the same way that a marriage relationship does.

This pressure has been to some extent anticipated by the House of Bishops' Pastoral Statement. Because the statement asserts that civil partnerships are not necessarily sexually active (which is true to the same extent that any particular marriage is not necessarily sexually active) it appears that disciplinary proceedings would not be brought against a member of the

[56] *R v Dibdin* [1910] P 57, CA.
[57] [1910] P 57 at 109.

clergy simply by reason of their having entered into a civil partnership. The statement says:

> The House of Bishops considers it would be a matter of social injustice to exclude from ministry those who are faithful to the teaching of the Church, and who decide to register a civil partnership.[58]

However, the statement also considers that a civil partnership is not necessarily intrinsically incompatible with holy orders:

> ... provided that the person concerned is willing to give assurances to his or her bishop that the relationship is consistent with the standards for the clergy set out in *Issues in Human Sexuality*.

There is no consideration in the statement as to any potential conflict between this desire for an assurance to be given to the bishop and the right to privacy and respect for private and family life given by the Human Rights Act 1998. Further problems may arise in seeking to discipline a clergy person for entering a civil partnership. Under the Clergy Discipline Measure 2004, which comes into force on 1 January 2006, there are four grounds for alleging misconduct, namely,

- the respondent has acted in breach of ecclesiastical law;
- the respondent has failed to do something which he or she should have done under ecclesiastical law;
- the respondent has neglected to perform, or been inefficient in performing the duties, of his or her office;
- the respondent has engaged in conduct that is unbecoming or inappropriate for the clergy.

There is nothing in ecclesiastical law that specifically prohibits entering a civil partnership or being sexually active within such a partnership. Neither the House of Bishops' Pastoral Statement, nor *Issues in Human Sexuality*, nor the General Synod resolution in 1988 amount to such a legal prohibition. The matter could therefore only be considered under the context of 'conduct that is unbecoming or inappropriate for the clergy ...'.

Given that a civil partnership will be a lawful status created by statute, and that such status will in almost all aspects be legally equivalent to marriage, it is difficult to see how entering a civil partnership can be 'conduct unbecoming or inappropriate' save for the simple fact, in and of itself, that the partnership is a same-sex one. The church will be obliged to confront directly whether a same-sex relationship that is in all other important respects the same as marriage is a sufficient reason for the legal discipline of clergy. Given the energy currently surrounding this issue, it is reasonable to assume that any such proceedings are likely to be appealed, perhaps as far as the European Court of Human Rights in Strasbourg.

[58] Paragraph 20.

Further, the Civil Partnership Act 2004 amends the Sex Discrimination Act 1975 so that civil partners have the right not to be discriminated against upon the grounds of their civil partnership just as married persons have the right not to be discriminated against upon the grounds of their marriage. This has the obvious potential to conflict with the exemption from the Employment Equality (Sexual Orientations) Regulations 2003/1661 which enables churches to discriminate in the context of employment against people on the grounds of sexual orientation 'where it is necessary to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'. Given that the 'official position of the Church of England' in *Issues in Human Sexuality* makes it clear that sexual orientation is no bar to office provided that celibacy is practised, it is hard to see how the dismissal of clergy simply for being in civil partnerships is covered by the exemption permitting discrimination, particularly as the House of Bishops has now emphasised that in their view a civil partnership is not necessarily sexual.

A further point arises in respect of the new Clergy Discipline Measure 2004. A clergy person who is the respondent to a decree of divorce or judicial separation on the grounds of adultery, desertion or unreasonable behaviour may be removed from office or prohibited by the bishop without further proceedings. So far as I am aware, there are no plans to amend the Measure to provide for similar automatic penalties for civil partners who are respondents to an order dissolving a civil partnership, or a separation order in respect of a civil partnership, on the grounds of desertion or unreasonable behaviour.

*Occasional Offices*

With same-sex partnerships becoming higher profile due to obtaining civil partnership status, it is possible that there could be conflict between members of a civil partnership seeking the occasional offices of the church and clergy unwilling to provide such to them. However, briefly put, civil partners are in the same position as anyone else with regard to the occasional offices. Children for whom they have responsibility have the right to baptism at the parish church subject only to (a) the usual checks that the person asking for the baptism has parental responsibility for the child and hence the authority to request it, and (b) a reasonable delay (save where the child is in danger of death) necessary for the purpose of preparing the parent or guardians or godparents of their responsibilities. The marital status, civil status and sexual orientation of a child's parent or carer has no relevance at all with regard to the child's right to baptism. This has been recognised in the House of Bishops' statement which emphasises that 'an unconditional welcome should be given to children in our churches, regardless of the structure of the family in which they are being brought up' and 'priests cannot refuse to baptise simply because those caring for the infant are not, in their view, living in accordance with the Church's teaching'.

With regard to marriage, clergy will have to check that the parties to a proposed marriage are both free to marry, not only with respect to pre-existing marriages but also with respect to pre-existing civil partnerships that have not been terminated. Interestingly, there is no proposal to amend section 8(2) of the Matrimonial Causes Act 1965 to permit a clergy person to decline to marry a person whose former civil partner is still living. Therefore, providing that the couple proposing marriage are otherwise qualified for marriage in their parish church, it cannot be refused on the ground that one party has previously been a member of a civil partnership.

With regard to funerals, the person with the duty to arrange for the burial or cremation of a deceased is the deceased's personal representative, whether appointed under a will or under intestacy. The laws of intestacy are amended by the 2004 Act however, so that civil partners become the administrators of their late partner's estates in the same circumstances that widows and widowers do. Clergy obligations to conduct funeral and burial services apply irrespective of the moral status or sexual orientation of the deceased and his or her personal representative. Failure to comply with those obligations would be a matter for discipline.

*Blessing Services*

Blessing services following a civil partnership are no more occasional offices to which people are entitled by right than services of blessing after a marriage. Blessing services have also taken place in the absence of any formal civil partnership, and may continue to do so. No legal consequences flow from such services as regards the status of the participants. The House of Bishops' statements 'affirms' that clergy of the Church of England should not provide services of blessing for those who register a civil partnership.[59] However it also states that:

> Where clergy are approached by people asking for prayer in relation to entering into a civil partnership they should respond pastorally and sensitively in the light of the circumstances of each case.[60]

The precise difference between a service of blessing and pastoral and sensitive prayer is not elaborated. Again, this statement is not a source of ecclesiastical or canon law. Nevertheless clergy will need to consider whether this statement impacts on their duty of canonical obedience to their bishop under Canon C 14. Any disciplinary proceedings in respect of prayer or blessing services could not be brought by means of the Clergy Discipline Measure 2004 as matters of doctrine, ritual and ceremonial are excluded from that Measure. Until such time as a new doctrine Measure is passed, they will continue to be covered by the Ecclesiastical Jurisdiction Measure 1963.

[59] Paragraph 17.
[60] Paragraph 18.

*Of the Admission to Communion of Notorious Offenders*

It is not permissible, in my view, to exclude lay people in civil partnerships from communion under Canon B 16. This is particularly true in the light of paragraph 5.6 of *Issues in Human Sexuality* which provides that the church must not reject lay people who sincerely believe that 'living in a loving and faithful homophile partnership, where mutual self-giving includes the physical expression of their attachment' is God's call to them.[61] This approach is confirmed in the House of Bishops' pastoral statement.

Whilst *Issues in Human Sexuality* and the House of Bishops' pastoral statement have no formal legal status, the former is often referred to as the 'official position of the Church of England' and as such it is difficult to see how persons in a civil partnership can be regarded as 'notorious offenders'.

Further, the last time this Canon (in its earlier form) was given judicial consideration in the case of *R v Dibdin* it was found that a marriage that was recognised by the law because performed abroad, but which would not have been capable of being validly formed in this country, was still nevertheless a valid marriage. If the law of the land regarded this marriage as valid, it was not open to the church to regard the parties to it as 'notorious offenders'. There are some obvious parallels between that case and the present situation. The extent to which the reasoning transfers between the two cases relates to the extent to which civil partnerships should be regarded as the equivalent to marriage.

## CONCLUSION

As can be seen above, civil partnerships are in all important respects the same as marriage in terms of practical legal effect. Civil partnerships also share the overwhelming majority of the conceptual understandings of marriage that exist within English law. The key difference is, of course, the gender of the participants. The Civil Partnership Act 2004 does not, in any practical sense, undermine marriage. It does not change marriage law save for a very few technical details and does not change the legal consequences of marriage at all. The provision for gay and lesbian couples in civil partnerships is in almost all contexts the same as for married heterosexual couples. It is not better than for married couples. Therefore there is no sense in which the State support for marriage has been eroded. Nor is there any sense in which the status of marriage has become second best to civil partnerships. So in neither of these senses can it coherently be maintained that civil partnerships 'undermine marriage'.

Further no coherent case has yet been advanced as to how a couple of the same sex living together in a voluntary, permanent, faithful relationship in any way makes another couple's marriage more likely to break down. It is difficult to see how one couple's marriage undermines another couples'

[61] *Issues in Human Sexuality*, para 5.6.

civil partnership, or vice versa. In fact the introduction of a marriage-like status for couples for whom traditional marriage is not an option is rather affirming of the status, rights and responsibilities of marriage. These are seen as such a good thing that more couples should have the opportunity of sharing in them.

What this Act does do, however, is challenge the *a priori* belief, held by some in the Church, that the social goods of marriage can be experienced and manifested only by heterosexual couples. Whether this belief is true is an empirical question. However, the evidence to determine whether or not same-sex partnerships can achieve the social goods of marriage will now be in the public domain. It will be interesting to see over time how the failure rate for civil partnerships compares to the high levels of divorce in heterosexual marriage.

Further, the fact of legal recognition of these relationships is likely to promote the general belief already widespread in society that gay partnerships can be just as stable, faithful, life-affirming, joyful and loving as heterosexual marriage can be. Therefore those in the Church who wish to maintain that homosexual partnerships are on scriptural or theological grounds a less good thing than marriage—or more bluntly that such relationships are sinful—will have to engage directly with this 'best' form of gay relationship. Cheap shots at gay promiscuity will not win the argument. For society and more liberal people in the Church to accept the conservative view that same-sex sexual activity is always wrong, the conservatives will have to show why the faithful sexual expression of love within this form of relationship, which looks remarkably like a marriage, is necessarily wrong. Therefore there is hope that the passing of this piece of legislation will force the Church to improve the quality of its debate on this issue.