

STATES OF JERSEY



CIVIL PARTNERSHIPS: GREEN PAPER NOVEMBER 2007

**Presented to the States on 14th December 2007
by the Chief Minister**

STATES GREFFE

LEGISLATION ADVISORY PANEL

'Green Paper' on "Civil Partnerships"

REPORT

Introduction

The Legislation Advisory Panel has been giving consideration to the possibility that there could be a change in the Island's legislation to allow for civil partnerships. The Advisory Panel has agreed that, whilst it was minded to proceed with some change to the present position, it would not wish to pursue a course of action which would extend the right to marry to same-sex couples. Consequently, it has also agreed that further consideration should be given to the remaining options (i.e. to follow the United Kingdom route and create civil partnerships which could be entered into by homosexual couples; or to create the right to form a civil partnership between both heterosexual and homosexual couples) following the receipt of further information.

In the subsequent paragraphs, the law in other jurisdictions, as well as our own, is set out. This report addresses in the most general terms the sort of problems that will need to be considered if there is to be a change in the legislation to allow for civil partnerships.

In summary, 4 options emerge for progressing (or not) new legislation –

- (a) to extend the right to marry to homosexual couples;
- (b) to follow the route taken by the United Kingdom and create civil partnerships, which could be entered into by homosexual couples;
- (c) to create the right to form a civil partnership between both heterosexual and homosexual couples; and
- (d) to maintain the existing position.

The Advisory Panel invites comments on these 4 options, which should be sent to it at the States Greffe, Morier House, Halkett Place, St. Helier, JE1 1DD by 31st March 2008.

Present state of the law in Jersey

1. The present position in Jersey is governed by the Marriage and Civil Status (Jersey) Law 2001 ("the 2001 Law").
2. Article 2 of the 2001 Law provides that one of the grounds on which a marriage will be declared void is that the parties to the marriage are "*not respectively male and female*". Therefore a marriage ceremony entered into by individuals of the same-sex would have no legal force or effect in Jersey.
3. Jersey law makes no reference to the recognition of marriages or civil partnerships legally formed under laws of another jurisdiction. There is no statutory mechanism in Jersey for civil partnerships whether heterosexual or homosexual.

Legal position in the United Kingdom

4. The legal position in the U.K. is governed by the Civil Partnerships Act 2004 ("the 2004 Act"). The 2004 Act came into force on 5th December 2005, and same-sex couples were able to form the first civil partnerships in Northern Ireland on 19th December 2005, in Scotland on 20th December 2005 and in England and Wales on 21st December 2005. The Explanatory Note to the 2004 Act explains that the purpose of the Act is to enable same-sex couples to obtain legal recognition of their relationship by

forming a civil partnership. Same-sex couples may do so by registering as civil partners of each other provided that:

- (i) they are of the same-sex;
- (ii) they are not already in a civil partnership or lawfully married;
- (iii) they are not within the prohibited degrees of relationship; and
- (iv) they are both aged 16 or over and, if either party is under 18 and the registration is to be in England and Wales or Northern Ireland, then the consent of the appropriate people or bodies (normally the parents) has been obtained.

5. A civil partnership can be formed in one of 2 ways. The first way is when 2 people register as civil partners of each other, either in the U.K. or under an Order of Council which allows for registration overseas at British consulates or by Armed Forces personnel. A civil partnership is formed when the 2 individuals involved sign a civil partnership document and that document is officiated by a Civil Partnership Registrar. For 2 people to be registered as civil partners of each other, each of them must give notice to the registration authority of the proposed civil partnership. Each civil partner is also required, when giving notice, to declare that he or she knows of no legal impediment to the formation of the civil partnership and confirm that each proposed civil partner has had residence in England and Wales for at least 7 days.
6. The second way of forming a civil partnership is by the couple registering an "*overseas relationship*". A civil partnership is treated as having been formed when the overseas relationship is registered as having been entered into, under the laws of the country or territory in which it is registered. For example, if a same-sex couple marry under the laws of Canada, once that marriage is registered in Canada, the couple are treated as having entered into a civil partnership for the purposes of U.K. law.
7. Civil partnerships only end on death, dissolution (akin to divorce) or annulment.
8. The Civil Partnership Registration Scheme was perceived as necessary to keep pace with changing social attitudes; this was particularly the case because many countries in the E.U. had, at the time, already afforded legal recognition to same-sex couples. The Civil Partnership Scheme was not extended to heterosexual couples as the U.K. Government was of the opinion that legal recognition of heterosexual couples relationships could be obtained through marriage.
9. The U.K. Government made it clear that civil partnerships were not the same as marriage. This is demonstrated in the 2004 Act by the exclusion of religious premises and ceremonies in the forming of civil partnerships. Parties to a civil partnership have available to them every material right and responsibility arising from a marriage but are not considered by virtue of that civil partnership to be married.
10. In July 2006, 2 women, Sue Wilkinson and Celia Kitzinger, petitioned the High Court of England and Wales for the right to have their marriage, formed validly under the laws of British Columbia in Canada, recognised in England as a marriage rather than as a civil partnership. The couple also argued that if the Court found that the marriage was not valid as a marriage under the laws of England and Wales, that the Matrimonial Causes Act, 1973 and the Civil Partnership Act, 2004 were incompatible with the Human Rights Act, 1998. The Court dismissed the petition and held that as the parties were domiciled in England their capacity to marriage was governed by English Law. Their marriage under Canadian Law was therefore an overseas relationship which was treated to be as a civil partnership under the Civil Partnership Act, 2004.
11. The Court also considered the Human Rights Act, 1998 and the Convention Rights under the European Convention on Human Rights.

12. Section 2 of the Human Rights Act, 1998 provides that any court determining a question that has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights or the Commission.
13. The High Court concluded that the purpose of [S.2 of the Human Rights Act, 1998](#) was to ensure that the same Convention rights were enforced by U.K. courts as would be enforced by the European Court of Human Rights in Strasbourg. The High Court held that where U.K. law was clear, it was not part of the purpose of [S.2](#) to oblige courts to interpret Convention rights or to develop European jurisprudence in a manner inconsistent with it.
14. The petitioners sought to rely on Article 12 which provides that—

“Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right.”
15. The High Court held that the wording of Article 12 of the European Convention on Human Rights referred to the right to marry in the traditional sense, namely as a marriage between a man and a woman according to the national laws governing the exercise of that right and therefore that Article 12 had no application to the facts of the case.
16. The High Court were also referred to Article 8, which provides that everyone has the right to respect for his private and family life, his home, and his correspondence. There should be no interference by a public authority with this right except where it is necessary in a democratic society in the interests of national security, public safety, economic well-being of the country, the prevention of disorder and crime, for the protection of health and morals or for the protection of the rights and freedoms of others.
17. The High Court held that with respect to the positive duties imposed by Article 8, any necessity to protect the private or family life of childless same-sex couples did not extend to recognising them as married. By declining to recognise a same-sex partnership as a marriage in legislation, the State could not be said to be improperly intruding on or interfering with the private life or family life of a same-sex couple who were living in a close loving and monogamous relationship. The High Court determined that the failure to recognise the status of the petitioner and the first respondent as being validly married fell outside the ambit of Article 8 taken together with Article 14.
18. Finally the Court held that although the State had no positive obligation under the European Convention on Human Rights to take steps to redress the perceived social disadvantages experienced by same-sex partners as compared with married persons, by embarking on legislation designed to alleviate such social disadvantage and passing the measures contained in the Civil Partnership Act, 2004, it brought the facts of the petitioner’s situation within the ambit of Article 12 taken together with Article 14 of the Convention. Nevertheless the Court held that the difference in treatment based on sexual orientation could be justified. The aim was legitimate and the means chosen to achieve that aim were appropriate and not disproportionate in their adverse impact. The High Court referred to the fact that the majority of governments in Europe regarded marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit in which both maternal and paternal influences were available in respect of their nurture and upbringing. The Civil Partnership Act, 2004 was therefore held not to be incompatible with Article 14. The couple have since decided not to appeal the decision of the High Court.
19. A similar case was heard in Ireland last year. Katherine Zappone and Ann Gilligan, Irish residents, were married in a civil ceremony in British Columbia in 2003. On their return to Ireland, the couple wrote to the Revenue Commissioners (the Irish tax authorities) informing them of their marriage and seeking to claim the various tax allowances and advantages to which married couples are entitled in Ireland. The Revenue Commissioners responded by informing the 2 women that they would not allow their claim for such allowances as they were not married. The couple sought leave for judicial review of the decision, which was granted. Ireland’s High Court rejected their case and held that the legal provisions relating to the right and capacity to marry in Ireland (which did not recognise same-sex marriage) were not

incompatible with the European Convention on Human Rights. On 22nd February 2007, the couple lodged an appeal to the Supreme Court. As far as can be ascertained, this appeal is yet to have been heard.

20. One further case of interest is that of Joyce and Sybil Burden. The 2 elderly sisters (aged 80 and 88) live together and sought to challenge the U.K. inheritance laws on the basis that the laws deny them the same rights as married or same-sex couples to exemption from inheritance tax. Under the inheritance laws, only property passing to a deceased's spouse or civil partner is exempt from inheritance tax. The sisters feared that when one of them died, the other would have to sell their jointly-owned home to pay the inheritance tax. The sisters argued that this was a breach of Article 1 of Protocol 1 (protection of property), taken in conjunction with Article 14 (prohibition in discrimination). The sisters appeared before the European Court of Human Rights in September 2006 to argue on the merits and admissibility of their legal action. The Court concluded that the difference in treatment was not inconsistent with Article 14 and accepted the Government's submission that the inheritance tax exemption for married and civil partnership couples pursued a legitimate aim, namely to promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse or partner.

Law Commission on Cohabitation

21. The Law Commission reviews and recommends reform to the laws in England and Wales. The Law Commission has undertaken an extensive consultation process focusing on the financial hardship suffered by cohabitants and their children on the termination of a relationship. The Commission was primarily concerned with people who are living together in relationships bearing the hallmarks of intimacy and exclusivity, but who are not married to each other or who have not formed a civil partnership. The Law Commission published their report to Parliament on 31st July 2007. A copy of that report and its executive summary can be obtained online at: <http://www.lawcom.gov.uk/cohabitation.htm>. By way of a summary, the Law Commission recommended the introduction of a separate scheme to enable qualifying cohabitants to obtain financial relief from their ex-partner in the event of separation. A remedy would only be available where: (a) the couple satisfied certain eligibility requirements; (b) the couple had not agreed to disapply the scheme; and (c) the applicant had made qualifying contributions to the relationship giving rise to certain enduring consequences at the point of separation.

European recognition of civil union or marriage between homosexuals

22. European countries that have awarded civil rights to same-sex couples, although not necessarily the full rights recognised to married couples, include Belgium, Denmark, Finland, Sweden, Norway, France, Germany, Iceland, Luxembourg, Portugal, the Netherlands, Spain, Andorra, the Czech Republic, Slovenia, Switzerland and the United Kingdom.
23. By way of example, set out below are some of the positions countries have chosen to adopt when recognising civil rights for same-sex couples.

Denmark

24. Denmark was the first country to introduce civil unions for same-sex couples (not heterosexual couples) on the 7th June 1989. The union takes the form of a registered partnership, by civil ceremony only, and has all the legal, fiscal rights and obligations of a heterosexual marriage, with 4 exceptions:
- Registered partners cannot adopt, with the exception that one party can adopt the biological children of another.
 - Registered partners cannot have joint custody of a child, except by adoption.
 - Laws making explicit references to the sexes of a married couple do not apply to registered partnerships.

– Regulations by international treaties do not apply unless all signatories agree.

25. Only citizens of countries which have legalized same-sex unions can enter a registered partnership in Denmark. This excludes foreigners from gaining a registered partnership status that would not be legally recognised in their own country.

Netherlands

26. From January 1998 same-sex couples in the Netherlands were entitled to register a civil partnership and gain all of the rights, privileges and obligations of marriage, except for the right to adopt. From 2001 this right was extended and the Netherlands were the first country to offer homosexuals full marriage rights by removing all references to gender in their marriage laws. The right to marriage and adoption in the Netherlands became open to both heterosexual and homosexual couples. Couples who had already entered into registered partnerships were able to have them converted to marriages. Married same-sex couples have all of the rights and privileges of opposite-sex married couples except that they are not allowed to adopt children from overseas because of legal complications with countries that don't allow homosexuals to marry.

France

27. French law provides for the “Pacte civil de solidarité” (“PACS”). The Code Civil defines it as a contract concluded between 2 people, over 18 years of age, of same-sex or of different sex, to organise their joint life. It is a mix of family law and contract law and the contract can be concluded between same-sex and opposite-sex couples. Those who are already married are forbidden from entering into a PACS and marriage will destroy a PACS. The agreement is recorded at the Tribunal d’Instance Greffe.
28. The partners are required to have a common address, as is obligatory in French marriages. The couple can effectively contract as they wish to organise their rights and duties within their relationship. French law does however require that the partners support each other financially as well as caring for each other and that they are responsible for each other’s debts insofar as they relate to the everyday expenses of the couple’s life.
29. Couples who have entered into a PACS benefit from inheritance benefits, tax relief, social security benefits, housing rights and also have similar rights to married couples under employment laws. Some of these rights however only accrue after the contract has been in place for 3 years. A deceased partner to a PACS can leave all of his estate to the surviving partner by will if there are no descendants or ascendants.
30. A PACS will be terminated on death, marriage or when a dual declaration of a common will to terminate the contract is registered with the Tribunal d’Instance Greffe. A PACS can also be terminated unilaterally at the request of one of the partners at the *Tribunal d’Instance*. The cessation takes effect 3 months after the request is registered by the court official.

International recognition of civil union or marriage between homosexuals

31. Internationally there are also a number of other countries that have awarded civil rights to same-sex couples, for example Canada and New Zealand.

Canada

32. Legalisation of same-sex marriage in Canada started in 2003 when a number of provincial or territorial justices ruled existing bans on same-sex marriage unconstitutional.
33. Same-sex marriage was legalized across Canada by the [Civil Marriage Act](#), which was enacted on 20th [July 2005](#).
34. Most of the legal benefits commonly associated with [marriage](#) had been extended to cohabiting same-sex

couples since 1999.

New Zealand

35. On 9th December 2004 the New Zealand Parliament passed the Civil Union Bill. The Bill came into effect on 26th April 2005, and established civil unions for same-sex and opposite-sex couples. A companion Bill, the Relationships (Statutory References) Bill, was passed shortly afterwards and that Bill removed all discriminatory provisions on the basis of relationship status from a range of statutes and regulations. As a result of these bills, all couples in New Zealand, whether married, in a civil union, or in a *de facto* partnership enjoy the same rights and undertake the same obligations.

Human Rights (Jersey) Law 2000

36. The Human Rights (Jersey) Law 2000 came into force in December 2006 and all public authorities are required to have regard to the Convention Rights. Whilst a number of European States have given legal and judicial recognition of stable *de facto* relationships to homosexuals, it is evident that there is still little common ground as to the approach to be adopted by the States and it appears that this is an area in which Contracting States still enjoy a wide margin of appreciation. Whilst Contracting States still appear to enjoy a wide margin of appreciation in this area, it is plausible this margin of appreciation will deplete in the future as wider universal recognition is given to homosexual marriage/partnerships. However, given the present wide margin of appreciation, it would seem defensible in human rights terms to take no action if that is what members think is the right course to follow.

Possible Actions

37. If new legislation is to be promoted in Jersey, it would seem that the new legislation could be approached in one of 3 ways–
- (i) by extending the right to marry to gay couples;
 - (ii) by following the U.K. route and creating civil partnerships which can be entered into by homosexual couples; and
 - (iii) by creating the right to form a civil partnership between both heterosexual and homosexual couples.

The fourth option is to take no action.

38. In the Appendix to this paper is a table setting out the routes some other countries have chosen to take.

APPENDIX

Countries that have legalized homosexual marriage	Countries that have legalised civil unions for homosexual couples	Countries that have legalised civil unions for all couples, whether heterosexual or homosexual
Netherlands	Denmark	France
Belgium	Norway	New Zealand
Spain	Sweden	Luxembourg
Canada	Switzerland	Switzerland – the canton of Geneva has the PACS system
South Africa (from December 2006)	Germany	Buenos Aires/Rio Negro
States of Massachusetts and Iowa (U.S.A.)	Iceland	Portugal
	United Kingdom	
	Andorra	
	Finland	
	Slovenia	
	Czech Republic	
	Mexico	