



Is gay marriage a second-class union?

A civil partnership may be a better vehicle for rights and protections, says **Edward Fennell**

Last night Mishcon de Reya hosted a debate on *Civil marriage — an issue of equality*, in conjunction with the Gay Women's Network. Inspired by the Government's consultation on equal civil marriage, it was designed to tease out the real significance of the Government's proposals.

In some respects, as Mishcon de Reya posited, could the difference between civil partnership and gay marriage be "just a matter of semantics"?

After all, as Sarah Higgins, of Charles Russell, says, since the civil partnership legislation of 2005 the same rights, protections and responsibilities broadly apply to civil partners as to opposite-sex married couples: "In terms of inheritance, capital gains tax and the status of 'nearest relative', the rights of civil partnership and marriage are the same — it's just the packaging that is different."

For Mark Harper, of Withers, however, the fundamental point is about equality. "For marriage to be available to same-sex couples is very important," he says. "Gay couples feel that they should be entitled to a State marriage or they will feel that they are being treated as second-class citizens."

The Government agrees. "Having two separate provisions for same-sex and opposite-sex couples perpetuates misconceptions and discrimination," says Theresa May, Home Secretary, and Lynne Featherstone, Equalities Minister, in their joint introduction to the consultative document.

The paradox in that statement, however, is that while civil partnerships are to be retained, will they be restricted to gay couples only? Where, you might ask, is the "equality" in that?

This apparent contradiction — marriage and civil partnerships for gay couples but marriage only for mixed-sex couples — was highlighted as an anomaly by several City lawyers this week. "This is pretty strange," says Pauline Fowler, of Hughes Fowler Carruthers. "There may well be heterosexual couples who have lived together for many years but have not wanted to get married. But as they age they may

see the value legally of formalising the relationship through a civil partnership even though they still don't want to be married."

So the real significance of the Government consultation is that it has missed the opportunity for creating genuine equality. "What hit me when I read the proposals was that they are not particularly new," says James Ferguson, of Boodle Hatfield. Opening up civil partnership to heterosexuals would have been a fresh development.

As it is, the full implications of civil partnerships are only now being appreciated by the gay community. Inevitably many civil partnerships — like heterosexual marriages — have broken down, but the terms of these dissolutions have yet to be fully explored.

That is why the case now before the Court of Appeal concerning Peter Lawrence, a millionaire city analyst, and his former partner, Don Gallagher, an actor, is so important.

Since the precedent set by *White v White* we have become used to wealthy heterosexual married couples

having to split the family assets roughly 50-50 on divorce. Will the same apply to gay couples? "The implications of the Lawrence case will be ground-breaking," says Ferguson. "It will test to what extent the courts will adopt the same or a different approach when dealing with a same sex-couple where one of them is much wealthier than the other."

According to Fowler, the gay community, in her experience, has still not fully adjusted to the idea of an equal division of a couple's combined assets — especially when the period of formal partnership has been quite short. "Wealthy gay people can be shocked when they realise that the break-up of the civil partnership is going to be so expensive for them," she says. Maybe if the word "marriage" had described their relationship they would have been more prepared.

But there are other complications that will resonate with wealthy gay

marrieds in the future, especially when

they have financial interests internationally or do not hold British citizenship. William Massey, of Farrer & Co, highlights the complexities that can already exist when creating the equivalent of prenup agreements for civil partnerships involving rich Americans working in London. How can these be made enforceable — at least in some states — when they return home?

And depending on the country involved, having "married" status may make matters worse, not least because far fewer jurisdictions have adopted gay marriage than those that have introduced civil unions.

Richard Frimston, of Russell-Cooke, advises on the cross-border implications of civil partnerships and says that countries that do not have same-sex marriages might not recognise marriages involving their nationals conducted in England and Wales. This is a matter where, at the moment, there is no consistency even across the EU.

"That is why case-by-case, country-by-country, advice will be needed by those entering a same-sex marriage," he says. Indeed it might be more advantageous having a civil partnership for some countries that also have civil unions but not marriage.

Love and marriage, in the words of the old song, go together like a horse and carriage. But in some parts of the world at least, a civil partnership may prove the more reliable vehicle for your rights and protections.

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