



House of Lords
House of Commons
Joint Committee on
Human Rights

Civil Partnership Bill

Fifteenth Report of Session 2003–04



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*Report, together with formal minutes and
appendix*

Ordered by The House of Lords to be printed 7 July 2004

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**HL Paper 136
HC 885**

Published on 15 July 2004 by authority of the House of Lords and
the House of Commons London: The Stationery Office Limited

£0.00

Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Current Staff

The current staff of the Committee are: Paul Evans (Commons Clerk), Nicolas Besly (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

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Summary

The purpose of the Civil Partnerships Bill is to remove discrimination between the way the law treats the relationships of married heterosexual couples and the way it treats same-sex couples who are legally prevented from marrying.

In general the Committee is satisfied that the Bill as introduced did achieve the aim of removing already established and likely future incompatibilities between domestic law and the right not to be discriminated against in the enjoyment of Convention rights on the grounds of sexual orientation. It welcomes the Bill as a measure enhancing protection for the fundamental human rights of same-sex partners.

Given the uncertainty over the future of the provision of the Bill, inserted at report stage in the House of Lords, greatly enlarging its scope of application, the Committee at this stage makes no analysis of the human rights implications of the Bill were that provision to remain.

The Committee does consider to what extent the exclusion of opposite-sex unmarried couples from the scope of civil partnerships may raise a question of discrimination in the enjoyment of rights. Such relationships are treated as analogous to married opposite-sex relationships. Once Parliament extends various benefits and protections to unmarried same-sex couples who register as civil partners, less favourable treatment of unmarried heterosexual couples on grounds of marital status requires justification.

The Bill as presently drafted will give rise to an inequality of treatment between same-sex couples and married heterosexual couples in relation to survivor's pension benefits under occupational pension schemes. Such less favourable treatment calls for justification.

1 Report

Background

1. The Civil Partnership Bill is a Government Bill, introduced to the House of Lords on 30 March 2004. The Baroness Scotland of Asthal has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. Explanatory Notes to the Bill have been published¹ and deal with the Government's view as to the compatibility of the Bill with Convention rights at paras 699–705. The Bill, as amended, had its Third Reading in the House of Lords on 1 July 2004.

The purpose of the Bill

2. The purpose of the Bill as originally introduced by the Government was to enable same-sex couples to obtain legal recognition of their relationship by forming a “civil partnership”. The Bill provided for legal recognition of such relationships by providing a formal scheme for their registration and setting out the legal consequences which follow from the formation of a civil partnership. Two individuals will be able to register as civil partners provided:

- a) they are of the same sex;
- b) they are not already in an existing civil partnership or lawfully married;
- c) they are not within the prohibited degrees of relationship; and
- d) they are both over the age of eighteen (sixteen in Scotland) or are over sixteen and have the relevant consent (in England, Wales and Northern Ireland).

On Report on 24 June the Bill was amended by the House of Lords to include within the scope of civil partnerships certain family relationships between two individuals where they are both over thirty and have lived together continuously for twelve years. The full consequential changes this would require to the remainder of the Bill were not made before it was sent to the Commons.

3. By granting legal recognition to same-sex relationships, the Bill was designed both to acknowledge the legitimacy of the claim of those in same-sex relationships to be accorded equal respect with heterosexual relationships, treating them as analogous;² and to remove the practical difficulties faced by same-sex couples as a result of the lack of legal recognition of their relationship.

4. We first consider the human rights issues raised by the Bill in its original form.

1 HL Bill 53-EN.

2 See for example Baroness Scotland on Second Reading: “It is a Bill that signals clearly that same-sex couple relationships should be treated with fairness and dignity” (HL Deb, 22 April 2004, col. 392).

Lack of legal recognition under current law

5. Same-sex couples are unable to marry because of the legal definition of marriage. Unmarried heterosexual couples who live together in a demonstrably committed relationship have received some legal recognition of their relationship, usually in the form of statutes using a formula such as “living as husband and wife”, and therefore explicitly based on an analogue of marriage. Same-sex couples, however, have not, to date, been accorded any express statutory recognition of their relationship.

6. Such legal recognition as same-sex relationships have received has been through judicial interpretation of the statutory phrase “member of the family.” In 1999 the House of Lords considered whether a same-sex partner, was capable of being either a “spouse” or a member of his partner’s “family” within the meaning of the Rent Act 1977.³ It held that he was not capable of being a “spouse” within the meaning of that term in the relevant legislation, because that term connoted a relationship between a man and a woman, nor was he within the meaning of the phrase “living as husband and wife” for the same reason, but that he *was* capable of being a member of his partner’s “family” within the meaning of that term as it was used in that Act.

7. Same-sex relationships have therefore been under a number of legal disadvantages compared to married heterosexual partners, which have practical consequences. Compared to partners in a married heterosexual relationship, same-sex couples are treated less favourably in terms of social protections such as survivor’s pensions, exemptions from taxation such as inheritance tax, and compensation in respect of fatal accidents, as well as not being recognised as their partner’s next of kin and therefore being excluded from key decisions about medical treatment, access to information, or participation in the procedures following death.

8. The Civil Partnership Bill aims to remove these legal disadvantages and, by granting legal recognition to same-sex relationships, to achieve equality between same-sex couples and married heterosexual couples.

The requirements of the ECHR

9. The Government states in the Explanatory Notes that it does not regard the inability of same-sex couples to marry as incompatible with the ECHR.⁴ This is in accordance with current Strasbourg jurisprudence.

10. It is, however, established in Convention case-law that a difference of treatment based on sexual orientation is covered by Article 14 (which guarantees enjoyment of the other rights without discrimination on any ground),⁵ and that where sexual orientation is the ground for different treatment, there is a need for particularly convincing and weighty reasons to justify such a difference of treatment.⁶ The European Court of Human Rights

3 For the purpose of succeeding to a statutory tenancy or an assured tenancy under that legislation on the death of his partner: *Fitzpatrick v Stirling Housing Association* [2001] 1 AC 27.

4 EN para. 700.

5 See for example *Salgueiro da Silva Mouta v Portugal* (21 December 1999) at para. 28; *Frette v France* (2003) 2 FLR 9 at para. 32.

6 See for example *Smith and Grady v UK* (1999) 29 EHRR 493, at para. 90.

recently considered in *Karner v Austria* the refusal to allow a same-sex partner to succeed to the lease of his deceased partner.⁷ The relevant legislation in that case entitled the “life companion” of the deceased to succeed to the tenancy, but the Austrian courts held that the deceased’s same-sex partner did not come within the meaning of that phrase. The Court held that, although protection of the traditional family was capable in principle of being a weighty and legitimate reason which might justify a difference of treatment on grounds of sexual orientation, it had to be shown that it was necessary to exclude same-sex partners in order to achieve that aim. In the absence of any such justification, the Court held that there had been a breach of Article 14 in conjunction with Article 8 (the right to respect for his home). The decision in *Karner* concerned a particular social protection for security of the home, but the reasoning behind it is of wider application.

Developments under the Human Rights Act

11. The House of Lords recently considered the implications of these developments, in light of the coming into force of the Human Rights Act 1998, in the case of *Mendoza*.⁸ The Lords earlier decision in *Fitzpatrick* was that same-sex partners were not within the scope of the Rent Act’s protection for spouses or unmarried cohabitants. In *Mendoza* the question was raised whether the words of that Act now had to be interpreted differently in order to achieve compatibility with Convention rights. The House of Lords decided⁹ that the statutory phrase “living as his or her husband or wife” in the Rent Act could and must be interpreted as including same-sex couples, so that a surviving same-sex partner succeeds to a statutory tenancy on the death of their partner.

12. The House of Lords found that there was a difference of treatment between same-sex couples and heterosexual unmarried couples (those living together as husband and wife) to whom the Act’s protection had been extended. Same-sex couples can have exactly the same sort of interdependent relationship as heterosexual couples can, and are therefore treated as analogous. The difference of treatment was based solely on sexual orientation and required cogent reasons to be justified. The Lords found that no such justification had been put forward, and that singling out heterosexual couples for more favourable treatment did not serve the aim of protecting the traditional family. They concluded that discouraging stable, committed, marriage-like same-sex relationships could no longer be regarded as a legitimate aim, and that the exclusion of same-sex couples from the protection given to the security of tenure of married and cohabiting opposite sex couples therefore failed to serve any legitimate aim and for that reason was incompatible with Article 14 ECHR.¹⁰

13. The House of Lords in *Mendoza* explicitly recognised that same-sex relationships are entitled to equal respect with heterosexual relationships. Lord Nicholls said—

⁷ *Karner v Austria* (2003) 2 FLR 623, paras 34–43.

⁸ *Ghaidan v Godin-Mendoza (FC)* [2004] UKHL 30 (21 June 2004).

⁹ The House of Lords was unanimous that it was discriminatory, and therefore incompatible with Convention rights, to exclude same-sex partners from the right to succeed to a statutory tenancy. It decided by a 4–1 majority, Lord Millett dissenting, that it was obliged by the interpretive obligation in s. 3(1) HRA 1998 to interpret the statutory phrase in a way which was compatible with Convention rights, rather than leave it to Parliament to amend the law. The dissent of Lord Millett is considered below in the context of the Civil Partnership Bill’s provisions concerning pensions.

¹⁰ The legislation was rescued from incompatibility, however, by interpreting it so as to include same-sex couples, which the majority held was both permissible and required by the strength of the interpretive obligation under s. 3 HRA.

Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced. Of course all law, civil and criminal, has to draw distinctions. One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. Like cases should be treated alike, unlike cases should not be treated alike. The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another.¹¹

14. Baroness Hale grounded the human rights guarantee of equal treatment in the foundational democratic principle that each individual has equal value:

Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom ... Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions.¹²

What the legislation needs to do

15. The Government has indicated throughout the debates on the Bill that it fully accepts that in order to remove already established and likely future incompatibilities between domestic law and the right not to be discriminated against in the enjoyment of Convention rights on the grounds of sexual orientation, legislation needs to remove all examples of differential treatment between same-sex and opposite sex couples in areas which engage Convention rights, unless and to the extent that there are serious and weighty reasons which justify such differential treatment.

16. In general we are satisfied that the Bill removes some existing incompatibilities in the present law and is designed to avert future findings of incompatibility in light of recent trends in the development of the case-law both under the ECHR and the Human Rights Act 1998. However, there are some human rights issues raised by the Bill's provisions which require further consideration.

¹¹ *Ghaidan v Godlin-Mendoza*, *op cit.*, at para. 9.

¹² *ibid.*, at para. 32.

The human rights issues

17. The main human rights issues raised by the Bill are:

- (1) whether in order for the Bill to be compatible with current human rights law it is necessary to include other relationships of interdependence between adults under one roof within its scope;
- (2) whether the exclusion of opposite sex couples from the scope of the Bill requires justification; and
- (3) whether the provisions concerning survivor's pensions give rise to a risk of unjustifiable discrimination between same-sex couples and married heterosexual couples.

The scope of the Bill: other non-marital relationships

18. The Bill as originally introduced by the Government applied only to same-sex partners. At Report stage in the House of Lords, an amendment was carried extending the scope of the Bill to certain other family relationships, provided that the two individuals concerned are both over the age of thirty and have lived together continuously for more than twelve years. The amendment has potentially very far-reaching implications for the structure of the Bill as a whole, and would require a large number of detailed consequential amendments to have coherent legislative effect. Baroness Scotland indicated at Third Reading that the Government would seek to reverse the amendment in the Commons, and the consequential amendments have therefore not been offered. The Bill as it stands at present is therefore inconsistent and incomplete, and we make no attempt here to examine the detailed human rights implications that might flow from the fundamental change of purpose proposed in the amendment made on 24 June.

19. However, we do need to address a more general question in relation to the amendment. One of the arguments made in support of it was that it was discriminatory to confine the scope of the Bill to same-sex couples while making no provision for such other relationships. We accept that there is a wider policy question about how the law deals with the very wide range of circumstances in which people now cohabit, as identified in the Law Commission's 2002 Report, *Sharing Homes*. However, the purpose of the original Bill was to remove discrimination between the way the law treats the relationships of married heterosexual couples and the way it treats same-sex relationships. The Bill is intended to remedy the State's denial of recognition that same-sex partners are capable of having a relationship which is equally worthy of respect,¹³ and it does that by making a legal analogy with marriage and the various rights and protections that currently flow from marriage. Human rights law now recognises that systematic denial of the recognition of same sex relationships violates the human dignity of same-sex partners. It is not contrary to human rights law to confine this recognition to same-sex partners who seek the same protections and rights as are available to heterosexual couples who choose to marry, however

¹³ See the extract from the judgment of Baroness Hale in *Mendoza*, cited in footnote 12.

inconsistent some may judge it to be not to extend it to other types of interdependent relationships.¹⁴

20. The Bill removes some existing incompatibilities in our law and seeks to prevent the possibility of future incompatibilities arising. It is not essential to this purpose to extend it in the way sought by the amendment made in the House of Lords on 24 June.

21. There may be one exception to this general conclusion. Under the terms of the Bill as introduced, no opposite-sex couples are eligible to register as civil partners. The Government accepts that this raises an issue of compatibility with Article 14 in conjunction with other Convention rights.¹⁵ However, it argued that the exclusion of opposite-sex couples from the scope of civil partnerships did not give rise to unjustified discrimination in breach of Article 14, because heterosexual unmarried couples, unlike same-sex couples, are eligible to marry, if both parties are competent and willing, which will give their relationship legal recognition as does civil partnership. The government argues that heterosexual couples who are unmarried have therefore opted for a lesser degree of legal recognition by choice.¹⁶

22. The human rights issue is whether it is unjustifiable discrimination under the Human Rights Act 1998 for the law not to provide the same facility for legal recognition of unmarried heterosexual couples who live together in a committed relationship once the same recognition has been provided for same-sex partners who are unable legally to marry. The question is whether this leads to less favourable treatment of unmarried cohabiting heterosexual partners in certain contexts, in breach of Article 14 ECHR in conjunction with other Convention rights. For example, when the Bill comes into force, exemption from inheritance tax will be available to a surviving spouse and a surviving civil partner,¹⁷ but not to the surviving partner of an unmarried heterosexual couple, even though they may have lived together as though husband and wife for the whole of their adult lives, and possibly raised children together.

23. The Government argues that there is no discrimination between unmarried cohabiting heterosexual couples and same-sex couples, either because they are not in an analogous position (and therefore cannot be meaningfully compared), or, even if they are, because there is objective and reasonable justification in the form of the Government's "policy that marriage is the best framework for stable family relationships for opposite-sex couples".¹⁸ The case-law of the Court of Human Rights establishes that the promotion of marriage, for example by conferring certain benefits on surviving spouses, is a legitimate aim under the Convention and in principle capable of justifying less favourable treatment of unmarried

14 Indeed, the lack of analogy is demonstrated by the fact that many such people will themselves already be married, or may wish to be married at some stage in the future. Entering into a civil partnership with a family member will not be compatible with the marital status or aspirations of such people.

15 EN paras 702.

16 As a matter of discrimination law analysis, the Government appears to rely on the choice argument both to suggest that unmarried heterosexual partners are not in an analogous position to same-sex partners (and therefore no justification is called for because there is no relevant comparator), and as a justificatory argument in its own right.

17 Under s. 18 Inheritance Tax Act 1984, as amended by the Civil Partnership Bill.

18 EN para. 703.

partners.¹⁹ It is clear from the decision of the House of Lords in *Mendoza*, however, that once Parliament extends the scope of a particular benefit, exemption or protection beyond married couples, it is far more difficult to demonstrate that the purpose of such provisions is the promotion of marriage. So, for example, once the scope of protection for security of tenure in the Rent Act was extended by Parliament to include cohabiting unmarried couples, it was clear that the underlying reason for the protection was the social policy reason that survivors of such relationships have a special claim to security of tenure. Once that step had been taken, there was no rational or fair ground for excluding same-sex couples who also share their lives and make their home together.²⁰ By the same token, when the Bill comes into force, a number of statutory benefits, protections and exemptions will be extended beyond marriage to same-sex couples who register as civil partners. This means that the “promotion of marriage” may no longer be exclusively relied upon to justify different treatment in relation to those protections.

24. The Government’s argument is that there is an objective justification for any difference of treatment, because unmarried heterosexual couples may be free to marry. But a decision of the Supreme Court of Canada in a case called *Miron v Trudel* illustrates that the courts may not accept this line of argument.²¹ The Canadian court recognised that heterosexual couples who choose not to marry may do so for very personal reasons of conscience and belief, for example because of the historical implications of the term “marriage” and the historical nature of the institution in which the woman was treated as property.²² Second, the court noted that being unmarried may not always be a choice made by both partners in an unmarried relationship. Both of these considerations would call into question the Government’s reliance on “choice” as the justification for not extending the scope of the Bill to opposite-sex unmarried couples.

25. There are similarities between the reasoning employed in the Canadian case and the reasoning of the House of Lords in *Mendoza*.²³ Once Parliament extends various benefits and protections to unmarried same-sex couples who register as civil partners, there is

19 See for example *Shackell v UK* (27 April 2000) (no breach of Article 14 in conjunction with Article 8 and Article 1 of Protocol No. 1 where social security benefits denied to surviving partner of unmarried couple with dependent children, where such benefits would have been available if they had been married).

20 See for example Lord Nicholls [2004] UKHL 30 at paras 17–18; Baroness Hale, *ibid.*, at paras 138 and 143.

21 (1995) SCR 124 DLR (4th) 693.

22 “... people who make a conscious decision not to subscribe to the institution of marriage may very well be motivated by very personal beliefs which have nothing to do with the contractual rights and obligations that incidentally attach to that status” (L’Heureux-Dube J.). A similar point was made by Lord Goodhart on Second Reading, HL Deb, 22 April 2004, col. 396.

23 The case concerned an unmarried couple who lived together with their children. The male partner was injured in a car accident involving an uninsured driver, and, being unable to work and contribute to his family’s support, he made a claim for loss of income against his partner’s insurance policy which, pursuant to terms prescribed by statute, extended accident benefits to the “spouse” of the policy holder. The insurance company refused his claim on the ground that he was not legally married to the policy holder. The Supreme Court of Canada held that the limitation of benefits to married people violated the equality provisions of the Canadian Charter of Rights and Freedoms because they discriminated on the grounds of marital status and could not be saved by any objective justification. It held that discrimination on the basis of marital status touches the essential dignity and worth of the individual, particularly the individual’s freedom to live life with the mate of one’s choice in the fashion of one’s choice, which is a matter of defining importance to individuals. The argument that legal recognition of such relationships undermined marriage was rejected: “it is not anti-marriage to accord equal benefit of the law to non-traditional couples”. Denying equal benefit to unmarried partners solely on the ground of their marital status had not been shown to be demonstrably justified: given the socially benign goal of the legislation in question, which was to sustain families through the hardship which occurs when an adult partner is injured, the state had failed to demonstrate that marital status was a reasonably relevant group marker of individuals who should receive benefits.

prima facie discrimination against unmarried heterosexual couples on grounds of marital status which requires justification.

26. We note that the Government has agreed to refer the question of reform of the law on cohabitation to the Law Commission. The complexity of reforming the law in order to achieve equality for unmarried heterosexual partners is not a justification for not including them within the scope of the present Bill. It is not yet clear what the Government proposes to do in order to bring such further reform forward. We have written to the Government in connection with this question. **We draw this matter to the attention of each House.**

Survivor's Pensions

The problem

27. Consistent with the Government's purpose of establishing equality of treatment between civil partners and married couples, the Bill provides for the extension of survivor pension rights to civil partners.

28. In relation to the State pension, this is done in the Bill by providing for the Category B retirement pension (the dependency pension) to be available to surviving civil partners.²⁴ Because that regime contains within it certain distinctions between widows and widowers' entitlements, the Government has had to choose whether to treat surviving civil partners as if they were widows or widowers. The Government has decided to treat civil partners as if they were widowers for the purposes of entitlement to Category B retirement pensions. The Government accepts that this means that female civil partners will be treated less favourably than widows, but considers that difference of treatment to be justified on the basis that it makes the most equal provision possible while complying with the requirements of EU sex discrimination law.²⁵

29. The main discrimination problem in relation to pension rights arises in the way in which the Bill deals with survivors' rights under occupational pension schemes. Clause 245 provides for a Minister to make amendments by order to any enactment or subordinate legislation relating to pensions which he considers appropriate for the purpose of, or in connection with, making provision with respect to pensions for surviving civil partners or dependants of deceased civil partners.

30. Occupational pension schemes are already required to make provision for survivor benefits for married partners. The power in clause 245 will be exercised to require such schemes to extend such survivor benefits to surviving civil partners. The potential discrimination problem arises because the Government envisages requiring occupational pension to calculate the value of such benefits on the basis of contributions made from the date of commencement of the Civil Partnership Act.²⁶

31. This will give rise to a difference of treatment between same-sex couples and married couples. The problem mainly arises in relation to public sector schemes. Most private

24 Clause 244 and Schedule 23, Pt. 3, paras 24–26.

25 EN para. 705.

26 EN para. 399.

sector schemes already allow discretionary provision for partners, including same-sex partners. After the Act comes into force, the widow of a married man who dies will be entitled to survivor benefits under her husband's occupational pension scheme calculated on the basis of contributions made by him since 1978. The position is different for a widower claiming a survivor's pension on the death of his wife: he will be entitled to survivor's benefits calculated on the basis of contributions made since 1988, which is the date on which widower's survivor benefits were first introduced. The survivor of a civil partner, however, will be entitled to survivor benefits on the basis of contributions made from the date on which the Civil Partnerships Act comes into force. Although the extent of this difference of treatment will diminish over time, it will have an immediate impact on older civil partners whose partners die in the next few years.

The human rights issue

32. Benefits under occupational pension schemes are contributory benefits, and within the scope of Article 1 of Protocol No. 1. Article 14 ECHR is therefore engaged. Less favourable treatment of surviving partners on grounds of sex or sexual orientation therefore requires justification.

33. When the Bill becomes law, the survivor of a civil partner who has made contributions since, say, 1978 will be less favourably treated than either a widow or a widower of a married person who has made exactly the same contributions. The basis for the difference between the two cases is not therefore a contribution record—it is the sexual orientation of the surviving civil partner. The Government argues that there is no discrimination, and therefore no incompatibility with human rights law, because there is no difference of treatment since extensions of pension rights are only ever introduced prospectively, not retrospectively. They also suggest that, even if there were a discrimination case to answer, any difference of treatment might well be justified on grounds of cost and/or fairness to pension schemes.

The retrospectivity argument

34. The Government point out that civil partners are being treated in exactly the same way as widowers were treated in 1988 when the right to a survivor's pension was extended to them.²⁷ Widowers became entitled to survivor's pension rights based on contributions from that date (1988), and not from the earlier date (1978) when widows received their rights. The pension provisions of this Bill, says the Government, are equal with all other extensions of pension provision in the past.²⁸ Pensions are said to be different from other benefits because they are accrued rights, and whenever pension provision has been extended, that has been the date on which accrued rights start clocking up. If the new pension entitlement was based on contributions made from some earlier date, it is said that this would be "retrospective" in effect, rather than prospective.

35. The Government also argues that examples of pension rights having been "backdated" following decisions of the European Court of Justice that it was discriminatory under EU

27 Baroness Hollis, HL Deb, 25 May 2004, GC col. 504.

28 *ibid.*, col. 506.

law to deny pension rights to certain groups²⁹ are not relevant to the question of civil partners' pension rights. In those cases, the Government says, the Court held that the individuals concerned should have been eligible to join the pension scheme on the date the Equal Treatment Directive came into force, and they had been denied their right to do so in the intervening period. Rectifying the position for that group which had been unlawfully denied their right therefore did not involve any retrospectivity. Those cases are said to be not relevant here, because the rights of surviving civil partners are not rights that have been illegally denied to people; rather they are rights that will arise from the point when the Bill is enacted.³⁰

36. We are not convinced by the Government's argument that there will be no difference of treatment between surviving civil partners and widowers because widowers were treated in the same way when their survivor benefits were introduced in 1988. A proper comparison would be with how a relevant comparator would be treated *today*, not with how that comparator was treated at some point in the past. The relevant comparison appears to us to be between a surviving civil partner whose partner dies the day after the Act comes into force, after having made identical contributions since, say, 1988, and a married survivor whose partner dies on the same day with exactly the same contribution record. The survivor of the marriage will receive a benefit based on 17 years of contributions (assuming the Act comes into force in 2005), while the same sex survivor will receive nothing despite the deceased partner having also made 17 years of contributions. It seems to us that this less favourable treatment on grounds of sexual orientation calls for justification.³¹

37. We also consider that the Government's argument for distinguishing the ECJ decisions, namely that a civil partner's right to a survivor's pension is not a right which has been illegally denied to people, but will only arise prospectively when the Civil Partnership Act comes into force, is thrown into serious doubt by the decision of the House of Lords in *Mendoza*. There is a significant risk, on the basis of the reasoning in *Mendoza*, that a court which is asked to determine the issue will hold that the denial of survivor's benefits to same-sex partners, whether under the current law or under the provisions of the Bill, is in breach of Article 14 in conjunction with Article 1 of Protocol No. 1, and that this will be held to follow from the enactment of those two provisions into our law by the Human Rights Act.

38. In that event, we do not consider that there would be any "retrospectivity", properly understood, in giving surviving civil partners equal protection to that given to a married survivor whose partner died on the same day with the same contribution record. It is necessary to distinguish between the *content* of the right to which the Human Rights Act gives rise, and the date on which that right became *available* in the UK. The issue of retrospectivity arises not in relation to the *content* of the right (to what benefit or protection does the human rights claim give rise?) but in relation to the *availability* of that right (when must the relevant events have taken place in order to be able to rely on the right?).

29 See for example *Preston v Wolverhampton Healthcare NHS Trust* [1999] ECR I-3201 and *Barber v GRE* [1990] ECR I-1889.

30 Baroness Hollis, HL Deb, 25 May 2004, GC col. 504.

31 We suggest below that the Government's argument about "retrospectivity" is a policy argument which goes to justification, not to the prior question of comparability.

39. The question which is then raised is what (if any) is the content of the entitlement which arises as a result of the coming into force of the HRA 1998. In the context of the Rent Acts, a married heterosexual partner of a statutory tenant, or one living with him or her in a heterosexual relationship, is entitled to succeed to the deceased partner's statutory tenancy on their death. As a result of the decision of the House of Lords, Mr Mendoza was *also* entitled to succeed to a statutory tenancy on the death of his same-sex partner. The content of his right not to be discriminated against under Articles 14 and 8, in concrete terms in the particular statutory context, is the right to succeed to the statutory tenancy on death in the same way as a heterosexual partner would succeed to such a tenancy on the death of their partner.

40. It appears to us that the content of the right not to be discriminated against in relation to survivor's pension rights must be to receive the same entitlement as a married partner in an analogous position, unless there is some objective reason for the content of that entitlement being different. The right not to be discriminated against on grounds of sexual orientation in relation to pension rights is available in domestic law as a result of the coming into force of the Human Rights Act 1998. That Act provides only for a limited degree of retrospectivity, in circumstances which are not relevant here.³² Because the HRA is prospective only for present purposes, the right not to be discriminated against in relation to pension rights (as defined above in terms of content) is available only to those same-sex partners whose partners have died since that date. What those same-sex partners are entitled to, however, is the same survivor benefits as a married survivor would be if their partner with the same contribution record died on the same day.

41. The pension provisions in the Bill will give rise to differential treatment in relation to contributory benefits on grounds of sexual orientation, which requires weighty justification if it is to be lawful.

Justification

42. The Government has not chosen to rely on cost as justification for the pension provisions, although it has made reference to this justification as a possible second line of defence.³³ Whether cost alone can ever amount in itself to a justification in relation to discrimination in the enjoyment of a Convention right is a matter of current controversy before the UK courts. The Court of Appeal in *Carson* held that cost *is* capable of amounting to such a justification.³⁴ However, this was without precedent as a matter of domestic discrimination law, European discrimination law, and human rights law. Earlier English law on the question held that cost cannot be relied on as a justification for discrimination if the available pot of money can be redistributed in a non-discriminatory manner,³⁵ and that while the availability of resources might well justify the adoption of a

32 Section 22(4) Human Rights Act 1998, as interpreted by the House of Lords in *R v Lambert* [2001] UKHL 37 and *R v Kansal* (No. 2) [2001] UKHL 62.

33 Baroness Hollis, HL Deb, 25 May 2004, GC col. 503 ("I shall not base them on costs"); col. 506 ("Arguments can be made on the grounds of cost or financial hardship, but I do not base my argument on those; rather it is about the nature of retrospectivity"); and col. 507 ("I do not make my case primarily on the grounds of cost).

34 *Carson and Reynolds v The Secretary of State for Work and Pensions* [2003] EWCA Civ. 797, at paras 70–73.

35 *Schaffter* [1987] IRLR 53.

realistic timetable for ending a discriminatory practice, it cannot be a valid justification for deliberately perpetuating such a practice.³⁶

43. We are not aware of any authority in Strasbourg case-law which establishes that cost is alone capable of justifying discrimination on one of the prohibited grounds. Leave to appeal to the House of Lords has been granted in *Carson* and the case will be heard later this year. In the meantime, in light of the decision of the Court of Appeal in *Carson*, and the fact that the Government has stated that the cost of giving same-sex surviving partners the same benefits as widowers would be £300 million, we have considered whether cost is capable of justifying the discrimination against same-sex partners notwithstanding that it is not relied upon by the Government as a justification.

44. We note that there is a great discrepancy between the cost figure quoted by the Government (between £60 million and £3 billion)³⁷ and the figure advised to some members of the House of Lords (£6–15 million)³⁸ and some NGOs (£6–12 million).³⁹ There is some indication that the Treasury does not regard the costs involved as being substantial.⁴⁰ It also appears that the additional cost to pension schemes, even if there is a high take-up of civil partnerships, is a relatively small proportion (less than 10%) of the additional annual cost of providing survivors' benefits to opposite sex spouses if the propensity of opposite sex partners to marry continues at current levels.⁴¹ The onus is on the Government to justify the differential treatment which we consider to arise as a result of the pension provisions in the Bill, and in our letter to the Minister we have asked for clarification of the discrepancy between the cost figures so far cited in the debates on the Bill. We do not consider that a cost in the range of £6–15 million would be likely to be a sufficiently weighty justification for less favourable treatment based on a suspect ground and which has a very serious impact on those individuals affected.

45. We also consider there to be a second justificatory argument at work, although it is not expressly articulated as a justification for unequal treatment by the Government: the need to protect pension schemes from unforeseen liabilities which might have an impact on other members of the scheme. This appears to us to be the real policy consideration behind the Government's argument about retrospectivity:⁴² a desire to ensure consistency for pension schemes and to avoid interfering with the pension rights and benefits of third parties.

36 Sullivan J. in *R(Purja) v Ministry of Defence* [2003] EWHC 445 Admin at para. 91.

37 In a letter dated 2 June 2004 from Baroness Hollis to Lord Lester, the cost is estimated as being anywhere in the region of £60 million and £300 million, depending on take-up and on whether benefits are based on full pensionable service or service since 1988. In a written answer (HL Hansard, 19 May 2004, WA90), the cost is estimated at around £3 billion if the propensity of same-sex couples to register matched that of opposite-sex couples to marry.

38 See for example Lord Alli, HL Deb, 25 May 2004, GC col. 503.

39 See for example Stonewall parliamentary briefing which states that its actuarial advice is that the cost will be between £6–12 million per year over fifteen years, or between 0.01 and 0.02% of pensionable payroll.

40 See for example Lord Higgins, HL Deb, 25 May 2004, GC, col. 511; Baroness Hollis, *ibid.*, col. 513.

41 HL Deb, 25 June 2004, c WA157.

42 See for example Baroness Scotland on Second Reading, HL Deb, 22 April 2004, col. 431: "retrospection would add significant liabilities to those schemes which do not already pay survivor benefits to unmarried couples"; Baroness Hollis at Committee stage, HL Deb, 25 May 2004, cols. 512–513: "In the context of our argument about retrospectivity, the costs that will fall ... on public service schemes to extend equity between civil partners and married couples will be mitigated by the fact that accrued rights will be built up over time."

46. If we accept that this is capable in principle of being a justification for less favourable treatment because it may have a very serious impact on the rights or settled expectations of third parties, this might constitute a sufficiently weighty justification to satisfy the high standard required by Article 14. However, the onus rests on the Government to demonstrate sufficiently weighty reasons for discrimination on grounds of sexual orientation. If the impact on existing schemes is one of the reasons for restricting the survivor's benefits for civil partners to contributions made from the date of the Act coming into force, evidence must be provided of the precise impact on those schemes.

47. We have written to the Minister asking certain questions in order to ascertain whether there in fact exists a sufficiently weighty justification for the less favourable treatment of same-sex couples in relation to survivor's pensions.⁴³ It may be necessary to return to this question in a future report in light of the Government's answers.

48. In the absence of such evidence of justification, we consider that there is a significant risk that the way in which the pensions provisions in the Bill restrict a civil partner's right to survivor benefits compared to a married partner's right to such benefit is incompatible with Article 14 ECHR in conjunction with Article 1 Protocol 1. **We draw this matter to the attention of each House.**

43 See Appendix.

Formal Minutes

Wednesday 7 July 2004

Members Present:

Jean Corston MP, in the Chair

Lord Bowness	Mr David Chidgey MP
Lord Campbell of Alloway	Mr Kevin McNamara MP
Lord Judd	Mr Paul Stinchcombe MP
Lord Lester of Herne Hill	Mr Shaun Woodward MP
Lord Plant of Highfield	
Baroness Prashar	

The Committee deliberated.

* * * * *

Draft Report [Civil Partnership Bill], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 11 read and agreed to.

Paragraph 12 read as follows:

“The House of Lords found that there was a difference of treatment between same-sex couples and heterosexual unmarried couples (those living together as husband and wife) to whom the Act’s protection had been extended. Same-sex couples can have exactly the same sort of inter-dependent relationship as heterosexual couples can, and are therefore treated as analogous. The difference of treatment was based solely on sexual orientation and required cogent reasons to be justified. The Lords found that no such justification had been put forward, and that singling out heterosexual couples for more favourable treatment did not serve the aim of protecting the traditional family. They concluded that discouraging stable, committed, marriage-like same-sex relationships could no longer be regarded as a legitimate aim, and that the exclusion of same-sex couples from the protection given to the security of tenure of married and cohabiting opposite sex couples therefore failed to serve any legitimate aim and for that reason was incompatible with Article 14 ECHR.”

Amendment proposed, in line 9, leave out “marriage-like”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Paragraph 12 agreed to.

Paragraphs 13 and 14 read and agreed to.

A paragraph—(*Mr Kevin McNamara*)—brought up and read as follows:

“This same logic must apply to the distinction against unmarried sexual relations and others covered by amendment made to the Bill in their Lordships’ House. In our Report on the Finance Bill [Twelfth Report of Session 2003-04] this matter was dealt with in paragraphs 2.55-2.57, headed spouse exemptions, which stated—

2.56 The term “spouse” is not defined in this Bill, nor in the Inheritance Tax Act 1984, but is interpreted by the courts as meaning “parties to a lawful marriage”. Confining the benefit of the exemption in paragraph 10 of Schedule 15 to the parties to a lawful marriage excludes from the scope of that exemption homosexual couples who live together as de facto spouses (but are legally unable to marry), heterosexual unmarried couples who live together as de facto spouses and people sharing a home on the basis of a long-term or family relationship which is not a sexual relationship.

2.57 The spouse exemption in Schedule 15 to the Act therefore engages Article 14 in conjunction with Article 8 and Article 1 of Protocol No. 1 ECHR: by discriminating on grounds of sexual orientation and marital status, it raises the question, what is the objective and reasonable justification for excluding de facto spouses from the benefit of the exemption. **We draw this matter to the attention of each House.**”

Question put, That the paragraph be read a second time.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Paragraph 15 read as follows:

“The Government has indicated throughout the debates on the Bill that it fully accepts that in order to remove already established and likely future incompatibilities between domestic law and the right not to be discriminated against in the enjoyment of Convention rights on the grounds of sexual orientation, legislation needs to remove all examples of differential treatment between same-sex and opposite sex couples in areas which engage Convention rights, unless and to the extent that there are serious and weighty reasons which justify such differential treatment.”

Amendment proposed, at the end to add the words “but it does not justify the continuation or accentuation of discrimination against other e.g. non-married heterosexual couples and others in non-sexual long term same household relationships.” —(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Paragraph 15 agreed to.

Paragraph 16 read and agreed to.

Paragraph 17 read as follows:

“The main human rights issues raised by the Bill are:

- (1) whether in order for the Bill to be compatible with current human rights law it is necessary to include other relationships of interdependence between adults under one roof within its scope;
- (2) whether the exclusion of opposite sex couples from the scope of the Bill requires justification; and
- (3) whether the provisions concerning survivor’s pensions give rise to a risk of unjustifiable discrimination between same-sex couples and married heterosexual couples.”

Amendment proposed, in line 5, after “couples” insert “and others” and before “Bill” insert “original” —(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, in line 8, delete “and” after first “couples”, after “married” insert “and unmarried”, and after second “couples” insert “and others”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Paragraph 17 agreed to.

Paragraph 18 read as follows:

“The Bill as originally introduced by the Government applied only to same-sex partners. At Report stage in the House of Lords, an amendment was carried extending the scope of the Bill to certain other family relationships, provided that the two individuals concerned are both over the age of thirty and have lived together continuously for more than twelve years. The amendment has potentially very far-reaching implications for the structure of the Bill as a whole, and would require a large number of detailed consequential amendments to have coherent legislative effect. Baroness Scotland indicated at Third Reading that the Government would seek to reverse the amendment in the Commons, and the consequential amendments have therefore not been offered. The Bill as it stands at present is therefore inconsistent and incomplete, and we make no attempt here to examine the detailed human rights implications that might flow from the fundamental change of purpose proposed in the amendment made on 24 June.”

Amendment proposed, in , line 6, delete “would” and insert “will”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, in , line 8, delete “would” and insert “will”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, in line 8, delete all after “Commons” to the end of the paragraph.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP

Lord Bowness

Mr David Chidgey MP

Lord Judd

Lord Lester of Herne Hill

Lord Plant of Highfield

Baroness Prashar

Mr Paul Stinchcombe MP

Mr Shaun Woodward MP

Paragraph 18 agreed to.

Paragraph 19 read and agreed to.

Paragraph 20 brought up and read the first time.

Question put, That the paragraph be read a second time.

The Committee divided:

Content, 9

Not Content, 1

Jean Corston MP

Mr Kevin McNamara MP

Lord Bowness

Mr David Chidgey MP

Lord Judd

Lord Lester of Herne Hill

Lord Plant of Highfield

Baroness Prashar

Mr Paul Stinchcombe MP

Mr Shaun Woodward MP

Paragraph 20 agreed to.

Paragraph 21 read as follows:

“There may be one exception to this general conclusion. Under the terms of the Bill as introduced, no opposite-sex couples are eligible to register as civil partners. The Government accepts that this raises an issue of compatibility with Article 14 in conjunction with other Convention rights. However, it argued that the exclusion of opposite-sex couples from the scope of civil partnerships did not give rise to unjustified discrimination in breach of Article 14, because heterosexual unmarried couples, unlike same-sex couples, are eligible to marry, if both parties are competent and willing, which will give their

relationship legal recognition as does civil partnership. The government argues that heterosexual couples who are unmarried have therefore opted for a lesser degree of legal recognition by choice.”

Amendment proposed, in line 1, delete “may be” and insert “is at least”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, in line 2, after “couples” insert “or others”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, at the end of the paragraph, to add the words, “This long-distance mind reading is only legitimate if the Government can demonstrate that both opposite sex partners are competent to marry and wish to do so.”—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Mr Kevin McNamara MP

Not Content, 9

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Another Amendment proposed, to omit footnote 16.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Mr Kevin McNamara MP

Not Content, 9

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Paragraph 21 agreed to.

Paragraphs 22 to 25 agreed to.

Paragraph 26 read as follows:

49. “We note that the Government has agreed to refer the question of reform of the law on cohabitation to the Law Commission. The complexity of reforming the law in order to achieve equality for unmarried heterosexual partners is not a justification for not including them within the scope of the present Bill. It is not yet clear what the Government proposes to do in order to bring such further reform forward. We have written to the Government in connection with this question. **We draw this matter to the attention of each House.**”

Amendment proposed, in line 3, delete “for not including” and insert “for failing to include”—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, in line 4, delete “present” and insert “original”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, in line 4, delete from “Bill.” to “We” in line 6.—(*Mr McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Another Amendment proposed, in line 5, after “forward” insert “It is not sufficient for the Government to avoid an immediate decision by referring it to the Law Commission without indicating the time in which it should report and giving a specific time table when it would present the findings of the Law Commission to each House in the form of a Bill.”
—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Paragraph 26 agreed to.

Paragraphs 27 to 48 read and agreed to.

Summary read as follows:

“The purpose of the Civil Partnerships Bill is to remove discrimination between the way the law treats the relationships of married heterosexual couples and the way it treats same-sex couples who are legally prevented from marrying.

In general the Committee is satisfied that the Bill as introduced did achieve the aim of removing already established and likely future incompatibilities between domestic law and the right not to be discriminated against in the enjoyment of Convention rights on the grounds of sexual orientation. It welcomes the Bill as a measure enhancing protection for the fundamental human rights of same-sex partners.

Given the uncertainty over the future of the provision of the Bill, inserted at report stage in the House of Lords, greatly enlarging its scope of application, the Committee at this stage makes no analysis of the human rights implications of the Bill were that provision to remain.

The Committee does consider to what extent the exclusion of opposite-sex unmarried couples from the scope of civil partnerships may raise a question of discrimination in the enjoyment of rights. Such relationships are treated as analogous to married opposite-sex relationships. Once Parliament extends various benefits and protections to unmarried same-sex couples who register as civil partners, less favourable treatment of unmarried heterosexual couples on grounds of marital status requires justification.

The Bill as presently drafted will give rise to an inequality of treatment between same-sex couples and married heterosexual couples in relation to survivor's pension benefits under occupational pension schemes. Such less favourable treatment calls for justification."

Amendment proposed, in line 4, before "Bill" insert "original". —(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP

Lord Bowness

Mr David Chidgey MP

Lord Judd

Lord Lester of Herne Hill

Lord Plant of Highfield

Baroness Prashar

Mr Paul Stinchcombe MP

Mr Shaun Woodward MP

Another Amendment proposed, to delete lines 9 to 12.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Another Amendment proposed, in line 14, after “couples” insert “and others”.—(*Mr McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Another Amendment proposed, in line 17, after “couples” insert “and others”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, in line 20, delete “and” and insert “, non-”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
 Lord Bowness
 Mr David Chidgey MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Prashar
 Mr Paul Stinchcombe MP
 Mr Shaun Woodward MP

Another Amendment proposed, in line 20, after “couples” insert “and others”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Summary agreed to.

Motion made, and Question proposed, That the Report be the Fifteenth Report of the Committee to each House.—(*The Chairman.*)

Amendment proposed, to leave out from the word “That” to the end and insert, “the Committee declines to make any Report to either House because this Report fails to consider the Children Bill as amended by their Lordship’s House.”.—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 9

Mr Kevin McNamara MP

Jean Corston MP
Lord Bowness
Mr David Chidgey MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar
Mr Paul Stinchcombe MP
Mr Shaun Woodward MP

Resolved, That the Report be the Fifteenth Report of the Committee to each House.

Ordered, That certain papers be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and that Baroness Prashar do make the Report to the House of Lords.

[Adjourned till Wednesday 14 July at a quarter past Four o’clock.]

Appendix

Letter from the Chair to Rt Hon Patricia Hewitt MP, Secretary of State for Trade and Industry, Minister for Women and e-Minister in Cabinet

The Committee is considering how to report to each House on the above Bill. It has carried out an initial examination of this Bill and would be grateful for your comments on the following points raised by our Legal Adviser. Our starting-point is of course the statement made under s.19(1)(a) of the Human Rights Act 1998; but I should make it clear that the Committee's remit extends to human rights in a broad sense, not just the Convention rights under the Act.

THE SCOPE OF THE BILL: OPPOSITE-SEX COUPLES

Opposite-sex couples will not be eligible to register as civil partners under the Bill. This raises an issue as to whether the Bill gives rise to unjustified discrimination against unmarried but cohabiting opposite-sex couples who could claim that their relationship is to be treated as being analogous to that of married couples or same-sex civil partners.

The Government justifies the difference of treatment by relying on its policy of promoting marriage as the best framework for stable family relationships for opposite-sex couples. It is clear from the recent decision of the House of Lords in *Mendoza*,⁴⁴ however, that once Parliament extends the scope of a particular benefit, exemption or protection beyond married couples, it is far more difficult to demonstrate that the purpose of such provisions is the promotion of marriage. So, for example, once the scope of protection for security of tenure in the Rent Act was extended by Parliament to include cohabiting unmarried couples, it was held to be clear that the underlying reason for the protection was not the promotion of marriage, but the social policy reason that survivors of such relationships have a special claim to security of tenure. Once that step had been taken, it was held that there was no rational or fair ground for excluding same-sex couples who also share their lives and make their home together.⁴⁵

By the same token, when the Bill comes into force, a number of statutory benefits, protections and exemptions will be extended beyond marriage to same-sex couples who register as civil partners. According to the House of Lords in *Mendoza*, the promotion of marriage can no longer be relied upon in relation to those protections. Once that step is taken, there must be a rational or fair ground for excluding opposite-sex couples who also share their lives and make their home together.

Question 1: In light of the decision of the House of Lords in Mendoza, what is the Government's reason for not allowing unmarried heterosexual couples to register as civil partners?

The Government also argues that any difference of treatment of opposite-sex couples is justified because unmarried heterosexual couples are free to marry and therefore "choose" the less favourable legal treatment of their relationship. A decision of the Supreme Court of Canada, in a case called *Miron v Trudel*, considered and rejected this argument as a justification for treating unmarried opposite sex couples differently from married couples.⁴⁶ It held that there are two problems with the "choice" justification. First,

44 *Ghaidan v Godin-Mendoza (FC)* [2004] UKHL 30 (21 June 2004).

45 See for example Lord Nicholls [2004] UKHL 30 at paras 17-18; Baroness Hale, *ibid.*, at paras 138 and 143.

46 (1995) SCR 124 DLR (4th) 693.

heterosexual couples who choose not to marry may do so for very personal reasons of conscience and belief (for example because of the historical implications of the term “marriage” and the historical nature of the institution as a property transaction in which the woman was treated as property).⁴⁷ Second, being unmarried may not always be a choice made by both partners in an unmarried relationship: some are unable to persuade their partners to enter into marriage.

Question 2: Does the Government accept that unmarried opposite-sex couples who share their lives together in a relationship which could claim to be analogous to marriage may decide not to marry for reasons of personal belief or conscience?

Question 3: Does the Government accept that unmarried opposite-sex partners who share their lives together in a relationship which could claim to be analogous to marriage might not marry due to the reluctance of one partner to enter into marriage, and that in such cases there is a social need to provide protection for the other partner and any children of the relationship?

The complexity of reforming the law in order to remove the less favourable treatment of opposite-sex couples might be offered as a justification for the exclusion of opposite-sex couples from the scope of civil partnerships. However, the onus is on the Government to demonstrate that this complexity requires a separate measure of law reform rather than simply allowing unmarried opposite-sex partners to be eligible for civil partnership. The Government has indicated that it intends to refer the question of reform of the law of cohabitation to the Law Commission.

Question 4: Can you indicate in outline the likely terms of reference to the Law Commission? In particular, can you confirm that the Law Commission will be asked to consider all aspects of less favourable treatment of unmarried cohabiting opposite-sex couples compared to married couples and civil partners, and not merely those relating to rights in shared property?

SURVIVOR'S PENSIONS

The pension provisions in the Bill will give rise to differential treatment of same-sex couples, compared to married couples, in relation to contributory benefits on grounds of sexual orientation. Such less favourable treatment requires weighty justification to be compatible with human rights law. The onus is on the Government to provide the evidence to demonstrate that less favourable treatment is justified. The Committee would therefore welcome answers to the following questions about the justification relied on.

Question 5: What will be the actual additional cost annually to public service schemes if survivor pension benefits are available to civil partners on the same basis as they are currently available to widowers (i.e. taking account of pensionable service/contributions since 1988) and the take-up of civil partnership is about 5-10% of the take up of marriage by opposite-sex partners (as the Government predicts)?

Question 6: Can the figure of £6-15 million a year, which has been quoted by NGOs and others on the basis of actuarial advice, be relied on?

⁴⁷ “... people who make a conscious decision not to subscribe to the institution of marriage may very well be motivated by very personal beliefs which have nothing to do with the contractual rights and obligations that incidentally attach to that status” (L’Heureux-Dube J.). A similar point was made by Lord Goodhart on Second Reading, HL Deb, 22 April 2004 col. 396.

Question 7: How much is the additional cost expressed as a percentage of the cost of providing such benefits to opposite sex couples?

Question 8: Can you confirm that the Treasury does not regard the cost as substantial?

Question 9: What proportion of public service schemes already provide for survivors of cohabiting relationships?

Question 10: Do public service schemes currently have a discretion to provide survivor benefits to same-sex couples?

Question 11: What assumption is currently made about the proportion of scheme members who will leave a surviving partner at death who is entitled to benefit under the scheme?

Question 12: What is the statistical basis for that assumption?

Question 13: Do the actuarial assumptions include an assumption that a certain proportion of scheme members are gay and therefore will not leave a surviving spouse who is entitled to benefit?

In view of the progress of the Bill the Committee wishes to report your responses to the above questions, and its conclusions on them, at as early a date as possible. The Committee would therefore be grateful for a reply by 29 July, or earlier if at all possible.

12 July 2004

Reports from the Joint Committee on Human Rights since 2001

The following reports have been produced

Session 2003–04

First Report	Deaths in Custody: Interim Report	HL Paper 12/HC 134
Second Report	The Government's Response to the Committee's Ninth Report of Session 2002–03 on the Case for a Children's Commissioner for England	HL Paper 13/HC 135
Third Report	Scrutiny of Bills: Progress Report	HL Paper 23/HC 252
Fourth Report	Scrutiny of Bills: Second Progress Report	HL Paper 34/HC 303
Fifth Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HL Paper 35/HC 304
Sixth Report	Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4	HL Paper 38/HC 381
Seventh Report	The Meaning of Public Authority under the Human Rights Act	HL Paper 39/HC 382
Eighth Report	Scrutiny of Bills: Third Progress Report	HL Paper 49/HC 427
Ninth Report	Naval Discipline Act 1957 (Remedial) Order 2004	HL Paper 59/HC 477
Tenth Report	Scrutiny of Bills: Fourth Progress Report	HL Paper 64/HC 503
Eleventh Report	Commission for Equality and Human Rights Structure, Functions and Powers	HL Paper 78/HC 536
Twelfth Report	Scrutiny of Bills: Fifth Progress Report	HL Paper 93/HC 603
Thirteenth Report	Scrutiny of Bills: Sixth Progress Report	HL Paper 102/HC 640
Fourteenth Report	Asylum & Immigration (Treatment of Claimants, etc.) Bill: New Clauses	HL Paper 130/HC 828

Session 2002–03

First Report	Scrutiny of Bills: Progress Report	HL Paper 24/HC 191
Second Report	Criminal Justice Bill	HL Paper 40/HC 374
Third Report	Scrutiny of Bills: Further Progress Report	HL Paper 41/HC 375
Fourth Report	Scrutiny of Bills: Further Progress Report	HL Paper 50/HC 397

Fifth Report	Continuance in force of sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 59/HC 462
Sixth Report	The Case for a Human Rights Commission: Volume I Report	HL Paper 67-I HC 489-I
Seventh Report	Scrutiny of Bills: Further Progress Report	HL Paper 74/HC 547
Eighth Report	Scrutiny of Bills: Further Progress Report	HL Paper 90/HC 634
Ninth Report	The Case for a Children's Commissioner for England	HL Paper 96/HC 666
Tenth Report	United Nations Convention on the Rights of the Child	HL Paper 117/HC 81
Eleventh Report	Criminal Justice Bill: Further Report	HL Paper 118/HC 724
Twelfth Report	Scrutiny of Bills: Further Progress Report	HL Paper 119/HC 765
Thirteenth Report	Anti-social Behaviour Bill	HL Paper 120/HC 766
Fourteenth Report	Work of the Northern Ireland Human Rights Commission	HL Paper 132/HC 142
Fifteenth Report	Scrutiny of Bills and Draft Bills: Further Progress Report	HL Paper 149/HC 1005
Sixteenth Report	Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 181/HC 1272
Seventeenth Report	Scrutiny of Bills: Final Progress Report	HL Paper 186/HC 1278
Eighteenth Report	The Government's Response to the Committee's Tenth Report of Session 2002–03 on the UN Convention on the Rights of the Child	HL Paper 187/HC 1279
Nineteenth Report	Draft Gender Recognition Bill Vol I: Report	HL Paper 188-I/HC 1276-I
Nineteenth Report	Draft Gender Recognition Bill Vol II: Evidence	HL Paper 188-II/HC 1276-II
Session 2001–02		
First Report	Homelessness Bill	HL Paper 30/HC 314
Second Report	Anti-terrorism, Crime and Security Bill	HL Paper 37/HC 372
Third Report	Proceeds of Crime Bill	HL Paper 43/HC 405
Fourth Report	Sex Discrimination (Election Candidates) Bill	HL Paper 44/HC 406
Fifth Report	Anti-terrorism, Crime and Security Bill: Further Report	HL Paper 51/HC 420

Sixth Report	The Mental Health Act 1983 (Remedial) Order 2001	HL Paper 57/HC 472
Seventh Report	Making of Remedial Orders	HL Paper 58/HC 473
Eighth Report	Tobacco Advertising and Promotion Bill	HL Paper 59/HC 474
Ninth Report	Scrutiny of Bills: Progress Report	HL Paper 60/HC475
Tenth Report	Animal Health Bill	HL Paper 67/HC 542
Eleventh Report	Proceeds of Crime: Further Report	HL Paper 75/HC 596
Twelfth Report	Employment Bill	HL Paper 85/HC 645
Thirteenth Report	Police Reform Bill	HL Paper 86/HC 646
Fourteenth Report	Scrutiny of Bills: Private Members' Bills and Private Bills	HL Paper 93/HC 674
Fifteenth Report	Police Reform Bill: Further Report	HL Paper 98/HC 706
Sixteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 113/ HC 805
Seventeenth Report	Nationality, Immigration and Asylum Bill	HL Paper 132/ HC 961
Eighteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 133/ HC 962
Nineteenth Report	Draft Communications Bill	HL Paper 149 HC 1102
Twentieth Report	Draft Extradition Bill	HL Paper 158/ HC 1140
Twenty-first Report	Scrutiny of Bills: Further Progress Report	HL Paper 159/ HC 1141
Twenty-second Report	The Case for a Human Rights Commission	HL Paper 160/ HC 1142
Twenty-third Report	Nationality, Immigration and Asylum Bill: Further Report	HL Paper 176/ HC 1255
Twenty-fourth Report	Adoption and children Bill: As amended by the House of Lords on Report	HL Paper 177/ HC 979
Twenty-fifth Report	Draft Mental Health Bill	HL Paper 181/ HC 1294
Twenty-sixth Report	Scrutiny of Bills: Final Progress Report	HL Paper 182/ HC 1295