

THE FUTURE OF REGISTERED PARTNERSHIPS

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THE FUTURE OF REGISTERED
PARTNERSHIPS

Family Recognition Beyond Marriage?

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The Future of Registered Partnerships. Family Recognition Beyond Marriage?

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FOREWORD

In July 2015, I attended a conference in Cambridge – *The Future of Registered Partnerships* – organised by Jens Scherpe and Andy Hayward, the organisers of the research project on the topic and the editors of this excellent book. We heard from lawyers, academics and law-makers from the UK and from overseas; we heard from jurisdictions where registered partnerships are available for opposite-sex as well as same-sex couples; we heard from other jurisdictions where registered partnerships had been introduced for same-sex couples and then abolished when marriage was opened up for same-sex couples; we also heard from jurisdictions which are ‘in transition’. One of the jurisdictions falling into the last category was and, at the time of writing still is, England and Wales.

In the International Academy of Family Lawyers (IAFL), we have become increasingly interested in a wide range of issues relating to the family – not just divorce and sorting out money and children. International family law specialists have shared their own experiences and the legal developments in their own countries with their colleagues in other parts of the world. The consequences of such dissemination have been immensely valuable for all of us; being able to consider these issues from such a well-informed position makes all the difference. Therefore, we were delighted to support the Cambridge conference, and many of our members attended.

The Cambridge conference in July 2015 posed important questions. Is there a function or a need for another form of formalised relationship besides marriage? What are the global developments in this area, and what can we learn from them? This goes way beyond the question about what should or should not be available to provide equality for same-sex and opposite-sex couples. It begs the question of whether people need something which is not called marriage but which, as in the Netherlands, provides something in legal terms more or less identical to marriage. But what about other relationships, such as carer relationships, that may warrant legal recognition? More locally, should civil partnerships in England and Wales continue to be available but for opposite-sex couples, as well as same-sex couples, or should they be abolished on the basis that it is discriminatory to provide more options for same-sex couples than for opposite-sex couples?

This book not only picks up these debates, but provides extensive and important background information relating to law reforms for all jurisdictions in this area. Examining the different approaches taken in various jurisdictions

provides something quite different from the run-of-the-mill commentary on and interpretation of the law; it is more a political, philosophical and even moral debate in addition to a legal analysis.

Those of us who are fellows of IAFL are in the fortunate position of being able to discuss pressing and topical family law issues with colleagues from around the world on a regular basis. It has been particularly rewarding that IAFL has on many occasions hosted educational programmes dealing with issues arising from same-sex and other relationships. We must not forget that relationship recognition, and particularly recognition of same-sex couples, is a highly contentious area of law in many jurisdictions. It is often tough for our fellows from these jurisdictions, who are generally thoroughly in favour of equality for same-sex couples, to see how matters have developed so quickly in many jurisdictions. As for England and Wales, it is something of a luxury, not enjoyed by many others in the world, to be having a discussion about whether or not we should be abolishing civil partnerships now that we have same-sex marriage. That is a happy position to find ourselves in. But even those from jurisdictions where such a concept is scarcely even raised, let alone imminent, the arguments surrounding registered partnerships are understood, appreciated and are of significant interest.

This book provides a wealth of invaluable information and fascinating debate on the issues thrown up by this particular topic. Jens Scherpe and Andy Hayward have created a very accessible work where they have thought carefully about the structure, content and pace. They have created the forum for a truly international debate and followed that debate through. This is a publication of great value to academics (and not just legal academics), to law-makers and to family law practitioners worldwide.

William Longrigg

Immediate past president, International Academy of Family Lawyers (IAFL)
and Partner, Charles Russell Speechlys LLP

PREFACE

This book analyses the legal recognition of family relationships between adults, irrespective of their legal gender, in the form of registered partnerships. Although the primary focus is on the formal recognition of these relationships, other forms of recognition are also considered. The aim of this book is to provide a broad and comparative basis for debates and law reform in this area. At the heart of these debates is the question: what is the nature, function and purpose of registered partnerships? As the contributions in this book reveal, the way jurisdictions have used registered partnerships to recognise family relationships varies greatly. After all, the answer to this question invariably is a political one: it can only be answered separately for each jurisdiction and only at the point in time when the question is being asked.

The original idea behind this project came in 2012. At that time England and Wales had just conducted a consultation on equal civil marriage, and by December that year the Government had pledged their support for its introduction. The Marriage (Same Sex Couples) Act 2013 followed, ushering in a significant change to the landscape of adult interpersonal relationships. After celebrations and the first ceremonies taking place in March 2014, we were left wondering what would happen to civil partnership, previously introduced through the Civil Partnership Act 2004. The messages as to its fate were mixed and the approach taken at the time by the Government had been an evasive one. Rather than confronting the issue of their abolition or retention head on, a consultation was conducted by the Department of Culture, Media and Sport in 2014. It was the methodological approach and ultimate findings of this consultation that motivated this project in the first place.

The short Report produced by the Department canvassed options for the future of civil partnership but, rather surprisingly, took a narrow, domestic law oriented and parochial view of these issues. No meaningful consideration was given to insights garnered from other European jurisdictions, let alone those further afield, or to the United Kingdom's obligations under the European Convention on Human Rights. Conceiving the reform of civil partnerships as a unique question for England and Wales overlooked the immense value of comparative family law scholarship. After all, many European and non-European jurisdictions had already grappled with the same issue and had a wealth of experience to share on the function and future of civil partnerships in an era of same-sex marriage. The absence of accessible material, we felt, was

an impediment to a full and learned debate on how the law should be reformed. Therefore, we embarked on this research project in order to provide comparative material, not only for the debates in England and Wales but indeed for any law reform discussions in this area.

The first major event of this project was a large international conference hosted by the Faculty of Law of the University of Cambridge on 10 and 11 July 2015. Following the production of a questionnaire, leading experts from over 15 European and non-European jurisdictions presented on the history, function and future of registered partnerships in their jurisdictions. Generating lively debate, this conference started a constructive dialogue on the future of civil partnerships and we were delighted that representatives from the Ministry of Justice, Government Equalities Office and Law Commission were able to participate in that conversation. In making that event possible, we would like to offer our special thanks to the International Academy of Family Lawyers (IAFL), Queen Elizabeth Building (QEB), Intersentia and Durham Law School for their generous financial support. In addition to the presenters, especially Emma Peart and Lynn De Schrijver presenting on behalf of Margaret Briggs and Ian Sumner respectively, we would also like to thank those that generously offered to chair panels: Tim Amos QC (QEB), Mark Harper (Hughes Fowler Carruthers), Steve Kirwan (Nowell Meller Solicitors), Isabelle Rein Lescastereyres (BWG) and Samantha Singer (QEB). We would also like to thank Peter Tatchell (Peter Tatchell Foundation) for providing the keynote address. For helping the conference run smoothly, thanks goes to the students that supported the event, namely Rebecca Williams, Zhuan Faraj and Nye Williams-Renouf, and, of course, the invaluable assistance provided by Felicity Eves-Rey (administrative support), Steve Burdett and Andrew Gerrard (IT support), Daniel Bates (website), Shirely Bidgood (booking website/eSales), Elizabeth Aitken (accounts), Eve Stupart (conference management, Gonville and Caius College) and Hayley Wharton (administrative support, Durham Law School).

Whilst the contributions to this book were being finalised, legal developments in England and Wales further underlined the need for continued analysis of civil partnership reform efforts. In January 2016, Mrs Justice Andrews, sitting in the High Court, heard the case of *Steinfeld and Keidan v The Secretary of State for Education* involving a challenge by an opposite-sex couple denied the ability to register a civil partnership.¹ In dismissing their claim, we felt that the reasoning of Andrews J required a much more comprehensive engagement with the human rights issues involved. These issues were analysed in detail in a subsequent workshop for this project that took place in Trinity College, Cambridge on 24 June 2016 that brought together academics, practitioners

¹ [2016] EWHC 128.

and policy-makers. We would like to thank Jo Miles for her assistance and insightful contributions to the workshop, alongside those of other speakers and participants, namely William Longrigg (Charles Russell Speechlys LLP), Rachael Kelsey (SKO Specialists), Amanda Jarret (GEO Legal Advisors), Helen Fenwick, Daniel Monk, Rob George, Brian Sloan, Claire Fenton-Glynn and Sergi Morales Martínez. Thanks also goes to Durham Law School for providing the financial assistance for this event. Since that workshop, developments in the reform of civil partnership in England and Wales have continued apace. Alongside several Private Members Bills introduced into Parliament and a public petition, by the Equal Civil Partnership Campaign, calling for the introduction of opposite-sex civil partnerships, the *Steinfeld* litigation has continued its journey through the courts. Despite their claim being dismissed by a 2:1 majority in the Court of Appeal in February 2017,² permission has been granted by the Supreme Court to hear their appeal in Spring 2018.

At the time of writing this preface, it is clear that the debate in England and Wales is not at an end. We very much hope that this book offers a meaningful contribution to not only this litigation, but also to the public debate surrounding the future of civil partnerships and the subsequent reforms which now seem inevitable. We further hope that the comparative material in this book can and will be used as a resource for legal discussion and reform work in other jurisdictions as well.

No book can be published without the help of those who transform the text from a manuscript to a wonderfully typeset file ready to be printed. We would like to sincerely thank Intersentia for their amazing (and amazingly patient) work on this, and particularly Rebecca Moffat whose assistance with this was absolutely invaluable. Our final thanks goes to our partners Ann-Christin Maak-Scherpe and Chris Bevan, who offered continued support and encouragement throughout this project.

Jens M. Scherpe and Andy Hayward
September 2017

² [2017] EWCA Civ 81.

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