

Same-Sex Couples in Scots Law -Part 1

Brian Dempsey surveys recent changes in the law¹

The campaign for recognition of same-sex relationships has come to dominate lesbian, gay, bisexual and transgender (LGBT) rights group's campaigning² and become a major political issue, especially in the United States.

The debate on this issue in the United Kingdom and Scotland may have been given added urgency by the recent unanimous decisions by the European Court of Human Rights that the UK's³ refusal to recognise the realigned sex of post-operative transsexuals was a breach of Article 8 (right to respect for private and family life) and Article 12 (right to marry and found a family). While the Westminster Parliament is not required to change the law regarding the status of transsexual people, the Scotland Act 1998 does require Scottish Ministers to act within the terms of "Convention Rights".⁴ Therefore a failure to act may be open to challenge. While the treatment of same-sex couples raises somewhat different issues to transsexual persons seeking to enter a mixed-sex marriage in their "new" sex any debate on recognition of transsexual's right to marry will inform, positively or negatively, the debate on recognition of same-sex couples.

This article surveys recent developments in the recognition of same-sex couples in Scots law,⁵ including case law, legislation and proposed legislation. In case law we identify the treatment of and attitudes towards same-sex couples. Under legislation we pay particular attention to the definition of same-sex couples. Finally we draw some conclusions about the relationship between lesbians and gay men and Scots law.⁶

Part I Case Law

Scottish case law has, for several years, quietly developed the legal recognition of same-sex couples. This changing attitude has, however, to be gleaned from cases involving contact and parental responsibilities and rights with respect to one or both parties' children as there has yet to be a Scottish case equivalent to, for example, *Fitzpatrick*⁷ or *M v H*⁸ seeking direct recognition of a same-sex relationship.

A "dreadful" case?

There are few reported cases involving same-sex couples in Scotland. The first reported case, which has gained some notoriety among commentators, is *Early v Early*.⁹ Here the father, who had custody of two of the children of the marriage, sought custody of the one child who lived with his mother and her female partner. The Lord Ordinary found a number of reasons for awarding custody to the father which were not related to the mother's sexuality or living arrangements.¹⁰ But in addition, while the court accepted that "a child may suffer no long term effects from being brought up in such a household"¹¹ there was concern about a boy living without "a suitable male role model"¹² especially when

approaching puberty and a fear of both the boy and his school companions reacting "unfavourably" to news of his mother's relationship.

It is worth noting that the Lord Ordinary found "some significance" in the fact that both the mother and her partner had not informed certain members of their family about the nature of their relationship¹³ and that this strengthened the assumption that there would likely be adverse reactions among the boy's school mates and others in the locale (the women's relationship not yet being, as the judge had it, "notorious"). Where lesbians and gay men are discreet about their relationship and sensitive to possible negative reactions this can be taken to strengthen the case against them but likewise where they are open about their relationship this too may strengthen the case against them as they may be seen as insensitive to the dangers of the child facing bigoted reactions.¹⁴

Although *Early* has been described as "dreadful",¹⁵ there were a number of compelling factors which influenced the court.¹⁶ While the case is indeed worrying in relation to the overturning of the status quo (the boy had lived with his mother for all of his eight years) the "anti-lesbian" aspect, which undoubtedly exists, may have been overstated.¹⁷

Again in *Hill v Hill*¹⁸ a same-sex relationship was presented as problematic. Mrs Hill had unlawfully taken her child from Canada to Scotland to avoid a determination as to contact with the child of the marriage. She raised specific issues about her estranged husband's lifestyle but also raised issues of "principle" – she feared that "a father and son relationship [was] developing between the respondent's homosexual partner and her son".¹⁹ This was raised to support her request that the matter of custody and access be dealt with in Scotland though her case does not seem very coherent. Lord McCluskey declined to explore the issues, trusting that the Canadian courts would take all relevant matters into account and decide in the best interests of the child.²⁰

With "considerable hesitation"

In *Meredith v Meredith*²¹ a father of four young children had left his wife to set up home with a man. In the course of an action for divorce Sheriff Bell, sitting at Edinburgh, had to consider the question of access and whether or not the children should come into contact with their father's male partner. The Sheriff's own note reveals a more thoughtful and less homophobic attitude than might be feared from the short published case note.

One may refer to the case as "hybrid" as the existence of the father's same-sex relationship is treated as both helpful and problematic. In granting access and contact with father's partner the Sheriff commented that the father "admitted freely that he and [his partner] shared a bed",²² but he (the Sheriff) was aware that the children would have relatively little contact with father's partner²³ and he was



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“impressed with both the defender and H who stated that they would take great care to avoid any demonstrations of affection or anything which drew attention to their relationship in the presence of the children.”²⁴

In (slightly) more positive terms Sheriff Bell noted that

“[t]he relationship between the defender and H appears to be what is now referred to as a stable relationship so far as can be judged. I think it better that the children get used to the idea that the defender is living with H in a house. There is no reason at all why they have to consider the sexual implications of that. ...

While I have had considerable hesitation on this matter, it appears to me that it is more in the interests of the children that the defender has the assistance of H in looking after them and that they get to regard it as a perfectly natural thing that they see both the defender and H.”²⁵

Sheriff Bell was, rightly it is submitted, being careful to respect the reservations of Mrs Meredith with respect to the dangers of precocious sexual understanding of the children and her distress at the thought of having to explain their father’s relationship to the older children.²⁶

Surrogacy and AID

In 1996 media interest was excited by a surrogacy arrangement entered into by a gay male couple living in Edinburgh.²⁷ Although the couple were extremely private and not willing to engage in political controversy²⁸ the Church of Scotland’s representative characterised the matter as one of “gay couple rights” –

“This case is yet another bizarre absurdity. The child’s rights must come first. On the basis of “gay couple rights”, a child is going to be thrown into a world of needless turmoil and controversy. We must never forget that this dear little child is going to be denied a normal upbringing.”²⁹

Despite calls from a right-wing MP for the child to be taken into local authority care³⁰ the local authority asserted that there was “no suggestion of a lack of parental care ... and, therefore, the local authority has no reason to be involved with this child in any way”.³¹

1996 also saw media controversy over a situation where a lesbian couple and a gay male couple were jointly raising a child born through artificial insemination to one of the women and one of the men.³² The arrangement seems to have worked well between the adult parties³³ and not to have caused any concern for the local authority or the local community.³⁴ Only the press, who hounded the two couples, and an anonymous (fictitious?) “eminent Scottish psychologist”, expressed concern.³⁵

Provocation

In the same year we find a rare case of recognition of partnership in a criminal case. Before the High Court of Justiciary a Ms McKean was accused of murder³⁶ having repeatedly stabbed and killed a man who, she believed, was having an affair with Ms McKean’s female lover. The key question was the availability or otherwise of the mitigating plea of provocation which reduces a charge of murder to culpable homicide. Words alone cannot generally found a plea of provocation but there is a so-called “adultery” exception. Lord MacLean could see no reason why “[i]n these somewhat more enlightened days of sexual equality” the mitigating plea should not be available to women. Moreover –

“I also see no reason why, in the modern context, the plea should not also be available to homosexual couples who live together and are regarded in the community as partners bound together by ties of love, affection and faithfulness – although I have to say that, until this case, the law has not so far been extended to them.”³⁷

McKean was said to have asked her victim “Are you fucking my wife?” immediately before stabbing him.³⁸ The couple were also said to have gone through a form of marriage ceremony when on holiday in Benidorm the previous year: they had been living together as lovers for four years at the time of the killing.³⁹ It is not clear whether thus characterising McKean as the “male” partner in a relationship closely modelled on marriage was simply a tactic to facilitate the extension of the plea⁴⁰ or closely reflected the attitudes of the parties.

It is submitted that Lord MacLean’s direction to the jury in *McKean* is a striking example of level-headed and humane equality-based jurisprudence and that the significance of the decision has been somewhat overlooked. (One possible explanation for this is that some may feel that the law should not recognise “passionate indignation”, with its overtones of male possessiveness and violence, as even a partial excuse for otherwise murderous acts and the possible distortion of lesbian relationships to fit the patriarchal model of marriage.)

A watershed

Some months after the McKean case, Scotland’s highest civil court, heard an appeal from the decision of the Outer House of the Court of

Session in a case involving the adoption of a child by a gay man⁴¹ living with his male partner. This case, *T Petitioner*,⁴² received a good deal of media attention.

The applicant had cared for the male child, born in 1990, for 18 months prior to the adoption application. The child had severe physical and learning difficulties. The two local authorities involved in the case and a court-appointed curator ad litem were of the opinion that the adoption was in the child’s best interests.

Lord Gill ruled, however, that all involved had failed to address the “issue of principle” –

“[whether] the statutory process of adoption should be sanctioned by the court in circumstances where it is expressly proposed by a single male prospective adopter that the child should be brought up jointly by himself and by a third party with whom he cohabits in a homosexual relationship”.⁴³

and refused the application.⁴⁴

What impact any commentary on the intention of Parliament in relation to homosexual applicants and their partners might have had on Lord Gill’s decision is, of course, mere speculation but it seems strange that the application was refused because none of the parties charged with protecting the interests of the child identified a problem. It is difficult to see that Lord Gill’s desired discussion of the problematic “issue of principle” would have led to a positive decision for the child.⁴⁵

On appeal to the Inner House Lord President Hope demolished this supposed “issue of principle”. Firstly he understood that the Lord Ordinary had two concerns; whether, in passing the relevant Act,⁴⁶ Parliament could have intended adoptions by a homosexual cohabiting with a partner and then whether, “the court can nevertheless ever be satisfied that the child’s welfare can be safeguarded in such circumstances”.⁴⁷ The “short answer” was “that the present case raises no such fundamental questions of principle”.⁴⁸

“There can be no more fundamental principle in adoption cases than that it is the duty of the court to safeguard and promote the welfare of the child. Issues relating to the sexual orientation, lifestyle, race religion or other characteristics of the parties involved must of course be taken into account as part of the circumstances. But they cannot be allowed to prevail over what is in the best interests of the child. The suggestion that it is a fundamental objection to an adoption that the proposed adopter is living with another in a homosexual relationship⁴⁹ finds no expression in the language of the statute, and in my opinion it conflicts with the rule which is set out in s6 of the Act.”⁵⁰

Lord Hope also stated that

“it is not possible to generalise about homosexuals, or fair to treat them as other than personalities demanding the assessment appropriate to their several individualities in exactly the same way as each heterosexual member of society must be regarded as a person, not as a member of a class or herd.”⁵¹

In the Inner House it was said that there had been a number of unreported adoption cases in sheriff courts concerning homosexual applicants. The court was shown two processes where homosexual applicants, one male and one female, had been granted adoption applications though it was not stated whether or not these applicants were in a relationship.⁵² The decision in *T Petr.* reflects an view that the same-sex relationship in question⁵³ added rather than detracted from the application⁵⁴ even to the extent that the application was overwhelmingly and obviously in the best interests of the child.⁵⁵

Parental Responsibilities

Having dealt with cases involving adoption and with custody applications by parents the next family issue for the courts to deal with was the responsibilities and rights of a same-sex partner of a birth parent. The first reference to this in the literature is the unreported case of *R v F* in 1999.⁵⁶ Here the mother’s female ex-partner should contact with a child they had both cared for.

The Sheriff focussed on the issue of competency of the application – “[t]he sheriff *ex proprio muto* doubted the competency of the writ insofar as he doubted the capability of a lesbian former partner of the child’s mother to be a person claiming an interest to exercise a parental right. He was not convinced that one could possibly exercise a parental right in circumstances when one could not be analogous to a parent. The pursuer could not be analogous to the child’s mother because the child already had a mother. The pursuer could not be analogous to the child’s father because she was a woman.”⁵⁷

It is not clear whether the sheriff received submissions that one can have more than one parent of either sex or whether it was argued that

“parental responsibilities and rights” can be conferred on persons other than “parents”.⁵⁸ However, after hearing submissions the sheriff ruled the writ competent. In the absence of court papers one can do little more than agree with the commentator on the case, John Fotheringham, when he concludes

“it is clear that the homosexual nature of a relationship between a pursuer and a defender/parent cannot have any bearing on the competency of the pursuer’s action for an order in terms of s11 of the 1995 Act.”⁵⁹

This year has seen two further cases in the media, both of which concern parental responsibilities and rights. Both cases also have an impact on the respect given to same-sex couples by the courts and, given media the interest, in society at large.

In *Pursuer v Defender in the Case of Child A (28/3/02)*⁶⁰ Sheriff Duncan faced a somewhat complex fact situation which concerned a lesbian couple and a gay man who had entered into an artificial insemination “agreement” which had soured. The father sought and was granted parental responsibility and rights and contact in respect of his son (which had been opposed by the mother)⁶¹ while the mother’s female partner sought, but was refused, parental responsibilities and rights.⁶²

In the course of the judgment⁶³ little was said about the living arrangements of the father, other than that he had been in a “homosexual relationship” for 13 years. The fact that he was a social work assistant and his partner a social worker might be thought to weigh in their favour but in any case the existence of a partner was not, apparently, seen as a difficulty.

The mother’s relationship, in contrast, was a source of concern, though it is fair to say that what concerned the sheriff was her finding that the mother’s partner was dominant and manipulative and that as a couple they had acted in their own interests rather than the interests of the child.⁶⁴ However the Sheriff went so far as to declare that

“[t]he relationship between [the mother and her partner] does not constitute a “family unit” for the purposes of an award of parental rights and responsibilities (sic) ... in terms of section 11 of the Children (Scotland) Act 1995.”

Three points may be made. Firstly, the qualification should be noted - the sheriff did not rule that the couple did not constitute a family but limited the finding to the interpretation of the 1995 Act. Secondly, with respect, the requirement of finding the existence of a “family unit” is at best a highly innovative gloss on the terms of the 1995 Act. The relevant test is firstly that an application is made “by a person who, not having, and never having had, parental responsibilities and rights in relation to the child, claims an interest”⁶⁵ following which the three principles of the best interests of the child being paramount, the “no order” principle and the right of the child to express a view⁶⁶ are to be applied. There is no

mention of “family unit”.

Thirdly, there is little indication as to why the sheriff found that “C” and the child’s mother were not, in fact, a family unit. It was accepted by the sheriff that they had lived together for 9 years, were mutually supportive of one another and that between them they provided a good home for the child. The sheriff did find that they were “keeping secret the true facts [of somewhat complex earlier relationships and their current living arrangements] from the defender’s employers and even her own parents”. Be that as it may, even at its highest it surely does not preclude the women from forming a family unit, albeit one about which Sheriff Duncan has a relatively low opinion.⁶⁷

Just weeks after this case, Sheriff McPartlin at Edinburgh awarded parental responsibilities and rights in a situation which shows that he recognised two women living together as constituting a family.⁶⁸ Each woman was the birth mother of a son and each was granted parental responsibilities and rights over the other’s child. Unfortunately the Sheriff declined to issue a note in the case and so the factors taken into account in recognising the family are not known.⁶⁹ One distinction here to both *R v F* and *Child A* is the lack of conflict – here the couple were said to have been keen to ensure that the children would have access to both women should the relationship “founder”.⁷⁰

The validity of this “family” was disputed in the media. A spokesperson for something called Family and Youth Concern was of the view that the decision was morally wrong –

“Children need to have a mother and a father to feel safe in a secure family unit. These women may be able to feed and clothe these children but they can’t give them a normal childhood and proper upbringing”.⁷¹

In contrast one of the women stated

“to me, family is about cohesion, about bringing people together in a secure, loving, stable environment. When David [the older child] falls over he runs to one of us. When Cameron sees me, or Pam, or David, his face lights up. That’s family.”⁷²

The spokesman for the Catholic Church linked the issues in the case directly with marriage and respect for same-sex couples – “To suggest same-sex couples should have the same rights as married couples is a step in the wrong direction.”⁷³ He also, with some justification, pointed to the “bizarre situation where unmarried same-sex couples have more parental rights than many unmarried fathers.”⁷⁴ This presumably refers to the difficulty unmarried fathers face in convincing courts to grant parental responsibilities and rights in face of the “no order” principle. While the decision in this case is welcome it would be interesting to know how the sheriff dealt with the obstacle of the “no order” principle.⁷⁵

To be continued in SCOLAG 301

1 Thanks to Outright Scotland and Tim Hopkins for comments on an earlier draft. Responsibility lies with the author.
 2 This is true at least for “Western” democracies whose agenda tends to dominate LGBT issues.
 3 *Case of Christine Goodwin v The United Kingdom* 11/7/02 and *Case of I. v The United Kingdom* 11/7/02 both via <http://hudoc.echr.coe.int/hudoc/>
 4 ss57 & 58, Scotland Act 1998.
 5 It is not intended to debate the merits of regulation of same-sex relationships here.
 6 Kenneth Norrie is the leading writer in this area. See eg his “Sexual Orientation and Family Law” in J Scouler (Ed) 2001 Family Dynamics Butterworths; Edinburgh.
 7 House of Lords, [1999] 4 All ER 707, finding that Fitzpatrick was a member of his deceased partner’s family.
 8 Canadian Supreme Court, (1999) 171 DLR (4th) 577, finding it wrong to exclude same-sex couples from aliment and division of property provisions.
 9 1990 SLT 221 (Inner House); 1989 SLT 114 (Outer House)
 10 *Early v Early*, @ 117B
 11 *ibid* @ 117E-F one wonders whether his lordship meant “no adverse effects” or simply “no effects”

12 *ibid* 117 C-D
 13 *ibid* 117F-G
 14 See eg S B Boyd (1992) “What is a ‘Normal’ Family? *C v C (A minor) (Custody: Appeal)* 1992 MLR 269.
 15 K McK Norrie (1996) “Parental Pride” 1996 SLT 321 @ p324
 16 Other factors included that the child had lived with his mother for all of his eight years, the father but not the mother wished to bring all of the children together, the mother seeking to end access between the child and the father, the father having previous convictions for child neglect but also having successfully cared for the other two children for a number of years.
 17 The case can also be read as a “bad mother” case with Mrs Early seeking custody only of the boy and relinquishing access to her other children (one of whom suffered from cerebral palsy) and wanting to end contact between father and son.
 18 1990 SCLR 238. The case concerned a mother who had wrongfully removed her son from Canada and was asking the Scottish courts to determine access and custody. Lord McCluskey ruled “in spite of the father’s homosexuality there was no evidence that the child’s welfare would suffer if he were returned to Canada.”
 19 *Hill v Hill* 1990 SCLR 238, 240G – 241A

20 *ibid* 242A-E
 21 Unreported. 1994 GWD 19-1150
 22 *Meridith v Meridith*, sheriff’s note p5
 23 *ibid* p12
 24 *ibid* p12
 25 Sheriff’s note p13
 26 They were between 7 and 2 years of age.
 27 See, eg, “Joy and the birth of prejudice” *The Herald* 6/9/96 and “Remodelling the family” *The Scotsman* 5/9/96
 28 “Joy and the birth of prejudice” *The Herald* 6/9/96
 29 Reverent Bill Wallace, Social Responsibility Committee in “Crisis talks on gay dads’ baby” *Daily Record* 2/9/96
 30 Phil Gallie quoted in “Crisis talks ...” *Daily Record* 2/9/96
 31 Director of Social Work quoted in “Documents presented by gay surrogate ‘parents’” *The Scotsman* 3/9/96
 32 “A harsh judgement on home affairs” *Scotland on Sunday* 12/5/96
 33 Indeed it was said to have been repeated three years later, “Timeshare gay parents ‘storing up troubles’ for children” *Daily Mail* 21/7/99
 34 “Gay dads were wed in America” *Daily Record* 8/5/96

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- 35 Timeshare parents ..." *Daily Mail* 21/7/99
- 36 *HMA v McKean* 1996 SCCR 402; 1996 SLT 1383
- 37 403A. See Hume i, 245/6 and Gordon Criminal Law (3rd Ed) para 25.24. The principle being, as Lord MacLean put it, that a couple "owe each other mutual obligations of fidelity" and that a loss of self control would be reasonable where a man found his wife was unfaithful.
- 38 403C
- 39 "Landmark verdict on lesbian killing" *The Scotsman* 6/1/96; "Lesbian killed male love rival" *The Herald* 6/1/96
- 40 In which case it might be seen as a somewhat problematic legal distortion of intra lesbian relations.
- 41 Applications are competent only from married couples (s14) or unmarried individuals (s15)
- 42 *T Petr* 1996 SCLR 879; 1997 SLT 724
- 43 *ibid* 731L
- 44 There was also a question of whether the natural mother had withheld her consent to the adoption unreasonably.
- 45 Lord President Hope was remarkably blunt in his criticism of Lord Gill's failings, see 730B-731K esp 731F and 731G.
- 46 Adoption (Scotland) Act 1978
- 47 *T Petr* 731L-732A
- 48 *ibid* 732 A-B
- 49 "Same-sex relationship" would be a preferable term.
- 50 *T Petr* 732D-E
- 51 *ibid* 732D-E
- 52 *ibid* 734L
- 53 Or homosexual relationship as the court would have it.
- 54 *T Petr* esp 727F-728E
- 55 Lord Hope 728D-E; Lord Weir 737G-I and Lord Wylie 737J-K
- 56 See J Fotheringham "Parental responsibilities and Rights as for Homosexual Couples (*R v F*, unreported) 1999 SLT 337
- 57 *ibid* @ p337
- 58 Eg can one be both an aunt and a parent to the same child?
- 59 Fotheringham, "Parental responsibilities ..." p339
- 60 *Pursuer v Defender in the Case of Child A* (28/3/02)
- 61 Unmarried fathers not having automatic parental responsibilities and rights s3, Children (S) Act 1995
- 62 It seems *R v F* was not referred to and the mother's partner's application was considered without raising any objection to the concept of having "two mothers".
- 63 It is fair to say that Sheriff Duncan revealed herself to be unaware of some of the realities of life for lesbians and gay men in Scotland, eg with respect to the implications to be drawn from the fact that the mother had not discussed her sexuality with her employers.
- 64 If the sheriff's findings in fact are accurate this would seem a reasonable conclusion but the influence of the sheriff's lack of sympathy with aspects of lesbian life cannot be immediately discounted as a factor. See also "Lesbian couple attack ruling ..." *Scotland on Sunday* 10/3/02 and "Bullied and Harassed" *Mail on Sunday* 10/3/02
- 65 s11(3)(a)(i)
- 66 s11(7)(a), s11(7)(a) and s11(7)(b) respectively
- 67 It is understood that the case is to be appealed and reversion to the statutory test would be welcome.
- 68 "Family victory for lesbian couple" *The Herald* 8/2/2002; "Courts awards full parental rights to lesbian couple" *The Scotsman* 8/4/02.
- 69 It would also be interesting to know how the sheriff dealt with the "no order" principle in light of s5, 1995 Act allowing persons with de facto care of the child to take decisions on the child's behalf.
- 70 "Lesbian couple win same parental rights as married heterosexuals" *Scotland on Sunday* 7/4/02
- 71 "Court awards full parental rights ..." *The Scotsman* 8/4/02
- 72 "Lesbian Couple win ..." *Scotland on Sunday* 7/4/02. See also "Home Truths" *Scotland on Sunday* 7/4/02.
- 73 "Court awards full parental rights ..." *The Scotsman* 8/4/02
- 74 "Family victory for lesbian couple" *The Herald* 8/2/2002.
- 75 The sheriff refused to issue a note in this case.

Same-Sex Couples in Scots Law - Part 2

Brian Dempsey concludes his review of the recognition of same-sex partners in Scots law

Part II Legislative Change

In Scotland we have seen several pieces of legislation which recognise same-sex couples in recent years. The first such legislation was a UK statutory instrument setting up a Register of Interests for Members of the Scottish Parliament.⁷⁶ "Cohabitee" is defined in the Order as including "a person, whether of the opposite sex or not, who is living with that member in a relationship similar to that of husband and wife"⁷⁷ and primarily concerns the declaration of gifts to MSPs of more than £250 in value.

AWIA

The Adults with Incapacity (Scotland) Act 2000 provides recognition for same-sex couples in its definition of "nearest relative". This was an innovation on the discriminatory definition in the Mental Health (Scotland) Act 1984⁷⁸ and came about through the deliberations of the Millan Committee⁷⁹ and sustained lobbying on the part of LGBT organisations.

Section 87 of the 2000 Act provides that where an adult has no spouse or has a spouse from whom they are separated, if

"2 (b) a person of the same sex as the adult –

(i) is and has been, for a period of not less than 6 months, living with the adult in a relationship which has the characteristics, other than that the persons are of the opposite sex, of the relationship between husband and wife; or

(ii) if the adult is for the time being an in-patient in a hospital, had so lived with the adult until the adult was admitted; then that person shall be treated as the nearest relative."

As we shall see, this definition "living with the adult in a relationship which has the characteristics, other than that the persons are of the opposite sex, of the relationship between husband and wife" has generally been following in subsequent legislation. This has not, however, come about without some difficulty. The Adults With Incapacity (Scotland) Bill as introduced inexcusably excluded same-sex partners from the list "nearest relatives" by referring only to the definition in the 1984 Act.⁸⁰ Following focussed criticism of this exclusion, at Stage 2 the Executive introduced, but then withdrew, an amendment in the following terms⁸¹ -

"In section 76, page 50, line 29, at end insert—

<(1A) Where—

(a) an adult has no spouse or where an adult has a spouse but [they are permanently separated];

and

(b) a person of the same sex as the adult—

(i) is and has been, for a period of not less than six months, living with the adult in circumstances which are characterised by, amongst other things, mutual affection, commitment and support based on a subsisting or previous sexual relationship between them; or

(ii) if the adult is for the time being an in-patient in a hospital, had so lived with the adult until the adult was admitted; then that person shall be treated as the nearest relative. ...>"

Following lobbying of the Executive by the Convenor and Sexual Orientation Reporter of the Parliament's Equal Opportunities Committee⁸² (at the prompting of LGBT activists) the Executive introduced an amendment at Stage 3 which was passed and enacted as s87 of the Act as described above. The primary objection to the Executive's original amendment had been that same-sex couples would be subject to a different test than would mixed-sex couples. While this may not have made any significant difference in practice there was concern that the different definition could be applied in a discriminatory way, setting a higher threshold for same-sex couples to overcome.⁸³

Housing (Scotland) Act

The following year, the Housing (Scotland) Act 2001 made clear from its introduction that rights of succession,⁸⁴ and indeed all the rights and responsibilities of the Act, would apply equally to same-sex as to mixed-sex couples. Section 108 of the Act provides

(1) For the purposes of this Act, a person ("A") is a member of another's ("B's") family if-

(a) A is the spouse of B, or A and B live together as husband and wife or in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex ...

and goes on to amend the Housing (Scotland) Act 1987 in the same terms.

For cohabitants, whether of a mixed or same-sex couple, to succeed to a Scottish Secure Tenancy however, the property must have been the person's only or principal home throughout the period of 6 months ending with the tenant's death, a condition which does not apply to married cohabitants.

Mortgage Rights (Scotland) Act

At the same time as the Housing (Scotland) Act was going through Parliament, the next piece of legislation to recognise same-sex couples, the Mortgage Rights (Scotland) Act 2001, was being considered. Unlike the Housing Bill, the Mortgage Rights Bill as introduced excluded same-sex couples. But it may be thought that there was a measure of equity in this as it also, somewhat bizarrely, excluded mixed-sex cohabitants.

The Act now allows a court to suspend the rights of heritable creditors if it considers it to be reasonable in all the circumstances. It provides that –

"s1(2)(b) a person living together with the debtor or the proprietor as husband or wife or in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex [may apply to the court for an order], if the security subjects (in whole or in part) are that person's sole or main residence"

The parliamentary debate on the Bill gives some indication of Member's views on recognition of same-sex (and other) partnerships. Firstly the Bill's proponent, Labour MSP Cathie Craigie, was at pains to point out that "any change to the *occupancy rights* of non-entitled partners would be outwith the scope of the bill",⁸⁵ which view ensured that the discriminatory treatment of unmarried partners and the total exclusion of same-sex partners in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 could not be addressed.⁸⁶

At the Stage 2 debate in the Social Justice Committee⁸⁷ Craigie rejected several amendments that would have increased the range of persons who could apply for an order under the Bill. These amendments, put down by Robert Brown MSP but either withdrawn or not moved, would have extended the bill to cover same-sex couples and "any other person who ... lawfully occupies the security subjects as that person's sole or main residence" which would include non-sexual partners and tenants. Brown used the definition from the Adults with Incapacity (Scotland) Act 2000 to cover same-sex relationships.

Craigie stated that she was "happy to consider in more detail and consult the Executive⁸⁸ and other interested parties on the possibility of lodging an appropriate amendment at stage 3" to cover non-entitled partners whether of the same or opposite sex but felt that there would be difficulties in the interplay between the Bill and the 1981 Act, not least because same-sex partners have no occupancy rights under the 1981 Act.⁸⁹ Extension to all persons who "lawfully occupy the security subjects" was not, Craigie felt, a good idea.⁹⁰

In the debate Brian Adam MSP was of the view that –

"There should be protection for people who have chosen to live together, and the time for which they have lived together should be taken

into account, but trying to define their relationship in terms of sexuality - the relationship between a husband and wife, for example - is a minefield and is irrelevant to the relationship between a debtor and a lender."⁹¹

While it seems to this writer that there is much merit in extending protections to people who are not living in a couple based on a sexual relationship the preservation of the privileged position of married couples would first have to be removed if this approach were to have any appearance of equity.

At the final (Stage 3) debate (before the whole parliament) Craigie accepted an amendment which, in due course, became the definition in s1(2)(c) mentioned above. Several concerns were raised about the definition of same-sex partners.

Conservative MSP Bill Aitken said –

“The intention of the bill is to deal with gay relationships. I have no particular difficulty with that, but I reiterate that I do not think that the definition [a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex] has anything to commend it in terms of the law. I do not think that the definition will be recognised by the law.”⁹²

Alasdair Morgan MSP was more concerned that sheriffs were not being given proper guidance as to what Parliament intended by the phrase “the characteristics of a relationship between husband and wife” in s1(2)(c) of the Bill.

“I am not going to make music hall jokes about those characteristics, but I do not think that that phrase is well-defined enough to be passed into legislation and to give a sheriff the guidance that will allow him or her to make a judgment.”⁹³

Dorothy-Grace Elder MSP had a different concern – the protection of persons not in a sexual relationship.

“[I]n the definition of partnership, will [Craigie’s amendments] protect a couple—two people living in a house—who have not come together on the basis of sexuality in their relationship? For instance, will it protect two elderly sisters who have lived together for years or a couple of old soldiers or former workmates? There are many different relationships that cause people to live together for decades.”⁹⁴

Ms Craigie’s reply was that “husband and wife implies a partnership of a sexual nature. The amendments are concerned with that type of partnership.”⁹⁵

Protection from Abuse Act

Despite continued pressure from LGBT groups during 2001 the Scottish Executive consistently proved reluctant to amend the Matrimonial Homes (Family Protection) Act 1981 to provide protection to adults in same-sex relationships, and their children, who may be in danger of losing their home through domestic violence. Instead the first Committee Bill was promoted as giving (albeit limited) added protection to such persons. The Protection From Abuse (Scotland) Act 2001 provides for powers of arrest to be attached to an interdict granted under the Act (provided there is not already such a power under the 1981 Act). The Act was deliberately written without reference to “husband and wife” or any other formulation in part to include same-sex couples.⁹⁶

Section 28

Also affecting questions of respect for same-sex couples (and so-called “gay families” as a whole) was the repeal in Scotland⁹⁷ of the notorious “Section 28” which banned local authorities from promoting homosexuality as a pretended family relationship.⁹⁸ Section 35 of the repealing Act goes on to provide

35(1) It is the duty of a council, in the performance of those of its functions which relate principally to children, to have regard to—

(a) the value of stable family life in a child’s development; and

(b) the need to ensure that the content of instruction provided in the performance of those functions is appropriate, having regard to each child’s age, understanding and stage of development.

This provision, and the related guidance,⁹⁹ was inserted as a sop to right-wing so-called “family values” activists but was welcomed by LGBT campaigners as a sensible and liberal measure.

Land Reform Bill

At the time of writing, two pieces of prospective legislation have been published which include reference to same-sex partners. The Land Reform (Scotland) Bill¹⁰⁰ provides exemptions in relation to certain restrictions on transferring land subject to a “registered

community interest” for transfers between members of the same family.¹⁰¹ Rather unusually the provision¹⁰² (which presumably concerns same-sex partners) is in the following terms –

38 (1) ... a person is a member of the same family as another if that person is—

(a) the spouse ...

(2) ...

(a) a person shall be treated as another’s spouse if they live together—

...

(iii) in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same gender

It is submitted that the introduction of the term “gender” is neither accurate nor helpful. To say the least, “same-sex” is more directly correct – the partnership is between two men or two women.¹⁰³ While “same-gender” might be stretched to encompass this, its more entrenched use is in terms of “sex role” – so that a “same-gender” partnership might be entered into by two feminine persons (of whatever sex) or two masculine persons (again of whatever sex). Welcome as inclusion is, hopefully the terminology will be corrected as the Bill goes through Parliament.¹⁰⁴

Mental Health Bill

The Executive’s new draft Mental Health (Scotland) Bill¹⁰⁵ likewise takes an unusual approach to defining cohabitants (both mixed and same-sex) by using the Executive’s first (rejected) attempt at a definition in the Adults With Incapacity (Scotland) Bill. The definition of “nearest relative” in relation to a person experiencing mental ill health, where there is no spouse or the spouses are separated (85(3)), is given as –

s85 ...

(6) ... a person who—

(a) is living with the relevant person in circumstances which are characterised by, among other things, mutual affection, commitment and support based on a subsisting or previous sexual relationship between them; and

(b) has been living with the relevant person in such circumstances for a period of at least 6 months ...

Three objections can be made to the resurrection of this definition. Firstly the definition of same-sex partner has been generally consistent in the various pieces of legislation enacted so far and a single test is to be preferred. Otherwise confusion and injustice may be caused by people being in a recognised partnership for one purpose but not another due to the application of a different test where the policy behind inclusion is the same in all cases. Secondly, the introduction of a new test, especially one affecting both same and mixed-sex couples, might be taken as indicating to the courts that the test should be substantially different to “living together as husband and wife” which might allow an uninformed or frankly hostile sheriff to discriminate against, in particular, same-sex couples. Finally, no argument has been put forward suggesting that the current test of “living together as husband and wife” is proving problematic either for mixed-sex couples or for same-sex couples.

There is, it is readily accepted, a strong argument for moving away from defining the relationship of people who are not married by reference to those who are.¹⁰⁶ This argument may, however, be stronger for mixed-sex couples who can be seen as choosing not to marry (provided they are free to do so) – it is not currently possible to argue that a cohabiting same-sex couple may be assumed to have rejected the idea of marriage. In any event, greater thought would have to be given to such a fundamental change to the basis of defining cohabiting couples.

In the most recent Parliamentary initiative, Green Party MSP Robin Harper is, at the time of writing, seeking support for a motion¹⁰⁷ calling for a Parliamentary debate on registration of same-sex partnerships. The proposition for debate is generally in terms of the recent, subsequently withdrawn, Relationships (Civil Registration) Bill in Westminster. Mr Harper’s intention is to include mixed-sex couples and other couples whose relationship is not sexual (for example two brothers or two housemates).¹⁰⁸ The motion seeks “full legal recognition

in areas relating to inheritance, pensions, bereavement, damages and all other relevant areas.”

Part III Other developments

In their 1999 consultation paper, *Improving Scottish Family Law*, the Scottish Office¹⁰⁹ asked for views on a range of issues raised by the Scottish Law Commission’s 1992 Report on Family Law.¹¹⁰ One recommendation of the Scottish Law Commission (SLC) had been that “[i]t should continue to be a ground of nullity of marriage that both parties are of the same sex.”¹¹¹

In its ensuing White Paper, *Parents and Children*, the Executive notes that

“[t]here were two responses to [the] consultation that considered this requirement to be discriminatory. While we fully recognise that a same sex partnership may have similar characteristics to a partnership between opposite sex cohabitants, it is not the Executive’s policy to introduce same sex marriage into Scotland.”¹¹²

The two responses cited as unequivocally in favour of repeal of the rule in s5(4)(e) were from the lesbian, gay, bisexual and transgender rights organisation Outright Scotland¹¹³ and Edinburgh University academic Anne Griffiths. Of the five responses the Executive highlighted¹¹⁴ in support of the continuation of the nullity of same-sex marriages not one gave any justification or argument for their assertion.¹¹⁵ The responses await a more sophisticated analysis than that given by the Executive.

As to regulation of, or rights for, cohabiting couples, in 1992 the SLC had written -

“We recognised in the discussion paper that similar arguments for legal recognition could also be made in relation to other types of couples, such as two men living together or two women living together. We received submissions pointing out that there was an even stronger argument for some legal intervention in the case of such couples because they did not have the option of marrying each other. We can see the force of these arguments and we are grateful for the carefully reasoned comments submitted to us on this issue. Nonetheless we consider, on pragmatic grounds, that it is likely to be more productive to concentrate on cohabitation as we have defined it above [ie mixed-sex]. It is this type of cohabitation which is statistically more important and in relation to which there is currently the greater demand for reform.”¹¹⁶

Neither the Scottish Office in 1999 nor the Scottish Executive in 2000 made any reference to greater recognition of cohabiting couples, same-sex or otherwise.

SLC Discussion 2002

The SLC’s recent Discussion Paper *Title to Sue for Non-Patrimonial Loss*¹¹⁷ addressed the question of whether persons in same-sex relationships should be included within such provisions (at present they are generally thought to be excluded by the terms of the Damages (Scotland) Act 1976, sch 1 para 1). There were two reasons given for considering the inclusion of same-sex partners in any reform. First was “that there is no doubt that homosexual relationships are increasingly accepted as legitimate lifestyles.”¹¹⁸ The second reason, significantly, was that following *Salgueiro da Silva Mouta v Portugal*¹¹⁹ continued discrimination on the basis of sexual orientation could breach the European Convention on Human Rights (ECHR)¹²⁰ and indeed there was an interesting three page examination of the impact of the ECHR on the issue in hand. The existence of an obligation under the ECHR may allow otherwise timid politicians to act.

The SLC, although making no recommendations, appeared relaxed about the possible inclusion of same-sex cohabitants stating that “there is no reason to expect any greater difficulty in establishing the existence of a stable homosexual cohabitation than has been experienced in respect of the equivalent heterosexual relationship.”¹²¹

Two points may be noted here while agreeing with the main thrust of the SLC’s comment. Firstly the SLC’s terminology is unfortunate. While terms such as “homosexual relationship” and several variants are in common usage they do not capture the legal (and perhaps social) reality of the relationships in question. As far as the writer is aware, all previous and current initiatives in this area concern possible recognition of *same-sex relationships* (that is those between two men or two women). They do not necessarily concern homosexual relationships (that is those between two gay men, two lesbians or a lesbian and a gay man). Nor is there any obligation for a person in a same-sex relationship to declare his or her

self “homosexual” – no more than there is an obligation on those currently getting married to declare that they are heterosexual and that that somehow defines their relationship.

Secondly, the statement that there should be no greater difficulty in establishing the existence of a same-sex relationship than there is in establishing a mixed-sex relationship is welcome but perhaps overlooks certain social realities. Some people in some communities may fear being “outed” to potentially hostile strangers (or even family) by any publicity attendant on a court action. Further, some solicitors and some members of the judiciary may in practice require more extensive and/or more intrusive evidence than they would require of unmarried mixed-sex couples. Solving these difficulties may not be within the remit of the SLC but they require to be acknowledged.

In the event, all respondents to the Discussion Paper supported inclusion of same-sex partners and the SLC conceded the point in relation to “homosexual relationships” – respondents “considered that the term was inappropriate, as it appeared to suggest a relationship based on specific sexual orientation. They suggested that the term “same-sex cohabitant” should be used, which we are happy to adopt.”¹²²

The SLC recommends that same-sex cohabitants should be entitled to sue for both non-patrimonial and patrimonial loss.¹²³ Finally, the paragraph concerned with the definition of same-sex cohabitants can be fully endorsed, raising as it does the difficulty of defining unmarried couples with reference to married couples -

“... in our view the position of same-sex cohabitants should be the same as opposite-sex cohabitants. In order to qualify, the claimant must have been cohabiting with the deceased immediately before the deceased’s death. Former cohabitants should not have title to sue and there should be no minimum period of cohabitation. However, as in the case of opposite-sex cohabitation, same-sex cohabitation should involve some degree of stability and commitment in order to qualify. Our draft Bill therefore defines a same-sex cohabitant as “any person of the same sex as the deceased who was living with the deceased in a relationship which had the characteristics, other than that the persons are of the opposite sex, of the relationship between husband and wife.” While this definition is not ideal in that it defines the relationship by reference to a married couple, it has been used in other recent legislation and appears to have become an accepted method to describe same-sex cohabitants for legal purposes.”¹²⁴

Local Authorities

Finally, it may be that, as in other jurisdictions, local emanations of the state will play a role in recognising same-sex couples.¹²⁵ The Greater London Council has introduced a register of same-sex partners, purporting to act under ss30 and 34 of the Greater London Authority Act 1999. In particular s30(1) provides that the Authority can act to secure one or more of its “principal purposes”, one of which, under s30(2)(b) is “promoting social development in Greater London”. It is understood that both Manchester and Leeds City Councils are in the advanced stages of introducing partnerships registers for same and mixed-sex couples.¹²⁶ It may be that Scottish Local Authorities might choose to follow suit under ss21 to 25 of the current Local Government in Scotland Bill 2002.¹²⁷

Conclusion

Recognition of same-sex couples has come a long way since *Early v Early* in 1989. With the exception of *T Petr*, the surrogate adoption cases and the repeal of Section 28 this has not occasioned major public comment; indeed only the latter attracted publicity for any length of time.

In case law it is submitted that Lord President Hope’s clear and robust statement of the law in *T Petr* provided a significant and welcome boost to those in same-sex couples coming before the courts. There still appears to be some confusion about the granting of parental responsibilities and rights but, while the way is always open to a discriminatory sheriff or judge to find against a person in a same-sex relationship by claiming to do so “on the facts of the case”, it would seem that the difficulties facing (former or current) same-sex partners are no different in type to those faced by grandparents, older siblings and others.

An acceptable, workable definition of same-sex partner seems to be emerging in Scottish legislation. The recent deviations from this definition in the Land Reform (Scotland) Bill and the Mental Health (Scotland) Bill have no merit and are, perhaps, mere lapses on the part of draftspersons. In any event it is to be hoped that they will be changed

before the Bills are enacted.

As with difficulties in court over parental responsibilities and rights, same-sex couples will have to take their place in the highly contested debate over legislative recognition of all unmarried couples. Whether it is right to regulate these relationships and if so to what degree, and whether the paradigm of marriage can be rejected in defining such relationships is not an exclusively LGBT issue.

The push for recognition of same-sex partnerships, and thereby access to certain State-conferred privileges, appears to be irresistible. The questions seem to be restricted to

- when will change come
- will it come through continued “consensus” and cooperation between LGBT groups and parliament or through litigation, both domestic and international
- will greater use be made of the ECHR as an “excuse” for politicians having to act
- what sops, if any, will be given to reactionary or traditionalist campaigners and
- which relationships will be so recognised and privileged and which excluded?

If the argument on the *principle* of recognition of same-sex partners

appears to be won (subject to the debate on recognising any non-marital partners, mixed or same-sex), the Scottish Executive is likely to resist any demands for same-sex marriage for several years to come. Whether that is viewed as problematic will largely depend on the extent and terms of recognition of same-sex partnerships.

There may, however, be other developments which provoke determination of same-sex marriage “rights” – which may be viewed as unwelcome by more than the Executive. With The Netherlands now allowing same-sex marriage (as distinct from partnership registration) it may not be long before a married same-sex Dutch couple move to Scotland and demand the privileges of marriage. Alternatively, or in addition, a Scottish same-sex couple, perhaps informed by religious traditions, may find that “partnership recognition” is insufficient. They could seek a review of Scottish Minister’s failure to act on same-sex marriage in the Court of Session and, if necessary, take their case to the European Court of Human Rights. They may alternatively seek judicial review of a registrar failing to accept their marriage notice.¹²⁸

In any event, same-sex marriage is not necessarily taken “off the agenda” by partnership regulation. Recognition or otherwise of same-sex partners and the treatment of lesbian, gay, bisexual and transgendered members of families will continue to illuminate changes in family policy in Scotland.

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76. The Scotland Act 1998 (Transitory and Transitional Provisions) (Members’ Interests) Order 1999, 1999 SI 1350. I owe this reference to Tim Hopkins.
77. para 2(1)
78. The 1984 Act’s definition of “nearest relative” (ss 53 to 57) being taken as the basis of the definition in the new Act.
79. “New Directions: Report on the Review of the Mental Health (Scotland) Act 1984”
80. Adults With Incapacity (Scotland) Bill, as introduced, s76
81. 1st Marshalled List of Amendments for Stage 2
82. Kate Maclean MSP and Nora Radcliffe MSP respectively
83. The requirement of 6 months cohabitation, while unnecessary and potentially unjust, applies to both same and mixed-sex couples.
84. s22 & Sch 3
85. eg Official Report Col 1918/1919
86. Activists had previously mooted the possibility of using the Bill to amend the 1981 Act.
87. 21 March 2001
88. Margaret Curran, for the Executive, stated she was sympathetic to the intention behind including same-sex couples and, subject to there being no clash with the 1981 Act, the Executive would see if a way forward could be found. Official Report, col 1923
89. Official Report, col 1918/1919
90. *ibid* col 1920
91. *ibid* col 1922
92. *ibid* col 1714. Aitken is wrong on this point but correct that the definition is not entirely satisfactory – see fn’s 103 and 116 below.
93. *ibid* col 1719
94. *ibid* col 1721
95. *ibid*
96. Explanatory Notes to the Bill para 9. Among people excluded by the 1981 Act who would be included in the new Act are “divorced spouses, same-sex cohabitants, non-cohabitant partners, other family members such as parents or grandparents, or neighbours of abusive people.”
97. Repealed by s34 of The Ethical Standards in Public Life etc (Scotland) Act 2000. For a critique of Section 28 see K McK Norrie “Meaningless and Symbolic Legislation” 1988 JLSS 310
98. The provision, still in force in England & Wales, is in fact s2A of Local Government Act 1986 which was inserted by s28 of the Local Government Act 1988. Note that Section 28 does NOT and never has banned the promotion of homosexuality, as generally asserted by the media.
99. The Executive issued a circular providing guidance to Directors of Education on the conduct of sex education in schools available at www.scotland.gov.uk/library3/education/finalcircular.pdf See also the Report Of The Working Group On Sex Education In Scottish Schools www.scotland.gov.uk/library2/doc16/sexedwg.pdf
100. as introduced – available via: www.scottish.parliament.uk/parl_bus/legis.html
101. s37(4)(b)
102. s38(2)(iii)
103. This point is further explored at fn106 below
104. At the time of writing the Executive has tabled an amendment in the name of Ross Finnie which would remove s38(1) to (3) entirely – apparently to remove the intended exclusion of transfers within families
105. <http://www.scotland.gov.uk/consultations/health/dmhb-07.asp>
106. See, eg, I D Willock “Cohabitation: An alternative basis” 2000 JR 1 and fn116 below
107. S1M-2596 Registration of Civil Partnerships- That the Parliament notes the proposed legislation laid before Westminster that is designed to afford couples in long-term relationships the right to legally register their relationships and *considers that the Executive should* progress equivalent legislation to establish a register of civil partnerships in Scotland and to afford couples who register their partnerships full legal recognition in areas relating to inheritance, pensions, bereavement, damages and all other relevant areas
108. Discussion with Robin Harper MSP
109. Forerunner of the Scottish Executive
110. SLC Report 135, *Family Law*
111. *ibid*, recommendation 45, page 68. This because the issue was “highly controversial” but the “topic might merit further consideration at some time in the future”, Para 8.7, p68
112. Scottish Executive (2000) *Parents and Children; a White paper on Scottish Family Law* p23 para 6.4.2
113. Which submission was written by the author of this article under instruction from the Outright Scotland Executive Committee
114. *Improving Scottish Family Law; Summary of Responses* para 12.3
115. These responses were from a rather peculiar collection of respondents - the Scottish Law Agents Society; the Glasgow Bar Association; Families Need Fathers; Christian Action Research and Education (CARE); Cardinal Winning for the [Catholic] Bishops’ Conference of Scotland and the law firm Brodies WS
116. SLC Report 135, para 16.3 page 115
117. SLC Discussion Paper 116, Title to Sue for Non-Patrimonial Loss, esp paras 3.35 to 3.39 and Appendix 3
118. *ibid* 3.36
119. 2001 Fam LR 2; See also K McK Norrie “Stay Standing if you Like Gay People” 2000 Feb *SCOLAG* 34
120. SLC Report 187, Title to Sue for Non-Patrimonial Loss, 3.37
121. *ibid* 3.38
122. *ibid* 2.58
123. *ibid* 2.63
124. *ibid* 2.64
125. Indeed many local authorities already recognise same-sex partners for housing purposes, for example
126. Under s2 of the Local Government Act 2000
127. “s21(1) A local authority has power to do anything which it considers is likely to promote or improve the well-being of - (a) its area and persons within that area”
128. This can be seen in the Canadian case *Halpern v. Canada (A.G.)* before the Ontario Superior Court of Justice (Divisional Court), Toronto judgement issued 12/7/02. Despite the recognition of the rights of same-sex couples in *M v H* several members of the Metropolitan Community Church (a “gay identified” church) sought, and have won, equal rights to marry. The case is, however, being appealed.