

## **Equal Civil Partnerships, Discrimination and the Indulgence of Time:**

***R (on the application of Steinfeld and Keidan) v Secretary of State for***

***International Development***

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*In R (on the application of Steinfeld and Keidan) v Secretary of State for International Development the Supreme Court unanimously declared that the ban on different-sex civil partnerships was incompatible with Articles 8 and 14 of the European Convention on Human Rights. In a strikingly robust and, at times, acerbic manner, the Court systematically dismantled the Secretary of State's request for tolerance of a discriminatory and unsustainable legal position. The decision represents a clear victory for those campaigning for reform and the issuing of a declaration of incompatibility by the Court is likely to have influenced the later announcement by Prime Minister Theresa May in October 2018 that different-sex civil partnerships will ultimately be introduced in England and Wales.*

**Keywords:** Civil Partnerships – Marriage – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Articles 8 and 14 – Human Rights Act 1998

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## Introduction

Civil partnerships, introduced in December 2005, were conceptualised as an ‘important equality measure’ offering largely comparable legal protections to same-sex couples at a time when granting access to marriage was not politically viable.<sup>1</sup> With societal attitudes changing, and again premised on the promotion of equality, the Marriage (Same Sex Couples) Act 2013 subsequently granted same-sex couples the ability to enter civil, and in some circumstances, religious marriages.<sup>2</sup> However, following the introduction of same-sex marriage in March 2014, Parliament had created a glaring inequality through its failure to simultaneously phase out or, alternatively, extend the coverage of the civil partnership regime to different-sex couples. Whilst labels and legal distinctions between the two institutions can be debated, it is indisputable that from that point in time onwards same-sex couples had access to two formal relationship statuses, whereas different-sex couples were limited to one.

The ensuing *inequality* created and its compatibility with the United Kingdom’s obligations under the European Convention on Human Rights were issues that had long been highlighted by academics.<sup>3</sup> With a view to extending the civil partnership regime to different-sex couples,

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<sup>1</sup> Department of Trade and Industry, *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (London: 2003) 13.

<sup>2</sup> See H. Fenwick and A. Hayward, ‘From Same-Sex Marriage to Equal Civil Partnerships: On a Path towards ‘Perfecting’ Equality?’ [2018] 30(2) CFLQ 97, 104-105.

<sup>3</sup> See N. Barker, ‘Civil Partnerships: An Alternative to Marriage? An Analysis of the Application in *Ferguson and Others v United Kingdom*’ [2012] 42 *Family Law* 499 and N. Barker and D. Monk, *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Abingdon: Routledge, 2015).

amendments were tabled to the Marriage (Same Sex Couples) Bill,<sup>4</sup> public consultations initiated<sup>5</sup> and Private Members' Bills introduced into both Houses of Parliament.<sup>6</sup> More importantly for this note, this issue was also challenged judicially, most recently by the Equal Civil Partnerships campaign. In June 2018 and after almost four years of litigation, the Supreme Court unanimously declared in *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* that the current ban on different-sex civil partnerships, contained within sections 1 and 3 of the Civil Partnership Act 2004, was incompatible with Articles 8 and 14 of the European Convention on Human Rights.<sup>7</sup>

Despite claims in the media to the contrary, the litigants remain unable to register a civil partnership. It is well understood that a declaration issued under section 4 of the Human Rights Act 1998 merely acts as a formal record of incompatibility and has been deemed 'little more than a cry for action'.<sup>8</sup> Formally speaking, a declaration of incompatibility does not oblige either the government or Parliament to act. However, it should be noted that declarations are also not normally ignored and the fact that incompatibility was found is likely to have galvanised support for the recently enacted Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 that compels the Secretary of State to amend the Civil Partnership

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<sup>4</sup> See the proposed amendment, Clause 10, introduced on 20 May 2013 and tabled by Tim Loughton MP: HC Deb vol 563 col 990 20 May 2013.

<sup>5</sup> See Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): A Consultation* (London: 2014) and the earlier Government Equalities Office, *Equal Civil Marriage: A Consultation* (London: 2012).

<sup>6</sup> See the Civil Partnership Act 2004 (Amendment) Bill [HC] 2016–17 and a modified later version, the Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill [HC] 2017–19, both introduced by Tim Loughton MP. See also the Civil Partnership Act 2004 (Amendment) (Mixed Sex Couples) Bill [HL] 2017–2019 introduced by Baroness Burt in the House of Lords.

<sup>7</sup> [2018] UKSC 32. See A. Hayward, 'Taking the Time to Discriminate - *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*' [2019] 41(1) JSWFL 92.

<sup>8</sup> C. Gearty, 'Revisiting Section 3(1) of the Human Rights Act' (2003) 119 *Law Quarterly Review* 551, 552.

Act 2004, by way of regulations, so as to permit different-sex civil partnerships.<sup>9</sup> The purpose of this note is to situate the Supreme Court decision within this broader landscape of law reform and, after detailing the proceedings to date, it will analyse three key issues: the use of public consultations; the issuing of a declaration of incompatibility, and the impact of this case on civil partnership reform.

## **A - Background to the Supreme Court decision**

### *B - Facts and previous decisions*

Steinfeld and Keidan are a different-sex couple with two children. They wish to enter a civil partnership owing to a genuinely held ideological opposition to marriage, which they perceive to be an out-dated and patriarchal institution.<sup>10</sup> The couple were refused the ability to register a civil partnership in 2014 on the basis that they were not ‘of the same sex’.<sup>11</sup> The couple unsuccessfully challenged that refusal in the High Court where Andrews J determined that their claim did not fall within the ambit of Article 8, and even had it done so that such difference in treatment could be objectively justified. Put simply, Andrews J believed that as civil marriage

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<sup>9</sup> See H. Fenwick, *Fenwick on Civil Liberties and Human Rights* (Abingdon: Routledge, 5th ed, 2017) 173 to the effect that Members of Parliament ‘perceive their role as being to modify legislation’ to comply with declarations. See also Ministry of Justice, *Responding to Human Rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to Human Rights judgments 2017–2018*, Cm 9728, November 2018 50 acknowledging the Government’s response to the Supreme Court decision.

<sup>10</sup> For further analysis see: L. Ferguson, ‘The curious case of civil partnership: the extension of marriage to same-sex couples and the status-altering consequences of a wait-and-see approach’ [2016] 28 CFLQ 347, R. Wintemute, ‘Civil partnership and discrimination in R (Steinfeld) v Secretary of State for Education’ [2016] 28 CFLQ 365 and C. Draghici, ‘Equal marriage, unequal civil partnership: a bizarre case of discrimination in Europe’ [2017] CFLQ 313.

<sup>11</sup> Civil Partnership Act 2004, s 3(1)(a).

was available to them the ‘only obstacle’ to the couple obtaining recognition of their relationship equivalent to that of a same-sex couple was their ‘conscience’.<sup>12</sup> The Court of Appeal accepted that their claim did fall within the ambit of Article 8 and unanimously dismissed what was termed the ‘can-marry’ argument on the basis that marriage was not an ‘effective option’ for the litigants.<sup>13</sup> Nevertheless, whilst all of the judges accepted that their inability to access a civil partnership constituted discrimination, a 2:1 majority considered that the need for the government to conduct further research into this area rendered such difference in treatment justifiable. This view, however, was time-sensitive; without providing a deadline by which the research had to be concluded, Briggs LJ remarked that it would gradually become ‘increasingly difficult’ for the government to justify a ‘wait and see’ position in the future.<sup>14</sup>

#### *B - Ambit of Article 8*

In the Supreme Court, Lord Kerr, with whom all the other justices agreed, gave the sole judgment. On ambit, it was accepted by counsel for the government that the claim did fall within Article 8 (despite Andrews J’s contrary belief in the High Court) and thus there was little discussion of this point. Had this point been disputed, the readiness with which the Court of Appeal determined the engagement of Article 8, coupled with a similar approach taken by the Strasbourg court in *Ratzenböck and Seydl v Austria*, would have made it highly likely that the Supreme Court would have reached the same decision.<sup>15</sup> One helpful contribution,

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<sup>12</sup> *R (Steinfeld) v Secretary of State for Education* [2016] EWHC 128 at [39].

<sup>13</sup> *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81 at [40] (Arden LJ).

<sup>14</sup> *ibid* at [162].

<sup>15</sup> [2017] ECHR 947. See H. Fenwick and A. Hayward, ‘Equal Civil Partnerships and the Implications for Steinfeld and Keidan: *Ratzenböck and Seydl v Austria*’, UK Human Rights Law Blog, 21 November 2017 at <https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourgs-latest-ruling-for-steinfeld-and-keidan-helen-fenwick-andy-hayward/> (last accessed 3 May 2019).

however, was rectification of an earlier erroneous view, stemming from *M v Secretary of State for Work and Pensions*, that an adverse effect in relation to Article 8 was required before an infringement could fall within its ambit.<sup>16</sup> Determining that no detrimental effect needed to be established, the Supreme Court brought the domestic position into line with that present at Strasbourg and, more importantly, emphasised the centrality of human rights in this context.<sup>17</sup>

### **A - Justification**

Having established the applicability of Article 8 and that the difference in treatment was based on sexual orientation, thereby engaging Article 14, the Supreme Court turned to justification. The appellants argued *inter alia* that it was for the government to justify the discriminatory effect of excluding different-sex couples from the civil partnership regime, that strict scrutiny applied and that the measure must not merely be suitable to achieve a legitimate aim, it also needed to be necessary to exclude individuals of a specific sexual orientation from its remit. In response, counsel for the Secretary of State argued that any change to this sensitive area of social policy fell squarely within the remit of Parliament and that necessitated the conferral of a ‘significant measure of discretion’.<sup>18</sup> Moreover, after the introduction of same-sex marriage, further research was needed to determine whether civil partnerships should be phased out or extended as ‘[m]omentous decisions of this type need...time for proper inquiry and consideration’.<sup>19</sup>

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<sup>16</sup> [2006] UKHL 11. For analysis see R. Wintemute, ‘Same-sex couples in Secretary of State for Work and Pensions v M: identical to Karner and Godin-Mendoza, yet no discrimination?’ [2006] 6 EHRLR 722.

<sup>17</sup> See, for example, *J.M v United Kingdom* [2010] ECHR 1361 where the Strasbourg court effectively overruled the House of Lords in *M*.

<sup>18</sup> n 7 above, at [27] (Lord Kerr).

<sup>19</sup> *ibid* at [25] (Lord Kerr).

### *B - Area of Discretionary Judgment*

In relation to the need for a margin of appreciation to be afforded the government, the Supreme Court, citing the earlier House of Lords decision in *Re G*,<sup>20</sup> remarked that such a concept does not exist domestically and, even if it did, in the form of a margin of discretion, it would be narrowly drawn since the dispute concerned a difference in treatment based on sexual orientation.<sup>21</sup> Moreover, that concept was inapplicable since the government was aware that the effect of introducing same-sex marriage without simultaneous modification of the civil partnership scheme was the creation of inequality ‘where none had previously existed’.<sup>22</sup> For the government to then ‘ask for the indulgence of time’ was, in the view of Lord Kerr, ‘less obviously deserving of a margin of discretion’.<sup>23</sup>

### *B - Legitimate aim*

The Supreme Court adopted the four-part test, articulated by Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department*,<sup>24</sup> which Lord Kerr summarised as follows:

(a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right; (b) are the measures which have been designed to meet it rationally connected to it; (c) are they no more than are necessary to accomplish it; and (d) do

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<sup>20</sup> *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173.

<sup>21</sup> See *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 [153] (Lord Mance) discussed in *Steinfeld* n 7 above, at [31]–[32] (Lord Kerr).

<sup>22</sup> n 7 above, at [36] (Lord Kerr).

<sup>23</sup> *ibid.*

<sup>24</sup> [2011] UKSC 45.

they strike a fair balance between the rights of the individual and the interests of the community?

The request by the Secretary of State for further time to conduct research was deemed incapable of constituting a legitimate aim as it was not intrinsically linked to the discriminatory treatment. Put simply, it could ‘never amount to a legitimate aim *for the continuance of the discrimination*’.<sup>25</sup> Had the government decided to phase out or extend civil partnerships upon the introduction of same-sex marriage, there would have been the potential to argue that the assembling of more data constituted a legitimate aim. But through creating ‘a *new* form of discrimination’<sup>26</sup> and then asking for ‘tolerance’ such an argument was found to be unavailable.<sup>27</sup> Even if there was a legitimate aim, less intrusive means were available to serve it. For example, whilst further research was being undertaken, the government could have delayed the commencement of same-sex marriage, extended civil partnerships to different-sex couples or, more controversially, paused all civil partnership registrations. As Lord Kerr noted, ‘[e]ach of these options would have allowed the aim to be pursued with less, indeed no, discriminatory impact’.<sup>28</sup> It was also clear that a fair balance was not struck between the rights of the individual and the interests of the community since objections by the community to denying different-sex couples access to civil partnerships for an ‘indefinite period’ and with an end still not in sight were ‘unspecified and not easy to envisage’.<sup>29</sup>

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<sup>25</sup> n 7 above, at [50] (Lord Kerr) (emphasis in original).

<sup>26</sup> *ibid* at [46] (Lord Kerr) (emphasis in original).

<sup>27</sup> *ibid* at [42] (Lord Kerr).

<sup>28</sup> *ibid* at [49].

<sup>29</sup> *Ibid* at [52] (Lord Kerr).



The Supreme Court subsequently dismissed the Secretary of State's attempt to justify the differential treatment and issued a declaration that the relevant sections of the Civil Partnership Act 2004 precluding access to different-sex couples were incompatible with Articles 8 and 14 of the ECHR.

### **A - Data gathering and the use of public consultations**

As noted above, the Supreme Court hearing centred exclusively on justification since counsel for the Secretary of State had conceded after the High Court decision that maintaining civil partnerships for same-sex couples only was no longer a viable option and then, following the Court of Appeal decision, that the difference in treatment was potentially justifiable. These variations in the argument presented throughout the course of the litigation were highlighted by Lord Kerr. A key component of the government's strategy rested upon the findings of consultations that in its view necessitated requesting more time to review the position after same-sex marriage had been introduced. These tactics found no favour in the Supreme Court and the arguments advanced as to their use were systematically dismantled. What is particularly striking about this aspect of the Court's reasoning is its forthright nature and, in particular, the characterisation of the discriminatory treatment. Lord Kerr referred to the position as one that had created a 'manifest inequality of treatment'<sup>30</sup> but more problematic was the fact that the government *knew* that it was bringing about such state of affairs, leading him to find that it had approached the severity of the issue with 'at best, an attitude of some insouciance'.<sup>31</sup> He went on to state that he wished to make it 'unequivocally clear' that from the moment same-sex

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<sup>30</sup> *ibid* at [3].

<sup>31</sup> *ibid* at [33].

marriage introduced the government was placed under an obligation to eliminate the inequality of treatment *immediately*’ (emphasis in original).<sup>32</sup>

It is thus apparent that the government’s appreciation of the human rights issues at stake was limited, despite the raising of the potential for infringement on multiple occasions. Commentators had noted several years before the Supreme Court ruling that a failure to phase out or extend civil partnerships upon the introduction of same-sex marriage could be deemed incompatible with the ECHR.<sup>33</sup> The earlier ‘Equal Love’ case brought in 2011, comprising a claim for equal civil marriage, which ran in tandem with a claim for different-sex civil partnerships, might also have provided such a warning (although the fact that it was ultimately declared inadmissible in December 2013, partly owing to the fact that one side of the case fell away following the introduction of same-sex marriage in March 2014, might have prompted the government to pay it little attention).<sup>34</sup>

Section 15 of the Marriage (Same Sex Couples) Act 2013, obliging the Secretary of State to issue a full public consultation on the future of civil partnerships, further evidenced limited appreciation of the ECHR dimension. In the ensuing review, the Department for Culture, Media and Sport stated, in one short paragraph, that even if a different-sex couple could bring the claim within the ambit of Article 8, the state is granted a margin of appreciation and, in light of the historical context, ‘it is not unlawful for same sex couples now to have more options available to them in terms of the legal recognition of their relationship than opposite sex

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<sup>32</sup> *ibid* at [50].

<sup>33</sup> See Wintemute, n 10 above, and J.M. Scherpe and A. Hayward (eds), *The Future of Registered Partnerships: Family Recognition beyond Marriage?* (Cambridge: Intersentia, 2017) vii.

<sup>34</sup> It was not in any event analogous with *Steinfeld* as both forms of couple had access to one formalized relationship status only.

couples’.<sup>35</sup> The Supreme Court questioned this confident assumption and the belief that such inertia in this area would be ECHR-compliant. The central thrust of the Supreme Court’s reasoning was that this crucial appreciation of human rights had been side-lined and that the government’s consultation strategy had been initiated in a manner ‘unconnected with the government’s perceptions of its obligations under ECHR’.<sup>36</sup>

The use of consultations was also criticised from a different direction. It should be noted here that the government was undoubtedly placed in a difficult position since while any consultation exercise needed to be completed swiftly, particularly as this discrimination affected ‘one of the closest relationships which one adult has with another’, time was needed to ensure that a reliable dataset was generated.<sup>37</sup> As the 2014 consultation was completed shortly after the introduction of same-sex marriage in March that year, it is hardly surprising that the data on civil partnership uptake would be inconclusive. Nevertheless, the significance of the Supreme Court’s reasoning in *Steinfeld* was not necessarily related to the speed with which this exercise was conducted, but instead related to the *focus* of these consultations.<sup>38</sup> For instance, Lord Kerr stated that interviewing current same-sex civil partners to better understand their views on civil partnership and marriage was ‘at best, of dubious relevance to the question of whether the continuing discrimination against different sex couples can be defended’.<sup>39</sup> Here, the Court

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<sup>35</sup> Department for Culture, Media and Sport, n 5 above, 15.

<sup>36</sup> n 7 above, at [34] (Lord Kerr).

<sup>37</sup> n 13 above, at [110] (Arden LJ).

<sup>38</sup> Note also the timing of publications; the Command Paper, *The Future Operation of Civil Partnership: Gathering Further Information*, Cm 9606 (2018) was released two working days before the Supreme Court hearing in *Steinfeld* on the 14 May 2018.

<sup>39</sup> n 7 above, at [53].

echoed views expressed by academics that the methodology of the consultation in 2014 lacked precision and failed to ask the right questions.<sup>40</sup>

It should be recognised, however, that both the Equal Civil Marriage consultation<sup>41</sup> and the later Department for Culture, Media and Sport consultation did seek views on whether civil partnerships should be extended to different-sex couples but received differing results.<sup>42</sup> The former saw 61 per cent of respondents, amounting to around 214,000 individual responses, favour opening up civil partnerships to different-sex couples,<sup>43</sup> whereas the latter consultation saw a decrease to 22 per cent, albeit out of a much smaller cohort of 10,634 respondents.<sup>44</sup> But, crucially, the significance of *Steinfeld* on this particular point is that Lord Kerr was clearly of the opinion that emphasising the same-sex dimension failed to address adequately, and had no causal connection to, the central point of the dispute at hand: discrimination against *different-sex* couples.

### **A - Issuing a Declaration of Incompatibility**

Steinfeld and Keidan remain unable to register a civil partnership. That result could have been avoided had the Court used the interpretative obligation in section 3 of the Human Rights Act

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<sup>40</sup> See A. Hayward, 'Justifiable Discrimination – The Case of Opposite-Sex Civil Partnerships' (2017) 76 CLJ 243, 245-246 and A. Hayward, 'The Future of Civil Partnerships in England and Wales' in Scherpe and Hayward, n 32 above, 527, 549-550.

<sup>41</sup> Government Equalities Office, n 5 above.

<sup>42</sup> Department for Culture, Media and Sport, n 5 above.

<sup>43</sup> HM Government, *Equal Marriage: The Government's Response* (London: 2012) 42.

<sup>44</sup> Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (London: 2014) 11. However, note the contradictory results in this consultation as whilst the majority of respondents were against the extension of civil partnerships to different-sex couples, a majority (55%) were equally against the scheme being phased out for same-sex couples.

1998 to reinterpret sections 1 and 3 of the Civil Partnership Act 2004 to render them compatible with Articles 8 and 14. In light of the complexity involved in such a move, and since counsel for the litigants actively sought a declaration, it is unsurprising that this point was not canvassed by the Court, and thus the remedial potential of section 3 as the ‘linchpin’, in the sense of incorporating the rights of the Convention domestically, was not further explored.<sup>45</sup> Had such point been argued, it is likely that the same-sex requirement of the Civil Partnership Act 2004 would be regarded by the Court as a ‘fundamental feature’ of the legislative scheme, thereby necessitating judicial restraint.<sup>46</sup>

Turning to section 4 of the Human Rights Act 1998 and institutional competence, Lord Kerr travelled the typical constitutional law terrain surrounding the making of declarations, noting the government’s argument that any change ‘fell squarely within the field of sensitive social policy which the democratically-elected legislature was pre-eminently suited to make’.<sup>47</sup> But, having established that the government’s measure pursued no legitimate aim, he found that such a view was unpersuasive. This robust dismissal of a call for deference, coupled with the fact that a declaration was ultimately issued, is of particular modern significance in that it opposes a recent trend whereby courts refuse to declare provisions incompatible, as exemplified in *R (Nicklinson) v Ministry of Justice*<sup>48</sup> and, more recently, in a case concerning abortion in Northern Ireland.<sup>49</sup>

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<sup>45</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [46] (Lord Steyn). See A. Kavanagh, ‘Judicial Restraint in the Pursuit of Justice’ [2010] 60 UTLJ 23, 31-32 and discussion of this option in Fenwick and Hayward, n 2 above, 113-114.

<sup>46</sup> *ibid* at [33] (Lord Nicholls).

<sup>47</sup> n 7 above, at [54].

<sup>48</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

<sup>49</sup> *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27. Note, however, the willingness of the Supreme Court to declare provisions relating to abortion incompatible but that these views were *obiter* as a majority of the Court found that the

Thus, a closer examination of this potential reversal of the trend is required. Citing his own minority view (albeit unattributed) in *Nicklinson*, Lord Kerr's analysis emphasised the established principle that declarations do not affect the continuing validity of the provision concerned or *compel* action on the part of the government or Parliament. He further stressed that the conditional phrasing of section 4(2) of the Human Rights Act 1998, whereby the court *may* issue a declaration, clearly envisages instances where incompatibility may exist, but no corresponding declaration is issued. However, he noted that instances of such reticence have not been 'comprehensively catalogued'.<sup>50</sup> This all might appear to suggest that there is some recent acceptance of a somewhat limited role for declarations; yet that observation must be contrasted with Lord Kerr's bold conclusion in *Steinfeld* that the Court has 'been given the power under section 4 of HRA...and that, in the circumstances of this case, it would be *wrong* not to have recourse to that power' (emphasis added).<sup>51</sup>

So, what are the circumstances creating a particular sense of urgency which had an impact on the decision to issue a declaration and which imbued its wording with that sense in *Steinfeld*? First, the absence of a legitimate aim and the comprehensive, unanimous rejection of the government's arguments may have contributed towards a desire on the part of the Court to compel action whilst, at the same time, being fully cognisant of the limitations of a declaration. It was the most unequivocal message the Supreme Court could send, particularly as this was not an instance of inequality created through omission or oversight, but one brought about

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Northern Ireland Human Rights Commission lacked standing: see J. Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2019) 82(3) MLR 525.

<sup>50</sup> n 7 above, at [57] (Lord Kerr).

<sup>51</sup> *ibid* at [61].

deliberately through a desire by the government to secure same-sex marriage at all costs.<sup>52</sup> Second, and drawing an analogy with *Nicklinson*,<sup>53</sup> the fact that Parliamentary time had been expended on Tim Loughton MP's Private Member's Bill could have militated towards reticence in issuing a declaration, despite a finding of discrimination.<sup>54</sup> However, the fact that this path was not chosen may reveal the Supreme Court's misgivings about that process; indeed, Lady Hale stated, extra-judicially, that she had been 'rather hoping that Parliament would solve matters for us'.<sup>55</sup> Despite Lord Kerr noting that ongoing Parliamentary consideration was no 'inevitable contraindication to a declaration of incompatibility', it is arguable that a declaration was issued since the Court *knew* that, as a Private Member's Bill, it had limited chances of success<sup>56</sup> and, at that time, it had been watered down merely to compel a review, as opposed to an textual amendment of the Civil Partnership Act 2004, as originally planned. Third, the Supreme Court was clearly mindful of the fact that there was at the time of the hearing no indication of an end point in sight in terms of the removal of the asymmetry of access to civil partnerships.<sup>57</sup> This aspect generated additional uncertainty for both current civil partners and those wishing to enter one in the future.

The use of a declaration in *Steinfeld*, as opposed to a potentially strained use of the section 3 interpretative obligation, will invariably appeal to political constitutionalists desirous of

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<sup>52</sup> See observations to this effect by Alistair Carmichael MP: HC Public Bill Committee col 12 18 July 2018.

<sup>53</sup> In this case the Assisted Dying Bill [HL] 2014-2015.

<sup>54</sup> The Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill 2017–19.

<sup>55</sup> B. Hale, 'Private Family Law Reform' [2018] *Family Law* 810, 814.

<sup>56</sup> See A. Brazier and R. Fox, 'Enhancing the Backbench MP's Role as a Legislator: The Case for Urgent Reform of Private Members' Bills' (2010) 63 *Parliamentary Affairs* 201.

<sup>57</sup> See H. Fenwick and A. Hayward, 'Rejecting asymmetry of access to formal relationship statuses for same and different-sex couples at Strasbourg and domestically' [2017] 6 EHRLR 544.

political processes to motivate reform rather than placing reliance on the judges.<sup>58</sup> However, despite Lord Kerr's standard emphasis placed on the merely declaratory element of section 4, this was no ordinary issuance of a declaration. The succinct, unanimous and unequivocal nature of the judgment in *Steinfeld* was the closest the Court could, realistically, get to compelling action.<sup>59</sup>

### **A - The impact of *Steinfeld* on civil partnership reform**

Below, the significance of the Supreme Court's decision in *Steinfeld* will be assessed through evaluating its impact on the government's on-going review of civil partnerships. The Supreme Court expressed no clear preference as to the ultimate fate of this regime. This position perhaps echoes the desire, previously expressed by the Court of Appeal, of judges not to 'micro-manage areas of social and economic policy' and certainly, again, reinforces the fundamental nature of a declaration of incompatibility.<sup>60</sup> However, one possible indication of support for extension of the regime was an extra-judicial observation made by Lady Hale when, in April 2018, she remarked that the aim of the Equal Civil Partnerships campaign was to 'strengthen rather than to undermine family responsibility', later asking: '[s]houldn't we actually welcome couples who want to enter into a legal commitment to one another, whatever it is?'.<sup>61</sup> But these observations were then followed up, unsurprisingly in light of Lady Hale's involvement in the

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<sup>58</sup> See T. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] *Public Law* 306.

<sup>59</sup> Contrast this with the arguably stronger remedy of disapplying a provision under European Union law as seen in *Walker v Innospec Limited and others* [2017] UKSC 47 where the Supreme Court adopted such an approach after finding that paragraph 18 of Schedule 9 to the Equality Act 2010 was incompatible with the Framework Directive.

<sup>60</sup> n 13 above, at [162] (Beatson LJ).

<sup>61</sup> Hale, n 55 above, 814.



then pending appeal, by the comment that '[t]here is (almost) always more than one solution to unjustified discrimination on suspect grounds - one can level up or level down'.<sup>62</sup> Nevertheless, the unambiguous call for action sent by the Supreme Court leaves no room for misinterpretation, and it is important to emphasise that no government since the inception of the Human Rights Act 1998 has refused to respond to a declaration of incompatibility.<sup>63</sup> That response, culminating in the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, will be analysed further below.

Evidence of movement on the part of the government was present soon after *Steinfeld* was handed down. The litigants immediately called upon Penny Mordaunt MP, Minister for Women and Equalities, to either back Tim Loughton MP's Private Member's Bill or use the power contained in section 10 of the Human Rights Act 1998 to take 'fast-track' remedial action to remove the incompatibility. Similarly, on the morning the outcome in *Steinfeld* was announced, Tim Loughton MP asked Prime Minister Theresa May whether she would support his Private Member's Bill. In response, May stated that the judgment would be considered with 'great care' and that the government was supporting his Bill insofar as it compels a 'full review of the operation of civil partnerships'.<sup>64</sup> In the Committee Stage of the Loughton Bill, held on the 18<sup>th</sup> July 2018, it was reported that Mordaunt had instructed that the period of time for conducting research was to be reduced 'with a view to concluding it later this year'.<sup>65</sup>

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<sup>62</sup> *ibid.*

<sup>63</sup> See Ministry of Justice, n 9 above. Note, however, the issues surrounding prisoner voting rights, analysed in C. Murray, 'We Need to Talk: "Democratic Dialogue" and the Ongoing Saga of Prisoner Disenfranchisement' [2011] 62 NILQ 57.

<sup>64</sup> Prime Minister's Questions vol 643 col 896-897 27 June 2018.

<sup>65</sup> HC Public Bill Committee col 15 18 July 2018. It should be noted that her predecessor Justine Greening MP had in a 10-page confidential document, *Options for Extending Civil Partnerships to Opposite-Sex Couples* proposed their extension but plans were shelved in January 2018 following her resignation: The Guardian, 'Plan to extend civil partnerships revealed in government report' (13 May 2018).

More recently, Prime Minister Theresa May's announcement in October 2018 that different-sex civil partnerships will be introduced now offers a clearer indication of the future reform trajectory. In announcing the move, it was stated that reform would 'protect the interests of opposite-sex couples who want to commit, want to formalise their relationship but don't necessarily want to get married' and would ensure that 'all couples, be they same-sex or opposite-sex, are given the same choices in life'.<sup>66</sup> This policy announcement is significant for several reasons and requires careful consideration.

First, the announcement avoids engagement with one method of removing the compatibility identified in *Steinfeld*; namely, phasing out the civil partnership regime.<sup>67</sup> This approach, the so-called Nordic Model, has been adopted in several jurisdictions and is often premised on the idea that civil partnerships were initially introduced for same-sex couples as a precursor to opening up marriage and once marriage is introduced their purpose becomes redundant.<sup>68</sup> It can be contrasted with the Dutch Model, where the civil partnership scheme is retained following the introduction of same-sex marriage as its foundational purpose – as an alternative to, and not a replacement for, marriage – continues.<sup>69</sup>

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<sup>66</sup> Evening Standard, 'Straight couples to be allowed to enter civil partnerships, Theresa May reveals' (2 October 2018).

<sup>67</sup> K. Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands' in R. Wintemute and M. Andenaes (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001) and J.M. Scherpe, 'The Past, Present and Future of Registered Partnerships' in Scherpe and Hayward, n 32 above.

<sup>68</sup> Several jurisdictions originally introduced same-sex registered partnerships but phased them out following the subsequent introduction of same-sex marriage: Denmark (1989), Norway (1993), Iceland (1996), Germany (2001), Finland (2002), Ireland (2010).

<sup>69</sup> See The Netherlands, France, Belgium, Luxembourg and Malta where this pattern emerged. Simultaneous introduction of same-sex marriage and extension of civil partnerships to different-sex couples took place in the Isle of Man in 2016.

The Prime Minister's statement is a welcome move as phasing out the regime in England and Wales would have been controversial as it would have created a 'legacy status' and marginalised same-sex couples who may, like the litigants in *Steinfeld*, also hold strong ideological objections to marriage.<sup>70</sup> Indeed, LGBT activist groups, such as Stonewall<sup>71</sup> and the Peter Tatchell Foundation, both oppose phasing out the civil partnership regime, the latter believing that such a move would 'provoke an almighty backlash' and 'do catastrophic damage to relations between the Conservative party and LGBT people'.<sup>72</sup> Moreover, it is argued that since the introduction of same-sex marriage a unique context was created that militated towards extension of the regime. This is particularly the case as, since March 2014, same-sex couples have continued to register civil partnerships, in full awareness of the availability of an alternative option (marriage), and it is estimated that only 12 per cent of current civil partners have actually chosen to convert their partnership to marriage.<sup>73</sup> Taking cognisance of the potential detriment to same-sex couples, extension of the regime to different-sex couples would now give expression to a unique evolution of the institution of civil partnership, exclusive to this jurisdiction, and also would accord greater respect to the values underlying Article 8.<sup>74</sup>

Second, the Prime Minister's announcement responds to growing enthusiasm for reform, and the publicity generated by the Supreme Court ruling will have undoubtedly contributed to

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<sup>70</sup> On the detrimental impact to same-sex couples, see Fenwick and Hayward, n 2 above.

<sup>71</sup> Stonewall, 'Abolishing civil partnerships is not an option', 27 June 2018 at <https://www.stonewall.org.uk/our-work/blog/abolishing-civil-partnerships-not-option> (last accessed 3 May 2019).

<sup>72</sup> Equal Civil Partnerships Campaign, 'Campaign responds to reports of Government u-turn on civil partnerships for opposite-sex couples', 1 February 2018 at <http://equalcivilpartnerships.org.uk/2018/02/campaign-responds-reports-government-u-turn-civil-partnerships-opposite-sex-couples/> (last accessed 3 May 2019).

<sup>73</sup> HC Public Bill Committee col 21 18 July 2018 (Tim Loughton MP).

<sup>74</sup> See Fenwick and Hayward, n 2 above, 118-119. See also B. Douglas, 'Too Attentive to our Duty: The Fundamental Conflict Underlying Human Rights Protection in the UK' (2018) 38(3) *Legal Studies* 360.

galvanising public support, as evidenced by an increase in signatures to the Change.org petition, *Open Civil Partnerships to All*, immediately following *Steinfeld* being handed down.<sup>75</sup> More importantly, the existence of a Supreme Court judgment now places England and Wales in a different position to that of other European jurisdictions that phased out civil partnership regimes at the same time as introducing same-sex marriage (and with little controversy, opposition or litigation). It is thus likely that the government knew that the presence of such a judgment would make it difficult, in a political sense, to phase out civil partnerships. Indeed, even prior to the Prime Minister's announcement, Baroness Deech speculated that *Steinfeld* now makes it 'highly likely that we will soon be legislating for civil partnerships for heterosexual couples'.<sup>76</sup>

Third, the commitment to introduce different-sex civil partnerships has now been placed on a statutory footing through the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 that enters force on the 26<sup>th</sup> May 2019. Section 2 of that Act enables the Secretary of State to amend the Civil Partnership Act 2004 via regulations so that two persons who are not of the same sex become eligible to form a civil partnership in England and Wales. This power must be exercised so that regulations are in force by the 31<sup>st</sup> December 2019.<sup>77</sup> Whilst the purpose of this section is laudable, the drafting is troubling as the Act defers heavily to the Secretary of State through the sanctioning of extensive Henry VIII powers, many of which are uncertain in terms of their precise scope.<sup>78</sup> For example, alongside the duty to create these

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<sup>75</sup> Currently standing at 148,000 signatures in May 2019. See <https://www.change.org/p/minister-for-women-and-equalities-penny-mordaunt-mp-open-civil-partnerships-to-all> (last accessed 3 May 2019).

<sup>76</sup> HL Deb vol 792 col 1404 20 July 2018.

<sup>77</sup> The Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019, s 2(2).

<sup>78</sup> The inclusion of these powers has generated criticism: see The Delegated Powers and Regulatory Reform Committee 45th Report of Session 2017-19 (HL Paper 274) (29 January 2019) noting that the justification for the Henry VIII powers was 'wholly lacking in this case'.

regulations, section 2(3) empowers the Secretary of State to make *any* other provision deemed appropriate in view of the extension of eligibility criteria to form civil partnerships. Similarly, and in relation to conversion of pre-existing civil partnerships to marriage, the Secretary of State must consult such persons *as they consider appropriate* prior to the introduction of regulations. It is thus evidently clear that extension of the regime through this route may not necessarily be a straightforward or transparent process. In hindsight, production of a comprehensive Bill that could have been debated fully, and in accordance with stringent Parliamentary procedures, would have been more advantageous than supporting this Bill that during this Parliamentary sitting alone had key clauses changed on no less than four occasions.

Without the benefit of the regulations, the text of the Act envisages that civil partnership eligibility under the extended regime would encompass intimate, conjugal couples that are currently excluded on the basis of sex. This would ensure that siblings would continue to be excluded. However, there are areas that still need clarification. For example, section 2 only applies to England and Wales and thus the regulations must engage with the fact that marriage and civil partnership remain devolved matters for Scotland and Northern Ireland. Close attention will need to be paid to complex private international law issues such as recognition of a different-sex civil partnership registered overseas.<sup>79</sup> In addition, the regulations will need to grapple with the financial consequences of civil partnerships and child law matters such as parenthood, parental responsibility and the pater est presumption. Thankfully, following the Government's recent announcement of plans to introduce a No Fault Divorce Bill, it is now likely that any consideration of adultery as a basis for dissolution applying to different-sex civil partners will not take place and that the proposed notification system would apply equally to

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<sup>79</sup> See M. Ní Shúilleabháin, 'Private international law implications of "equal civil partnerships"' [2019] 68(1) ICLQ 161.

spouses and civil partners.<sup>80</sup> Overall, although further work is required, it should ultimately be remembered that tiered systems of equal marriage and civil partnership operate effectively in other jurisdictions and, subject to the drafting of the regulations, potential clearly exists for such a system to operate effectively in England and Wales.<sup>81</sup>

## A - Conclusion

The result in *Steinfeld* was not entirely surprising and it was anticipated by academics that a declaration would ultimately be issued.<sup>82</sup> What was surprising, however, was the forceful clarity and unambiguous message sent by the Supreme Court to the government. The judgment was, as noted by Tim Loughton MP, ‘absolutely categorical’ as to the need for action to be taken.<sup>83</sup> Thus, through the Supreme Court emphasising the patently anomalous and discriminatory position of England and Wales, the judgment in *Steinfeld* was able to exert pressure upon the government to reform this area and, as a result, lay the foundations for the forthcoming introduction of equal civil partnerships. As for the Supreme Court’s discussion of institutional competence and the decision to issue a declaration of incompatibility, the influence of *Steinfeld* will also extend outside the realm of family law. In time, the judgment is very likely to become a salutary lesson for future governments contemplating the creation of situations of difference in legal treatment on protected grounds and then seeking the indulgence of time as a means of justification.

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<sup>80</sup> Ministry of Justice, *Reducing family conflict Government response to the consultation on reform of the legal requirements for divorce*, CP 58 April 2019.

<sup>81</sup> See, for example, the regimes operating in The Netherlands, Belgium, France, Australia and New Zealand.

<sup>82</sup> See S. Halliday, ‘Civil partnerships, human rights, constitutionalism and the UK Supreme Court’ [2018] *Family Law* 608.

<sup>83</sup> HC Public Bill Committee col 11 18 July 2018.