

Quest Digest



Morality, Conscience
& Legislation
2004

Issue 3: January 2004

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SENSITIVITY & COMPASSION?¹

Almost three years have now passed since the last issue of *Quest Digest*. This is a long gap, even though the intention was to produce an issue only when enough material, likely to be of interest to those who are not members of *Quest*, was available. The present issue, consequently, is larger than usual and is mainly taken up by papers delivered at annual *Quest* conferences in the meantime.

‘Catholic Morality and Sexual Reality’ was the theme of our 2001 conference, held at Ditchingham in Norfolk, when Professor O’Connell and Fr Gareth Moore, OP, spoke to us. Professor O’Connell’s paper has already been published in *Quest Bulletin*², our publication for members, but is reprinted here. Fr Moore’s paper was not available in manuscript before his death; rather than leave a blank, I have reconstructed it – reasonably accurately, I hope – from notes that I took at the time.

The topic of the 2002 conference, held at London Colney in Hertfordshire, was ‘Questions of Conscience’, when we were addressed by Dr Linda Hogan of the Irish School of Ecumenics at Trinity College, Dublin, formerly of the Department of Theology and Religious Studies in the University of Leeds, and author of *Confronting the Truth: Conscience in the Catholic Tradition*³. Our second speaker was James Alison, formerly a Dominican priest, author, *inter alia*, of *faith beyond resentment: fragments catholic and gay*³.

During the last year, a spate of legislation and legislative proposals affecting lesbian and gay people has come both from the European Union and from our own government. The purpose of our

¹ Cf. *Catechism of the Catholic Church* on homosexual people: ‘Excipiendi sunt observantia, compassionione et suavitate’, §2358. This is, of course, a difficult, if not impossible precept for those who also believe that Scripture presents homosexual activities ‘tamquam graves depravationes’ (*ibid.* §2357), an epithet severer than that applied to genocide (*ibid.* §2313).

² Issue 30, Autumn 2001, pp.9–12

³ London: Darton, Longman & Todd, 2001

2003 conference, in Birmingham, was to consider these developments and the issues they raise; hence the theme ‘Legislation: Implications for Gay and Lesbian Catholics’. Our first speaker, Ian Buist, formerly a senior civil servant in the Colonial Office, and a member of the United Reformed Church who has prepared submissions to government departments for the Lesbian and Gay Christian Movement on various legislative proposals, gave us a masterly survey of the relevant legislation and attendant problems. He was followed by Mark Watson, a solicitor, currently Marketing Director of PlanetOut Partners UK, who has worked in the Immigration Service and Stonewall.

Naturally, the Department of Trade & Industry’s current proposals to give legal recognition to same-sex partnerships particularly exercised both the speakers and *Quest* members at the conference. Just at this time the Bishops’ Conference of England & Wales announced that it had formed a working group under the chairmanship of Bishop John Hine to advise it how to respond to the DTI’s proposals and, almost simultaneously, a document strongly opposed to legal recognition of same-sex partnerships, describing it as ‘the legalization of evil’⁴ was issued by the Congregation for the Doctrine of the Faith. *Quest* immediately invited Bishop Hine or a member of the working group to attend our conference in Birmingham, but none was available, and he invited *Quest*, instead, to send him any relevant material from the conference or arising out of it. At the conference, a resolution was passed *nem. con.* that

This *Quest* Conference urges the working party of the Bishops’ Conference on civil partnerships to welcome and give general support to the government’s proposals in this area, and to assess them in the light of the criteria set out by Cardinal Hume in his Note of 1997.

This resolution was communicated to Bishop Hine, together with copies of the papers by Ian Buist and Mark Watson printed here and

⁴ *Considerations regarding Proposals to give Legal Recognition to Unions between Homosexual Persons, 2003, §5.*

evidence prepared by a small working party, appointed by the committee immediately after the conference, that addressed the Vatican document as well as assessing the DTI's proposals in the light of Cardinal Hume's three criteria, mentioned in the resolution quoted above. This evidence, together with *Quest's* evidence to the DTI, has already been published on our website, but is included here as well in a final section entitled 'Civil Partnerships'.

The curious fate of the working group chaired by Bishop Hine was documented in *The Tablet*⁵. Our Archivist, in a subsequent letter, contrasted the procedure on this occasion with that followed some fifty years ago, when the Home Office asked the hierarchy to consider whether homosexual acts between men should be decriminalized⁶. Cardinal Griffin set up a committee representative of relevant interests: a moral theologian, a PP, a Recorder/QC, a psychiatrist and a psychiatric social worker, under the chairmanship of the Catholic chaplain to the University of London, Mgr Tomlinson, whose homosexual orientation was known and respected. The bishops accepted the committee's unanimous advice in favour of decriminalisation and reiterated it to the Home Office.

But was not this also, in the CDF's book, 'legalization of evil'? Cardinal Godfrey, who succeeded Griffin, was challenged in similar terms, and replied:

Two questions of fact arise:

- a) If the law takes cognizance of private acts of homosexuality and makes them crimes, do worse evils follow for the common good?
- b) Since homosexual acts between consenting adults are now crimes in law, would a change in the law harm the common good by seeming to condone homosexual conduct?

⁵ 11 October 2003 ('News from Britain and Ireland', 'How Bishop Hine came down against "gay partnerships"', pp. 30–31).

⁶ *The Tablet*, 25 October 2003 (letter from C.R.A.Cunliffe, p.16).

Ecclesiastical authority could rightly give a decision on this question of fact as well as on the question of moral law, if the answers to questions of fact were overwhelmingly clear. As, however, various answers are possible in the opinion of prudent men, Catholics are free to make up their own minds on these two questions of fact.⁷

Cardinal Hume may have been influenced by these remarks in formulating his own criteria, for he said:

These are matters of practical judgement and assessment of social consequences, and thus must be considered case by case and this without prejudice to Catholic teaching concerning homosexual acts. It may well be, however, that Catholics will reach diverse conclusions about particular legislative proposals even taking into account these criteria.⁸

Yet Bishop Hine's submission gives no hint of the different views on same-sex partnerships, often at variance with those of bishops and Vatican officials, which are permissible to and held by many Catholics irrespective of their sexual orientation.

This incident must cast a procedural shadow over the prospects for any worthwhile outcome to consultations by the Bishops' Conference and raise doubts about what it understands by 'dialogue' within the Church. It points up the urgency of establishing a transparent procedure for consultations on the model of that laid down by the Cabinet Office for the government and published as Annex D of the DTT's document on Civil Partnerships. The following excerpt is pertinent:

Responses should be carefully and open-mindedly analysed, and the results made widely available, with an

⁷ *The Tablet*, 7 December 1957, p.523.

⁸ *A Note on the Teaching of the Catholic Church concerning Homosexual People*, 1997 (revised).

account of the views expressed, and the reasons for decisions finally taken.⁹

The submission that Bishop Hine eventually sent to the government on behalf of the Bishops' Conference betrayed little acquaintance either with our evidence or with that submitted by the Catholic Caucus of the Lesbian and Gay Christian Movement, but was marked, instead, by uncritical acceptance of the arguments of the CDF (although it adopts a much more conciliatory tone than the latter). Its blanket rejection of all legal recognition of same-sex partnerships will ensure that it carries no weight with the DTI, and an opportunity has been missed to improve the legislation proposed. If the bishops wished to object to legal recognition of same-sex partnerships *tout court*, they should have done so at the earlier stage of consultation, before the present proposals were drawn up; yet the Bishops' Conference is not among the List of Consultees at that stage given in Annex C. The time has long passed for the government to consider *whether* legal recognition should be given to same-sex partnerships; that has already been decided, and is supported by all three political parties; what is now at issue is the form recognition should take.

The incident also raises a very serious issue for the Catholic Church, namely, the treatment by Church officials of differing opinions within the Church. Anyone who speaks to Catholics about their beliefs knows that what they actually believe and what they are supposed (by Church officials) to believe often do not coincide. This is not surprising. In any large community there will be differences of opinion. A pretence that such differences do not exist is, however, dishonest, while an attempt to suppress them is dangerous. Truth is always hard-won: consensus emerges from sincere dialogue, with reasons given and examined on both sides. It cannot be imposed; people have to be *convinced*.

⁹ Annex D, ¶6.

Even Catholics need discernment when reading Church documents; witness a theologian writing at the height of the modernist ‘crisis’, almost a century ago:

These points are the more delicate, because ... the Pope is demanding an absolute assent to formularies which are *not of faith*, at least in all their parts, so that authority *binds us* while *not binding itself*. And so I answer that in doctrinal matter authority can only bind us in the measure in which it binds itself. ... the publication of (a) decree and of (an) encyclical ... cannot have suppressed the rights of theological criticism, but, on the contrary, has made this necessary so that one may be able to ... give each proposition its proper value; ... The publication of the decree ... and the encyclical ... constitutes in divers degrees an act of the ecclesiastical *magisterium* which imposes on the Catholic a double duty.

- 1 The duty of respect due to every act of the ecclesiastical jurisdiction, and, in particular, for the *magisterium*.
- 2 The duty of assent of the mind to the doctrines taught, but of an assent which is *correlative* and *proportioned* to each order of truth according to the nature of that order: the truths of Divine faith being received as of Divine faith, the philosophic truths being received as such, the historical truths as facts, etc.

And if in these documents propositions are to be found which are simply the expression of *opinion* susceptible of modification by a deeper examination, and, in any case, dealing with matters outside the faith, then it is clear that the publication of the decree ... and the encyclical ... cannot have the effect of changing the nature of these propositions, nor afford them the benefit of an *assent of faith*, but only one of *respect* due to an act of the

magisterium. In other words, the duty of *respect* extends to all parts of the document in question; the duty of assent of the mind is subordinated to the nature and character of each of the propositions contained in it.¹⁰

These nuances, while affording necessary protection to the individual Catholic, are not enough to safeguard the *evangelical* dimension of Church pronouncements. It is often forgotten that the latter are read by or reported to other Christians and to people of all faiths and none. Today, even by comparison with fifty years ago, people are encouraged to think for themselves and formulate their own views. Any attempt to dragoon the faithful to follow a ‘party line’ which goes beyond – often far beyond – what is *of faith* will, evangelically speaking, be counter-productive and serve only to bring Christianity, and especially Catholicism, into disrepute. No surer method could be devised of alienating people from the Church and emptying the pews; and if that is happening today, Church officials need to ask themselves why. Archbishop Worlock once said that contraception is not the acid test of Christianity; the way Christians deal with their intra-denominational disagreements, by contrast, immediately displays to the world whether they *really* believe that we should love our neighbours as ourselves.

¹⁰ Archbishop Mignot of Albi, letter to Baron von Hügel, 28 October 1910; cf. also Francis Sullivan, SJ, *Creative Fidelity: Weighing and Interpreting Documents of the Magisterium*. Dublin: Gill & Macmillan, 1996.

CATHOLIC MORALITY AND SEXUAL REALITY

Christianity and Gayness: Searching for Truth, Freedom and Joy

James O'Connell

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The sources of morality: reason, history and scripture

Moral issues require human judgments; and such judgments arise for people in every culture. In other words, we, humans, in dealing with one another have in every generation to face up to issues of truth and freedom, justice and respect, compassion and forgiveness. Undoubtedly history, culture and circumstances condition our judgments. Christians in using rational reflection in making judgments about right and wrong in behaviour have also drawn on scripture for evidence. Yet I will argue that the Hebrew and Christian scriptures have at times been used to support judgements that, even if they were culled initially from scripture, derive mainly from historical and cultural sources. The danger with using scripture to back judgments arising out of history and culture is that the latter judgments then appear to have a divine sanction that they would not otherwise have had; and they prove much more difficult to revise when they are seen as sacred rather than as human judgments.

Problems in drawing on scripture have come not only from its uneven and disparate development but also from the way in which passages have been quarried to provide material on particular aspects of morality. Such picking and choosing has been more evident in judgments on sexual behaviour than in most other areas. Yet the



documents of the Hebrew scriptures are often contradictory, sometimes inhumane, always deeply conditioned by the conditions of their times, and, not least, influenced by the groups to which the scripture writers belonged. The trouble with the quarrying approach is that it tends to be used to underpin the organisational control exercised by clerics and to bolster conservative judgments formulated by elders – whether aristocrats in some communities or rich farmers in others – of society. That approach moves quickly over the impurity of menstruating women, a declaration of abomination against cross-dressers, death penalties for adultery, and a prohibition against a man marrying again a woman whom he had earlier divorced. Yet a stricture against homosexual behaviour is cited as if that rejection were not as out of date as the other examples just cited. It is as if the concept of sexual orientation had never been formulated and homosexuals were still seen as heterosexuals behaving badly.

The gentle teaching of Christ

It is however true that once we get to the Christian scriptures attitudes have changed radically. If Jesus and his followers took over the finest developments of Hebrew thinking, Jesus also reached beyond his tradition. He was just and compassionate beyond his tradition, he forgave sinners, and he welcomed the outcasts of his society. He eventually died outside the gate at the hands of the religious and political authorities. Jesus had taught by conveying attitudes and giving advice, sketching principles and illustrating them. Broadly speaking, he proposed values but did not lay down rules. I believe that he provided a human ideal that is still significant in, and relevant to, our times. One has only to listen to his sayings:

Do not judge, so that you may not be judged. For with the judgment you make you will be judged, and the measure you give will be the measure you get. Why do you see the speck in your neighbour's eye, but do not notice the log in your own? (Matthew 7:1–3)

He taught his followers to love and to respond to force with non-violence:

Love your enemies, do good to those who hate you, bless those who persecute you ... To the person who slaps you on one cheek, present the other cheek too; to the person who takes your cloak, do not refuse your tunic. (Luke 6:27ff)

He chose people who were mostly not rich to work with him and urged them to trust God and to offer their services free:

You received without charge, give without charge. Provide yourselves with no gold or silver, not even with a few coppers ... with no haversack – or spare tunic. (Matthew 10:10)

He said that being a disciple wasn't going to be easy:

If anyone wants to be a follower of mine, let him renounce himself and take up his cross and follow me. For anyone who wants to save his life will lose it; but anyone who loses his life for my sake will find it. (Luke 16:24ff)

With reference to his own family he says:

Who is my mother, who are my brothers? ... Anyone who does the will of my father in heaven, he is my brother and sister and mother. (Matthew 12:46ff)

It seems to me that once Christ has been sensitively listened to – and when Paul's strictures on law have been understood – then we cannot permit the community of Christ to be turned into a mere organisation nor into a social code bristling with laws. Yet it is sadly true, for example, that a reported saying of Christ about marriage has turned an ideal into a law and provided a basis for convoluted and arcane marital legislation in the *Code of Canon Law*. Such transformation reminds us that if the Church is historically reformed, it is also in every age requiring to be reformed.

Freedom and community in Christian living

I want to argue several things: first, we need to talk less about the Bible's authority than to learn from its capacity to inspire thoughtfulness and to stimulate goodness; second, if in this approach the scriptures animate and nourish Christian ethics rather than lay down rules, it is the community worked on by the Holy Spirit that reaches conclusions; and, third, we may have to accept that the scriptures have nothing directly to say about AIDS or contraception, investment banking or Third World deforestation. Christian teaching has only the broadest, even if deeply thoughtful, generalities to bring to bear on huge areas of contemporary ethical debate.

To put my contentions in a positive form: the Christian narrative tells about a God who is an intelligent and purposeful creator, who has care for the whole world and each individual, whose purposes are realized in the liberating life, death and resurrection of Jesus, and who guards a community that continues in the Spirit. From this narrative we come to understand that each human being is to be respected and loved, that we are to be faithful to one another and to our promises, that we are to speak the truth in love, that we are to forgive those who wrong us, that we are to protect the poor and weak, that we need to work to set aside unjust structures, and that we are to be respectful stewards of creation. While ethical challenges are posed for all humans, what Christianity does is to offer us a motivation that comes from faithfulness to God, seeing Christ in our neighbour, and acting in the Spirit. In this process moral discernment calls for a dialogue between faith today and the faith of the apostolic community.

Community is central to Christian behaviour. When Paul was accused of failing to uphold morality by setting aside the law, he responded in a three-fold teaching: we have been freed by Christ and draw our strength from personal contact with him; we have discernment through the Spirit on how we should act; and we find support within the Christian community. Within this community each individual is made to the image of God and re-made through the Spirit to the image of the reconciling Christ; God dwells in each one;

and the final destination of each one is union with God. Those individuals who have put on Christ see Christ in each other; and together they seek to love God in Christ.

In the actual conduct of life we are shaped in community through learning what God has done for us; we gather around the Eucharist in memory of Christ, bring our fellowship to that meal, and find our fellowship nurtured there; and in making an individual way in the world we draw on the help that the community of the local and world-wide Church offers us. In that social context gay people should value – where it is available – the worth of supportive fellowship in the local or parochial community. They also need to build support structures among gays and others that they can draw on. In addition, one may add that in our times a community of support may well not be confined to the local or geographical community but may depend on fellowship among like-minded and thoughtful Christians who live far apart, as well as on the networks they provide throughout the Church.

In formulating more specific values for our circumstances where scripture furnishes only general orientations but profound inspiration we have to draw on rational and methodological reflection. Here, in taking account of the networking of orders – mental, biological and physical – within human persons and society we are at the heart of the social construction of reality, including morality. The social construction of reality is creative but it is not arbitrary – just as the use of language is creative but it is not arbitrary. It needs constantly to take respect for the individual into account; and it has to consider carefully the functional nature of biology, the interdependence of human community, and the aesthetics of behaviour. But it may, for example, while taking the broad maxim ‘thou shalt not kill’ into account, set it aside for the sake of defending the vulnerable innocent. Similarly it may, for example, while taking biology into account integrate biology into a broader human whole. Hence, a person who finds his or her sexual psychology at odds with their biology may on reflection decide to offer a certain primacy to their psychology. This

does not make the group or the individual morally sovereign. Rather it makes respect for the individual-in-society sovereign.

In other words, we are obliged in each individual situation to decide the integration of the *foundation* of morality which is respect for persons and its *guidelines* which help us to combine social means and ends, the requirements of community, and aesthetic behaviour. In many situations thinking cannot depend on precedent only or on general maxims but has to argue creatively in the light of new situations or individual circumstances. Being moral depends on loyalty to a person or persons, not conformity to a system or order. In other words, the one fundamental criterion for judging creatively the coherence of order is the good of the person and the love of, or respectful relationships with, our neighbours. Interestingly, in making this roundabout and rational way we have come back to the heart of the morality of love of neighbours that Christ enjoined. In a Christian context it also leads us to understanding that we are not primarily sexual beings or ethnic or racial beings but individuals who have put on Christ and who have done so with our physical and cultural dimensions.

The sad thing is that the authorities of the Church of Christ have failed to interpret the central moral drive and historical nuances of their scriptures; they have remained caught in the trap of traditional natural law; they have put order before love; and they have laid burdens of hardship on vulnerable individuals. Fortunately in recent times they have begun to run into the hostility of the community of the Church as well the opposition of its thinkers. In the case of contraception they have promulgated a non-received teaching; in the case of communion for divorced and re-married persons they have gradually ceased to have the support of the faithful; and in the case of gay people they have failed to win the intellectual case, have lost the agreement of fine theologians, have been exposed to the gibes of thoughtful journalists, and have been surely, if gradually, losing the approval of the faithful. Church authorities – the Curia and others –

are going to learn the hard way that a static moral teaching will fall into disrepute in changing times.

Sundry moral issues

We need to keep in mind that respect for the individual in society and love for our neighbour in Christ lie behind our judgments, offer grounds for tolerance, and suggest how we strive for human ideals. Yet while we pursue the ideal given to us by Christ, we have to acknowledge that we are flawed and sinful people. Time and again we need the forgiveness of God and our neighbour. In the Lord's prayer we even offer God a dangerous measuring rod for forgiving us: forgive us our sins as we forgive those who have sinned against us. Christ also insisted that we hold back from judging because God alone sees the heart. We can see flaws but need to be reluctant to judge the sin, sometimes even in ourselves.

In this context I want to raise some issues that trouble the gay community and to which there may be no easy answer: cruising and cottaging, bisexuality and transsexuality as well as the lesser problems involved in cross-dressing and body ornamentation. I won't deal with sado-masochism but the same principles apply.

(a) **Cruising and cottaging:** In dealing with certain practices we have to take the history of gay people into account as well as the temperament of individual persons. For many centuries gay people have been discriminated against and marginalised. By and large the ethos and laws of society impeded secure relationships; and they drove homosexuals to furtiveness and the margins. Such history lives in the minds and bones of people – as in the medical area of life the psychoses of cancer, tuberculosis and heart trouble live long after it has become possible for medicine to deal with these illnesses and for life to continue. For similar psychological reasons cruising and cottaging endure after their time has reasonably gone, and also partly because social views and the remnants of laws still tell against homosexuals and maintain or provoke older behaviour. In other words, some people will remain flawed even when the conditions of healing have gradually

become available. They are still led to indulge in practices that prevent the deepening of friendship, that avoid a committed sexual relationship, and that expose them to illness and death.

Yet in spite of the flaws of cruising and related practices there may well be some persons who can only find in that way some society and sexual relief. The religious challenge for such people is to face up to their flaws and to contend with them. Sin does not lie in indulging in such practices but rather in not trying, however unsuccessfully, to deal with them. Personal and social obligation lies in making efforts to revise structures and set aside attitudes that collude to drive people into the margins of spasmodic gratification, loneliness and danger.

(b) **Choosing a sex:** Bisexuality can be taken positively in that it opens up the choice for a minority of persons to take a partner who is either heterosexual or homosexual. I have hesitations about the integrity of having sexual relations of both kinds simultaneously. Yet people are driven by strange urges; and it is not for me simply to condemn them. Again I suggest that the challenge of integrity may lie in coping with sexual compulsions rather than in immediately succeeding in dealing with them. However, particularly in the case of someone who has a settled partner, faithfulness becomes a crucial issue; and it must add to other human motives for maintaining consistency in sexuality.

(c) **Anomalous dressing:** Cross-dressing and ornamentation (body piercing and tattoos) are issues of aesthetics rather than morality. In the case of a stable partnership it may be a matter of respect and sharing to secure agreement to cross-dressing. Also, while some gay persons may dislike body piercings, and while many may be upset by ostentatious tattoos and exotic forms of dress, one has to accept that such dislike and upset is predominantly aesthetic, that is, a matter of taste. It may be further argued that flamboyant behaviour that may bring the gay community into some disrepute as well as in individual cases inviting physical violence from homophobes is best avoided. However there is an issue of basic freedom for individuals in making their choices. On the one hand, it is a freedom of expression that some

gay people insist on against the repression of the past. On the other hand, it is also true that colourful gay dressing has as fashions change gradually become more socially acceptable. Few things change as fast as tastes.

Making use of freedom: travelling light with love

You are the first Western generation of homosexuals who while you still encounter clerical obtuseness and elements of popular prejudice are broadly, if not completely, exempt from the threat of criminal law. More important again, you have won over intellectual and most media opinion, gained the backing of Catholicism's finest moral theologians, and secured the reluctant if real acceptance of Anglican bishops. In a powerful sense you have been freed. You are free to be persons who are gay. Your future is yours to make.

In the intimacy of your lives you can express faithfulness to a partner, experience the worth of human giving and receiving, and overcome those difficulties of drawing close to one another that exist wherever two persons seek to unite in love and partnership. You may have to exercise a discipline of love in unions where structures are weaker and often less supported than in marriage and maintain a correspondingly greater search for spiritual strength. In this context it seems reasonable and just, grounded in faith and inspired by love to look for a blessing of gay partnerships that are settled and serious. It is a way of asking God's grace on a union and offering the Christian community a way of providing symbols and support to gay Christians. Discretion may suggest that while prevailing official attitudes remain in position such blessings should be sought privately from well-disposed clerics. But there is nothing also to prevent gay Christians from gathering among themselves and with others in informal ceremonies where Christ is present to exchange their consents and where Christian witnesses pledge their support for a loving union.

We need, however, to be reminded that gay people like all others may accept celibacy for the sake of the kingdom of God, renouncing the urges and contact of the flesh, accepting the loneliness of a solitary path,

taking each hand but not holding on to any, working in various areas of life – actors and musicians, teachers and clerics, not least – so that many others may find full joy and abundant life.

You who have belonged to a persecuted community can face towards the world together in offering love to the afflicted, in identifying with marginalised minorities, and in forgiving your enemies. You may well bring to victims a gentleness that has been engendered by your own experience and sensibilities. You travel more lightly burdened than do those encumbered with, if also comforted by, children; and you may well take up challenges in social areas where those with children cannot easily go. You may offer your love to many other brothers and sisters or seek spiritual children in place of the children of the flesh who belong to heterosexual marriage. Some of you also may want to extend a home and love to children who have lost families; and you are likely to do that well. You may create an availability that fits between those who are celibate and those married with children. You may live better than most with a sense of detachment from property. In a word, through your search for truth, your example of goodness and your sense of beauty you can enrich the world of our time.

Conclusion

Let me end in wishing you three gifts that are embedded in the great gift of Christian love: truth, freedom and joy. The gift of truth is the courage to recognise people and the world for what they are, and to find this courage in Christ who is himself truth. The gift of freedom, which you have through the Spirit, is your capacity to make your future, to reject threats, and to set aside fears. The gift of joy is rejoicing in being what you are, in what God who is father and mother has made you, in being at ease with your own bodies and thoughts, in finding happiness in loving, and in reaching fulfilment in stretching out generously to embrace the whole world. May you gather these three gifts together – truth, freedom and joy – in the love of God, the grace of Christ, and the fellowship of the Holy Spirit.

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An Empirical Claim

Gareth Moore, OP
late of Blackfriars, Oxford

*Fr Gareth Moore died of cancer on 6 December 2002 at the early age of 54. He was professed as a Dominican in 1978 and ordained in 1982. Subsequently he became Bursar of Blackfriars as well as teaching philosophy, Old Testament and Hebrew there. In 1995 he was elected Prior at Rixensart, near Brussels, where he remodelled the life of the priory until returning to Oxford the year before he died. The editor of Quest Digest did not receive a typescript of his talk; what follows is a reconstruction from the Editor's notes, taken at the time, and must not be assumed accurate in every detail, though it is faithful to the general argument. Nor did the talk have a title; the title above is due to the Editor. Although the talk concentrates upon a single argument, and although the ground is covered in Fr Moore's posthumous work *A Question of Truth: Christianity and Homosexuality* (London: Continuum, 2003, especially pp.157–63), it seemed worthwhile reproducing here by way of illustrating the following remarks made about him in *The Times*' obituary: 'Moore was a Catholic priest and friar for whom truth was paramount... He never used his mind to diminish or to bully, always to enlighten and disclose what was true or what was false. He never wished to see true doctrine expressed in bad arguments'; or, again, the quotation from Simone Weil that he set at the beginning of *A Question of Truth*: 'If ever it comes to a choice between Jesus and truth, we must always choose truth, because disloyalty to truth will always prove in the long run to have been disloyalty to Jesus.'*

In a recent television program, a gay couple, Joe (47) and Eric (32), appeared, members of the Metropolitan Community Church, who had made a formal commitment to each other and were living – apparently happily – with each other. Asked to comment on their relationship, Archbishop Peter Smith of Cardiff began by saying that the Church is not obsessed with genital acts, but must

nevertheless preach the values of the Gospel, because Christians believe that following Jesus leads to life and truth: and tradition without truth is, as St Cyprian said, just error grown old. One of the Gospel values is that gay sex is wrong; so, however Joe and Eric may perceive it, sex for them is not a life-enhancing experience, because God did not intend it. On the contrary, God's will is that, in sex, reproduction should always be possible; so Joe and Eric will not find happiness in their relationship, because they have the wrong kind of sex. In this he was echoing the Congregation for the Doctrine of the Faith¹¹.

The roots of this view lie in the thought that God's commands are not arbitrary. He wants us to flourish, to which it is essential that our organs work properly. As St Thomas Aquinas says, God cares for each thing according to what is good for it: the 'law of God' is a rule of life for human flourishing and is the voice of reason. But because relationships are social, bad ones also destroy happiness. Often, however, we are blind to this, because our desires get in the way, and we need others to tell us what is really happening. So here: the Church tells us that gay sex is like smoking; just as we have lungs to inhale the air we need to live, not to damage ourselves with nicotine, so our sex organs are given to us in order that we may reproduce, not for sterile pleasures, and our true happiness lies in having children. Joe and Eric are unwise rather than evil; what they are doing will not lead them to happiness.

This assumes, of course, that avoiding gay sex is, in every circumstance, however faithful the relationship in which it occurs, a law of God and, to justify the assumption, appeal is made both to the Bible and to natural law. As yet, there is no consensus among scholars about these arguments. But here, we are offered an *empirical* test, since the view predicts that, in the long run, gay sex will lead to unhappiness for those who engage in it. A general logical point must be made about the relationship between theories and predictions that follow from them: if a prediction turns out to be false, the theory from which is

¹¹ *On the Pastoral Care of Homosexual Persons*, 1986, §7.

follows cannot, as a whole, be true; but if a prediction is verified, that does not prove that the theory is true ('If A, then B; but not B; therefore not A' is a valid pattern of argument, but 'If A, then B; but B; therefore A' is invalid). Hence the example of an unhappy gay couple does not show that the Vatican's theory is true, but a single example of a happy gay couple would show it false.

Unfortunately, there is a serious problem in assessing examples that might be cited. Happiness is not measurable; two people may disagree whether a third person is or is not happy, and his own assessment may be self-deception. Yet the correct assessment will usually become clearer over the long term, and evidence one way or the other can pile up. For example, it has been claimed that suicide rates among young gay men show that they are a pretty miserable lot, being 1 in 5 as against 1 in 25 for the population as a whole, so that they are five times more likely to commit suicide than young heterosexual men. However, this does not take into account the effects of environmental factors. In the thirties and forties, there were doubtless many more unhappy Jews than non-Jews in Germany, but that doesn't show that it is a sin to be Jewish. Moreover, the prediction was that people *who have gay sex* will be unhappy, not just that *being gay* leads to unhappiness.

If we ask what, as a matter of experience, makes people happy, part of the answer would be: doing what you want to do and having a significant relationship with another person (which usually includes sex). Is this expectation fulfilled? Well, there are plenty of examples of very happy homosexual relationships persisting after years of sexual activity. This is just a matter of observation; it is not a question of dissent from any doctrine. Have the officials of the Congregation for the Doctrine of the Faith, and their spokesmen such as Archbishop Smith, actually *asked* gay couples about their relationships? There are echoes, here, of Rome's treatment of Galileo; the Church no longer teaches, on the ground that to believe otherwise would impugn both the Bible and its own teaching authority, that the earth cannot turn and move in space.

QUESTIONS OF CONSCIENCE

Living with Contradictions: Disagreement and Dialogue in the Church

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There are many complications involved in belonging to a church that has placed such a high value on legalistic conformity to a set of fixed rules and precepts. This paper attempts to address some of these issues in the context of a discussion about conscience in the Catholic tradition, focussing on the way in which the tension between the *magisterium* and individuals is played out. Obviously this is an issue for all those who belong to the Catholic tradition. It comes sharply into focus in relation to many ethical issues, and especially many issues in sexual ethics. But perhaps the tensions are nowhere more acute at the moment than in relation to homosexual desire.

Let me just explain at the outset that, although I'm not going to develop it here, my own understanding is that homosexual sex is not an incomplete or less perfect expression of human sexuality. Sexuality is part of our embodied identity; it is endlessly evolving and is an aspect of our lives that we experience as complicated, thrilling and sometimes difficult. This is true of sexual desire whether it is expressed heterosexually, homosexually or bisexually. My take on the ethics of sex is that it is in the quality of relationships, and in issues of justice and care, that the moral dimensions of sexuality are located, and not in sexual acts themselves – whatever their complexion. And issues of justice, mutuality and truthfulness are challenges and difficulties that we encounter regardless of who we desire or love, and in relationships that are not primarily sexual as well as those that are. Moreover relationships and encounters are never simple and unambiguous. They can be both affirming and undermining at different times; they usually



involve a dialectic of joy, pain and even tedium. Nor is longevity necessarily an indication of a relationship's strength or integrity – sometimes security and comfort can trump mutuality and love. So these general points ground my belief, that all sexual relationships, homosexual and heterosexual, whether they are brief or long term, have the capacity to reflect the best of our humanity, to embody those aspects of our existence that make it truly valuable. Having said this however I don't want to be trapped by the theological idealisation of sexuality that is sometimes evident in Catholic thinking – the kind of idealisation that really bears very little relation to reality. There has been a tendency in the past 30 years to idealise heterosexual sex within marriage, in an effort perhaps to make up for the centuries of denigration. So I wish to avoid this kind of over-inflated rhetoric about sexuality. However in so doing I also want to affirm that I regard heterosexual and homosexual sex as having the same potential and value. I don't want to say they are identical in terms of experience, but that they are identical in terms of their ethical/moral potential or quality. So for me the most pressing thing for Catholic sexual ethics is the need to hear the voices of women and men who are involved in gay and lesbian relationships, so that discussions of the ethics of sex would take account of the diversity of sexual desire.

But how does one live in a church that refuses to accept that homosexual desire and sex is a good and valuable expression of sexuality? It seems that in the near future at any rate, there will not be any change (in a positive direction) in the Church's teaching on homosexuality. Indeed it seems more likely that the Church will become even more draconian in policing its rule that homosexual relationships are not acceptable. My approach to this is that it is really a question of conscience. I disagree fundamentally with Church teaching on this issue. In my view it reflects an institutionalised homophobia that is evident in many aspects of culture and society. So then the question is how one harnesses other aspects of the tradition to find a place from which to dissent – and here I think that aspects of the Church's teaching on conscience can be helpful.

As one might expect of a tradition that is over 2,000 years old, the Church's theology of conscience is one that involves many strands. There have been competing theologies of conscience within the tradition; it is not one simple unambiguous narrative of moral freedom. Different theologies of conscience reflect and embody particular understandings of the nature of the person, of morality and of Church. Indeed the nature of conscience itself involves such difficult questions that disagreement is somewhat inevitable. As such, within the Church we shall need to begin to live with the contradictions that flow from the ambiguous nature of conscience itself. The language of conscience refers to the personal discernment of moral truths and value. However since this is somewhat vague and abstract, theologians through the ages have struggled to delineate precisely what it involves. Inevitably, throughout history theologians have tended to emphasise either the objective or the subjective aspects of morality and as a result theologies of conscience have tended to be either theologies of obedience or of freedom.

In the Christian tradition, at the most basic level conscience is understood as the personal discernment of good and evil, in the context of relationship with a loving God. As such it is not purely subjective, arbitrary nor private. And although it is concerned with individual, discrete moments of choosing, it also reflects the manner in which particular choices are patterned into a unity that is the moral character. As a result conscience embodies the culmination of moral reflection, which can be rational, intuitive, emotional and imaginative. Conscience also reflects the fact that Christians do not profess a purely private faith, but rather belong to a worshipping community. Although it is thoroughly personal, conscience is rooted in the narratives and traditions of the Church and involves personal engagement with the cumulative wisdom of the community.

The view of conscience that I work with also reflects the Aristotelian conviction that ethics is not an exact science and that we should not expect the same degree of precision and certitude from

morality that one might expect from some other disciplines¹². One of the reasons why this is the case is because ‘circumstances alter cases’ and intentions and consequences do have a bearing on the morality of a particular practice or decision. Thus I would reject moral theologies that evaluate acts in isolation from the contexts in which they are performed and would endorse an understanding of conscience that confronts the complexities of persons and of contexts.

An inevitable result of these complexities is the presence of serious disagreement among Catholics regarding the morality of particular issues. The nature of the moral enterprise makes this inescapable, as do the limitations and failures that are part of the human condition. And of course it is not only the presence of conflicting views on morality that is problematic within the church today; difficulty also resides in the Church’s inability to live fruitfully amidst the reality of difference and disagreement.

The nature and authority of Church teaching

At the heart of the contemporary struggle within the Church to articulate a renewed way of being Church in the world is a complex discussion regarding the role of Church teaching on moral matters. The *magisterium* certainly has a role to play in articulating the values that ought to shape our moral sense and in providing clear guidance in the ever more complicated situations of contemporary life. However during this present pontiff’s tenure the authority of this guidance or teaching of the *magisterium* has been expanded and exaggerated.

One recent example was occasioned by the 1998 Apostolic Letter *Ad Tuendam Fidem*. In this text Pope John Paul II announced the insertion of new canons into the *Code of Canon Law* and also expanded the already controversial 1989 Profession of Faith¹³. The purpose was to introduce a new category of moral doctrine, that is ‘a

¹² Aristotle, *Nicomachean Ethics*, 1.3. 1–4, 1094b.

¹³ For a discussion of the controversy surrounding this 1989 Profession of Faith see Örsy, *The Profession of Faith and the Oath of Fidelity: A Case Study*, Delaware: Glazier, 1990.

doctrine definitively proposed by the Church.¹⁴ Now this new term ‘definitive teaching’ is highly problematic and really represents an attempt to create the impression of infallibility for a teaching that is no more than the *magisterium*’s best opinion at this moment in history on a particular issue – a far cry from infallibility. Yet according to the papal letter any definitive teaching must be ‘embraced and held’ as ‘irreformable’. Thus here is one example of what has popularly been termed as a creeping infallibility within the Church today.

Ladislav Örsy is very good on this point. He argues that today teachings that represent the Church’s current but not conclusive thinking on a range of issues are being presented with excessive weight and authority. The commentary that accompanied the papal letter discussed the issue of definitive teaching more fully. It explained that, with regard to this type of teaching, which includes the doctrine that priestly ordination is reserved only to men and the teaching on the invalidity of Anglican orders, ‘whoever denies these truths would be in a position of rejecting a truth of Catholic doctrine and would therefore no longer be in full communion with the Catholic Church.’¹⁵ The deeply worrying logic of this position seems to be that people cannot continue a respectful and loyal dialogue within the Church on a number of unresolved issues.

One of the most problematic aspects of these debates is that they tend to facilitate the creation of false distinctions between respect for Church teaching and the necessity for personal moral responsibility. These conflicts can perpetuate the mistaken assumption that the teaching Church corresponds to the *magisterium* and that the learning Church is the clergy and laity. Furthermore they can promote a false sense of the nature of obedience in the context of a community of faith and morals. Of course Catholics are expected to give careful consideration to teachings that come from the *magisterium* – although I would say that this principle is seriously undermined by the exclusive

¹⁴ Örsy, L., ‘Intelligent Fidelity’, *Ceide*, Vol. 2, No. 2, 1998, p. 29.

¹⁵ Cardinal Ratzinger, ‘For the Defence of the Faith’, *The Tablet*, July 11, 1998, p. 921.

and clerical nature of the *magisterium*. I would like to see a *magisterium* drawn from the diverse constituencies within the Church and not associated exclusively with any particular ministry. However, although it is important to give due attention to the teaching authorities within the Church, the Christian tradition has continuously insisted that moral responsibility and choice resides ultimately with each individual. We cannot export our moral choices or hand over our decision-making to any other person or body. As such we must be obedient to our own discernment of the Spirit, we must adhere to our own consciences. Obedience therefore can never be construed as the blind submission of one's will and intellect, particularly if one's considered judgement pulls one in the opposite direction.

Through its history the Church's own understanding of the nature and authority of its teaching has been extremely nuanced and sensitive. However another cause of debate today is the belief that recent magisterial pronouncements ignore the subtle gradations of authority, which belong to the different forms of Church teaching and that they claim a status that is at odds with their nature. Francis Sullivan has discussed this issue at length, and makes the point that many of the *magisterium's* statements make excessive claims regarding the degree of obedience that is due to them.

In his contribution to this debate Richard Gaillardetz makes the point that 'all Catholics have a right to know that ecclesiastical pronouncements differ significantly, not only in their content but in their authoritative character. They must also know that their response to Church teaching {should correlate} to the ... character of the teaching itself. What is at stake here is nothing less than a proper understanding of what constitutes Church membership and the fact that, in Catholic teaching, not all disagreement with ecclesiastical pronouncements necessarily separates one from the Roman Catholic communion.'¹⁶

¹⁶ Richard Gaillardetz, *Teaching with Authority, A Theology of the Magisterium in the Church*, Minnesota: The Liturgical Press, 1997, p.271.

It takes a significant degree of knowledge to discern the authority of the various forms of Church teaching. Indeed one of the most frequent criticisms of the teaching offices of the Church is that they have failed to help people to identify the appropriate weight that should be given to any pronouncement. Thus the important gradations of authority are frequently blurred.

Örsy develops this point, suggesting that increasingly today the authority of certain pronouncements is sometimes upgraded, ‘falsifying the binding force of its message.’¹⁷ Indeed André Naud makes the point that ‘along with the infallible *magisterium* properly exercised in the Church, there is another ‘uncertain’ *magisterium* that teaches with less authority and must honestly acknowledge the possibility of error.’¹⁸ Yet we are rarely appraised of the nature and authority of this important and voluminous form of teaching. Much of the Church’s teaching on homosexuality falls into the category of non-infallible teaching. It is, one might say, the tradition’s best guess or best estimation about the morality of homosexual sex, but it is not infallible. Yet it is presented as though it is and any dissent from that position is dealt with severely.

Assent and dissent

In the past 20 years within the Catholic Church much ink has been spilled over the issue of dissent, the nature of the authority of the *magisterium* and the opportunities for manoeuvre within that framework. And no doubt these are very important. However such discussions do seem to entrench rather than alleviate difficulties and appear to make real dialogue even more unlikely. In terms of fundamental disagreement with the *magisterium* on the matter of gay and lesbian sex for example, one of the difficulties of conducting the discussion exclusively in terms of dissent is that one inevitably perpetuates a legalistic model of morality. With such a model the

¹⁷ Örsy, ‘Intelligent Fidelity’, *op. cit.*, p. 30.

¹⁸ Gaillardetz, *op. cit.*, p. 290.

complexities of the moral enterprise are discussed primarily in the language of obedience. In addition relationships in an already fragmented Church are fractured further and entrenched positions become even more solid.

An alternative, following Kevin Kelly's suggestion, would be to focus first on what is, after all, of central concern in all moral debates, how we can best understand the good and loving thing to do in each given situation. When disagreements occur, as they inevitably will, given the nature of the moral enterprise, then a further issue of how to harmonise the insights of each perspective would need to be considered. With such a model, however, we should be more inclined to keep our attention focussed on creating a dialogue to achieve agreement and to find ways of living fruitfully in the midst of difference. This kind of approach acknowledges the important role that the Church has in the formation of conscience. It also reflects the reality that the Church operates within the constraints of culture and time and that its own understanding is inevitably limited by such factors. In addition it conveys a sense of the Church's tradition as developmental and dynamic rather than as unchanging. But most of all it reminds us that one's ultimate concern must be with what is good and true in a given context.

The duty of conscience is not to assent to magisterial teaching, but to try to work towards the articulation of the good in each context. One hopes and expects that normally these two will coincide. However when they do not, one's duty continues to be to strive to embody, in one's decisions, that which one has come to understand to be good and true. It is not that situations of disagreement will be avoided with this approach: such a claim would be fanciful. However, when the unambiguous intention is to seek the good, albeit often in complicated and indeterminate circumstances, then the issue of assent or dissent remains of secondary importance.

The paradigm of law as conceived within a hierarchical Church cannot accommodate the many possible reasons for dissent among the faithful, and as such is wholly inappropriate as a way of

understanding and resolving the complexities of the moral life. Differences of opinion tend to be put down to error on the part of the laity. The possibility that the position of the *magisterium* may be in error is rarely even considered. Nor is the possibility that a final resolution of particular issues may not yet be achieved, because of our continued lack of understanding.

However within a different kind of paradigm differences of opinion between individuals and the *magisterium* can be regarded as an inevitable aspect of the dynamic nature of human growth and understanding. Furthermore they are recognised as arising necessarily from the unity-in-difference that is the essence of vibrant communities. Rather than being ruled out, loyal opposition is essential if a community is to flourish. Loyal opposition signals a primary commitment to seek the truth, even if it leads one to depart from one's community's understanding of that truth. But it also signals a degree of confidence in the community, so that even when there are differences of opinion, one remains faithful to it.

Development and change in the moral tradition

In his poem 'The Settle Bed' Seamus Heaney evokes the seemingly unchangeable nature of tradition. He speaks of an inheritance

'upright, rudimentary, unshiftable planked
In the long long ago, yet willable forward
Again and again and again, cargoed with
Its own dumb, tongue-and-groove worthiness
And un-get-roundable weight ...'¹⁹

This is precisely how many people experience the heritage of the Church's moral teaching. Respectful of its upright and worthy purpose we feel trapped by its un-get-roundable weight. Its weight can paralyse one's sense of purpose and confidence in one's own discernment. Yet this is not at all what is intended for a community with a rich moral

¹⁹ 'The Settle Bed' from *Seeing Things*, 1991, reprinted in Seamus Heaney *Open Ground, Poems 1966–1996*, London: Faber and Faber, 1998.

inheritance. Once we can see that the tradition of moral guidance and teaching is nothing more than the accumulated wisdom and insight of our forebears, then it becomes something supple we can work with, planked in the long ago, yet willable forward.

One of the reasons why the tradition of moral teaching seems to be weighty and unyielding is because we fail to appreciate the developments and changes that are themselves part of the tradition. We tend to operate with an overly simplistic and unified view of the moral teaching of the Church. We assume that the position now being taught on, for example, slavery, marriage or human rights is essentially the same as, or at least consistent with what the Church taught in the past. Yet with the example of human rights this is clearly not the case. When, in 1789 the National Constituent Assembly of France declared that ‘men are born and remain free and equal in rights’ and that ‘the aim of every political association is the preservation of the natural and inviolable rights of man,’²⁰ the Vatican reacted immediately to condemn it. In 1791 Pius VI in his *Quod Aliquantum* claimed that it was anathema for Catholics to accept the Declaration of the Rights of Man and of the Citizen. He insisted that ‘this equality, this liberty, so highly exalted by the National Assembly, have then as their only result the overthrow of the Catholic religion.’²¹ Yet by 1963, a mere two centuries later, John XXIII insisted that ‘any human society if it is to be well ordered and productive, must lay down as a foundation this principle, namely that every human being is a person, that is, his nature is endowed with intelligence and free-will. Indeed precisely because he is a person he has rights and obligations flowing directly

²⁰ ‘Declaration of the Rights of Man and of the Citizen’ printed in Küng and Moltmann, *The Ethics of World Religions and Human Rights, Concilium*, 1990/2, pp. 3–5.

²¹ Quoted in Bernard Plonger, ‘Anathema or Dialogue? Christian Reactions to the Declarations of the Rights of Man in the United States and Europe in the Eighteenth Century’ in Alois Muller and Norbert Greinacher, eds, *The Church and the Rights of Man, Concilium* No. 12, 1979, pp. 1–16.

and simultaneously from his very nature. And as these rights are universal and inviolable so they cannot in any way be surrendered.²²

This is not simply a conflict between two texts pulling in alternative directions. The tradition has changed, and changed radically. Once the concept of inviolable and natural rights was anathema, today it forms a central plank of the Church's understanding of how the dignity of the person is to be protected and promoted.

John Noonan discusses other examples of change in the Church's moral teaching. In the cases of usury, marriage, slavery, torture and religious freedom, Noonan documents the real and substantial changes which have taken place in the Church's teaching, over the centuries. Yet we do not immediately or easily think of this kind of flexibility when we speak of the Church's moral doctrine or teaching.

Thus when we examine the substance of what is often presented to us as an unchanging tradition, we can see that the notion of a static tradition of moral teaching is a myth. Of course there has long since been an acceptance of the idea of development in the Church's moral teaching in the abstract. Yet while the principle of development and change in the Church's moral doctrine is widely accepted, individual moral doctrines are presented as if they were universal in their scope, exceptionless in their application and timeless in character. In short, when it comes to particular moral teachings, the possibility of change and development, which is conceded in the abstract, is rarely acknowledged. As a result certain moral teachings, such as those relating to contraception, homosexuality, or divorce and remarriage, are invested with a degree of certainty and inflexibility which is unwarranted.

Individual moral judgement is not exercised in a vacuum. It is shaped by and shapes the believing community's witness to the faith. However neither is individual moral judgement the prisoner of past understandings. One need not be paralysed by a misconceived notion

²² *Pacem in Terris* #9

of the moral tradition as monolithic and unchanging. For, as Seamus Heaney reminds us, we can ‘conquer that weight’ because

‘whatever is given
Can always be reimagined, however four-square
Plank-thick, hull-stupid and out of its time
It happens to be ...’²³

The Church and moral failure

In the same way that individual moral discernment is a complex and delicate phenomenon, so too is the institutional process. It may seem inappropriate to speak of the institutional Church in such terms, but being in part a human institution, it is subject to some of the same difficulties that complicate individual moral deliberation. Indeed not only is the Church limited by its human frailties. It is further hampered by the inevitable conflicts that arise as a result of the variety of views and roles that legitimately comprise the institution. This makes moral failure inevitable. In terms of individuals we often speak of the failures of reason, emotion, intuition and imagination that account for many of the instances of individual moral failure. Although one cannot speak of the institutional Church as possessing rationality or an emotional life, the limitations that comprise the Church’s moral failures can be seen in similar terms.

When the institutional Church, through the *magisterium*, comes to a judgement about the acceptability or not of a particular practice or process, it does so using the same resources that are available to ordinary people. Christians believe that moral judgements are made with the guidance of the Spirit, in dialogue with the inherited wisdom of the tradition and in the context of the community’s religious narratives and symbols. But they are also made by people who are subject to limitations. We trust that each judgment and teaching is well reasoned. However in the same way as an individual’s assessment may be flawed through limited or incomplete knowledge, or through a

²³ Heaney, ‘The Settle Bed’, op. cit.

misunderstanding of the situation, so too can an institution's. Just as individuals occasionally have to make decisions in the face of uncertainty or without all the information we know to be relevant, so too does the Church. The emotional responses of the individuals who make up the *magisterium* also come into play when it teaches. These can take the form of excessive emotions, lack of an appropriate emotional response because of the inability to empathise with a particular kind of abuse or a deep-seated fear of change. The intuitions at play within the community may also lead it to disregard important new insights or to ignore voices long marginalised. Nor is it difficult to envisage how a failure of imagination might be possible. When an institution, through its members as well as through those entrusted with its governance, becomes locked into a mind-set and way of being, then it is difficult for it to make necessary leaps of imagination. It is often when such failure occurs that the prophetic voices of our age are most urgently heard. All institutions are susceptible to the failure of imagination; it is a hazard of institutional life.

Yet many of the most significant and enduring moral insights of the institutional Church have come when, against the tide of history, and with great imaginative courage, the *magisterium* has articulated a truly radical position. One could see the change in the Church's teaching on religious freedom as an example of this imaginative leap. The belief that error has no rights totally determined the Church's approach to religious liberty for centuries. Many theologians and bishops even believed in using force to compel heretics to return to the Church. Yet during Vatican II, the Church took a truly bold and imaginative step and reversed the teaching of centuries. In *Dignitatis humanae*, the Church insisted that 'the human person has a right to religious freedom, that it is based on the very dignity of the human person and that this right must be given recognition in the constitutional order of society.'²⁴ One of my hopes is that we are living through a time of transition within the Church – a time when the old

²⁴ *Dignitatis humanae* #2

certainties are being restated with such venom precisely because the tide of history is working against them. In this category of old certainties I include the fear and loathing of sex, and particularly homosexual sex. In some respects therefore it is possible to interpret this current period as the last gasp of a model of Church that has had its day.

Mary Grey's inspiring and challenging *Beyond the Dark Night: A Way Forward for the Church?*²⁵ expresses well the ambiguity that is involved in living in what she calls these twilight decades. She speaks of the collapse of the edifice of an overly centralised Church, and of being left in a place wherein we only have fragments and hints of other ways of being Church. In this place of hope and uncertainty it is entirely understandable that many seek to re-establish the old patterns of thought and practice and to reaffirm the certainties of an earlier time. Yet her hope, and mine, is that out of this rubble will emerge an inclusive and holistic faith, one that would celebrate rather than denigrate human sexuality in its many manifestations.

Institutional moral failure can also be aggravated by self-deception. In order to preserve the reputation and standing of the institution there can be a refusal to acknowledge or accept the reality of past moral failures. Bad decisions can be rationalised, mixed motives can be explained in a positive light, the memories and narratives of the past can be constructed in order to flatter and internal critics can be silenced. As with individual self-deception, much of this can be unconscious, or at least not deliberately intended. Institutional self-deception can also be accomplished in a more indirect manner. The institution can avoid finding things out, it can ignore uncomfortable or troubling signs, it can bury inconvenient information and it can look the other way.

²⁵ London: Continuum, 1997.

This could be said to fall into the ‘twilight of knowing and not knowing’²⁶, to use a much overused phrase. I think that there is a lot in this sphere of thinking that pertains to the Church’s irrational homophobia. The absurdity of a theology that constructs one singular account of the nature and essence of human sexuality and regards everything else as deviant is the most extreme expression of this self-deception. But there are many other examples. In this case a fictional account of its past and its present leads to the perpetuation of its position, but only when the Church begins to accept and then to value the diversity of human sexuality will this particular failure begin to be addressed.

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Unbinding the Gay Conscience

James Alison

Some of you may have known Benjamin O’Sullivan, a Benedictine monk of Ampleforth Abbey who killed himself early in 1996. As far as I can tell, Benjamin was set up by a reporter from the *News of the World*, and the only thing which prevented his death from being a murder was that Benjamin himself consented to the voice of the lynch mob and became the hand that put him to death. I felt that his death was brought about because this extremely attractive, apparently self-confident, effervescent young man had been unable to stand up as an ordinary gay man to the voice of the lynch mob. And the reason he had been unable to stand up to them was because he was bound in his conscience. Shortly after his ordination he had expressed a fear to me that he wasn’t really a priest, because ‘if they had known’ surely they wouldn’t have ordained him. That hardly anyone who knew Benjamin well can have failed to know that he was

²⁶ Visser’t Hooft, quoted in Gita Sereny, *Albert Speer: His Battle With Truth*, London: Macmillan 1995.

gay is of course not relevant: the person caught in the trap looks at the world through fear-coloured spectacles, and fear darkens rather than illumines what it projects. But this gives a hint of what I mean by a bound conscience: the sort of person who can't stand up and be what they are, who can't trust in the goodness of what they are being given to become, whatever the lynch mob may throw at them, the sort of person who labours instead in a world of half-truths, any belonging being a half-belonging, because always feeling that 'if they knew' then 'I wouldn't really be allowed here'. Which translates into a permanent and deep feeling of 'I'm not really allowed here'.

It seemed to me, and seems to me, and I told this to Cardinal Hume when I visited him to talk about Benjamin sometime later, that the fact that the Church can no longer easily say, as Peter could to the man lame from birth at the Beautiful Gate in Acts 3, 'in the name of Jesus of Nazareth, walk' is, while sad, something I can live with. But if the Church, and by that I mean if we, cannot even unbind a conscience like Benjamin's, then we really are fit for nothing more than to be thrown out and trodden under foot like the saltless salt we are become.

I realised, after this, that given that our hierarchs were not going to do anything, in fact, probably are not able to do anything, paralysed themselves so often by the same bound conscience which afflicted Benjamin, that I had to write something which would contribute to the unbinding of the gay conscience, try to find the other-given authority to be able to say 'In the name of Jesus of Nazareth, stand and be'. And the result of my failure to do that in a systematic way is the book called *faith beyond resentment: fragments catholic and gay*²⁷ which I think some of you have read.

All I could do in that book was come up with some sign posts to my sense that if the Jesus of the Gospels really is alive and in our midst, and if he really is what God's self-disclosure to us looks like, then unbinding the gay conscience is very much the sort of thing that

²⁷ London: Darton, Longman & Todd, 2001

he finds himself doing here and now. He is God's pastoring of the sheep whom the shepherds have abandoned, and it does make sense to work out what that looks like.

If the question, then, is not 'what would Jesus do', but 'what is Jesus doing' (and I take it that the latter is the authentically Catholic question, presupposing the Real Presence of Jesus in an ongoing project, rather than a textual presence in a receding past), then it makes sense to spend a little time reflecting on the power of the One who unbinds our conscience.

Let me say first that in an ideal world, Peter would realise that he had been given the power to bind and loose specifically so as to be able to open heaven to the gentiles. He would pronounce those words 'God has shown me that I should not call any human profane or impure'²⁸, and gay people would find themselves with unbound conscience as brothers and sisters in the Church on the same footing as everyone else, that is to say, as sons and daughters and heirs.

But in fact, it seems to me that we find ourselves in a strange moment in that story from Acts 10. We find ourselves in the tiny gap *after* Peter has preached to us about Jesus, whom God anointed with the Holy Spirit and power²⁹, *after* we have believed that message, and so realise that Jesus is Good News for us, and *after* the Holy Spirit has come down upon us, so that we are beginning to live the life of loved children and are able to speak well of God³⁰. But we find ourselves in the tiny space *before* Peter has found it in him to declare "Can any one forbid water for baptizing these people who have received the Holy Spirit just as we have?" And he commanded them to be baptized in the name of Jesus Christ.³¹

If you want a reality check on this, then consider what the current teaching of the Vatican Congregations is: 'the homosexual

²⁸ Acts 10:28

²⁹ Acts 10:34–43

³⁰ Acts 10:44–46

³¹ Acts 10:47–48

inclination, though not itself a sin, constitutes a tendency towards behaviour that is intrinsically evil, and therefore must be considered objectively disordered'. If you read that phrase in the light of the passage from Acts which I have just recalled, you can see quite clearly that it is a piece of backsliding. Where Peter said 'God has shown me that I should not call any human profane or unclean' his modern minions say 'While it is true that gay people are not profane or unclean, they must in fact be considered to be so'.

So, we find ourselves living at a time of Petrine backsliding from the Gospel, and yet beginning to be aware that the reception of the Good News, and our own unbinding does not come from Peter, but from God, and that Peter later on gets to understand and confirm this. This is a perfectly understandable biblical pattern which we can inhabit while we wait for Peter.

Now what I would like to do today is start to examine the binding and the unbinding. What does it look like? I suppose the first step is to look at what being 'bound' means. A bound conscience is one which cannot go this way or that, forward or backwards, is paralysed, scandalized. In that sense it is a form of living death, and those afflicted by it are living dead, and many of us are or have been such people. Let me give some examples of what I mean. We are familiar with the notion of a 'double-bind' or a 'Catch 22 situation'. A bound conscience is a sense of being formed by a double bind or a series of double binds. For instance: 'My command is that you should love, but your love is sick'; or 'You should just go away and die, but it is forbidden to kill yourself'; or 'The only acceptable way for me to live is a celibate life, but if they knew who I really was, they wouldn't allow me to join' or 'Of course you can join, but you mustn't say who you really are' or 'You cannot be gay, but you must be honest'. Many of us have been inducted into just such patterns of desire over time. They classically follow the form 'Imitate me, do not imitate me'. If you find yourself gravitationally pulled towards someone, and yet the message given to you is 'Be like me, do not be like me' you will be

scandalised, eventually you will judder to a halt, unable to move forwards or backwards.

What I would like to suggest is that in all these cases we are dealing with a self that has been formed by being given contradictory desires without being given any ability to discern where they might appropriately be applied. In other words, two instructions are received as on the same level as each other, pointing in two different directions at once, and the result is paralysis. This is what σκάνδαλον – *skandalon* – refers to in the New Testament – scandal, or stumbling block. Someone who is scandalised is someone who is paralysed into an inability to move. And the undoing of σκάνδαλα – *skandala* –, which means the unbinding of double binds that do not allow people to be, is what the Gospel is supposed to be about.

I want to make it quite clear that we are dealing with something very basic and central to the Gospel here. It is perfectly possible to present the Gospel in such a way that it is a sort of double bind. Any sort of presentation of the Christian faith which says ‘I love you but I do not love you’, or ‘I don’t love you as you are, but if you become someone different I will love you’ is in fact preaching a double-bind, a stumbling block, a pathway to paralysis.

Let’s imagine the conversation between a false god and the self:

Fg: I want to love you, but I can’t love you as you are, because you are sinful and objectively disordered.

Self: Well, what then must I do to be loved?

Fg: You must become someone different.

Self: I’m up for it, show me how.

Fg: Love isn’t something that can be earned, it just is.

Self: Well then how do I get to become the sort of person who can be loved?

Fg: If I were you I would start somewhere else.

Self: That’s a great help. How do I start somewhere else?

Fg: You can't, because even starting off for somewhere else starts from you, and you can't be loved.

Self: Well if I can't start off from somewhere else, and I can't start off from where I am, what can I do?

Fg: Give up on the love thing; just obey and be paralysed.

That's how powerful it is to receive our sense of self, our identity, our desire, in imitation of, through the regard of, eyes which give us a mixed message, a double bind.

Now if the Gospel means anything at all it means that the Good News about God is unambivalent, that there are no 'if's and 'but's in God, God's love is unconditional. And this means, above all, that there are no double binds in God. That God desires that our desire should flow free, life-giving and untrammelled, because it is in that flow of desire that we are called into being.

Well, if that is the case, imagine then what might be a conversation between the Unambivalently loving God and the self:

UlG: I love you.

Self: But I'm full of shit, how can you love me?

UlG: I love you.

Self: But you can't love me, I'm part of all this muck.

UlG: It's you that I love.

Self: How can it be me that you love when I've been involved in bad relationships, dark rooms, machinations against other people?

UlG: It's you that I love.

Self: But...

UlG: It's you that I love.

Self: But...

UlG: It's you that I love.

Self: OK then, so are you just going to leave me in the shit?

ULG: Because I love you, you are relaxing into my love and you will find yourself becoming loveable, indeed becoming someone that you will scarcely recognise.

Self: Hadn't I better do something to get all ready for this becoming loveable?

ULG: Only if you haven't yet got it that it's I who do the work and you who get to shine. Because I love you, you are relaxing into being loved and will find yourself doing loveable things because you are loved.

Self: I think I could go along with this.

Or to put it in a nutshell, when faced with the standard Irish joke about 'How do I get to Dublin?' and being told 'If I were you I wouldn't start from here', the Gospel response, that is to say the regard of Christ, tells us: 'I will come with you starting from where you are'.

Now I put it to you as a question: is the teaching of the Vatican Congregations that I quoted to you before compatible with the Gospel, or is it compatible with the bad Irish joke? I'll quote it for you again: 'the homosexual inclination, though not itself a sin, constitutes a tendency towards behaviour that is intrinsically evil, and therefore must be considered objectively disordered'.

To me at least it is clear. This teaching is interposing itself between the regard of Christ and our own sense of being in a way which tends to pervert the simple regard of one who loves us as we are, and as loved we will find ourselves becoming someone different. It is teaching us instead that God will only love us if we start from somewhere else. That is to say, the teaching is in the technical sense a '*skandalon*', a stumbling-block, something which aggravates a double-bind rather than undoing it. It is because I think that the teaching is incompatible with the Gospel at this very fundamental level that I also think that, despite the protestations of the current office-holders in the Roman Curia, it cannot in fact be the teaching of the Church.

A dimension of this which I have brought out more or less strongly, and which may not be obvious when people talk about

conscience³², is the importance of understanding that our conscience is *always* related to and formed by what is other than us, prior to us, outside us. It is not as though there is a ‘real’ private voice somewhere inside us that gives us infallible deliverances that are right. On the contrary, what constitutes our ‘inside’ is a more or less well-managed conversation between different voices which have called us into being one way or another, through parents, education, Church, politicians, and which often enough have tied us up. We are called into being as bodies acting in the world through those voices. This means that when it comes to the unbinding of conscience, it is not ever a question of searching back under all the voices for some innocent voice that I know to be a ‘good conscience’. That is merely a terrible form of self-deception. No, both the being given a self and a sense of self through language, and the unbinding of the conscience are always the work of someone else, outside us, and the most important thing is ‘to which other are we listening?’ Who is the ‘other’ who can unbind our conscience, who can induct us into desiring without double-binds?

I rather suspect that this helps to bring out part of the impression which Jesus left on those to whom he spoke, and is therefore rather the impression that he leaves when he speaks to us: ‘for he taught them as one who had authority, not as the scribes’³³ or ‘my sheep hear my voice, and I know them, and they follow me’³⁴. Speaking with authority means speaking from within the power of the author, the beginner, the creator and can be recognised precisely

³² Here are some resources for further reading on questions of conscience:

H. Richard Niebuhr ‘The Ego-Alter Dialectic and the Conscience’ *Journal of Philosophy* 42 (1945) pp 352–359.

J. Ratzinger ‘Conscience and Truth’ pp 1–20 of John M. Haas, Ed., *Crisis of Conscience*. New York: Crossroad 1996 (Considerable effort should be made to avoid the rest of this book.)

H. McCabe ‘Aquinas on Good Sense’ pp 152–165 of *God Still Matters*. London: Continuum 2002.

J. Milbank ‘Can Morality Be Christian?’ pp 219–232 of *The Word Made Strange*. Oxford: Blackwell 1997.

³³ Mt 7:29; Mk 1:22

³⁴ John 10:27

because it unbinds double-binds and stumbling blocks which cannot be from God because no good Creator could possibly treat his creatures in this way.

I would like to dwell a little more on the effects on us of this regard, the one that looks at us and says, 'I love you, and as you discover yourself loved you will find yourself becoming something else'. I want to say something apparently rather banal here, but I think it is rather important. I think that we would be wise to send the word 'love' to the laundry and use the word 'like' instead. I say this for the following reason. You have probably met people, as I have, who tell us that they love gay people, and that is why they are so keen to change us. In other words their 'love' does not include the word 'like'. It means something like: 'I feel that in obedience to God's love for sinners I must stop you being who you are'.

But in fact the word 'like' is rather more difficult to twist into a lie than the word 'love', because we know when someone likes us. We can tell because they enjoy being with us, alongside us, want to share our time and company. Well, what I would like to suggest is that if our understanding of love does not include liking, or at least being prepared to learn to like, then there's a good chance that we're talking about the sort of love that can slip a double-bind over us, that is really saying to us 'My love for you means that I will like you if you become someone else'.

Well, it seems to me that the doctrine of the incarnation of Our Lord, the image of God coming among us as the likeness of humans,³⁵ is a strong statement that the divine regard is one of *liking* us, here and now, as we are. Glad to be with us. And this means that the one who looks at us with love is not just looking at us with a penetrating and inscrutable gaze of utter otherness, but is looking at us with the delight of one who enjoys our company, who wants to be one with us, to share in something with us. Sure, as we learn to relax into that being loved we are going to find that we are quite different from what we thought we were, and that our patterns of desire will become quite different,

³⁵ Phil 2:7

which is what it means to find that the Holy Spirit has come to dwell in us in and through the reformation of our desire. But the regard does not first knock down so as then to build up, as we so often imagine it, rather as though Jesus was a sergeant-major whose job it is to give hell to the recruits and make them feel awful so that later, after they've lost their identities, they'll start to feel good new identities as soldiers, and then they'll discover he has a heart of gold.

No, our faith is that the eyes of God that are in Christ, and thus the divine regard through which we can receive new being, are eyes that like us, from alongside, at the same level as us. Which means, do not control us, do not try to 'know better than us' who we are, but want to participate in a discovery with us of who we are to become.

And that means that there is no plot to lose. There is only an adventure of trusting in the goodness of the one who loves us and seeing what we would really like to do.

Our Lord put it this way:

For it will be as when a man going on a journey called his servants and entrusted to them his property; to one he gave five talents, to another two, to another one, to each according to his ability. Then he went away. He who had received the five talents went at once and traded with them; and he made five talents more. So also, he who had the two talents made two talents more. But he who had received the one talent went and dug in the ground and hid his master's money. Now after a long time the master of those servants came and settled accounts with them. And he who had received the five talents came forward, bringing five talents more, saying, 'Master, you delivered to me five talents; here I have made five talents more.' His master said to him, 'Well done, good and faithful servant; you have been faithful over a little, I will set you over much; enter into the joy of your master.' And he also who had the two talents came forward, saying, 'Master, you delivered to me two talents; here I have made two talents more.' His master said

to him, 'Well done, good and faithful servant; you have been faithful over a little, I will set you over much; enter into the joy of your master.' He also who had received the one talent came forward, saying, 'Master, I knew you to be a hard man, reaping where you did not sow, and gathering where you did not winnow; so I was afraid, and I went and hid your talent in the ground. Here you have what is yours.' But his master answered him, 'You wicked and slothful servant! You knew that I reap where I have not sowed, and gather where I have not winnowed? Then you ought to have invested my money with the bankers, and at my coming I should have received what was my own with interest. So take the talent from him, and give it to him who has the ten talents. For to every one who has will more be given, and he will have abundance; but from him who has not, even what he has will be taken away. And cast the worthless servant into the outer darkness; there men will weep and gnash their teeth.'³⁶

The key feature of this parable is that it is the imagination of the servants as to what their master is like which is the determining factor of their conscience and thus the wellspring of their activity. The first two servants clearly imagined their master being away as an opportunity to do something delightful. Because they trusted that their master was the sort of daring fellow who would do rash and crazy things for which there was no script, would dare, would experiment, would risk losing things and so would end up multiplying things greatly. In other words, they perceived their master's regard for them as one of liking them enough to be daring them and encouraging them to be adventurous, and so, imagining and trusting that abundance would multiply, they indeed multiplied abundance. The third servant revealed exactly what regard he had laboured under: his imagination of who the master is comes out in his own words:

³⁶ Mt 25:14–30

Master, I knew you to be a hard man, reaping where you did not sow, and gathering where you did not winnow; so I was afraid, and I went and hid your talent in the ground.

He acted according to his imagination. And his imagination was one of a double bind, perfectly captured in the phrase ‘reaping where you did not sow, and gathering where you did not winnow’. His perception of the other was of one who did not like him and thus had put an impossible burden on him, and so all he had done was simply sulk. He had been bound, the living dead, moving neither forward nor backward. It is no wonder that in Luke’s version, the master says ‘Out of your own mouth I will condemn you, you wicked servant’³⁷, because it is in fact the servant’s own perception that has bound him.

Now I put it to you that the Eucharistic presence of Jesus in our midst is the way God constantly reminds us, calls us into mind, of his regard, one of liking us, encouraging us to be daring with him, during the time of the ‘absence of the master’, and that our having our conscience unbound means our becoming able to trust in the regard of one who likes us and so is delighted that we will come up with crazy new daring schemes which didn’t seem to be part of the programme at all. And it is according to our conscience that we will act. If our conscience accepts the regard of, and wants to be like, someone who likes us, who is daring, creative, innovative, effervescent, unafraid, risk-taking and so on, then we will find ourselves behaving like that, being able to stand up and take the rap, delighting in finding ways of getting people off the hook, never taking no for an answer, refusing to believe that something is impossible for God; and that is who we will become.

Someone of unbound conscience can dare to get it wrong, because they don’t have to get it right. If you have to get it right, that means that you don’t dare to get it wrong, which means that you are afraid of what will happen to you if you do get it wrong. But the Catholic and Christian understanding of conscience is that because we know that we are liked we can get it wrong, and it doesn’t matter,

³⁷ Lk 19:22

because we are not frightened of punishment, but able to learn from our mistakes. In fact, if we can't dare to be wrong, then we can't truly get it right, because our being right will be a form of protection against what is other than us, what is unknown, exciting, big and causing us to be bigger-minded, magnanimous. A good conscience is not a feeling of self-satisfaction at having got it right; it is much more the underlying excitement of knowing yourself on the way somewhere, which is perfectly compatible with a deep sorrow of realisation at having got something wrong. This is the excitement of being a son or daughter who is on an adventure, not the contractual precision of a slave who has to get something right because he has no sense of being on the inside of the project of whoever is in charge, and merely senses the other as arbitrary and capricious, as someone who will glower at what is not perfect.

Well, what does it mean to you that God does not merely 'love' us gay people in a clinical, arms-length sense, but likes us, enjoys our company, wants to be in on the adventure with us, see where we can take the adventure of being human? Is it not true that the mere phrase 'I like you' gives permission to be, is creative of space, suggests 'I'm curious to accompany you', means delight? And if that is the case, why don't we dare to imagine that God does actually want us to be free and happy, starting exactly from where we are; that our desire for a loving partner, or to build a crazy community project full of eccentric queens making a difference to society and Church, is something which could well lead to fulfilment, a fulfilment much bigger than we could imagine. Just because Peter hasn't yet got it, doesn't mean that the Spirit can be stopped from unbinding our desire. Just because our hierarchs seem unable to dare even to offer us the sort of eucharistic space which is our baptismal new-birthright doesn't mean that our consciences need be bowed down by, bound by, all that heaviness of decline management, that defensive bureaucratic inability to negotiate as adults with adults. For that heaviness and that inability says something about them, and need say nothing about us.

Consciences are unbound for a doing and a becoming, and that, I think is where we find ourselves now: given that the only judgment

we will receive will be that of freedom³⁸, what do we want to dare to do, starting now? What would it be fun to present our master with on his return?

One final point. I think we are very privileged to be gay and lesbian Catholics at this time, and this is in part because of the growing sense that we are in on the inner dynamic of the project that is the sharing of the Good News about God with the world. I want to point out that one of the features of the texts of the apostolic witnesses in the New Testament is that they are marked to a very strong degree by the notion of a sort of ‘coming out’, a leaving behind something which while theoretically good in itself, had turned into a trap. Sometimes this is presented in a moralistic way as people leaving something bad to join something good. Well, I think it is much closer to the mark to see it as people leaving something apparently ‘good’ – whether the ‘Law’ or the decencies of Roman civil religion, and instead becoming free. Paul is keen that the freedom not turn into licentiousness, but he is much, much more keen that people don’t go back into ‘goodness’ with its bound consciences and its comforting dependency on group approval³⁹. Which of the following two propositions do you think is closer to the witness of the New Testament?

A gay Catholic holds that ‘not going back like a dog to its vomit’ means, first and foremost, not going back to gay meeting-places, relationships, places where there is a risk of sex;

Or:

A gay Catholic holds that ‘not going back like a dog to its vomit’⁴⁰ means, first and foremost, refusing the lure of the ecclesiastical closet which binds conscience and makes

³⁸ James 2:12

³⁹ Gal 3:1

⁴⁰ cf Prov 26:11 and 2 Peter 2:22

people unfree, leading to dysfunctional relations and an inability to love and to tell the truth.

What does the teaching about not putting new wine in old wineskins, or about avoiding the leaven of the Pharisees, mean if it isn't part of the way the author of all things speaks into being a daring conscience?

So, where shall we take it?

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LEGISLATION: IMPLICATIONS FOR GAY AND LESBIAN CATHOLICS

Equality and Sexuality: Britain's Fast-Changing Laws

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These 12 months are seeing the most dramatic and radical changes in the social rules by which gay and lesbian people live since 1967. But the changes are piecemeal, so the wider public, and even our own community, are largely unaware of what is going on. We need to stand back and take an overview. That shows an unmistakeable, and I hope fundamental, trend, whose consequences will be very far-reaching.

For the wider public, the row within the Church of England over the intended appointment of Canon Jeffrey John has put the issue of gay rights and responsibilities under an unprecedented spotlight. The huge wave of public comment is not likely to leave any of the traditional churches unaffected. There are certainly sympathetic views among the Catholic lay community which might be tapped to support your aims. It has not gone unnoticed that Canon John is not suffering because of his now celibate *orientation* and *lifestyle*, but because of his *beliefs* which he will not recant. It is very evident that the whole issue is not going to go away. So this is a special moment, which presents special opportunities.

In this talk I shall first run through the legal changes in summary. I shall deal at the end with the two latest and most



controversial – employment equality and civil partnerships. After that I shall go into the arguments and reasons for the latter in a bit more detail. Finally I shall make some suggestions for actions which *Quest* and its members could take to help move the process along, both in the short and the long term.

Changes in the law

First, then, to the individual changes made or mooted in the law:

Immigration rules. Unmarried partners may now obtain leave to enter or remain in Britain on the basis of a relationship of more than two years with a British citizen or other person settled in the UK. *The rules apply to same-sex and other couples.*

Adoption and Children Act, 2002. This will, amongst other things, allow suitable couples to adopt children, *including gay or lesbian couples.* Formerly, *individual* lesbian or gay people could adopt, but *partners* jointly could not.

Housing tenancies. The Government is to equalise the rights of same-sex couples to succeed to a tenancy. The Court of Appeal ruled last November that same-sex partners could inherit a Rent Act tenancy.

Sexual Offences Bill, 2003. This Bill replaces all existing legislation on sexual offences. One of its founding principles, welcomed in the Lords by all three main parties, is no discrimination by gender or orientation. To those who fought for equality in the 1970s, these changes in the criminal law were the first and most important goal.

Repeal of 'Section 28'. The Government is committed to abolishing this, with its obnoxious reference to homosexuality 'as a *pretended* family relationship'. Discussion after the split in the Conservative Party on the matter concentrated not so much on keeping it, as on what, if anything, should replace it. On 10 July, the Lords voted against a replacement provision by 180 to 130 – a huge turn-out. Section 28 is now dead.

Employment Equality Regulations, 2003. Passed in June 2003, these implement an EU Directive, which binds all existing and new member

States. This requires legislation to ban discrimination at work on grounds of race, age, disability, religion or belief, and sexual orientation. The latter three must be in force by 2 December 2003. The Regulations cover indirect, as well as direct, discrimination, including harassment, and training, including vocational training. The Directive allows faith-based organisations a special exemption to discriminate on grounds of *belief*, but not other grounds, in specific posts where they can prove it is genuinely required by the job, its context and their ethos. This is more or less reproduced in the *Religion or Belief Regulations*. A separate provision was included at the last minute in the *Sexual Orientation Regulations*. This allows requirements relating to sexual orientation to be applied in some circumstances where the employment is ‘for the purposes of an organised religion’. LGCM, the trades unions, and others fought this new provision. It will almost certainly be challenged in the British courts, and in the European Court of Justice, as going beyond what the Directive permits. Indeed, the NUT announced on Monday that it would take the Government to judicial review to try to get the provision struck down even before it comes into force. Their move is likely to be supported by other unions, and by NGO members of the ‘coalition of the willing’ set up by LGCM and Stonewall to combat the Government’s decision. *But in any case the Regulations will apply to the generality of jobs in British society*. If the provision stands, there will therefore be an increasing gap between the rules for equality applying to ‘religious employers’ and to others.

I should say something here about the role of the Churches in this affair. Public consultation on the draft Regulations ended in February. Between then and their publication on 8 May, there was private discussion between the Archbishops’ Council of the C of E, accompanied by Archbishops Vincent Nichols and Peter Smith, and the Government, over the former’s demand for more or less wholesale exemption from the *Sexual Orientation Regulations*. What they got was an exemption allowing discrimination where the employment was ‘for the purposes of an organised religion’ (undefined), and the

discrimination was either to comply with the doctrines of the religion, or (in individual cases) to 'avoid conflict with the strongly held religious convictions of a significant number of the religion's followers'. This was modelled on the law allowing the Churches not to appoint women as priests. But it obviously puts the real power in the hands of any vocal, possibly homophobic, minority. No heed was paid to the likely effects where e.g. Muslim or other religions might take a fundamentalist line against employment of any homosexuals at all. The Government lawyers admitted to a Parliamentary Select Committee that any body controlled to some extent by religious representatives might be able to discriminate, and that theoretically even window-cleaners could be affected. There was no consultation at all with those likely to be adversely affected – including AMICUS, which represents clergy workers, or indeed LGCM. The Select Committee of both Houses advised that the provision was of doubtful legality, and criticised the failure to consult. Despite this, the Government steamrolled the provision through. They probably calculate that if it falls in the courts they can at least say to the Church leaders that they did their best ... It is understandable that Church leaders should try to preserve their right to apply their celibacy rules for priests, etc. But they are greatly at fault in not having limited their demands to the absolute minimum in the interests of protecting others from injustice and discrimination.

Civil registration of same-sex partnerships. A Bill sponsored by Lord Lester to introduce the registration of *all* partnerships was widely welcomed in the Lords early in 2002. On 30 June the Government issued proposals for a new law to register *same-sex* partnerships. This would not legally be marriage, but would create parallel treatment in law for registered and married couples. Such partnerships are already legally sanctioned in Belgium, Denmark, Finland, France, Germany, Hungary, Iceland, Netherlands, Norway, Portugal, Sweden and the canton of Zürich in Switzerland. In Belgium and Netherlands they amount to full marriage, but more limited partnership rights are also available. In Denmark and Sweden such partnership is virtually

equivalent to marriage. In the last few weeks the Supreme Court in Ontario has ordered that same-sex couples may now marry. Partnerships are already legalised in Quebec, British Columbia and Nova Scotia. The Canadian Government has just announced that it will legislate federally for this throughout the whole of Canada. Three U.S. States have such laws (California, Hawaii and Vermont), and three in Australia (A.C.T., New South Wales and Victoria). New Zealand is now debating a similar law.

The Government's proposals follow the 'full' Danish and Swedish models, and not the more restricted models from France and elsewhere. Partnerships could be registered from 16 with parental consent, and 18 without. The same prohibited degrees would apply as for marriage: no partnerships with close relatives. The immigration waiting period would be abolished. Registered partners could be recognised as 'next of kin'. Registered partners would have the same protection over domestic violence as married spouses. Partnerships would have to be exclusive, as for marriage, and intended to be life-long. Termination would require the same process of attempted reconciliation and divorce. The Government recognises that the tax system would have to be changed to equalise the position of the two groups. Anyone already married would have to divorce before registration. The process itself would be handled by existing Registrars, and all the details would be part of the public domain. *As for Church or other blessings, they say only that 'Any additional ceremony would be for the couple to arrange.'*

Let me note here that in New Zealand the Catholic Bishops, while opposing gay marriage, supported the registration of same-sex couples to ensure their civil and proprietary rights. And the Swiss Bishops, in 2002, publicly recognised the merits of civil registration for same-sex partners, while refusing to give a Catholic blessing to such unions. As soon as these proposals came out, the Catholic Bishops' Conference in England and Wales set up a Working Party to determine their response. The proposals are open to consultation only until 30 September.

I shall say something more about the forthcoming debate in a moment. But first I want to ask why all this is happening at all.

Reasons for the development of fuller equality in Britain

1 The first is the spreading acceptance of a single framework of human rights and corresponding responsibilities as the basis for social and public relationships throughout Europe and beyond. *Powerful agents*: the European Convention on Human Rights, and the judgments of the Strasbourg Court; its incorporation into British law (the Human Rights Act); and the commitment of the EU to implementing such rights throughout all its members (backed by the ECJ in Luxembourg).

Your branch of the Church takes a strong doctrinal stand on social justice and the removal of inequalities. The enactment of the EU Equal Treatment Directive has given a powerful shove to all the lobby groups interested in attacking discrimination on all of the six so-called 'strands'. There are big questions still unresolved about how Employment Equality can be consistently enforced and supported – there is no body to advise and support complainants and employers over sexual orientation or religion or belief discrimination. Lord Lester put forward an overarching Equality Bill earlier this year, but the Government is not going to do more than it has to, certainly this side of a General Election. There are increasing pressures and desires for all to work together. I attended last week the first meeting of an 'Equalities Coalition', promoted by the Fawcett Society (the Law Society is also interested). I was encouraged to hear the representative of the National Board of Catholic Women stress the need for us to talk and break down boundaries, in the interests of securing justice. People are hoping for something wider than what we are getting. So gay, and other, rights are increasingly being subsumed within the wider notion of *human* rights and *human* equality.

On the international, and specifically European, dimension I think you might want to ask Mark Watson's views. A prime mover here is the International Lesbian and Gay Association (ILGA), whose

work in Brussels is now to be supplemented by a special East European office paid for by a British foundation. I hope *Quest* is aware of and involved with ILGA and its faith equivalent.

2 The second reason for altered attitudes is the greater visibility of homosexuals, and their acceptance as a minority like any other. There is plainly now a consensus on orientation as a ‘given’, and we would want to claim that as indeed *God-given*. Open gays and lesbians are seen among Ministers of the Crown, senior police officers, public officials at all levels, including diplomats – even the Security Services are recruiting from those in a stable relationship. One of my deepest satisfactions recently was being thanked by a diplomat I knew only by name for what I had done 30 years ago by ‘coming out’. She said the attitudes of the Service were now completely supportive.

3 The third mover for change has been the change in ‘good manners’, following the flight from traditional marriage among heterosexuals. This seems to me to have intensified. Previously, unmarried partners often decided to marry when they had children. Now they more commonly do not. We all now have to recognise introductions of ‘my partner’ in every social gathering, often among our own family members. Paradoxically, same-sex couples are moving the other way; with increasing confidence, as citizens and taxpayers, they are looking for *more* public commitment on their part, and recognition of their unions by others, and not *fewer* legal responsibilities. The two are crossing over in the middle.

The partnership debate

The chief issue will be: ‘Will the legal recognition of same-sex partnerships strengthen the solidity of society. and reinforce the institution of marriage, or will it instead undermine and weaken them?’ The guidance I have had from your Chairman shows that this is a central preoccupation also for the framing of Catholic attitudes. The Government is obliged to assess the costs and benefits of any proposal for legislation, and you should look at paragraph 5.1 of Annex A of the DTI document for that assessment. It is unequivocal.

Same-sex couple registration will encourage stable relationships, an important asset to the whole community; increase social acceptance and cut intolerance; and add 'life satisfaction' economic benefits worth from £6bn to £60bn to our collective annual income. 'Strong and stable families provide the best basis for raising children and for building strong and supportive communities ... Strengthening adult couple relationships not only benefits the couples themselves, but also other relatives they support and care for, and in particular their children ...'

There will be shouts that the Government is betraying its promise not to introduce 'gay marriage'. Legally that will not be so; there will not be access to marriage as in the Netherlands, Belgium etc. But the rights and duties will in virtually every respect be parallel. Some, like Peter Tatchell, have started arguing that any scheme should apply to heterosexual as well as same-sex partnerships. I am against this. If the obligations are similar then the heterosexual couples can get married. If there were a scheme for what they are prepared to tolerate, and no more, we should end up with an inferior kind of union for same-sex couples. LGCM itself, and its RC Caucus, have issued separate Press statements welcoming the Government's proposals, on which we shall comment in detail later, before the deadline.

Before leaving this for later discussion, I think we should ask ourselves what drives so many gays/lesbians to seek recognition in law of what they covenant together? I am convinced that it does not arise only from a feeling of discrimination. It stems from something much more fundamental – the inborn desire to find 'the other half', with which all humans are acquainted, and which I believe to be God-given. Most of our literature reflects our preoccupation with this desire. The play-off between 'earthly' and 'heavenly' love is a common theme also in religious writers – I am thinking of people like François Mauriac, who deals with it centrally in many or most of his books (eg *The River of Fire* and *Galigai*). But the most original, and earliest, picture comes from the comic poet Aristophanes' funny but revolutionary fable in Plato's 'Symposium'. Everyone at the dinner

party has to make a speech in praise of love. Aristophanes relates that human beings used to have three sexes, male, female and hermaphrodite, and that everyone had four legs and arms, four eyes and two joined heads. Being wicked and inventive, they rapidly came to threaten Olympus. So Zeus ordered Apollo to cut them all in half, turn round the heads and genitals, and make them walk upright instead of on all fours. ‘And if they cause any more trouble, we’ll cut them in half again and they can hop on one leg!’ Ever since, we severed halves go around looking for our true mate; the two male halves are gays, the two female halves lesbians, and the hermaphrodites heterosexuals. Hence the compelling desire to re-unite. Aristophanes’, or Plato’s, picture is revolutionary not only in recognising different orientations, but in putting an equal, even romantic, love at the heart of heterosexual marriage. This is not at all how marriage was actually perceived in ancient Athens, any more than nowadays in South Asia or the Middle East.

I believe this is what drives us, when we have found ‘the right person’, to want to make public and binding emotional and financial covenants for life – as serious and vital a rite as marriage itself – and to have those promises acknowledged and supported not only by families and friends but by the whole community. The desire for such a covenant of course is biblical – look at 1 Samuel 18:4. Jonathan and David’s covenant was also, significantly, renewed later twice, each time ‘before the Lord’. Many gay and lesbian couples today similarly want to covenant openly before God (see the stream of requests to LGCM to arrange blessings).

Implications for the Churches and other religions

The stresses caused by current arguments over such issues are growing. As the Churches dwindle, the gap between the rules which some religious leaders would like to make universal, and those that the general public and the State will actually enforce, gets wider. Our adherents are also citizens and members of ordinary society, so they too feel these tensions. A re-examination of the *essentials* of each faith,

what and to whom its mission is, and how much from the past is 'baggage' to be offloaded, or instead to be cherished, cannot long be evaded. It is time in any case to abjure the tempting right to try to regulate the lives of a widely unbelieving society.

I think this division can easily be understood by the Catholic community, so long excluded from political power (although I do not much notice it among Catholic members of the House of Lords). It is possible to support laws for the public generally, while trying to maintain belief disciplines for those who subscribe to the relevant faith (cf. *halal/kosher* meat; the Islamic ban on interest, etc.)

I understand that Catholic moral theology differentiates the Church's theology of chastity from its theology of justice. Fr James Keenan, SJ, has recently affirmed that while the Church prohibits all sexual activity except non-contraceptive relations between husband and wife, it in no way endorses the unequal or discriminatory treatment of divorced heterosexuals nor of gays and lesbians. 'On the contrary, it obliges society to recognise that all of these people retain their full range of human and civil rights because of their inherent dignity as human persons.' He goes on to recall the statement of the U.S. Bishops that 'the fundamental rights of homosexual persons must be defended and that all of us must strive to eliminate any forms of injustice, oppression or violence against them.' If the interests of social justice, including those for homosexuals, are presented with sufficient force, we might hope that the CBCEW Working Party could be persuaded to follow its brothers in New Zealand.

Suggestions for *Quest* and its members

I hope that you will collectively and individually consider what you might do to encourage acceptance of the proposals for civil registration among Catholics generally, and by the CBCEW Working Party in particular. You could prepare your own submission to the Working Party (whether or not they ask for such contributions). You should also respond to the Government paper before 30 September. You could

consider contacting bodies like the National Board of Catholic Women, whom I mentioned earlier.

Beyond this there is a much harder and longer task. Given what we now know both about human and indeed animal sexuality, does the doctrinal description of homosexuality as ‘objectively disordered’ in any way correspond to the facts? Dr Bruce Bagemihl’s survey of same-sex relationships and behaviour among animals and birds (everything from ant-bears to zebras) – it is called ‘Biological Exuberance’ – gives the lie to the notion that these are a purely human and ‘sinful’ aberration (the consequence of ‘idolatry’, according to St Paul in Romans 1:22–27). Getting this re-examined seems to me essential.

Apart from this, it is not entirely clear that your Church accepts the objective existence of people with a different and inborn (therefore God-given) orientation. Nor is it clear how it will cope when Church members, engaged in same-sex partnerships, aspire to full civil registration. What pastoral counselling will they receive? Will their wish for openness and faithfulness be, in effect, discouraged, despite the strengths which – see the Government proposals – this would bring to society as a whole? Some of the answers to these questions might be found by contact with, and research into, the operation of partnership and marriage laws as they already apply in other countries with a strong Catholic presence, from the Netherlands to Switzerland (and indeed Quebec). This would include research on the pastoral attitudes actually taken by the Church.

All in all, there is much work to be done, and done fast. This is, as I said at the start, a special time, and it presents exceptional opportunities. It is up to us not to shirk them, so as to help create a better world for those who come after.

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Gay Marriage & Other Options

Mark Watson

Marketing Director of PlanetOut Partners UK

Three significant events have taken place recently that makes the prospect of lesbian and gay marriage look increasingly optimistic.

The first, and I must say one of the most surprising events, was when MPs and Lords voted to allow lesbian and gay couples to adopt children on the same basis as straight couples. Many had thought that this step would be one of the hardest battles we should have to fight on the road to full legal equality. In the event there was little resistance and the measure – for which much credit should go to health secretary Alan Milburn, who successfully steered it through – was passed relatively easily (unless your name was Iain Duncan Smith, of course).

The Government then produced a consultation paper on Civil Partnerships for the legal recognition of same-sex couples, which I will discuss later, which both the Liberal Democrats and even the Tories are supporting.

The third, and equally surprising event was when the Lords voted to repeal Section 28. Although MPs had voted for repeal the Lords has steadfastly refused to vote for repeal. Whether the Lords have had a change of tune, seen the light, grown tired of ‘buggery’ or just gone senile I don’t know. But their support for possibly the two most contentious pieces of equality legislation means that they are likely to support the civil registration proposal and therefore the government might not be so timid in taking this forward. It is winning adoption rights that was so significant – it was this issue that was set to dominate any debate on full partnership rights. In Scandinavia the first partnership laws excluded the right for gay couples to adopt. In the UK this is no longer an issue.

But before we win the right to have our relationships fully recognised by the state we must win the argument. And before we can

put forward our argument, we need to know ourselves what it is we are arguing for. The easy bit was to convince people that something needed to be done to address the discrimination that so obviously exists (including next of kin rights, pensions, inheritance, immigration and some employee benefits). The tricky part is to decide (even amongst ourselves) how to resolve this.

There are essentially four ways that lesbians and gay men could achieve the same rights as heterosexuals but there is really only one option if same-sex couples are to achieve full equality. As a major gay.com poll indicated, it's actually the option supported by a majority of lesbian and gay people, too. It is also the simplest option: marriage.

Option one – Marriage

All we should need is a simple one-line bill to repeal Section 11c of the Matrimonial Causes Act (1973). That's it. This is the discriminatory law, introduced less than 30 years ago, which declares marriages between persons of the same sex void. By repealing Section 11c this would allow same-sex couples to marry and would end any discrimination between lesbian and gay couples and heterosexuals. Marriage would also give access to all sorts of benefits under European law that will continue to be denied to same-sex couples if they were to get another form of partnership rights in the UK. This law would only be recognised in the UK whereas the institution of marriage is recognised world-wide. This is also the simplest measure because no other legislation would have to change to accommodate it.

Option two – Unmarried Partners Act

This option, proposed by the likes of Peter Tatchell, would be similar to the French 'PACS' law and is similar to the bill introduced into parliament by Liberal Democrat peer Lord Lester. It would apply equally to heterosexuals and lesbians and gays and would give legal protection for all unmarried couples. However, apart from the bill itself, it is likely that other legislation would have to be changed to accommodate it. The dilemma if this option were to be pursued is this: if it offers everything that a marriage would, then what is the

difference, and if it doesn't, then what is the point? Interestingly, this model could also be extended to protect any two people who were living together, say two sisters or an elderly mother and her daughter. However the inclusion of these relationships seems to me a way of suggesting that our relationships are somehow like 'friends living together' – 'this is Mark and his friend' – rather than 'this is Mark and his partner'.

Option three – Civil Partnerships for the legal recognition of same-sex couples

Essentially this is the same as option two but would only be available to same-sex couples. This is what the government is suggesting at the moment. Now, although any law that protects same-sex couples should be welcomed, I think it seems slightly strange to introduce a bill that instead of removing disparity from the law actually legislates in favour of discrimination between same-sex and heterosexual relationships. It is likely that a law of this type would face a legal challenge on the basis that it discriminates against unmarried straight couples, who would be prevented from benefiting. In addition, many lesbians and gays might see this as a second-class partnership law. However having looked at the White Paper, the proposed legislation is marriage in everything but name.

Option four

The fourth option would be to introduce legislation that would mean any two people living together were automatically considered by the law as a 'couple'. However, this is not as straightforward as it sounds. For example, if a person is married but is actually living with someone else and there is no will, which partner is legally entitled to inherit? Does living with someone for six weeks carry the same weight as six or 60 years? Just because your boy-friend moved in at Christmas does that mean he is entitled to half your house in July?

Personally I believe that marriage is really the only option if we truly believe in equality and when it happens (as it has in the Netherlands) no doubt there will be the usual suspects claiming that it

‘undermines marriage’. I’m not entirely sure what that means. Neither am I convinced that allowing gays to marry would somehow make heterosexuals less inclined to marry. However I believe that we should support the government’s White Paper and press for this to be included in the Queen’s Speech this year – otherwise the opportunity will be lost until after the next election.

The main objectors are likely to be from religious organisations – what the Churches decided to do about it is up to them and people like you – however we recognise marriage as a state institution not a religious one. The legal contract is with the state – the deal is you get tax benefits, certain rights, etc., in exchange for looking after each other and therefore saving the state the burden of doing it. If people want to include a spiritual arrangement in this as well that should be up to them.

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CIVIL PARTNERSHIPS

Evidence Submitted to the Working Group on Civic Partnerships of the Bishops' Conference

1 Cardinal Hume, in his *Note on the Teaching of the Catholic Church concerning Homosexual People* of 1997, wrote that 'the Congregation for the Doctrine of the Faith has indicated that judgements about legislation and responses which may be made by the Church can be left to the bishops of the country concerned (*L'Osservatore Romano*, 29 July 1992)' (§13). The publication on 31 July 2003, by the Congregation for the Doctrine of the Faith, of *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, appears to over-ride this discretion, since it concludes that 'The Church teaches that respect for homosexual persons cannot lead in any way ... to legal recognition of homosexual unions' (§11) and tells Catholic MPs that they have, under pain of grave sin, 'a moral duty ... to vote against it' (§10). *Prima facie*, this leaves the Bishops' Conference with no leeway and dictates the working group's conclusions.

2 However, there are other remarks in the document that give us grounds to suppose that our evidence may still serve some useful purpose. First, it is stated that the document does not contain new doctrinal elements, though that seems to be at variance with the claim noted above that opposition to legal recognition of same-sex unions is taught by the Church. Second, the purpose of the document is stated as being 'to provide arguments drawn from reason' against such recognition. But if the CDF takes its stand here upon reason, not upon revelation or authority, its arguments may, by the same token, be assessed at the bar of reason, and even the bishops must be held free to scrutinise them. Third, these arguments are provided as a resource for bishops 'in preparing more specific interventions, appropriate to the different situations throughout the world', which implies that the



arguments may be used or not, as bishops see fit, and that they are expected to tailor their responses to local situations. Finally, the aim of the bishops in responding to proposals for legal recognition of same-sex partnerships should be to protect and promote the dignity of marriage, the foundation of the family and the stability of society (of which marriage is a constitutive element) – all admirable aims, with which few would cavil, and that provide a yardstick against which such means as refusing legal recognition to same-sex partnerships may be judged (§1).

3 The Chairman of the working group has indicated that he believes it ‘directly relevant to the situation in this country’ and that the group ‘will draw’, *inter alia*, ‘on the CDF considerations’. Among these is the CDF’s contention that ‘There are absolutely no grounds for considering homosexual unions to be in any way similar or remotely analogous ... to marriage’ (§4: the text actually says ‘to God’s plan for marriage and the family’; as it does not make sense to suppose a union similar to a plan – a category-mistake – we have adjusted this to make it meaningful). Accordingly, the Chairman has also said ‘Our response will clearly oppose creating a legal registration of same-sex partnerships which equates them to marriage’ and that ‘the closer any proposed legislation comes to creating ‘same-sex marriage’, the stronger our objections become’. Yet the government has stated: ‘It is a matter of public record that the government has no plans to introduce same-sex marriage. This consultation document is about a civil partnership registration scheme’ (DTI §1.3). But perhaps the working group is not prepared to accept the government’s protestation at face value; even some commentators who support the proposals have described them as ‘marriage in all but name’.

4 Nevertheless, the CDF has placed itself in a dilemma. If same-sex partnerships are really in no way similar or remotely analogous to marriages, then no legislation can create a similarity, and any suggestion that civil partnerships would be in competition with marriage must be dismissed from the start. The CDF cannot have it both ways: either there is an analogy here, or – *a priori* – civil

partnerships pose no threat to marriage. There is simply no case to answer, no facts to consider. But, of course, the CDF's subsequent argument that legal recognition of civil partnerships would inevitably lead to a re-definition of marriage gives the lie to this, for how could it possibly do so if there are no similarities between them? This contradiction must be resolved before we can go further, for literally *anything* follows from a contradiction; if you are prepared to accept a contradiction, you have given up on reasoning altogether. Philosophers and theologians were clear about this even by the thirteenth century: they say again and again that the principle of non-contradiction is the basis of all theoretical reasoning.

5 Two *different* things are analogous when they are similar in some respects but not in others: as is often said, every analogy goes lame at some point. If the two things were the same in every respect, then we could not differentiate between them. More than this, an analogy rather than a mere similarity often involves some parity of structure⁴¹. It is not enough, therefore, to refute an analogy to cite respects in which the two things are different; one would also have to consider respects in which it is claimed that they are the same and show that the similarities are illusory. All that the CDF does is to say that while marriage (married sex?) is holy, homosexual acts are wrong; that while married sex can be reproductive, homosexual sex cannot; and that while the partners to a marriage are complementary, same-sex partners are not. The third contrast is unclear but, apart from that, three dissimilarities do not show that there is no analogy between the two cases, for it still remains open that there are balancing similarities.

6 The *Alternative Service Book* of the Church of England offers a description of marriage that Catholics could also endorse; it is:

... a gift of God in creation and a means of his grace, a holy mystery in which a man and woman become one flesh. It is God's purpose that, as husband and wife give

⁴¹ cf. Aquinas, *De veritate* 2.11, especially on analogy of proportionality.

themselves to one another in love throughout their lives, they shall be united in that love as Christ is united with his Church.

Marriage is given that husband and wife may comfort and help each other, living faithfully together in need and plenty, in sorrow and in joy. It is given, that with delight and tenderness they may know each other in love, and through the joy of their bodily union, may strengthen the union of their hearts and lives. It is given that they may have children and be blessed in caring for them and bringing them up in accordance with God's will, to his praise and glory.

As Canon Jeffrey John, who quotes it, comments: 'With the exception of childbirth all these purposes of marriage can be fulfilled in a permanent, faithful, stable gay relationship, and are being fulfilled in many.'⁴² Later, he remarks:

Knowing an ordinary gay couple is the best antidote to prejudice and the best way of destroying the ludicrous stereotypes and suspicions that still lurk in the mind of many. People soon come to realize the lifestyle doesn't differ much from their own. As one 'out' priest put it, 'once it dawned on the parish that having a partner didn't mean orgies at the vicarage but having arguments about who goes to Tesco's and who walks the dog, they stopped minding. They realized we were the same as them.' It is only by helping good relationships to be seen that healing will come – for everybody.⁴³

There are, then, many similarities between marriage and same-sex partnerships and we think that most people would agree that there

⁴² *'Permanent, Faithful, Stable': Christian Same-Sex Partnerships*. London: Darton, Longman & Todd, 1993, p.13.

⁴³ *ibid.*, p.27.

is enough by way of a structural similarity to constitute an analogy. It does seem that the CDF's distaste for same-sex unions has blinded it to facts which stare anyone in the face who is prepared actually to *look* at the phenomena being compared instead of trying to decide empirical questions *a priori*.

7 The heart of the CDF's *Considerations* is entitled 'Arguments from reason against legal recognition of homosexual unions'. Moreover, these arguments 'are addressed not only to those who believe in Christ, but to all persons committed to promoting and defending the common good of society' (§1). This signals that these are not theological arguments and, hence, that we are invited to assess them without invoking revelation. Accordingly, we wish to examine them logically and shall resist the temptation to indulge in rhetoric, of which, we believe, everyone has already had a surfeit in this area. As the working party may not include any logicians, it may be helpful to begin with some basic points of logic. If the conclusion of an argument is to be true, then its premisses must be true and the argument itself be valid. An argument can be shown *invalid* by means of a *counter-example*, that is, by citing a parallel argument with uncontroversially true premisses and an uncontroversially false conclusion. This method will only work if the counter-argument is accepted as having a parallel structure to the original, but a single counter-example is enough to show that the original is invalid. To show that an argument is *valid*, it can be broken down into minimal steps each of which exemplifies a pattern of argument so simple that its validity is uncontroversial. The CDF puts forward four arguments against legal recognition of same-sex partnerships; again, a single valid argument from true premisses would be enough.

8 **The argument from inconsistency.** According to official Church teaching, homosexual sexual activity is always wrong. However, no one today supposes that everything that is wrong should *ipso facto* be illegal; apart from any other consideration, such law would be unenforceable and that would lead to contempt for the law itself. *Prima facie*, then, the *morality* of homosexual sexual activity is

irrelevant to the issue before the working group. The CDF acknowledges that civil law has a more limited scope than moral law, and even allows that same-sex sexual partnerships, though wrong, might be *tolerated*. But ‘the approval or legalization of evil is something far different from the toleration of evil’ (§5). The reason is that

... civil law cannot contradict right reason without losing its binding force on conscience. Every humanly-created law is legitimate in so far as it is consistent with the natural moral law, recognized by right reason, and in so far as it respects the inalienable rights of every person. Laws in favour of homosexual unions are contrary to right reason because they confer legal guarantees, analogous to those granted to marriage, to unions between persons of the same sex (§6).

9 This is presented as a deductive argument. Reduced to its bare bones, it goes as follows: every law that contradicts right reason is not morally binding; but every law recognising same-sex unions contradicts right reason; *ergo* no such law is morally binding. The argument is formally valid both in Aristotelian and modern first-order logic. But it is likely to be opaque to a modern reader, as the expression ‘contradict right reason’ is no longer current. Moreover, the expression plays a key role and it is essential to the validity of the argument that it should bear exactly the same sense in both premisses. The CDF cites two references, which shed some light on it. The first is to the present Pope’s encyclical letter *Evangelium vitae* (§72); the context is a discussion of legitimizations of abortion and euthanasia, but the encyclical quotes, in turn, Pope John XXIII’s encyclical *Pacem in terris*, which makes a quite general point:

Laws and decrees enacted in contravention of the moral order, and hence of the divine will, can have no binding force in conscience (section II, §51 in CTS translation).

Both popes, as well as the CDF, then cite St Thomas Aquinas:

Human law has the force of law to the extent that it is according to right reason ... but to the extent that it departs from reason, it is said to be unjust and thus does not have the force of law.⁴⁴

This occurs in a reply to an objection under the question ‘Is every law derived from the divine law?’ but, strangely, neither the CDF nor either of the two popes refers to a question in which Aquinas raises directly the question at issue: Does human law impose necessity on a person before the court of conscience? i.e. are we bound in conscience by human laws? He answers that we are so bound, provided the laws are just. But they can be unjust in two ways, either by being contrary to human good or being contrary to divine good. An example of the latter would be laws inducing us to idolatry. These we may never obey. An example of the former would be laws which are not generally useful, but serve the lawgiver’s greed or glory; or, again, laws which exceed the legislator’s competence. These do not oblige us in conscience, unless perhaps to avoid scandal or disorder.⁴⁵

10 The importance of the second text is that it spells out what is meant by a law being according to right reason (being just) or, by contrast, departing from it (being unjust). A law is unjust if and only if it is contrary to divine or human good. But in what does contrariety consist? The CDF is clearer on this point, interpreting contrariety as

⁴⁴ *lex humana in tantum habet rationem legis, in quantum est secundum rationem rectam ... In quantum vero a ratione recedit, sic dicitur lex iniqua; et sic non habet rationem legis (Summa theologiae, 2–1.93.3ad2).*

⁴⁵ *In iustae autem sunt leges dupliciter. Uno modo, per contrarietatem ad bonum humanum ...: vel ex fine, sicut cum aliquis praesidens leges imponit onerosas subditis non pertinentes ad utilitatem communem, sed magis ad propriam cupiditatem vel gloriam; vel etiam ex auctore, sicut cum aliquis legem fert ultra sibi commissam potestatem ... tales leges non obligant in foro conscientiae; nisi forte propter vitandum scandalum vel turbationem ... Alio modo leges possunt esse iniustae per contrarietatem ad bonum divinum: sicut leges tyrannorum inducentes ad idolatriam, vel ad quodcumque aliud quod sit contra legem divinam. Et tales leges nullo modo licet observare (Summa theologiae, 2–1.96.4co).*

inconsistency in this context.⁴⁶ Now inconsistency is defined quite precisely: a set of propositions is inconsistent just in case not all of them *can* be true, i.e. if they contain a latent contradiction, the negation of one member of the set being derivable from some or all of the remainder. But this applies only to *propositions*, expressions that are accounted true or false, whereas we are concerned with *laws*, which are a kind of command. So we need a practical analogue of this theoretical notion of consistency. Well, by obeying a law we bring about a certain state of affairs, which in turn can be described by a proposition. The state of affairs in which divine and human good consist can also (theoretically) be described. So we can say that an unjust law will be one that, if obeyed, will result in a situation inconsistent with divine or human good. That cannot include laws that merely *permit* actions that go against divine or human good, since the CDF agreed earlier that the civil law is more limited in scope than the moral law, i.e. that not every immoral action should be illegal. It must, then, mean that an unjust law is one that *obliges* citizens to act against divine or human good, in a word, to do something wrong. This is a strict interpretation of the CDF's position, but it has textual support and we should not lightly pronounce laws unjust. Moreover, this is supposed to be a rational argument addressed to all people of goodwill, so it is appropriate that its premiss should be uncontroversial, rather than relying upon debateable views as to what is or is not in accordance with right reason. The premiss, then, means that no one is morally bound by a law that obliges citizens to do something wrong.

11 We may now paraphrase the second premiss of the argument as follows: 'Laws in favour of homosexual unions *oblige citizens to do wrong* because they confer legal guarantees ... to unions between persons of the same sex'. Even now, the phrase 'in favour of' is tendentious, suggesting laws that *encourage* same-sex unions, whereas what is proposed is merely a law to *recognize* existing same-sex unions. But, either way, the premiss appears to be false; it would be a hard task

⁴⁶ On contraries, see also Aristotle, *Categories* 10–11.

to show that the government's proposals would force anyone to do wrong, even allowing the CDF's premiss that homosexual sexual activity is always wrong. It is, of course, more plausible (if obscure, to a modern reader), at least at a first hearing, to assert that laws recognising same-sex unions are contrary to right reason, but only by interpreting 'right reason' in a sense other than that which it must bear in the first premiss. If, then, we give a sense to 'contradict right reason' in the second premiss under which the latter might be true, this will not be the sense that it bears in the first premiss. The argument, therefore, is invalid by reason of the ambiguity of its key term 'contradict right reason', in the two premisses.

12 Is the CDF's underlying thought in this argument perhaps that people who get married (and in that respect are doing something good) are *rewarded* by the government, whereas same-sex couples are doing something bad, so they should not be rewarded for it? However, the government's proposals make it clear that registration of a civil partnership will carry responsibilities as well as privileges, and these will certainly be enough to deter some same-sex couples from registering a partnership, just as the responsibilities of marriage are a deterrent to many heterosexual couples. In the government's eyes, and in that of most of our fellow-citizens, the notion that the privileges of marriage are a *reward for good behaviour* will be laughable. Or is the thought that such legislation is in some way *irrational* or *unreasonable*? In that case, it needs to be shown why, especially in view of the government's lengthy arguments in favour of it. At any rate, it is clear that this argument cannot be repeated as it stands; nobody will be convinced by it without further elucidation.

13 **The argument from reproduction.** Same-sex partnerships 'are not able to contribute in a proper way to the procreation and survival of the human race' and 'are totally lacking in the conjugal dimension'. The latter consists in 'mutual assistance' of the partners and being potentially reproductive (§7). This is a non-deductive argument that implicitly invokes the common good. The phrase 'in the proper way' is problematic; if it is used to make the premiss true by definition, then

we have only a tautology and not an argument. If, on the other hand, it is given a sense under which the premiss is contingent (empirical), then it needs to be spelled out. Meanwhile we can only ignore this qualification and consider the empirical statement: 'Same-sex partnerships are not able to contribute to the procreation and survival of the human race'. Certainly, same-sex partnerships are not reproductive (except, perhaps, in extraordinary circumstances). But it seems just to be false that they do not contribute to the survival of the human race, for it can be argued with some force that *overpopulation* is today a much greater danger to its survival than *underpopulation*, and that same-sex couples make a valuable contribution to it precisely by *not* having offspring. They actually bestow an advantage on heterosexual couples with children, by not increasing the competition for resources, and so benefit the married and their families. But perhaps, in the CDF's book, that is not contributing 'in the proper way' to human survival?

14 If the 'conjugal dimension' of a relationship consists, as the CDF states, in the mutual assistance of the partners and being potentially reproductive, then again it will be false that same-sex partnerships are totally lacking in the conjugal dimension, since, although not potentially reproductive, they offer the same facilities as marriage for mutual assistance and, indeed, exhibit it in practice. What is left as true in these two assertions is, therefore, simply that same-sex unions are not potentially reproductive. But it is unclear why a partnership should not be legally recognized on that account alone. The Church recognizes marriage between men and women where the woman is past child-bearing age, and there was a case a few years ago when a disabled couple were married (after an initial fuss) although disabled in a way that made reproduction physically impossible. So far, there is simply no argument here, valid or invalid.

15 **The argument from society.** The third argument is that marriage would inevitably be redefined if same-sex unions are given legal recognition, in such a way that it would lack any essential reference to heterosexual factors such as reproduction and child-

rearing. This is a causal argument and, as such, empirical. *Prima facie*, it is invalid if same-sex unions are distinguished in law from marriages: there is then no inevitability at all about redefinition of marriage. It raises, however, an important conceptual issue: has not marriage been redefined already? Are there not a number of distinct and mutually incompatible contracts in our society all of which are called ‘marriage’? To take two, compare Catholic marriage with civil marriage in the UK. Catholic marriage is a contract that, once validly entered into, can end only with the death of one of the partners; civil marriage in the UK is a contract that, while open-ended and not fixed, can be terminated during the lifetimes of both partners for a variety of reasons. These contracts, *qua* contracts, are patently incompatible with each other, in this and probably many other respects; one can of course live under both by voluntarily not making use of provisions of one that would conflict with provisions of the other. Again, Muslim marriage is a contract that allows the husband to have more than one wife; civil marriage in the UK does not. What we now have in a pluralistic country like Britain is a *family* of institutions all called ‘marriage’:

These phenomena have no one thing in common which makes us use the same word for all ... but they are *related* to one another in many different ways. And it is because of ... these relationships, that we call them all [‘marriage’] ... we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail. I can think of no better expression to characterize these similarities than ‘family resemblances’; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way.⁴⁷

⁴⁷ Ludwig Wittgenstein, *Philosophical Investigations* I.65–67.

16 It might be clearer, without denying the family resemblances between different types of marriage, if we were to distinguish between *matrimony* as a contract witnessed by a minister of religion under the rites authorized by that religion, and *marriage* as a civil contract registered by the state. It can then be said with some confidence that legal recognition of same-sex partnerships would carry no implications whatever for the definition of Catholic matrimony, which is entirely a matter for the Catholic Church. Since civil marriage and Catholic matrimony have already parted company – despite many resemblances – any redefinition of ‘marriage’ would be of no consequence to the Church. The CDF is probably correct, however, in thinking that legal recognition of same-sex unions, whatever they were called in the first instance, would eventually be called ‘gay marriage’ and that it would cease to be a defining characteristic of marriage that the couple were of different sexes. We are only a short step from this in the UK at present; all that would be required is to repeal section 11c of the Matrimonial Causes Act (1973), which declares marriages between persons of the same sex void. If registration of a civil partnership were to confer essentially the same rights and responsibilities on same-sex couples as marriage confers on couples of different sexes, it might well seem legislatively simpler to combine both sets of provisions into a single bill and call both ‘marriage’. But would this matter? Perhaps the churches are not ready for it yet, because they are reluctant to give up the limited power over civil marriage that they still retain, so that the issue is more one of power and influence than of morality. The differences between matrimony and marriage have already increased to the point at which it can only be a matter of time before we adopt the French system under which every marriage must be witnessed at the *mairie* and any religious marriage ceremony is quite distinct. And the Church in France has already learned to live with that.

17 **The argument from the legal order.** The fourth argument is that marriages have to be legally recognised because married couples ensure the succession of generations; same-sex unions do not exercise this function for the common good and so don't need recognition. This

seems to be a deductive variant on the second argument; what else is it 'to ensure the succession of generations' but to have and bring up children? As it stands, it is an example of a common logical fallacy, that of negating the antecedent of a conditional: *if* a couple can have and raise children, *then* it must be legally recognized; but a same-sex couple cannot have and raise children; *ergo* it must not be legally recognized. **Counter-example:** if there is an accident on the motorway, then we shall be late; but there will not be an accident on the motorway; *ergo* we shall not be late (We might be held up by congestion instead.) In order for it to be valid, the premiss would have to be: marriages require legal recognition *only* because married couples have and bring up children. But that is false: there could also be other reasons for giving legal recognition to a partnership, other reasons why it would be in the public interest to do so. The government, indeed, supplies them.

18 The result of this scrutiny of the CDF's four arguments is, therefore, that each of them is either invalid or has at least one false premiss. Accordingly, they fail to demonstrate that same-sex unions should not be accorded legal recognition. In these circumstances, Cardinal Hume's three criteria for assessing legislative proposals are still to the point:

The Church does have a duty to oppose discrimination in all circumstances where a person's sexual orientation or activity cannot reasonably be regarded as relevant. However, in making any response to proposed changes in the law which are designed to eliminate injustices against homosexual people, there are a number of criteria which have to be kept in mind. Among the most important are the following:

1 are there reasonable grounds for judging that the institution of marriage and the family could, and would, be undermined by a change in the law?

2 would society's rejection of a proposed change in the law be more harmful to the common good than the acceptance of such a change?

3 does a person's sexual orientation or activity constitute, in specific circumstances, a sufficient and relevant reason for treating that person in any way differently from other citizens?

These are matters of practical judgement and assessment of social consequences, and thus must be considered case by case – and this without prejudice to Catholic teaching concerning homosexual acts. It may well be, however, that Catholics will reach diverse conclusions about particular legislative proposals, even taking into account these criteria. (§13)

We agree with the criteria and shall apply them to the DTT's proposals for civic partnerships. We hope that the Bishops' Conference will also accept them not only for now, but as a reference for judging any future legislative proposals.

19 First Criterion. Some clarification of this criterion is needed, since it is not immediately clear what would count as 'undermining' the institution of marriage and the family. This is a point upon which elaboration from the working party would be welcome. We note that undermining these *institutions* is in question, not undermining particular families or marriages, although widespread damage to the latter would doubtless affect the institutions adversely as well. We suggest that the institutions would be undermined if, as a result of making legal provision for same-sex partnerships, they would be held in less public esteem, or the ties that bind the partners together would be weakened, or heterosexual couples would be less likely to marry, or children be less well provided for.

20 Civil partnerships are not an *alternative* to marriage but, rather, *complementary* to it. Doubtless some homosexual people who, in the

absence of civil partnerships, would have married will not do so if they can enter into a legally recognised same-sex partnership instead. But this will strengthen marriage, not undermine it. The reason is that – at least in our experience – a marriage in which one spouse is homosexual is rarely successful. To begin with, it is very unjust to the heterosexual partner who, even if aware of the orientation of the other spouse, is unlikely to appreciate initially the full consequences of it for a long sexual relationship. Fidelity becomes increasingly difficult for both spouses, and eventually they split up (probably after a period of regular adultery, which may be casual), with the bitterness and upheaval that are a commonplace of divorces, and unhappy consequences for any children involved.

Some recent statistics about promiscuous sexual activity are revealing. Police reports show that approximately half of those arrested for homosexual activity in public places are married men, and we can reasonably take this to be an accurate sample of the whole. This little-known fact seems to me enormously significant. It suggests that a large number of men who are predominantly or at least significantly homosexual in orientation, having adopted for whatever reason the course of marriage, are driven to seek satisfaction for their true sexual nature in this way. It is fair to ask how many of them would have been saved from the misery of their situation if building a decent same-sex partnership had ever been presented to them as a viable option.⁴⁸

A policy that increases the proportion of failed marriages could reasonably be held to undermine marriage, whereas one that decreases the proportion, by offering an alternative to people who are not suited for marriage, should increase respect for it.

⁴⁸ Jeffrey John, *'Permanent, Faithful, Stable': Christian Same-Sex Partnerships*. London: Darton, Longman & Todd, 1993, p.21.

21 Second Criterion. The government has no doubt that civil partnership registration ‘would encourage stable relationships, which are an important asset to the community as a whole. It would reduce the likelihood of relationship breakdown, which has a proven link to both physical and mental ill-health... Strengthening adult couple relationships not only benefits the couples themselves, but also other relatives they support and care for ...’ (DTI, §5.1). This is supported by other considerations:

Two ... sets of statistics, taken from surveys of the behaviour of gay men in the U.S.A. and in France, demonstrate that the incidence of promiscuous activity among gay men falls dramatically when they enter into a stable relationship. This is proof positive that gay monogamy, no less than marriage, fulfils its Prayer Book function as a ‘remedy against sin’. Again it is fair to ask how many gay men would have been saved from the degradation of promiscuous and compulsive sex if they had had the chance of living and loving in a stable relationship.⁴⁹

Even those who think that homosexual sexual activity is always wrong must consider which is worse, sexual activity within a stable relationship, or casual sexual activity. If the answer is the latter, then there is reason to think that, even from this point of view, legal recognition of civil partnerships will effect some moral improvement. But the question before us is only whether *not* recognising civil partnerships will be more harmful to the common good than acceptance: are stable sexual relationships, then, in the public interest or not?

22 Third criterion. The CDF frequently quotes itself to the effect that ‘Every sign of unjust discrimination in their regard [that of

⁴⁹ *ibid.*, p.22.

homosexual people] should be avoided.’⁵⁰ This may sound magnanimous, but the catch, of course, lies in the qualification of ‘discrimination’ by ‘unjust’. If, every time some particular piece of discrimination arises, it can be dismissed as not being unjust, the apparent guarantee is not worth much. On the other hand, it may be that, sometimes, discrimination may be justified. What we need to add to the CDF’s maxim, then, is a *defeasible presumption* that *any* discrimination will be unjust. That is to say, we begin by assuming that all discrimination is unjust, and the onus lies with those who think it is justified in a particular case to show this. Cardinal Hume’s third criterion then specifies exactly what has to be shown: that a person’s sexual orientation/activity provides a *sufficient* and *relevant* reason for treating him or her differently from other citizens. Some of the government’s proposals are directed to remedying *prima facie* injustices:

Many [people in a same-sex relationship] have been refused a hospital visit to see their seriously ill partner, or have been refused their rightful place at their partner’s funeral ... Couples who have supported each other financially throughout their working lives often have no way of gaining pension rights. Grieving partners can find themselves unable to stay in their shared home or to inherit the possessions they have shared for years when one partner dies suddenly without leaving a will.⁵¹

It is not acceptable just to assert that these instances of discrimination are not unjust because the people concerned are in a same-sex relationship. How is this relevant? And does it provide a *sufficient* justification for treating them differently from married couples on these counts? It is not up to us to show that the existing discrimination is unjust; if somebody wants to argue that it is justified, we will consider his arguments. ‘The intrinsic dignity of each person must

⁵⁰ as 7

⁵¹ DTI, Foreword by Jacqui Smith, p.9.

always be respected in word, in action and in law', said the CDF in an earlier document⁵², and Cardinal Hume commented: 'Any systematic failure to respect that dignity needs to be tackled, if necessary by appropriate legislation.'⁵³

23 We conclude that the government's proposal to provide legal recognition for same-sex partnerships is, in general, in accordance with Cardinal Hume's three criteria and even, on his principles, that such legislation *should* be enacted. Moreover, as a matter of strategy, since the government's proposals enjoy three-party support, the working group will have much more hope of influencing the legislation if it criticises it constructively than if it can only muster blanket disapproval. Some of the details, indeed, deserve closer scrutiny, which we shall give in our evidence to the DTI. One may be mentioned here because it relates to the argument of §18. The registration procedure proposed will require the couple to give notice of intention to register a civil partnership, then wait a minimum of 15 days while the registrar checks that the formal requirements are satisfied, and finally set a date for registration. If the government really wants to encourage stable relationships, then it is surely sensible to require the parties to consider very carefully whether to undertake such a major commitment, just as the Church imposes a long period of reflexion upon religious before they may take final vows. Even though couples will doubtless have thought about the matter well before giving notice of intention, 15 days does seem a very short minimum period (unless, perhaps, one party is dying). The delay is no doubt set at a minimum of 15 days to parallel the provisions for marriage and, indeed, we can think of no reason that would dictate a different period of notice for same-sex partnerships. But if stability is the aim, then perhaps it should be made more difficult to enter into either contract.

⁵² *Letter on the Pastoral Care of Homosexual Persons*, 1986, §10.

⁵³ Hume, *op.cit.*, §14.

24 The working party's report will have an evangelical dimension. It will, no doubt, be read by the CDF, but its content will be noted by lesbian and gay Catholics in this country and throughout the English-speaking world. The government estimates that between 5% and 7% of the population is lesbian or gay, which would amount to between 200,000 and 280,000 people in England & Wales alone baptised as Catholics. At the moment, the Church enjoys a poor public image among homosexual people who openly acknowledge their orientation, because Church officials have given fodder in recent years to those who are eager to publicize derogatory or condemnatory remarks about lesbian and gay people but do not give equal emphasis to supportive statements. We believe that the tone of the CDF document is ill-judged. It is not enough to repeat that lesbian and gay people 'must be accepted with respect, compassion and sensitivity'⁵⁴ and then go on to make the following assertions:

Those who would move from tolerance to the legitimization of specific rights for cohabiting homosexual persons need to be reminded that the approval or legitimization of evil is something far different from the toleration of evil (§5).

Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development (§7).

... there are good reasons [unstated] for holding that [same-sex] unions are harmful to the proper development of human society (§8)

Legal recognition of homosexual unions ... would mean not only the approval of deviant behaviour ... but would

⁵⁴ CDF, §4, quoting CDF (1986), §10 and *Catechism of the Catholic Church* §2358.

also obscure basic values which belong to the common inheritance of humanity (§11).

These remarks, even if they are consistent with the CDF's view that homosexual sexual activity is always objectively wrong, are calculated to give offence. If they amount to treating lesbian and gay people with sensitivity, what would count as treating them *insensitively*?

25 This should be a cause of sorrow to pastors (as distinct from ecclesiastical politicians), who will be mindful of our Lord's words 'Whoever causes one of these little ones who believe in me to sin, it would be better for him if a great millstone were hung round his neck and he were thrown into the sea' (Mark 9:42). Religion and sex has always been a heady mixture; it offers a great temptation to the self-indulgence of expressing our emotions rather than the honest labour of trying to tease out the truth. We need to be aware of this temptation and to guard against it. More obvious, perhaps, is fear of those who press us to a course of action against our better judgment with threats of reprisals. Every means should therefore be taken by the working group, short of compromising the truth, to avoid judgments that will be seen by lesbian and gay people as discriminatory and unjust; for that would indeed be, in the strict sense, 'to give scandal'. We do not envy the working group its task, for it seems impossible now to reassure lesbian and gay Catholics of the Church's good-will towards them without some public rebuke – though it might be tactfully phrased – to the CDF. As committed Catholics, we do not confuse the Church with Church officials, however exalted their rank, but we should like to be able to be proud of them, too. It is, therefore, doubly disappointing to have to criticize one of their documents not only for its low intellectual quality but also for its patent ill-will, especially in an age when the Church has argued vigorously for human rights elsewhere.

Appendix: Testimonies

The late Archbishop Worlock of Liverpool reported that

It is of special interest to recall Cardinal Hume's first intervention in the debate at the 1980 Synod on the Family, when he referred to the wording of the *schema* which said that 'the prophetic mission of the family is related to the teaching office of the pastors'. The Cardinal added a most significant consideration: 'This prophetic mission of the family, and so of husbands and wives, is based upon their experience as married persons and on an understanding of the sacrament of marriage of which they can speak with their own authority. This experience and this understanding constitute, I would suggest, an authentic *fons theologiae*, from which we, the pastors, and indeed the whole Church, can draw.'⁵⁵

What is sauce for the goose is sauce for the gander, so we have asked some members of *Quest* in long-standing relationships to say

- how the government's proposals will affect you
- whether you would consider registering a civic partnership and, if so, why
- how your view of (heterosexual) marriage would be affected by enactment of the government's proposals
- together with anything else that you would particularly like the working group to know.
- The emphasis throughout should be on your personal experience.

[The names of the contributors were given to the working group, but have been removed here.]

⁵⁵ Foreword to John Henry Newman, *On Consulting the Faithful in Matters of Doctrine*. London: Collins, 1986.

A & B

If the government's proposal to acknowledge gay couples through enabling them to register their partnership were enacted, then my partner and I would want to register our relationship. We now want the same responsibilities, and advantages, that heterosexual married couples enjoy (pension rights, inheritance rights, hospital visiting rights...the list goes on). After having been together for twelve years, paying far more tax during this time than equivalent married heterosexual couples pay, we both feel that it is about time that our relationship was fully recognised in law.

We have found through our own experience that at present there are horrendous double standards in the way gay couples are treated by the State. For example, during recent litigation against my former employer, I was informed that one of the reasons why I did not qualify for legal aid was because my partner's income took our 'household income' through the threshold for such aid. My partner (or at least his income) was recognised by the State. Having now won the litigation, I am very much aware that should I die in the near future, my partner would face onerous tax issues, because my partner is not recognised by the State as my spouse.

My partner and I have faced life's joys and tribulations together, supporting one another throughout the difficult times, as many, though not all, married couples do. I feel that we do not deserve to be discriminated against by the State (nor indeed by the Church). Our relationship deserves the same recognition and support (including pastoral support) that married couples can expect.

We do not agree that by enabling gay couples to register their partnership, the government will be undermining heterosexual marriage. The issue often appears to be presented as if such a registration process (for gay couples) would cause straight couples to seek some alternative to marriage. We do not see why there should be any difference between a civic ceremony in a town hall for a straight couple, such as that which takes place at present, and a ceremony for a gay couple. Further, our families and friends have shown us support in

respect of this matter, with some of the latter expressing surprise upon learning that the ‘partnership registers’ occasionally featured on the television news give the participants no additional rights or responsibilities as far as the law is concerned.

C & D

We believe the Government’s proposals will legitimise our relationship removing any doubts or ambiguities regarding such matters as inheritance, pension rights and status as next of kin. We have been in a relationship for forty-three years and are already accepted and recognized as a couple by families and friends as well as a large number from the wider community, including the church. However, we would welcome the opportunity to register our relationship as a civic partnership for the above legal advantages.

Our view of marriage both as a sacrament and a social contract between heterosexuals would be unaffected by the proposed legislation.

We wish the Working Group, and the hierarchy generally, could be persuaded to consider us, and others like us, not as elements in some abstract theological theory, but, in the spirit of the gospel, as human beings, fellow Christians, with social as well as pastoral needs.

E & F

We are in the second year of a strong, close, loving and monogamous relationship – as strong and good as the best of marriages. No legislation for or against registering same-sex relationships can ever detract or enhance the love that we have for each other. However, from our love for each other comes a strong desire to protect our future and rights together – this we believe will be given to us when this new legislation goes through.

I recently had to go into hospital to undertake some serious investigations, there could have been complications and this caused us worry. Andrew was worried for me, he wanted to be there to support me, he wanted to be kept informed, and he wanted to be present in

everything. I wanted the same, and with some element of risk involved I also wanted him to be protected and provided for in case of the worse, I really needed him to be close in everything. If he was my civil partner he would have these rights, at present he has none. We relied on the good will of the hospital staff (who were very supportive) but what would happen if the good will was not there?

Incidentally, when it comes to paying out money, buying new furniture, a car or a bathroom the salesperson is very happy to recognise us in our relationship, is keen to involve us both in decision making and of course to accept the cheque. Our family, friends and neighbours are supportive of our relationship, it seems only the government (and sadly the Church) lags behind in these views.

We are both committed Catholics and understand the tensions and difficulties that some within the Church have with this. This really hurts and we don't believe that Christ would behave in this way to us, it seems that they would rather brush this under the carpet and would rather we did not exist as adult committed Catholics. For them we are an embarrassment. But we believe and we are committed to the Church as much as we are to each other despite wave after wave of diatribes against us, our relationship and our love for each other.

It is interesting the view that heterosexual marriage would be cheapened by enactment of the government's proposals as we see many sound and faithful marriages that would not be affected by such externalities. We also see some heterosexual marriages which are weak, a sham, un-wholesome – but legal. Marriage is a good thing which should be encouraged and all should be encouraged to enter the permanency and stability which this brings. Civil partnership will not weaken marriage, but enhance the importance of this gift.

We would consider a civic partnership to cement our partnership rights and further help to support each other in our relationship.

G & H

How would partnership rights affect us?

Firstly, let us state that we have made legal provision to protect one another insofar as we understand is currently possible. We purchased our home jointly in such a way that, should one of us predecease the other, the full ownership of the property will revert to the surviving partner. We have each made a 'living will' so that, in the case of medical emergency, one of us can try to have his opinion considered and be consulted by medical staff regarding the course of treatment to be taken. We understand, however, that any doctor could choose to totally ignore this document without consequence. We have each registered with our individual employers an 'expression of wish' with regard to payment by our employers of death-in-service benefit. But again, this payment is allocated at the employers' discretion; so our wishes could be ignored.

So, partnership rights would firstly give us peace of mind in knowing that each would be legally registered as the others next of kin – so, for example, any medical emergency scenario would be much simplified. Also, by being registered as legal spouse or partner, our employers would automatically make any death in service payment to the surviving spouse/partner. In the event of the death of one of us, death duties payable by the surviving partner, as sole inheritor, would be greatly diminished.

Would we consider registering a civic partnership and, if so, why?

Once it becomes available, we fully intend to legally register our partnership. Firstly, we already take as much responsibility and care for each other as is legally possible at present. This legislation will allow us to take fuller responsibility for, and care of, each other. Secondly, for all the benefits stated above. Thirdly, to strengthen the already-existing commitment we have to one another. We also believe it will strengthen our standing within our local community by our public acknowledgment of our commitment to one another.

How would our view of (heterosexual) marriage be affected by enactment of the government's proposals?

The availability of marriage to heterosexual couples will remain unaltered by this legislation and we do not see any correlation to the legal registration of our partnership. We do not believe that our ability to register our partnership will in any way undermine heterosexual marriage or the fabric of society (as is being implied by some quarters in the press).

We have also received the following testimonial from a priest, whose name has been supplied in confidence to the Chairman of the working group:

I am a priest who has developed a ministry to gay men since the AIDS epidemic first came to public attention in 1987. This ministry has been carried out with the permission of four bishops under whom I have exercised my priesthood.

An attitude prevalent with many of the gay men I have met is that the Church is not interested in them. They have often received unsympathetic condemnation in the Sacrament of Reconciliation rather than the forgiveness and sympathetic spiritual help that they had expected. Most don't bother with it any more. Many stop going to Mass because they cannot square the lived experience of their sexuality with what they perceive as the hostile attitude of 'the Church', by which they mean unhelpful priests and 'the Vatican'.

But there are also same-sex partnerships of long standing: often of greater stability than some marriages. These couples are often active in various parish ministries, e.g. Special Ministers of the Eucharist, Readers, musicians and artists. I know of none of these couples whose relationships is not expressed, at least occasionally, sexually, though they would claim that this is not what sustains their relationship. They would claim that it is the love by which they support and value each other. They often have a very real faith and deep spiritual life through which they become outgoing, helpful people. They find it difficult to

accept that the teaching of the Church on these matters is actually true. They cannot, therefore, assent to it.

Most of these couples welcome the proposed legislation to provide equal civil rights to those of heterosexual couples and go on to say that they receive more help from relevant NGOs and Parliament than they do from the Church.

They now look to the Bishops to support the proposed legislation as a practical expression of some statements from the Bishops that the Church should welcome gay men and treat them with justice and lack of discrimination.

My own hope would be that some priests would be encouraged to develop pastoral initiatives in providing support for gay men and that this support would be publicised so that all members of the Church would be aware of its availability and so bring it to the notice of those who would benefit from it. At present I feel my ministry, after all these years, seems like an undercover operation!

There are many gay men who suffer the shame of a promiscuous life style because they not only feel rejected by the Church but also by God. There are others who struggle to live a celibate life style and yet wonder if this really is the imposition of a loving God or just an unloving and unjust rule of the Church.

The proposed legislation is an opportunity for the Church, first, to welcome help towards justice for the gay community and then seek to participate in that help by making publicly authorised spiritual help available for gay men, in a way in which they can accept it.

Response by *Quest*

to 'Civil Partnership: A framework for the legal recognition of same-sex couples' (Women & Equality Unit of the Department of Trade & Industry, 2003)

Q*uest*, an association for lesbian and gay Catholics, welcomes in general the government's proposals to provide for legal recognition of same-sex partnerships. We believe that these proposals will remedy some injustices, will directly encourage stability in such partnerships and also, indirectly, enhance stability in and respect for marriage, by providing a 'respectable' alternative for those not suited for marriage but who nevertheless want to live in a permanent intimate relationship. Moreover, if these proposals will enhance the stability of partnerships, they will also increase the security of children adopted by partners, whether of the same or of different sexes. In all of these ways, legal recognition of same-sex partnerships is in the public interest, and we trust that the government's proposals will be included in the Queen's speech at the opening of Parliament in the autumn.

We are aware that the Catholic Bishops' Conference of England & Wales has set up a working group to prepare its own response to these proposals and we have already submitted evidence to that group in the above sense. However, the Bishops' Conference has not established consultation criteria comparable to those approved by the Cabinet Office and published in Annex D of 'Civil Partnership'. The working group has not issued a consultation document, nor even asked publicly for submissions. It has not itself published a list of its members, nor any assurance that its report, when complete, will be made public. We are especially concerned that no member of the working group is openly lesbian or gay, so that no voice is given to those whom these proposals principally concern. Moreover, the working group and, even more, the Bishops' Conference, are working under external pressure to conform to a blanket condemnation of any

form of legal recognition for same-sex partnerships promulgated by the Vatican on 3rd June 2003. We have criticized the arguments in that document in our evidence to the working group, and this is not the place to pursue the matter. Our purpose here is solely to warn the government that it cannot safely be assumed that any submission from the Bishops' Conference expresses the views of British Catholics as a whole, nor even that consultation – in the sense that the government understands it – was undertaken before the Conference formulated its own view. Such evidence as we have – admittedly anecdotal – suggests that many if not most British Catholics who have thought about the matter do not agree with the Vatican's strictures.

We now turn to the questions posed in 'Civil Partnership' and to other details of the proposals.

4.13–17 We agree that registration must be public, but instead of requiring an address, the Church of England (default) parish or Local Authority ward could be given, since these are already legally recognised for some records and documents; or perhaps place of birth. To prevent misuse, we suggest that additional measures as well as restricting some of the information supplied could help. Misuse could be made an offence, on the lines of the provisions for the Gender Recognition register. Evidence of identity could be required for access to the register, and a record kept in case of future problems.

More important than details of how the register is published are the circumstances under which, in virtue of registration, an individual may be forced into disclosure of his or her relationship. For example, partnership has a direct effect on pensions. For that and reasons of long standing tradition, it is quite usual on an application form (and indeed later during employment) for an employer to ask, because he needs to know, the marital status of the applicant/employee. This is either by tick-a-box or by fill-in-the-box. A registered partner cannot be single (the duties imposed on the employer are greater than those for a single man), yet he is not married but at the same time is ineligible to marry or to form a new civil partnership. This may be relevant to his employment. Failure to disclose a civil partnership

would then be to deceive the employer, and will in any case be discovered when he seeks to enforce his pension rights or to take compassionate leave because his partner is ill. If he does disclose it, however, he may lay himself open to discrimination. This may not be immediate, but when promotion or retirement is in question. The Sexual Orientation Regulations included in the Employment Equality Regulations 2003 are a particular cause of concern in this connection, as they allow requirements relating to sexual orientation to be applied in some circumstances where the employment is 'for the purposes of an organised religion'.

4.19–20 The principle to be followed here is that discrimination in any part of the UK is discrimination in every part of the UK. Moral issues are impervious to location, unless it can be shown that location introduces a moral difference, i.e. there is a defeasible presumption in favour of the above principle. Laws that introduced or perpetuated discrimination would therefore be unjust. We therefore agree with the government's conclusion in 4.19 while, in regard to 4.20, we think it totally unacceptable not to introduce civil partnership provisions in Northern Ireland. There is an especially discriminatory climate against lesbian and gay people in parts of Northern Ireland; to exclude civil partnerships in that province would send out a signal that the government condones such attitudes. And this will be a feature in which we live, not in a united kingdom, but in a disunited one.

7.4 Agreed.

7.20 Two principles appear to be in conflict here. The first is that same-sex partners and different-sex partners should be treated on a par unless there is something in the nature of the two types of relationship that dictates otherwise. The other is that a given provision should be reasonable in itself. On the first principle, same-sex partners not being civil partners should receive exactly the same treatment with respect to Social Security benefits as unmarried partners. A reason is then given for treating unmarried different-sex partners the same as married partners, namely, that otherwise the former would benefit financially

by not getting married. There is a further, tacit premiss that it is in the public interest that different-sex partners should marry. But does this require that remaining unmarried should *never* confer a financial advantage? Surely it would be enough if, *on balance*, the financial advantages of marrying outweighed those of unmarried cohabitation? When we consider widow(er)s' pensions, inheritance tax, tenancy succession and the whole gamut of financial advantages in marriage, surely there can be no doubt where the financial balance lies? So perhaps the most reasonable solution would be to change the treatment of unmarried different-sex partners with respect to Social Security benefits, treating them as single.

A further consideration militates against treating same-sex partners not being civil partners, for this purpose, as though they were in a civil partnership. Many more people of the same sex share a household, either simply for companionship or for economic convenience, where there is no question of a sexual relationship, than people of opposite sex. In their case, there is no question of registering a civil partnership, and hence no argument that they should be encouraged, in the public interest, to do so. It would be extremely invidious for public servants to have to determine, in all of these cases, whether or not an intimate relationship were in question. So, if there is a case here for treating people of the same sex who elect to share a household as if they were married for Social Security purposes, the reason cannot be that they enjoy a sexual relationship, but simply that they share a household. That, indeed, appears to be a more relevant reason anyway; but if this is the real ground for differential treatment, let it be stated as such – that they live together. It has nothing whatsoever to do with sexual relationships, whether hetero- or homosexual, and the reference to marriage is a red herring. The appropriate question to ask these people is simply 'do you share an address *and a common purse* with anyone else?' In this way, most – though perhaps not quite all – temporary interdependency is caught, whether a multiple flat share that cooks communally rather than individually, or adult children in the parental home.

8.5 The same principles apply here as in 7.20. However, the *reason* for treating unmarried different-sex couples on a par with married ones is different: presumably, it is that in both cases the partners have assumed financial responsibility for each other. Again, then, the relevant point is that there is a shared household. In the case of registered partnerships, whether civil or marriage, the financial responsibility has been assumed legally, so partners to both should be treated equally with respect to child support. Where the mutual financial responsibility is *de facto* but not *de iure*, a decision has to be made whether to count it as equivalent to a *de iure* responsibility so far a child support is concerned. This is complicated because *de facto* responsibility is not an all-or-nothing matter; mutual financial responsibility may be accepted only *up to a point*, and that point may differ from case to case. But this calls into question whether unregistered couples should in this respect be treated the same as registered couples; it does not drive a wedge between unmarried heterosexual couples and unregistered same-sex partners. We conclude that *either* unregistered same-sex partners should be treated as cohabiting unmarried heterosexual couples with respect to child support, *or* that the treatment of the latter should be reviewed.

Are there any other rights and responsibilities that should be given to registered civil partners?

1 The right to have a Registered Partnership converted to a marriage if legislation is ever introduced to allow same-sex marriage.

2 The right not to be discriminated against in employment nor branded in a job application by title of relationship. This should include a clear statutory limit in the request for information and job application forms, such as ‘are you single, legally attached, liable for maintenance/provision for family?’ rather than ‘are you married, single, divorced or separated?’

3 The duty to maintain children and the amount of maintenance to be fixed by formula for liability and amount, as now for heterosexuals in the Child Support Act 1991, §26, and therefore the

‘right’ not to be branded as separate and unusual by a different type of Court proceeding as at 8.9. This would also benefit heterosexuals. Proof would be a simple paper exercise for liability and the amount a matter of arithmetic.

4 The Human Fertilisation & Embryology Act 1990 and associated rules need more thought as to detailed drafting, but there is no other good reason why Registered Partners should be excluded from its provisions.

Terminology: ‘civil partnership registration’ and ‘registered partner’.

‘Spouse’ is already a technical term, otherwise old-fashioned and gradually becoming obsolete, and so need not imply marriage. There would therefore be no insuperable obstacle to adopting it instead of ‘registered partner’, and this would have the additional advantage that National Insurance, Inland Revenue and electoral forms would not have to be altered.

Some people would like to see registered same-sex partnerships called ‘marriage’. Eventually, if a clear distinction is drawn between civil marriage and religious marriage as different if related contracts, there might be no objection to recognizing registration of same-sex partnerships as a form of civil marriage; and it would certainly simplify legislation. However, in spite of their differences, religious and civil marriage are not, at present, clearly differentiated in the public mind, so that to call partnerships ‘marriage’ would be to provoke opposition to the government’s proposals not because of their substance but merely in the interest of conceptual tidiness.

On the other hand, ‘partnership’ has strong commercial overtones; to avoid them, ‘life covenant’ could be considered, at any rate as a temporary expedient, in the expectation that, once the institution is established, popular usage will gradually change and legislation can then be amended to catch up with it.

Other comments:

2.9 *Rights of other home-sharers*

There is a potential unforeseen consequence here. Siblings are within the prohibited degrees and therefore, as the government says, a separate issue. But flat-mates may not be if they are of the same sex and find it financially convenient to register. Same-sex partnerships require a 'relationship', undefined in the document, so two elderly widows, for example, who share a flat but not a bed, or two retired celibate priests, might register a partnership simply in order to pool their financial resources and maximize the transferable resources for the survivor. There is no requirement that a civil partnership should be a *sexual* partnership, even though the legislation has been devised primarily for the benefit of same-*sexual* partners. It could just as well be an economic partnership.

Further, there will be a risk to the interests of landlords such as the Peabody Trust. Imagine that I am terminally ill and require an expensive drug treatment that cannot be prescribed on the NHS. The treatment will prolong my life for a finite period. My flat is a highly desirable property. I am poor. My will leaves what little I have to my nephew and niece. A 'kind' man who does not love me and cannot afford to buy a flat offers me a substantial sum, which will not cover the deposit on a London flat but will pay my drugs bill, to form a partnership before I die. When I do, he will be free to marry, but he will also have secured the tenancy for himself and his bride as against the landlord, who will not have vacant possession.

4.10 *Place of Registration*

While approving this provision, we note the phrase 'a place where registrations normally take place' and trust that this will include all of the places nowadays available for the registration of marriages, assuming the proprietors of those places are willing for them to be used for the purpose. It is likely that some couples will want to seek the support of their friends and relations for the match in the usual way by making a considerable social occasion of the event, possibly in

conjunction with a religious event of a more or less official character. This will also gain support for the bill from the licensed and hospitality industries.

4.12 Registration: step 2

One of the government's stated aims in introducing civil partnership is to 'encourage more stable family life' (1.2). Yet it proposes that a civil partnership may be registered after a minimum of 15 days after giving notice to the registrar. No doubt the intention is to parallel the arrangements for registration of a marriage. In both cases, however, to enable such a major decision so quickly hardly seems likely to encourage stable relationships. The parties will no doubt have thought about the matter before giving notice to the registrar but, even so, a 'cooling-off' period of six months is more realistic and would allow for the consequences to be more fully understood, while 4.9 allows for shorter periods in exceptional circumstances. The period proposed by the government puts both marriage and civil partnership on a par with taking out an insurance policy and makes it only half as serious as buying goods on 30 days' approval. Is that really the government's intention? There is, though, no reason why it should be more difficult for same-sex partners to enter a civil partnership than for a heterosexual couple to marry, so this would require a review of marriage law, too. But registered Civil Partnership is ideally placed to set an example from the outset of well-considered stability to other forms of partnership, both more and less formal. Same-sex partners are less susceptible to the pressures of time that are occasionally present less or more obviously in the solemnization of some heterosexual marriages.

4.21 Mutual Recognition of Civil Partnerships

This paragraph speaks only of recognition in England & Wales of civil partnership schemes operating in other countries. Clearly the government should give parity not only to visiting and resident foreign partners, one of whom may be a UK national, but if it does, may then expect parity for UK partners travelling, or taking up residence and tax

status, abroad. Once civil partnerships are established in the UK, the government may well find itself compelled to extend the benefits conferred by partnerships on UK nationals (though not the ability to form them in the first place), to visiting or resident European Union nationals in the UK. As a general rule, it is not permissible to confer rights and benefits upon one's own nationals and then to discriminate against other EU Nationals by not conferring the same rights upon them when here.

Consideration should also be given, however, to recognition abroad of the scheme to be introduced here. Perhaps the way in which Double Taxation Relief agreements were negotiated with other countries individually would be a model for how to proceed; at any rate, steps should be taken to secure the recognition of the new scheme here in as many other countries as possible. A start could be made with the other countries of the European Union. Though the government cannot legislate for other countries, the eventual White Paper could include a statement of intent to negotiate such agreements wherever possible.

There is a further reason why the government should pay attention to recognition of civil partnerships by foreign governments. In 3.3 it lays down provisions to ensure exclusivity of partnerships. But what happens if a person who has validly entered into a civil partnership in England or Wales goes to a country that does not recognise same-sex partnerships and validly marries there? Suppose, further, that marriages in that country are recognised in England & Wales (as is most likely). Not only would there be problems if the person in question returned to England or Wales, but his/her Domicile of Choice could be uncertain and in the event of death abroad (especially if intestate, or with a will recognised in one country but not in the other) inheritance, too. These issues should at least be considered before legislation is introduced and, if necessary, advice given to those who have registered a civil partnership and subsequently wish to emigrate.

5.4 *Grounds for Dissolution*

‘Unreasonable behaviour’ in the case of a marriage may include unreasonable *sexual* behaviour, and by now it is well-established what counts as such. But what would count as unreasonable sexual behaviour in a same-sex partnership? Since the government’s proposals have studiously avoided stating that civil partnerships are sexual partnerships, the criteria for unreasonable sexual behaviour are unclear. For example, would there be an analogue of adultery? How would this be relevant if the partnership were purely economic? Are the courts to be expected to work out the criteria for themselves?

7.2 *Changes to the Immigration Rules*

We welcome the proposed changes. They will only affect a very small number of people, but the pain caused those few by the present disparity in the treatment of married couples and of same-sex partners is great. Three consequences, however, should be noted:

Registration will not prevent enquiry as to the genuine nature of the partnership, as happens now to avoid ‘marriages of convenience’, so yet again we need to know whether, for a partnership, sexual activity is a *sine qua non* or not an issue at all.

Our previous suggestion that the period of notice for registering a partnership should be longer than 15 days might make it impossible for a foreign national to stay long enough to qualify.

A marriage can be contracted almost anywhere in the world, but a civil partnership could only be registered in the UK. We suggest that this facility be extended to UK Diplomatic Missions abroad, where at least one partner is a UK citizen.

7.6–8 *Enduring Power of Attorney*

‘No *significant* differences’. Why not simply ‘no differences’? Is there an implied qualification here and, if so, on what points?

7.9 *Incapacitated Adults*

Since the proposal extends to all partners irrespective of legal status, it would *restrict* the freedom of someone who did not want to register a

partnership (or marriage) because he or she did not want to confer decision-making rights on his or her partner in these circumstances.

7.11 Prisoners

Should this be restricted to subsisting partnerships *prior* to imprisonment? Here Partnership is far more open to abuse than marriage. Imagine two male child-abusers, in gaol. It is the first refuge of such unfortunate persons falsely to label themselves gay. They decide to form a Partnership on a purely cynical basis, having no love for each other, though that cannot be questioned, in order to meet to plot their future activities upon release and to support each other in trying to dupe the Parole Board that they are no longer a danger to others, for they now have each other. No certainty of success, but some will try – a most unpleasant prospect that will leave the government, legislature and gay community in a very bad light if just one case succeeds.

7.17 'Next-of-kin'

The treatment of hospital visiting in 'Civil Partnership' is totally inadequate. In the whole range of topics covered by the document, the two that cause the greatest distress to lesbian and gay people are refusing medical information and visits to their partners (together with registration of deaths) and denial of tenancy succession. Granted that 'next-of-kin' is not legally defined in the context of hospital visiting, it nevertheless has a clear meaning in ordinary language: one's nearest relative. Unless explicitly warned to the contrary, someone admitted to hospital is likely to understand it in that sense, to be unaware of the legal niceties, and probably to be in no condition to think clearly about the consequences of how the question is answered. If, indeed, there is no law governing who can visit a patient in hospital, then this issue can surely be addressed within the NHS (with corresponding provision for private hospitals) without the need for legislation. Moreover, it can be dealt with immediately. What is needed is to replace the question about next-of-kin with a question asking, instead, whom the patient wishes to be informed in case of emergency, and for

a list of people who may visit if general visiting is medically deemed to be inadvisable and/or receive information about his/her condition. Patients would then know exactly what provisions they are making and unnecessary distress be avoided. We have heard many unhappy stories about this, yet it seems that it would be quite easy to rectify.

Piecemeal legislation

It is evident from 'Civil Partnership' that the government wishes, no doubt for strategic political reasons, to legislate for civil partnerships as far as possible in isolation from marriage, and perhaps there is no practical alternative to doing so for the present. However, it is already clear that much other existing legislation, upon which marriage has had an effect, will have to be amended. This shows that recognition of certain personal relationships by the state has pervasive consequences in many other spheres of life. It is therefore questionable how far legal recognition of a new form of personal relationship can be carried through successfully without looking at it in the context of relationships already recognised. The danger of piecemeal legislation is that it opens the door to unexpected and unforeseen consequences that are unwelcome. We have already drawn attention to one of these (apropos 4.21), and have noted another point (4.12) where a review of marriage law is desirable. Logically, there is a strong case for looking at legal recognition of personal relationships as a whole in order to devise appropriate legislation that will be both consistent and comprehensive.