couples. There are no automatic rights to inherit the estate, even if cohabitants have children together, unless there is a will. Cohabitants are ineligible for the tax relief or exemptions that apply to spouses and civil partners. Their pension rights are different to surviving spouses and more limited.

In England and Wales, same-sex couples can engage the same rights as married couples. Same-sex marriage was legalised with relatively little fuss through the Marriage (Same Sex Couples) Act 2013. Dr van Acker believes this legislation resulted from strategic politics and traditional values. She described the legislation as being about equality, and commitment, inclusive values, adopted through the Tory brand and decisive leadership on this particular issue during David Cameron's premiership, although this was not extended to introducing improved rights for cohabitants. It was based on traditional family values, namely a practical and symbolic affirmation of love, commitment, stability and responsibility. By contrast, recent Australian governments have demonstrated indecisive leadership and internal party divisions on same-sex marriage, but not in respect of cohabitation.

A postal voluntary plebiscite took place in Australia in relation to the introduction of same-sex marriage in Australia in 2017, the outcome of which was 61.6% in favour of marriage equality. On 7 December 2017, the Australian Parliament passed a Bill almost unanimously to allow two people regardless of their sex to marry, and the first same-sex marriages in Australia took place shortly afterwards. Comparative research on the experience of different countries continues to inform policy and decision makers in planning changes to legislation or development of case law. As the trend emerges for cohabitants to live together for longer periods and later in life, it will be interesting to see how the breakdown of those relationships are treated in terms of addressing needs and entitlement.

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Equality law update: *Re M*

The Prime Minister announced the Race Disparity Audit in August 2016 with a view to shining a light on how people of different ethnicities are treated across public services by publishing data held by the Government. In October 2017 the interim report was published (https://www.ethnicity-facts-figures.service.gov.uk). It covers a wide range of areas with some shocking findings about racial disparity in public services and outcomes. Within the justice system it found some of the more acute differences, with black defendants more likely than any other group not to be granted bail and employment tribunal claims from minority groups at 18% although they only make up 10% of the workforce in 2016. It is a shame that the audit so far has not considered family justice within its ambit. Given the number of young persons and children our area of law deals with the Government should be urged to redress this gap as a matter of urgency and arguably must do to ensure it is complying with its obligations under Art 2 of the Convention on the Rights of the Child:

> 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

On the 30 November 2017 the new, 'Practice Direction 3 AA – Vulnerable Persons: Participation in Proceedings and Giving Evidence' came into force. The detailed direction will give more force to considering issues of discrimination and how they impact on a person's ability to participate in proceedings. For example:

> '2.1 Rule 3A.3 FPR makes clear that when considering the vulnerability of a party or witness for the purposes of rule 3A.4 FPR (the court's duty to consider

how a vulnerable party other than a child can participate in the proceedings) or rule 3A.5 FPR (the court's duty to consider how a vulnerable party or witness can give evidence), the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7 FPR. Where rule 3A.7(d) refers to questions of abuse, this includes any concerns arising in relation to any of the following:

a. domestic abuse, within the meaning given in Practice Direction 12J;
b. sexual abuse;
c. physical and emotional abuse;
d. racial and/or cultural abuse or discrimination;
e. forced marriage or so called "honour based violence";
f. female genital or other physical mutilation;
g. abuse or discrimination based on gender or sexual orientation; and
h. human trafficking.'

The Practice Direction is a welcome change which should lead to greater awareness of equality issues as well as effective participation for vulnerable parties in family proceedings. At the end of 2017 in *Re M (Children)* [2017] EWCA Civ 2164, [2018] FLR (forthcoming) Sir James Munby, President of the Family Division, sitting with Lady Justice Arden and Lord Justice Singh delivered a compelling and comprehensive judgment dealing with issues of discrimination for the family practitioner and anyone concerned with equality and discrimination. In *Re M* the Court of Appeal allowed an appeal from the judgment of Mr Justice Peter Jackson (as he then was) in *J v B and The Children (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4, [2018] 1 FLR 59 where a transgender father was refused direct contact with his children. In 'Equality and anti-discrimination: key principles for the family lawyer' in July [2017] Fam Law 742 I wrote:

> 'This is a troubling judgment in many respects. If transgender were replaced with another protected characteristic it may be harder to see how far the discriminatory attitudes of others should be weighed in the balance.'

It is fair to say that the President has deftly dealt with issues of discrimination in *Re M*. The appeal concerned the father's application for direct contact with his five children which was refused by Peter Jackson J who had decided that because the father was transgender the children would face discrimination from the community if they had contact with their father and that outweighed all other factors in favour of them having a relationship with their father. As noted by the President at the outset of his judgment:

> 'The outcome of this appeal is of very great importance to the father, to the mother and the children, and to the ultra-orthodox North Manchester Charedi Jewish Community in which the children have always been brought up. But in its potential implications this appeal is of profound significance for the law in general and family law in particular. For on one view it raises the question of how, in evaluating a child's welfare, the court is to respond to the impact on the child of behaviour, or fear of behaviour, which is or may be unlawfully discriminatory as involving breaches of Art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or of the Equality Act 2010.' (para 55)

The Court of Appeal set out the main facts of the case. The father is transgender and left the family home in July 2015 to live as a transgender person. She now lives as a woman and for that reason alone is shunned by the North Manchester Charedi Jewish community ('the community'). The children would face ostracism by the community if they have direct contact with her. Peter Jackson J noted that these practices within the community amounted to unlawful discrimination against and victimisation of the father and the children because of the father's transgender status (para 178(7)). Peter Jackson J identified in his judgment fifteen arguments in favour of direct contact but found that the central question, namely

'the reaction of the community if the children were to have contact with the father' (para 8 CA) led him to refuse the father's application for contact.

The Court of Appeal considered the judgment in depth noting the evidence from a foster carer of the likely ostracising and discrimination the children will face if they see their father (para 15) and the evidence of the attitude of the community given by Rabbi Oppenheimer (para 17). Rabbi Oppenheimer had written that the best interests of the children meant that they could not and should not be expected to have any direct contact with their transgender father. The Court of Appeal noted Rabbi Oppenheimer's 'chilling explanation as to why indirect contact would not give rise to a risk of ostracism: "it would not enable the children to have a living relationship" ' (para 22). Peter Jackson J concluded, inter alia, that:

> 'So, weighing up the profound consequences for the children's welfare of ordering or not ordering direct contact with their father, I have reached the unwelcome conclusion that the likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community is so real, and the consequences so great, that this one factor, despite its many disadvantages, must prevail over the many advantages of contact.' (para 187)

The Court of Appeal considered three grounds of appeal which were all allowed. I focus here on the most relevant points on equality and discrimination. The court considered the characteristics of the reasonable man or woman in contemporary British Society and cites the decision of Thorpe LJ in *Re G (Residence: Same-Sex Partner)* [2006] EWCA Civ 372, [2006] 2 FLR 614:

> '[I]f the reasonable man or woman is receptive to change he or she is also broadminded, tolerant, easy-going and slow to condemn. We love, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority. Equality under the law, human rights and the protection of minorities, particularly small minorities, have to be more than what Brennan J in the High Court of Australia once memorably described as "the incantations of legal rhetoric".' (para 48).

The court in *Re M* was reminded in the skeleton argument on behalf of Stonewall (Ms Monaghan QC and Ms Hannet) that norms that were safe decades ago no longer apply. They cited for example the case of *Re D (An Infant) (Adoption: Parent's Consent)* [1977] AC 602, where Lord Wilberforce said:

> 'A reasonable man would say, "I must protect my boy, even if it means parting from him for ever so that he can be free from this danger". It follows that this is not a case of a rare incident of misconduct or criminality. The father has nothing to offer his son at any time in the future.'

The court emphasised two essential principles central to the issues before them. The first that the function of the judge in a case like this is to act as the 'judicial reasonable parent':

> 'Judging the child's welfare by the standards of reasonable men and women today, 2017, having regard to the ever changing nature of our world including, crucially , for present purposes, changes in social attitudes, and always remembering that the reasonable man or woman is receptive to change, broadminded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society. We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and where their human rights are respected. We live in a plural society, in which the family takes many forms, some of which would have been thought inconceivable well within living memory.' (para 60).

The second principle is the positive duty on a judge to attempt to promote contact. The Court of Appeal found Peter Jackson J's judgment vulnerable on a number of grounds. He had failed to ask himself a number of pertinent questions including:

> 'Should I not directly and explicitly confront the mother and the community, which professes to be law abiding, with the fact that its behavior is or may be unlawfully discriminatory?' (para 77)

He had failed to address head on human rights issues and issues of discrimination which plainly arose, noting though that he did not have those issues explored much before him. The court gave very careful consideration to the Equality Act 2010 and Art 14 of the Convention (HRA 1998, Sch 1, para 84–115 of Court of Appeal judgment) with a reminder that although a freestanding right has not been violated it does not follow that there is not a breach of Art 14 which provides:

> '**Prohibition of Discrimination**
>
> The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

The court dealt of course with Art 9 – the right to manifest one's religion – in a democratic society the majority opinion will often carry the day but the rights of minorities must be fairly balanced against those of the majority. Essentially, often there must be a compromise between different belief systems in a society. The court found provisionally that if direct contact were granted for the children this would not involve an interference with the community's rights under Art 9. The court as an organ of the State imposing any restriction on their 'communities' expression of their religious beliefs would be doing so to serve the legitimate aim of protecting the children's rights to have contact with their father (para 134). The judgment concludes:

> 'The best interests of these children seen in the medium to longer term is in more contact with their father if that can be achieved. So strong are the interests of the children in the eyes of the law that the court must, with respect to the learned judge, persevere. As the law says in other contexts, "never say never". To repeat, the doors should not be closed at this early stage in their lives.' (para 138).

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Surrogacy law reform

The aim of English surrogacy law has been to provide a suitable legal framework for couples, who typically have been unable to conceive, to start a family by engaging a surrogate and thereafter secure a parental order to secure legal parenthood. This area of law is complex and a variety of hurdles need to be overcome by prospective legal parents to secure a final parental order in their favour. A final parental order endorsed by the English court ensures the transferring of legal status from the surrogate birth mother to the intended parents.

The above situation, governed principally by the Human Fertilisation and Embryology Act 2008, left a gap in this area of law as it dealt with couples who sought surrogacy as a mechanism to start a family, but did not cover prospective single parents. Surrogacy was not an avenue for the creation of a family for a single person.

The lack of provision for single people was challenged recently in *Re Z (A child) (No 2)* [2016] EWHC 1191 (Fam), [2016] 2 FLR 327, before the President of the Family Division, Sir James Munby. In this case a UK resident single father, who had a child through a surrogacy arrangement in the US, sought a parental order for the child. His application was rejected because as a single parent he did not meet the criteria set out in the 2008 Act. However, crucially, on human rights grounds a declaration of incompatibility was issued by the President.