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Irish Council for Civil Liberties
An Comhairle um Chearta Daonna

EQUALITY

FOR ALL

FAMILIES



Irish Council for
Civil Liberties



April 2006

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About the ICCL

The Irish Council for Civil Liberties (An Chomhairle um Chearta Daonna) is the leading independent, non-governmental membership organisation working to defend and promote human rights and civil liberties in Ireland. It was founded in 1976 by, among others, Mary Robinson (former President of Ireland and UN High Commissioner for Human Rights), Kader Asmal (Professor of Law and member of the South African Government), and Justice Donal Barrington (former Supreme Court Judge, Judge at the European Court of Justice and the first President of the Irish Human Rights Commission). Its members and officers through the years have included many leading academics, lawyers and public figures.

Over the last thirty years, the ICCL has campaigned in the sphere of civil liberties and human rights reform; in particular, it has consistently focused on the interface between criminal justice issues and human rights concerns. The ICCL has also been very active in a wide range of constitutional reform campaigns, and has championed the rights of minorities including those of lesbian, gay and transsexual people, Travellers, women, and migrant communities.

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Foreword

In 2004, when the Irish Council for Civil Liberties (ICCL) established a working group on Partnership Rights and Family Diversity, there was already significant interest in the area of diverse family types and concerns about the invisibility of unmarried cohabiting couples within Irish legislation and social policy. The inequalities experienced by individuals and families who were not married was beginning to get more media coverage and there were some efforts to examine this at a policy level.

In Ireland, Senator David Norris had formed a working group to prepare a private members bill to address the absence of rights for couples living outside of marriage. Increasing interest and, at times, media sensationalism accompanied the political controversies caused in the United States and Canada with the introduction of same-sex marriage in several states and provinces. Meanwhile in Europe more and more countries were either recognising same-sex relationships in law or extending original protections accorded some years before.

The Working Group was concerned at the increasing numbers of people in Ireland, both heterosexual and gay, whose relationships were denied protections because Irish legislation/policy is informed solely by the narrow model of a family and marriage contained within the Irish Constitution. Conscious that family forms had greatly diversified in the last 30 years, we embarked on a consultation process to identify the needs and concerns of people in diverse families and unmarried relationships and to hear from some of their representative organisations. Public consultations were organised in Cork and Dublin to enable us to gather first hand views and experiences from people affected, still others contacted the ICCL directly when they heard of our interest in their situations, and a public forum was held in Dublin to get feedback on our initial framework. Although the range of family types and the reasons for the arrangements that people entered into were varied, there were very particular common aspirations. Recognition, dignity and choice were the key themes emanating from the consultations and discussions held by the working group.

Participants spoke of seeking recognition of the relationships they had established through the extension of rights and protections, dignity to live their lives and raise their families without fear of social inequality and the right to choose the most compatible form of relationship and family form which delivered on the needs and best interests of all. It became clear to the ICCL that it is the substance of people's relationships that is most important to them. Despite an absence of rights and entitlements, at the centre of all of these relationships are the commitments of care and interdependence that have been forged.

Many cohabiting opposite-sex couples were also clear that marriage was not an institution into which they wanted to enter. They felt that to do so privileged their relationship in a way that was not acceptable to them either for reasons of conscience or because marriage failed to reflect the dynamics of their family form. For same-sex couples marriage was not an option currently available to them, nor was it one that all wanted. Nevertheless, because of the history of social invisibility and inequality against which lesbian and gay people have always had to struggle for recognition, many felt that true equality could only be served by the extension of marriage rights to same-sex couples. It must be added that a substantial number of same-sex couples greatly desired access to marriage because it is commonly perceived as the definitive means of showing the depth of commitment between two persons.

Fathers who were separated from their children wanted reform in the law to recognise both their rights and the important role that they should be allowed play in their children's lives. For others still whose relationships are not premised on a conjugal relationship but where the bonds of affection, care and commitment are no less important, there is a longed for wish to be recognised and accommodated in maintaining those bonds without fear of material loss or usurpation because of automatic privileges bestowed on other forms of relationships.

Our conclusions are, we feel, very much in keeping with the range of relationships and the diversity of need that we encountered. They address the injustice and vulnerability experienced by far too many people in Ireland because of the failure of our political, legal and policy-making structures to acknowledge that our society is changing, that difference does not equate with lesser and that families are essentially fora wherein individuals, regardless of gender or sexual orientation, express their deepest levels of care and commitment.

I would like to offer my profound thanks to my fellow members of the Working Group and the staff of the ICCL for their dedication in producing this report. Special thanks go to Maria Katajisto, who worked as an Intern on the project and Fiona de Londras. Fiona drafted a number of the background papers for the Working Group. The professionalism and humour of all made a daunting task both challenging and exciting.

On behalf of the Working Group I extend our deepest appreciation to those individuals from agencies/organisations in the field of partnership rights and family diversity who gave freely of their expertise, experience and informed opinions to assist us in our work. In particular I would like to thank Professor Fiona Williams from Leeds University who helped clarify and develop my understanding of family life, Geoffrey Shannon, child law expert, who advised the ICCL around the complexities of family law, and Fergus Ryan, Lecturer in Law, Dublin Institute of Technology, who gave his expertise to our consultations.

In addition, both Trinity College Dublin and University College Cork Student LGBT Groups deserve particular gratitude for their organisation of our regional consultations.

Finally, I want to acknowledge the many, many individuals, couples and families who shared their stories with us, exposing the hurt, anxiety and vulnerability caused by inequality but who nevertheless daily demonstrate their continued capacity to love and care for one another against the odds.

Marie Mulholland

Convenor, ICCL Partnership Rights and Family Diversity Working Group

April 2006

Executive Summary

OVERVIEW

Securing legal recognition of partnership rights for same-sex couples and unmarried opposite-sex couples is a core aim of the Irish Council for Civil Liberties under its five-year strategic plan (2004-2009). The ICCL believes that the question of partnership recognition should form part of a wider dialogue about Irish society's support for relationships of love and care.

Report Objectives

The objectives of this report are to:

- > Review the current status of unmarried couples and other family groupings under Irish law and policy.
- > Highlight breaches of international human rights standards and developments in other jurisdictions.
- > Make a series of recommendations on constitutional and legislative reform designed to ensure legal recognition of and enhanced state support for various interpersonal relationships.

Methodology

In compiling this report the ICCL endeavoured to employ an inclusive, participatory methodology. In this regard the views of various constituencies most affected by the current exclusionary legal framework were sought at various junctures, through both public consultations and dialogue with representative non-governmental organisations.

REPORT FINDINGS:

Chapter 1: Introduction

Chapter 1 articulates the context and rationale for the report. Census figures establish that families and households take increasingly diverse forms. Yet not all relationships that fulfil the vital role of providing love and care are considered families for the purposes of the Constitution. Reform of State law and policy in this field should be informed by the key principles of equality and autonomy.

Chapter 2: Constitutional Framework

This chapter provides an overview of the main constitutional provisions applicable to families and sets out recommendations for reform under three headings; 'definition of family', 'marriage' and 'children's rights'. Citing relevant case law it demonstrates how the Constitution's preference for heterosexual married families effectively sanctions unequal treatment of other family forms and fails to adequately protect children. It argues that all caring relationships entailing support for children, partners and other dependent persons should be recognised equally at constitutional level. Further, access to civil marriage

should not be contingent on one's sexual orientation or gender identity. Finally, a case is made for the express constitutional protection of children's civil, cultural, economic, political and social rights.

Chapter 3: Legislative Context

Chapter 3 surveys relevant domestic legislation. It discusses the hierarchy of rights and duties accorded individuals dependent on the form their relationship takes, highlights the limited protection available for co-habiting opposite-sex couples and critiques the exclusion of same-sex couples from recognition frameworks. The principal areas covered are those concerning marriage registration, parental rights and responsibilities including custody, access, guardianship and adoption, the family home, inheritance, social welfare, domestic violence, immigration policy and employment.

Chapter 4: Policy Context

Developments within the policy field that adopt inclusive approaches to interpersonal relationships are highlighted in this chapter. These include the instrumental work of the Equality Authority in placing discussions on partnership rights and family life within an equality framework and the related recommendations of the National Economic and Social Forum. The chapter also welcomes and interrogates law reform initiatives emanating from the Constitution Review Group and the Law Reform Commission. It further notes that the approach of the Department of Social and Family Affairs is increasingly cognisant of family diversity, and welcomes the establishment of the Ombudsman for Children's Office. In contrast to these positive developments the Tenth Progress Report of the All Party Oireachtas Committee on the Constitution is considered disappointing in all major respects. In particular, its recommendations on constitutional change are not adequately anchored in human rights principles.

Chapter 5: International Human Rights Standards

Chapter 5 notes that Ireland is bound by a number of human rights conventions, which safeguard individuals' personal and private lives. Particular attention is paid to the standards developed by the European Court of Human Rights. The Court adopts a functional approach to the definition of family life and so respects a wider range of family forms than the domestic legal system. In addition, it prohibits differential treatment on the grounds of sexual orientation, transsexuality and marital status, without objective justification. The State's duty to respect a range of children's rights is elaborated under the UN Convention on the Rights of the Child. Irish law, especially that concerning children and the LGBT community, falls short of what is required under these international treaties.

Chapter 6: Comparative Law

Chapter 6 itemises the various steps taken by courts and parliaments in jurisdictions comparable to Ireland to eliminate inequalities and discrimination faced by non-

marital families. Drawing on examples from other European states, Canada and South Africa the chapter highlights in particular the progress made in the legal recognition of LGBT partnerships. It also notes that the UK Civil Partnership Act 2004 has no parallel in the Republic of Ireland despite the Irish Government's undertaking to provide an equivalence of human rights protections within the State as exist in Northern Ireland. Chapter 6 concludes that Ireland's position on LGBT relationships lags far behind that of its European counterparts.

Chapter 7: European Union Family Law

The implications of EU family law, human rights and equality measures are explained in Chapter 7. While EU competence in this field is limited, measures concerning immigration, the mutual recognition of family law judgments and employment, have an increasing impact. Rules in the area of free movement of persons require the introduction of legislation that at a minimum facilitates the reunification of unmarried families. Regulations concerning the jurisdiction, recognition and enforcement of judgments will have consequences for the recognition of same-sex marriages contracted in other European countries and court orders concerning the parent-child relationship. EU employment equality measures have already significantly shaped the Irish legal landscape and will continue to generate positive change for transsexual and arguably also same-sex partners.

Chapter 8: Recommendations

The report closes with a series of recommendations designed to realise equality for all families living in Ireland. Constitutional change is an imperative element of our reform agenda; without a referendum along the lines suggested any legislative action will be confined to limited parameters. We are seeking a revision of Articles 41-42 which will guarantee all individuals respect for their family life. In order to protect children's rights in particular, the family based on marriage should no longer be privileged. An express right for all persons to marry in accordance with the law and found a family, irrespective of gender identity or sexual orientation, should supplement this overarching provision. In order to fulfil Ireland's obligations under the UN Convention on the Rights of the Child insertion of an express guarantee of children's rights modelled on section 28 of the South African Constitution is a priority. A gender-neutral provision recognising the work of carers in the home should replace the current outmoded reference to women's domestic 'duties'.

On the legislative front we are calling for omnibus relationship recognition legislation. The ban on same-sex marriage should be eliminated and the additional option of partnership registration should be made available to all couples. A presumptive scheme aimed at protecting individuals from exploitation is also an integral component of our proposals.

1. INTRODUCTION



1.1

The Changing Dynamics of Family Life

The forms that families take are diverse and for many of us those forms may also change over the span of a lifetime. Family support networks may include parents, children, grandparents, step-parents, step-children, adopted children, same-sex partners, ex-partners, or ex-sons and daughters-in law. Increased numbers of women in paid employment and of people living alone, together with shifting population demographics, have brought further societal changes. Global migration means that family commitments continue across continents. Despite inadequate official recognition of or respect for relationships based outside of marriage, such relationships have always existed and continue to thrive. The shape of family forms may be changing but there is no evidence of a lesser commitment within them than those of the traditional kind.¹

As is the case in many other countries, domestic relationships in Ireland have become more diverse in the past 30 years. Opposite-sex cohabitation - whether as an alternative to marriage, as a prelude to marriage, or as a sequel to marriage - is a growing phenomenon that now has widespread social acceptance. In contrast to the experience of the 1960s and 70s, a surge in births preceded rather than followed a surge in marriages in the 1990s.² In addition, there has been a significant increase in the number of stepfamilies or reconstituted families.

According to the 2002 Census there were 77,600 cohabiting couples, an increase of 46,300 since 1996.³ The Census showed that the number of cohabiting same-sex couples increased from 150 to 1,300 over the same period.

The number of cohabiting couples with children is also rising. The Census reveals that the amount of children living with cohabiting parents more than doubled from 23,000 in 1996 to 51,700 in 2002.⁴ This represented

5.5 % of all couples with children. Increasing numbers of children live in solo parent households. Recent analysis also shows that the number of solo parents with children aged under 20 has risen from 60,700 in 1994 to 117,200 in 2004, with 91% of solo parent households headed by women.⁵

Despite societal changes, including women's greater participation in paid employment,⁶ significant gender disparities in relation to work inside and outside the home persist: less than 1% of those describing themselves as "looking after home/family" in 2004 were male.⁷ With respect to the provision of regular unpaid care to wider groups of people (including relatives and friends) the gender breakdown is more even; 61.4% were female. Women's hourly earnings for labour market employment were 82.5% of men's for the same period.⁸

Statistical data demonstrates that there is a direct link between family status and poverty levels. Reports issued by bodies such as the Combat Poverty Agency have consistently found that persons living alone or in lone parent households and older women are subject to a greater risk of poverty than other family groups.⁹

1.2

A Legacy of Inequality

Deficiencies in the Constitution,¹⁰ family law instruments and state policy generally mean that diverse family forms are not accorded equality of respect and recognition, and that caring labour is devalued. Lesbian and gay persons are denied access to a legal framework when forming committed relationships. Unmarried opposite-sex couples are also denied specific legal recognition and are accorded a lesser legal status as parents than their married counterparts. Children's interests are not regarded as the *paramount* consideration in cases involving both their families and the State's duties towards them. The identity of transsexual people is not respected. In this section we sketch the underlying causes of these inequalities.

¹ See F. Williams (2004) *Rethinking Families*, Calouste Gulbenkian Foundation: London.

² See for example T. Fahey and H. Russell (2001) *Family Formation in Ireland: Trends, Data Needs and Implications*, Report to the Family Affairs Unit, Department of Social, Community and Family Affairs, The Economic and Social Research Institute: Dublin.

³ Available from the website of the Central Statistics Office <http://www.cso.ie/>

⁴ *Ibid.*

⁵ Central Statistics Office (2004) *Women and Men in Ireland 2004*, Stationery Office: Dublin.

⁶ *Ibid.* The survey shows that the proportion of women in the labour force increased from 35.7% in 1994 to 47.1% in 2004. The proportion of men in the labour force was around 70% in both years.

⁷ *Ibid.*

⁸ *Ibid.* Female income liable for social insurance payments in 2002 was 63.3% of male income. The figure of 82.5% represents the male/female wage differential when an adjustment is made for usual hours worked (men 41.3 hours and women 31.7 hours).

⁹ See generally the Agency's website: www.cpa.ie/; See also Central Statistics Office (2005) *EU Survey on Income and Living Conditions* (www.cso.ie/).

¹⁰ See especially Chapter 2 on the constitutional position.

The Irish State has traditionally promoted a narrow form and function of intimate relationships. State law and policy has endorsed heterosexual marriage as the definitive family unit and assumed that responsibility for care of children and other dependent persons is largely a private and female concern. These inequalities are enshrined in Ireland's primary source of law, the Constitution - *Bunreacht na hÉireann* (1937) - which pre-dates all the major international human rights instruments. The constitutional provisions on family life, which are "heavily influenced by Roman Catholic teaching and Papal encyclicals"¹¹, endorse a gendered division of labour and provide protection only to families based on marriage. Little reference is made to children; instead their rights are inferred from their family unit.¹²

Article 41.2 incorporates a stereotypical view of women as primarily homemakers and mothers while neglecting to recognise the role of men as fathers or the value of the care work that takes place in all interdependent relationships.¹³ Men are construed as "breadwinners" and women as dependents; an ideology that was actively supported by state policies that prevented certain women from working outside the home¹⁴ and left gender-based discrimination in employment intact.¹⁵ Notwithstanding the acknowledgment of the work carried out by women within the home, the Constitution does not oblige the State to provide financial support to those carrying out such labour.¹⁶

Prejudice and discrimination against lesbians and gay men has been widespread in Ireland, as in other European countries.¹⁷ Consensual sex between men was criminalized by the Irish State for decades, thus severely stigmatising homosexuality, a pattern that persists in the continued exclusion of Lesbian, Gay, Bisexual and Transgender (LGBT) people from recognised family structures.¹⁸

As the primary law of the State the Constitution does not simply operate at a symbolic level; it has a material impact on all national law and policy. Courts have, for example, interpreted the constitutional priority accorded marriage in a manner that has concrete negative effects for other families and individuals. Article 41 has been used to uphold discrimination against children born outside marriage, unmarried fathers, and gay men.¹⁹

Over the past few decades some extreme inequalities arising in the family sphere have been tackled by the Irish State. Positive measures include the removal of the ban on divorce and contraception, the criminalisation of rape within marriage and the introduction of social welfare payments for deserted spouses and solo parents. In many other cases, however, international factors rather than domestic political initiative prompted positive changes in this sphere. For example, the Government only decriminalised sex between men following a ruling by the European Court of Human Rights, and likewise finally abolished the concept of 'illegitimacy' of children when a case was brought to the Strasbourg Court.²⁰

While some progress has been achieved, national standards in the arena of interpersonal relationships remain considerably weaker than those applicable in other European countries.²¹ Full implementation of the international human rights conventions that Ireland has ratified would also secure greater protection against discrimination in this sphere.²² A mix of political and legal factors impedes reform. Given appropriate political impetus, some progress could be achieved by way of legislation. However, the Constitution (as interpreted by the courts) sets the parameters in which ordinary law reform takes place. Chapter 2 addresses the current constitutional position and outlines in some detail the case for amendment.

¹¹ Constitution Review Group (1996) *Report of the Constitution Review Group*, Stationery Office: Dublin, p.319.

¹² One Family (2005) *Policy Paper Number One - Working for a Constitution which Affords Equal Rights to all Families*, p.5. (www.onefamily.ie).

¹³ See discussion by A. Connelly (1999) 'Women and the Constitution of Ireland' in Galligan, Ward and Wilford (eds.) *Contesting Politics: Women in Ireland, North and South*, Westview Press: Boulder; Dublin, pp.18-37; and L. Flynn (1998) 'To be an Irish Man-Constructions of Masculinity in the Constitution', in T. Murphy and P. Twomey (eds.) *Ireland's Evolving Constitution 1937-1997: Collected Essays*, Hart Publishing: Oxford.

¹⁴ Women employed as civil servants in the public sector were forced to leave their position upon marriage until 1974.

¹⁵ Enactment of the Anti-Discrimination (Pay) Act 1974 and the Employment Equality Act 1977 stemmed from Ireland's membership of the European Community.

¹⁶ N. Yeates (1999) 'Gender, Familism and Housing: Matrimonial Property Rights in Ireland', *Women's Studies International Forum* 22, 607-618.

¹⁷ ICCL (1990) *op. cit.*, pp.5-8; P. Hanafin (1998) 'Rewriting desire: the construction of sexual identity in literary and legal discourse in postcolonial Ireland' *Social & Legal Studies* 7(3), pp. 389-408.

¹⁸ ICCL (1990) *ibid.*, p. 8.

¹⁹ See Chapter 2.

²⁰ Despite rulings from the European Court of Human Rights in cases such as *Dudgeon v United Kingdom* (1982) 4 EHRR 149, the Supreme Court upheld the constitutionality of the ban on homosexual sex in *Norris v Attorney General* [1984] IR 36. In *Norris v Ireland* (1991) 13 EHRR 186, the European Court ruled that Irish law violated the ECHR, and 5 years after that judgment male sexual relationships were effectively decriminalized in 1993. In *Johnston v Ireland* (1987) 9 EHRR 203 the European Court also ruled that Ireland's succession laws discriminated against children born to non-marital families. The Government finally acted on a 1982 report by the Law Reform Commission and the Status of Children Act 1987 was passed.

²¹ See Chapter 6.

²² See Chapter 5.

1.3 Key Principles

ICCL believes that state law and policy on families should be underpinned by two core values: **equality** and **autonomy**.²³ Realisation of these values entails respect for diverse family forms, freedom of conscience and belief, personal privacy and the inherent dignity of all individuals.

Autonomy in this context refers to the ability to freely choose the form that one's personal relationships take. The Law Commission of New Zealand, for example, supports the recognition of same-sex partnerships as necessary in furthering the personal autonomy of gay and lesbian people.²⁴ Personal autonomy, or self-determination, is not realised in isolation from other people but developed in connection with others.²⁵ Under the European Convention on Human Rights (ECHR) respect for private life includes the traditional concept of a right to be "let alone" but also comprises the right to establish and develop relationships with other human beings.²⁶ As the Law Commission of Canada puts it: "Autonomy is compromised if the state provides one relationship status with more benefits and legal support than others, or conversely, if the state imposes more penalties on one type of relationship than it does on others".²⁷ In Ireland, same sex couples are effectively treated as strangers for legal purposes and opposite-sex partners are penalised when they do not opt for marriage. Respect for the autonomy of adults would give rise to a range of relationship recognition options that do not coerce individuals or ignore their disparate needs and choices.

According to the Law Commission of Canada equality in this sphere has dual application. Governments must promote equality between different types of relationships *and* as between individuals within relationships.²⁸ At present heterosexual marriage is recognised as the definitive form of interpersonal relationship and subsidized most heavily. Instead all caring relationships that entail support for children, partners and other dependent persons should be recognised and supported

by the State. Chapters 2 and 3 illustrate that the Irish legal system currently affords inadequate protection to unmarried people: in particular many of the benefits and responsibilities that automatically accrue to spouses are not available to other couples. The ICCL contends that families should be valued for what they 'do' rather than what they look like.²⁹

As Madame Justice L'Heureux-Dubé of the Canadian Supreme Court explains:

It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.³⁰

Discrimination between different types of relationships does not just affect adults it has an adverse impact on children. The Supreme Court of South Africa has reiterated in recent judgments that laws according lesser rights to non-marital families are unconstitutional insofar as they discriminate against children.³¹

Equality between individuals *within* relationships is secured by ensuring that individual family members are not disadvantaged by virtue of their family status. For example, financially dependent persons (including children) must be protected from exploitation³² and one's gender and/or sexual orientation must not be used as definitive evidence of capacity to engage in parenting or other care-taking activities. Historically, the privacy afforded marital and other familial relationships sheltered various forms of inter-personal oppression. While this sphere has been rendered more egalitarian, it remains the case that people who engage in care work within the home are placed in a position of 'derived dependency' and so open to exploitation.³³

For this reason the ICCL believes that the Government must also implement further measures aimed at ensuring that people who assume the greatest burden of care work no longer remain at greatest risk of poverty.

²³ Law Commission of Canada (2001) *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (www.lcc.gc.ca/), Chapter 2.

²⁴ Law Commission of New Zealand (1999) *Recognizing Same-Sex Relationships*, Law Commission: Wellington.

²⁵ J. Nedelsky (1989) 'Reconceiving Autonomy: Sources, Thoughts and Possibilities', *Yale Law Journal of Law and Feminism* 1, 7-36. See also discussion by M. Bailey (1999) *Marriage and Marriage-Like Relationships*, Law Commission of Canada: Ottawa.

²⁶ See further Chapter 5.

²⁷ Law Commission of Canada *op. cit.*, p. 18.

²⁸ Law Commission of Canada *op. cit.*, Chapter 2.

²⁹ 'Ultimately, it is easier, fairer and more practical to define families by what they do rather than what they look like': Vanier Institute of the Family (1994) *Profiling Canada's Families*, Vanier Institute of the Family: Ottawa, p.9.

³⁰ *Canada (Attorney-General) v. Mossop* [1993] 1 SCR 554, at 634.

³¹ See further Chapters 2 and 6.

³² J. Baker, K. Lynch, S. Cantillon and J. Walsh (2004) *Equality: From Theory to Action*, Palgrave Macmillan: Basingstoke, pp. 37-8.

³³ See generally M. Fineman (2003) *The Autonomy Myth: A Theory of Dependency*, The New Press.

Under conditions of declining public support, broader definitions of family may simply mean more people are conscripted into care rather than better care giving or better relationships. Unless there are formal supports for unpaid care giving, both the caregivers and their relationships are increasingly likely to fall apart. And such supports need to recognize the diversity in needs and the diversity in networks, networks that extend beyond kin to create the most satisfying care.³⁴

Reform of state policies should address all caring relationships. In particular, policy that fails to recognise the role of carers in the home can disadvantage partners who do not engage in paid employment. For example, at present spouses in that position are treated as dependent under the social welfare system (as are unmarried opposite-sex cohabitantes in some contexts). This legal status has particular repercussions for social insurance and access to pensions and exacerbates the established poverty risk faced by older women.³⁵

Both the Irish Human Rights Commission³⁶ and the National Women's Council of Ireland (NWC) reiterate that continued use of the couple as the central unit of state social and legal policy is problematic, particularly for people who engage in unpaid care work.³⁷ The ICCL recommends the introduction of publicly-funded care-taker resource grants to offset the personal costs (in terms of lost employment, educational and other personal development opportunities) incurred by carers³⁸ along with other measures to combat poverty risks associated with solo parenting and care work generally.

The European Commission's Supiot Report provides a useful starting point for reforms along these lines. It advocates constructing social and economic rights around the concept of 'occupational status', which would reflect individuals' engagement in socially useful unwaged work in addition to their history of paid employment.³⁹ Further initiatives in this field would also go some way to fulfilling the duties assumed under the International Covenant on Economic, Social and Cultural Rights, which obliges the State to progressively realise a range of rights including the right to health, housing and an adequate standard of living. Contemporary State

policies ensure that children inherit the socio-economic status of their parent/s: the ICCL advocates the adoption of robust constitutional protection for children's civil, political, social, economic and cultural rights.⁴⁰

1.4 The ICCL Partnership Rights and Family Diversity Working Group

In response to these major inequalities affecting all sectors of Irish society, and building on the ICCL's previous work,⁴¹ achieving legal recognition of the relationships of unmarried opposite-sex and same-sex couples, together with addressing inequalities in family law, is a strategic aim for the ICCL (2004-2009). The objectives of the present report are to:

- > Provide a policy and legal background on the current situation of unmarried opposite-sex and same-sex couples and other family groupings.
- > Highlight breaches of international human rights standards and developments in other jurisdictions.
- > Make a series of recommendations on constitutional and legislative reform to ensure legal recognition of, and enhanced state support for various interpersonal relationships.

ICCL believes that the question of relationship recognition should form part of a wider dialogue about Irish society's support for relationships of love and care. This report takes existing provisions that give legal recognition to relationships of interdependency and seeks to make them more inclusive.⁴² While the changes proposed are quite extensive, ICCL acknowledges that still more profound questions, in particular those relating to material support for people who give and receive care remain to be fully addressed. Consideration of laws and policies that do not directly address interpersonal relationships but may impact significantly upon them is also beyond the scope of this paper.⁴³

³⁴ P. Armstrong and O. Kits (2001) *One Hundred Years of Caregiving*, Ottawa: Law Commission of Canada, p. 33.

³⁵ See for example, Irish Human Rights Commission (2005) *CEDAW Submission*, Dublin: Irish Human Rights Commission, Chapter 4 and National Women's Council of Ireland (2003) *Women and Poverty: Factsheet No. 2*, (www.nwci.ie/documents/wompoverty.doc) which reports that: 'More than 70% of women do not have occupational pensions (due to their leaving the workforce to undertake caring work); this has significant financial implications for older women'.

³⁶ *Ibid.*, para. 4.5.2.

³⁷ See National Women's Council of Ireland (2003) *A Woman's Model for Social Welfare Reform* (<http://www.nwci.ie/documents/swr.doc>).

³⁸ For detailed consideration of the question of 'care-taker resource grants' see, A. Alstott (2004) *No Exit*, Oxford; New York: Oxford University Press.

³⁹ European Commission (1999) *Transformation of Labour and the Future of Labour Law in Europe*, Office for Official Publications of the European Communities: Luxembourg.

⁴⁰ See Chapter 2.

⁴¹ ICCL (1990) *Equality Now for Lesbians and Gay Men*, ICCL: Dublin.

⁴² For the purposes of this report we do not consider more radical options such as replacement of the State marriage contract with an alternative legal institution. See M. Fineman (1995) *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies*, Routledge Press; M. Bailey (1999) *Marriage and Marriage-like Relationships*, Law Commission of Canada: Ottawa.

⁴³ Examples of such measures would include the criminalisation of trespass which impacts on the family life of Traveller families and the policy of dispersal and direct provision in relation to the family life of asylum-seekers. ICCL's policy work in these and other areas can be consulted at <http://www.iccl.ie/>

The ICCL launched its Partnership Rights and Family Diversity work in April 2004. As part of this initiative, the ICCL:

- > Undertook a mapping exercise to consult with organisations committed to family diversity and LGBT organisations to establish what work has been done by relevant groups and to seek input on policy recommendations (refer to Appendix 1).
- > Organised consultations in Dublin and Cork to gather the views of those adversely affected by Ireland's failure to recognise diverse family forms (refer to Appendix 2).
- > Researched and drafted a briefing paper on the situation of unmarried couples in law.⁴⁴
- > Sought views from organisations/individuals on the ICCL's proposals for reform.

1.5 Report Outline

Chapters 2 and 3 of this report supply an overview of the current Irish legal framework applicable to familial relationships, while Chapter 4 highlights some key domestic policy developments. Chapters 5, 6 and 7 go on to compare the national position with international human rights standards and the situation in comparable countries. Finally, the report closes with the ICCL's recommendations for change.

⁴⁴ F. De Londras (2004) *Unmarried Couples within Irish Law: Current Law and Proposals for Reform, Briefing Paper Drafted for the ICCL Partnership Rights and Family Diversity Initiative*, unpublished paper available from the ICCL.



2. CONSTITUTIONAL FRAMEWORK

2.1 Introduction

Laws that regulate familial relationships are derived from a range of sources - European Union (EU) law, the Constitution, legislation, and the common law principles developed by judges in case law. These sources do not rank equally, but are arranged in a hierarchy. Ireland's accession to the European Community entailed acceptance of the supremacy of EU law and so it takes precedence over national sources.⁴⁵ In practice this means that should a domestic legal provision conflict with EU law the latter will prevail. To date many aspects of relationship recognition and children's rights fall outside the competence of the European Union and so continue to be determined by the individual Member States.⁴⁶ Next in the hierarchy of sources is the Constitution - *Bunreacht na hÉireann* (1937) - as the fundamental law of the State it has primacy over Irish legislation and common law principles, which must as a result conform to constitutional standards.

This Chapter outlines the main constitutional provisions applicable to families and sets out recommendations for reform under three headings: definition of family, marriage, and children's rights. Legislative provisions and salient policy instruments are discussed in Chapters 3 and 4 respectively.

International human rights conventions supply important standards of treatment, which governments agree to apply to all people within their territories. Ireland is a member of both the United Nations and a regional human rights body, the Council of Europe. In that connection it has ratified a large number of human rights instruments. However, according to Article 29.4 of the Constitution unless an international agreement is incorporated into Irish law by the Oireachtas it is not enforceable within the State. Since passage of the European Convention on Human Rights Act 2003, the key convention produced by the Council of Europe, the European Convention on Human Rights (ECHR) can be used in domestic legal proceedings.

As such we can expect the Convention to have an increasing impact on the interpretation of Irish law. While this Chapter draws on relevant ECHR standards, Chapter 5 discusses the Convention and other relevant international human rights agreements in further detail.

Although the judiciary generally regard the Constitution as a living instrument that should change in tandem with society⁴⁷, many decisions concerning familial relationships do not reflect the reality of contemporary family life and gender relations. At the same time judgments are constrained to an extent by the actual wording of relevant provisions.⁴⁸ The ICCL, therefore, regards a constitutional referendum as an imperative element of family law reform. Any amendment should be underpinned by two core values: autonomy and equality.⁴⁹ Realisation of these values entails respect for diverse family forms, freedom of conscience and belief, personal privacy and the inherent dignity of all individuals.

2.2 Definition of Family

Article 41 of the Constitution provides:

- 1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
- 1.2 The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
- 2 1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved

⁴⁵ Article 29.4. 7° of the Constitution reflects the supremacy of EU law: "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State."

⁴⁶ See Chapter 7 on EU family law.

⁴⁷ See generally J.M. Kelly (2003) *The Irish Constitution*, 4th edition, Butterworths: Dublin, Chapter 1.

⁴⁸ See A. Connelly (1993) 'The Constitution', in Connelly (ed.) *Gender and the Law in Ireland*, Dublin: Oak Tree Press, p. 6.

⁴⁹ Law Commission of Canada *op. cit.*, Chapter 2.

- 2.2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
- 3.1 The State pledges itself to guard with special care the institution of Marriage, on which the family is founded, and to protect it against attack.⁵⁰

The Irish Constitution, as interpreted by the courts, only affords married families constitutional recognition. According to relevant case law, the elevated status of this family form does not simply mean that the State cannot discriminate against marital families; it also sanctions unequal treatment of other family groups. On numerous occasions Irish courts have interpreted the constitutional priority accorded marriage in a manner that has adverse concrete effects for other families and individuals.

Article 41 has been used to uphold discrimination against children born outside marriage, unmarried fathers, and gay men. In *O'B v S*⁵¹ the Supreme Court held that exclusion of children whose parents are not married to each other from certain succession rights was permissible in light of the constitutional provisions that protect the position of the marital family. The Supreme Court found that the natural father of a so-called 'illegitimate' child was not entitled to be heard prior to the making of an adoption order in *The State (Nicolaou) v An Bord Uchtála*.⁵² Walsh J considered it "abundantly clear that the father of an illegitimate child has no natural right to either the custody or society of his child". While the relationship between a father and a child born outside of marriage could be acknowledged in legislation, according to the Court, it should not be afforded constitutional recognition.

The position of unmarried female parents and their children is also inferior to that of their married counterparts. In *G. v An Bord Uchtála*⁵³ the Supreme Court established that while an unmarried mother was automatically the guardian of her child, their relationship did not amount to a 'family' within the terms of the Constitution. According to O'Higgins CJ.

"...these rights of the mother in relation to her child are neither inalienable nor imprescriptible, as are the rights of the family under Article 41. They can be alienated or transferred in whole or in part and either subject to conditions or absolutely, or they can be lost by the mother if her conduct towards the child amounts to an abandonment or an abdication of her rights and duties."⁵⁴

In *Norris v Attorney General*⁵⁵ while the Supreme Court acknowledged that the criminalisation of consensual sex between men interfered with the plaintiff's right to privacy it found such interference was warranted in order to safeguard the common good. One of the main reasons advanced for the decision was the need to protect the institution of marriage from attack.⁵⁶

Although the Constitution also states that all persons are equal before the law (Article 40.1), arguments based on that guarantee were unsuccessful in all of the cases referred to above. The limitations of the equality guarantee have been highlighted by the Constitution Review Group⁵⁷ and loomed large in the case of *Lowth v Minister for Social Welfare*.⁵⁸ Mr Lowth, a deserted husband, sought equal entitlement to State benefits available to deserted wives. The Supreme Court rejected his claim, ruling that differences in treatment between the two groups concerned were justified because the legislation was pursuing a valid objective, namely supporting the social function ascribed to women under the Constitution.

A common thread in the cases of *Lowth*, *O'B v S*, *Norris*, *G. and Nicolaou* is the omission to supply any empirical evidence demonstrating that equal treatment of the various groups concerned would undermine the constitutionally protected institution of marriage or the work carried out by women within the home. The comments of a Canadian judge in a case concerning the allocation of social welfare benefits are instructive: "it eludes me how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. Where is the threat?"⁵⁹ Further, under the European Convention on Human Rights a difference in treatment based on gender or sexual

⁵⁰ Article 41.3. 2° goes on to deal with the dissolution of marriage.

⁵¹ [1984] IR 316 (Sup Ct).

⁵² [1966] IR 567 (Sup. Ct.).

⁵³ [1980] IR 32.

⁵⁴ *Ibid.*, at 55.

⁵⁵ [1984] IR 36 (Sup. Ct.).

⁵⁶ See in that particular the reasons supplied by O'Higgins CJ at 63. For a critical appraisal of the decision see ICCL (1990) *op. cit.* and Flynn *op. cit.*

⁵⁷ Constitution Review Group *op. cit.*, pp. 220-43.

⁵⁸ [1999] 1 ILRM 5. In *Leary v. UK* (Application No. 38890/97, April 25, 2000), and *Cornwell v. UK*, (Application No. 36578/97, April 25, 2000), the same issue came under scrutiny in the European Convention system. Both cases alleged gender discrimination, in that certain social security benefits were paid to widows and not to their male counterparts. The British Government chose to settle the actions through payment of substantial sums to the applicants.

⁵⁹ Iacobucci J. in *Egan v. Canada*, [1995] 2 S.C.R. 513, at 616.

orientation is justified only if it actually advances a legitimate aim, and the means used to realise that aim are proportionate. In other words, it is not adequate for ECHR purposes to treat people differently because of their gender or sexual orientation without demonstrating that the differential treatment is objectively necessary.⁶⁰

EQUAL RECOGNITION OF ALL FAMILIES

In the ICCL's opinion the current constitutional position is untenable in a secular, liberal democracy. Families are key spheres where people can realize their need and capacity for intimacy, attachment and caring relationships. All of us have urgent needs for care at various stages in our lives, as a consequence of infancy, illness, impairment or other vulnerabilities.⁶¹ These needs are met daily by diverse families including married partners, solo parents, and same-sex couples: all deserve equality of respect and recognition. However, heterosexual marriage is currently recognised as the definitive interpersonal relationship by the courts; this stance is based on a view of the family that is rooted in a religious construct of marriage, as opposed to the factual reality of family life.

In order to advance equality between different types of relationships, the ICCL believes it is essential that the current reference to the family based on marriage in Article 41.3.1 be removed. It is preferable that the Constitution should not seek to define the family as such, because in accordance with international human rights law it is clear that the existence of family life is established by reference to the presence of close personal ties. The European Court of Human Rights acknowledges that the essence of family life consists of interdependence and the emotional connections that exist between people. In a similar vein the United Nations definition of the family emphasises the actual relations of interdependence between two or more people rather than the form a particular relationships takes.⁶² To unnecessarily impose a narrow definition would run the risk of excluding and discriminating against some families. The ICCL believes that the functional approach of the European Court of Human Rights is to be preferred.

⁶⁰ See further Chapter 5.

⁶¹ See further Baker et al *op.cit.*, pp. 37-8.

⁶² See further Chapter 5.

⁶³ See Chapter 1.3..The High Court decision in *MhicMathúna v Ireland* [1989] IR 504 is welcome in this regard. Carroll J. rejected a constitutional challenge to legislation that gave a tax-free allowance to single parents in respect of children living with them, on the basis that it treated single people more favourably than married people. The Court found that "the position of a single parent is different to the position of two parents living together. The parent on his or her own has a more difficult task in bringing the children up single handedly because two parents living together can give each other mutual support and assistance."

⁶⁴ Consideration of socio-economic rights in general is beyond the scope of this paper. For ICCL policy in this area see <http://www.iccl.ie/>

The Constitution should recognize the right of everyone to family life in the same terms as Article 7 of the EU Charter of Fundamental Rights: "Everyone has the right to respect for his or her private and family life, home and communications."

In line with ECHR principles the right should only be interfered with in accordance with the law when it is necessary in a democratic society in the interests of public safety, the protection of health, or for the protection of the rights and freedoms of others, in particular dependent children.

CARE LABOUR AND SOCIO-ECONOMIC RIGHTS

Recognising diverse family forms within the Constitution is not an adequate response to the needs of family members. As a step towards realising equality between individuals within relationships the State should ensure that financially dependent persons, including children, are not vulnerable to exploitation. We recommended in Chapter 1 that the State enact further re-distributive measures aimed at ensuring that people who assume the greatest burden of care work no longer remain at greatest risk of poverty.⁶³

Such policy initiatives should be reinforced at constitutional level. The ICCL therefore recommends retention, in a revised form, of the reference to the value of care labour in Article 41.2. Allusions to women's "life within the home" and the mother's "duties within the home" represent a form of biological determinism and should be removed. The amended article should provide: "The State recognises that home and family life give society a support without which the common good cannot be achieved. The State shall provide support to persons caring for others within the home."

Protection of children's socio-economic rights at constitutional level is vital in order to ensure that child poverty and homelessness is tackled effectively (see further section 2.4 below).⁶⁴

2.3 Access to Marriage

Although the institution of marriage is protected by the Constitution, unlike the major human rights conventions the text does not provide for an express right to marry. Rather the courts have found that such a right is implicitly protected.⁶⁵ Exclusion of same-sex couples from the institution of marriage is therefore not a textual requirement but is based on judicial interpretation.

Murray J. has defined marriage as: "A solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution."⁶⁶ In *T.F. v Ireland*⁶⁷ the Supreme Court approved the following statement: "the Constitution makes it clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship".⁶⁸ More recently, McKechnie J. found that the constitutional right to marry could be invoked only by persons of different *biological sex*.⁶⁹

These judgments conflate marriage as a religious ceremony with the wider social and legal institution. Retention of a 'Christian', or for that matter any other religious conception of marriage, is incompatible with the values of a secular, liberal democracy.

Courts in an increasing number of jurisdictions have determined that the common law definition of marriage should be interpreted so as to include same-sex partners. The evolution of Canadian case law (at federal level) commenced with a Supreme Court judgment to the effect that the definition of 'spouse' in a family law statute should be read so as to include same-sex partners.⁷⁰ In 2004, the Court ruled that opening the definition of marriage to same-sex partners was compatible with and indeed promoted constitutional norms, in particular the equality guarantee of the Canadian Charter of Rights and Freedoms.⁷¹ The Federal Parliament of Canada ultimately legislated for same-sex marriages in 2005.⁷²

In South Africa, the Supreme Court of Appeal recognised the right of same-sex couples to marry in the case of *Fourie and Bonthuys v. Minister for Home Affairs and Director-General of Home Affairs*.⁷³ The Court eloquently traces the gradual removal of discrimination faced by same sex-couples, as well as the injustice that exclusionary practices have caused the LGBT community. In upholding the rights of gay men and lesbian women to marry, Cameron J states:

At issue is access to an institution that all agree is vital to society and central to social life and human relationships. More than this, marriage and the capacity to get married remain central to our self-definition as humans. As Madala J has pointed out, not everyone may choose to get married: but heterosexual couples have the choice. The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations. It offers a social and legal shrine for love and for commitment and for a future shared with another human being to the exclusion of all others.

The current common law definition of marriage deprives committed same-sex couples of this choice. In this our common law denies gays and lesbians who wish to solemnize their union a host of benefits, protections and duties. ...More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all.⁷⁴

In December 2005 the Constitutional Court of South Africa upheld this decision and gave the Government one year to cure the under-inclusiveness of relevant legislation and the common law.⁷⁵ Judge Sachs pointed out "it is precisely because marriage plays such a profound role in terms of the way our society regards

⁶⁵ *McGee v Attorney General* [1974] IR 284.

⁶⁶ *DT v CT* [2003] 1 ILRM 321.

⁶⁷ [1995] IR 321, at 373.

⁶⁸ Per Costello J. in *Murray v Ireland* [1985] IR 532 at 535-6.

⁶⁹ *Foy v. An t-Ard Chlaraitheoir & Ors* [2002] IEHC 116 (9 July 2002).

⁷⁰ *M. v. H.* [1999] 2 S.C.R. 3.

⁷¹ *Reference re Same-Sex Marriage* [2004] SCR 698, 2004 SCC 79 (CanLII). The Court also found that the guarantee of religious freedom in s. 2(a) of the Canadian Charter of Rights and Freedoms was broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

⁷² Bill C-38 (The Civil Marriage Act), which came into force on 20 July 2005.

⁷³ Case no: 232/2003, 30th November 2004.

⁷⁴ *Ibid.* at paras 14-15 (references omitted).

⁷⁵ Cases CCT 60/04 and 10/04, decided on 01 December 2005.

itself, that the exclusion from the common law and Marriage Act of same-sex couples is so injurious..."⁷⁶

In *Goodridge v. Department of Public Health*⁷⁷ the Massachusetts Supreme Court also underscored the importance of marriage as a social institution. The Court rejected the 'separate but equal' approach pursued where marriage is closed off to lesbian and gay people and an alternative institution is put in place. Denial of the right to marry "works a deep and scarring hardship on a very real segment of the community for no rational reason" the Court explained. The resultant harm to gays and lesbians is not only that which flows from the denial of the benefits of marriage, it includes the harm of being deemed "second-class citizens".

The ICCL submits that the benefits and duties of marriage should be extended to those who cannot currently legally marry in Ireland owing to their sexual orientation or gender identity. As in a growing number of common law jurisdictions, the Irish Courts have the power to interpret the right to marry in an inclusive and egalitarian manner. Following the lead of the South African Courts, the Canadian Courts and the Massachusetts Supreme Court the ICCL believes that the Irish Courts should adopt a constitutional definition of marriage as a consensual union between two persons to the exclusion of all others. This definition is consistent with the gender-neutral right to marry set out in the EU Charter of Fundamental Rights and Freedoms.⁷⁸

The case of *Zappone and Gilligan v the Revenue Commissioners, Ireland and the Attorney General*⁷⁹, which is due to be heard in 2006, presents the Irish judiciary with an opportunity to revise the existing constitutional interpretation of marriage in order to give effect to the values of equality and autonomy. Katherine Zappone and Ann Louise Gilligan were lawfully married in British Columbia, Canada in September 2003. On their return to Ireland, the Inspector of Taxes (Revenue Commissioners), refused to recognise them as a married couple, although an opposite-sex couple married under the same law in Canada, would have been so recognised. On 8

November 2004, the couple successfully sought permission to bring judicial review proceedings in the High Court against the Inspector of Taxes' decision.⁸⁰

If the applicants' assertion of their constitutional right to marry is successful it will mean that there is no constitutional impediment to the recognition of a same-sex marriage. Consequently, the Oireachtas would be free to remove the ban on same-sex marriage, without the need for a referendum.

As an alternative to a judicial resolution of the constitutional position on same-sex marriage, the Government should take the initiative by proposing a constitutional amendment that would alter Article 41 to explicitly recognise the right to marry along the lines of the right as defined in the EU Charter on Fundamental Rights.

It is important to emphasise that civil recognition of same-sex marriage does not alter the right of religious denominations to perform wedding ceremonies according to their values and traditions. Indeed, the State can preserve the ability of religious organisations to decide who can marry, according to their beliefs, by creating a separate civil ceremony and register for all marriages. For example, the Catholic Church does not permit divorce and will not perform a religious ceremony if one of the intending spouses has been divorced. Nonetheless, Irish law permits both civil divorce and civil remarriage, whatever the religion of both parties. Such an approach should be adopted in a society that values religious pluralism.⁸¹

⁷⁶ *Op. Cit.* para. 155.

⁷⁷ 440 Mass. 309, 798 NE2d 941. November 18, 2003.

⁷⁸ Article 9 of the Charter provides: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

⁷⁹ No. 2004/19616P. See further the web site on this case: www.kalcase.org.

⁸⁰ A very similar case is being brought in the UK, where a British couple, Celia Kitzinger and Sue Wilkinson, who were legally married in Vancouver in 2003, are seeking to have their marriage recognised under section 55 of the UK Family Law Act 1986. See further <http://www.liberty-human-rights.org.uk/press/2005/kitzinger-and-wilkinson.shtml>

⁸¹ See Law Commission of Canada *op. cit.*, Chapter 4.

2.4 Children's Rights

The Constitution does not explicitly recognise the child as a legal person whose individual rights must be respected and independently represented. A key difficulty with the current position stems from the fact that the rights guaranteed by Articles 41 and 42 attach to the marital family unit as a whole, setting up an inevitable tension where the interest of family members conflict.⁸² In particular children's rights and those of their parents/guardians do not always coincide. Unfortunately families are potentially sites of abuse and neglect. In addition, many children, such as unaccompanied minors and those who are homeless, do not have access to the care a family can provide and so are especially vulnerable.

Family and child law experts have drawn attention to the fact that the current approach has generated some confusion in case law as to the constitutional propriety of treating the child's welfare as the paramount consideration.⁸³ Likewise, the Kilkenny Incest Investigation Committee noted "the very high emphasis on the rights of the family in the Irish Constitution may be interpreted as giving a higher value to the rights of parents than to the rights of children".⁸⁴ Its report recommended a constitutional amendment to expressly provide for an "overt declaration of the rights of born children." Moreover, a recent statutory report notes that constitutional protection of the marital family unit effectively prevents the adoption of children whose best interests would be served by such an order.⁸⁵

Court judgments have found that although children's rights are not explicitly protected (apart from the right to primary education secured in Article 42) they are nonetheless secured under the general personal rights provisions of the Constitution.⁸⁶ In recent case law, however, the judiciary has held that separation of

powers concerns present a significant obstacle to even the vindication of children's express right to education. In *T.D. v Minister for Education and Others*⁸⁷ the Supreme Court overturned (by a 4:1 majority) a High Court order directing the State to adhere to its own time-scales for the building of special-care and high-support units for children at risk.⁸⁸ Such orders were said to fall outside the court's competence, being exclusively matters for the government as they implicated expenditure of resources.

Ireland ratified the United Nations Convention on the Rights of the Child, 1989 (UNCRC) without reservation on September 21, 1992. The Convention provides an internationally agreed framework of minimum standards designed to safeguard the well being of persons under 18 years of age. UNCRC recognises the indivisibility of children's civil, political, economic, social and cultural rights and commits governments to ensuring that young people have basic living conditions, can realize their full potential, are protected from abuse and exploitation and are enabled to participate in decisions affecting their lives.⁸⁹ However, because it has not been incorporated by the Oireachtas, the Convention does not form part of domestic law. The United Nations Committee on the Rights of the Child recommended in 1998 that the Irish Government "accelerate measures to implement recommendations from the Constitutional Review Group for the inclusion of all the principles and provisions of the Convention."⁹⁰

In the ICCL's view UNCRC should be incorporated into Irish law via legislation and the Constitution ought to be amended to include an *express* guarantee of children's rights based on similar provisions in section 28 of the South African Constitution.⁹¹ Moreover, given the absence of an effective constitutional equality guarantee a further sub-clause should be included to the effect that the child's right to family care or parental care is guaranteed irrespective of that carer/parent's gender, marital status or sexual orientation.

⁸² According to Costello J. in *Murray v Ireland* [1985] ILRM 542, at 547, the rights guaranteed by Article 41 "belong to the institution in itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family."

⁸³ See Law Reform Committee of the Law Society of Ireland (2005) *Rights-Based Child Law: The Case for Reform: Part 1*, Law Society of Ireland: Dublin, Chapter 2; G. Shannon (2004), *Child Law*, Roundhall: Dublin, paras 1 - 08; A. Shatter (1997) *Family Law*, 4th edition, Butterworths: Dublin, p. 94.

⁸⁴ *Kilkenny Incest Investigation Report* (1993), Stationery Office: Dublin.

⁸⁵ Department of Health and Children (2005) *Adoption Legislation: 2003 Consultation and Proposals for Change*, Stationery Office: Dublin, Chapter 7.

⁸⁶ See for example, *G. v An Bord Uchtála* [1980] IR 32.

⁸⁷ [2001] 4 IR 259. For a critical evaluation of the court's reasoning in *T.D.* see C. O'Mahony (2002) 'Education, Remedies and the Separation of Powers', 24 *Dublin University Law Journal* 57; G. Whyte (2002) *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Institute of Public Administration: Dublin, pp. 357-63.

⁸⁸ The injunction in issue was the culmination of a series of cases involving failure to provide such accommodation; as a result some children had remained homeless, others were placed in temporary accommodation such as B+B's or sent to units in the UK and further afield, while a number of boys and girls were even detained in penal institutions despite not having committed any criminal offence. In *D.G. v Ireland* (2002) ECHR 447 the ECtHR found that such practices violated Article 5 of the European Convention which safeguards the right to liberty.

⁸⁹ For a user-friendly guide to the Convention see the website of the Children's Rights Alliance: <http://www.childrensrighs.ie/convention.php>

⁹⁰ Recommendation No. 24. Concluding Observations of the Committee on the Rights of the Child, Ireland, UN Doc. CRC/C/15/Add.85 (1998).

⁹¹ Section 28 of the Constitution of the Republic of South Africa (1996) provides:

"(1) Every child has the right:

to a name and nationality from birth;

to family care or parental care, or to appropriate alternative care when removed from the family environment;

Significantly insertion of a provision along the lines of section 28 would grant Irish courts the jurisdiction to protect the socio-economic rights of especially vulnerable children, such as their right to health, adequate housing and nutrition. Judgments of South African Constitutional Court demonstrate that the provision can be applied in a manner that respects the separation of powers.⁹²

Our recommendation to the effect that children's rights be entrenched at constitutional level is cross cutting and affects all other provisions concerning families.⁹³ In particular, the proposed clause to the effect that a child's interests are of paramount importance militates against the continued inclusion of special protection for married families in the Constitution. For this reason, the recommendations of the All-Party Oireachtas Committee on the Constitution are highly problematic.⁹⁴ A series of cases emanating from the South African Courts illustrate that state preferences for marriage violate not just the rights of unmarried partners to equal protection but also the rights of their children.⁹⁵ In *J & B v Director General, Dept of Home Affairs & Others*⁹⁶ the South African High Court emphasised that under section 28 the interests of the children are not merely important - they override all other considerations in cases concerning children. This type of provision represents international best practice, mirrors the requirements of UNCRC and should be replicated in Ireland in order to ensure that all children are afforded the highest level of protection in engagements with both public authorities and with their families.

2.5 Conclusion

This Chapter demonstrates that the Constitution fails to recognise family life outside of marriage, although such a position is out of sync with the international legal standards Ireland has agreed to uphold. Furthermore, the case law canvassed above shows that retention of a special status for married families is incompatible with the protection of children's rights in particular. As the primary source of domestic law the Constitution sets the parameters in which all other laws and policies must operate. Constitutional amendment is therefore an indispensable element of any reform strategy in this sphere.

to basic nutrition, shelter, basic health care services and social services;
to be protected from maltreatment, neglect, abuse or degradation;
to be protected from exploitative labour practices;
not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child's age;
(ii) or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age;
to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
not to be used directly in armed conflict, and to be protected in times of armed conflict.
(2) A child's best interests are of paramount importance in every matter concerning the child.
(3) In this section "child" means a person under the age of 18 years."

⁹² See for example M. Kende (2003) 'The South African Constitutional Court's Embrace of Socio-economic Rights: A Comparative Perspective', *Chapman Law Review* 6, 137.

⁹³ See ICCL (2005) *Submission to the All-Party Oireachtas Committee on the Constitution: Public Consultation on Family Rights*, available from <http://www.iccl.ie/>.

⁹⁴ All-Party Oireachtas Committee on the Constitution (2006) *Tenth Progress Report: The Family*, Stationery Office: Dublin. The Committee's findings are discussed in Chapter 4.

⁹⁵ See further Chapters 5 and 6.

⁹⁶ Case No. 1906/2002.

CASE STUDY ONE

Mike and Linda started living together in 1989. He is 49 this year and was married for about eight years. He is now divorced and has his wedding vows annulled.

Mike has two adult sons from his marriage, one of whom is mid twenties and the other late twenties. The boys lived with him for a few years after his marriage ended and then moved to Scotland to live with their mother. His youngest son lived with Linda and him for the first two years of their relationship.

Linda is 40 years old. She has one child, Rob from a previous relationship, who lives with her and Mike. Mike and Linda also have three children together, aged 13, 12 and 9. All six live together including Linda's son from a previous relationship.

Linda and Mike choose not to marry. Linda has never had any desire to get married and Mike having done it once does not feel the need to do it again. Linda feels strongly that she does not need her relationship sanctioned by either the church or the State.

As an unemployed and unmarried couple living together Linda and Mike had to claim as a co-habiting couple. This entitles them to less money than a single man and a lone parent if they were to claim separately. However, when Mike started working he was taxed as a single man even though he has been living with Linda and they have children together and Rob is his dependant also. Linda and Mike feel that they are continually penalised financially by the State whether working or unemployed.

Linda and Mike have had no difficulties with negative attitudes at their children's schools, but recognise and appreciate that this is because their children attend Educate Together schools which have a much more inclusive ethos.

Their children have no problem with the fact that their parents are not married. Linda and Mike have been careful to explain to them when they were of an age to understand about their decision not to marry and to explain the difference between being half brothers and half sisters or full brothers and sisters.

The couple had concerns about the continuation of their council house tenancy as the tenancy is in Linda's name but the recent change in legislation (Residential Tenancies Act 2004) has given them peace of mind.

Linda and Mike are often bemused and sometimes offended by attitudes to their relationship as an unmarried couple. People's responses vary from assuming that they are unable to marry or that they do not care enough about each other to marry.



3. LEGISLATIVE CONTEXT

3.1 Introduction

Irish law stratifies various interpersonal relationships at both constitutional and legislative level. This distinct hierarchy places marriage at its apex by conferring more rights and duties on couples in a legally recognised marriage than on any other relationship. Opposite-sex cohabiting couples acquire limited rights under certain pieces of legislation but are not entitled to the constitutional protections afforded to marriage, and so occupy the second tier of relationships. 'Other' family forms occupy the final tier of the hierarchy. This group includes solo parents and same-sex couples that have been repeatedly excluded from rights which automatically accrue to opposite-sex couples.

Despite the existence of the Equal Status Acts 2000-2004, which prohibit discrimination in the provision of goods and services on several grounds including gender, marital status and sexual orientation, there is persistent inequality in how the law treats various families and individuals. The Act is subject to a number of wide exemptions: any measures required by other laws cannot be challenged⁹⁷ and the definition of 'service' does not include several key government functions.⁹⁸

Laws regulating relationships between individuals cover two primary areas - financial interdependence and emotional ties. The emotional ties between people are acknowledged primarily in laws that attribute responsibility for decision-making about one's family members. Examples include provisions on the guardianship of children and rules on decisions as to medical treatment in the event of a partner's incapacity. Provisions on family reunification, and the right more generally to have one's partner reside in the same place also fall under this rubric. Financial interdependence is reflected in regulations concerning social welfare, taxation, inheritance, property ownership, maintenance obligations and so on.

As outlined in further detail below, when someone enters a marriage contract a range of rights and duties automatically become applicable. Unmarried couples may acquire some of these protections by entering into specific contracts and drawing up an appropriate will, for example. Other benefits and duties, such as taxation measures and parental rights, cannot be opted

in or out of by private arrangement. In any event, many unmarried couples will not be aware of their legal status and/or will not have the financial resources required to consult a solicitor. This Chapter summarises the main areas in which diverse family forms are treated unequally under relevant legislation.

3.2 Marriage

Section 2(2)(e) of the Civil Registration Act 2004 explicitly precludes the possibility of a valid civil marriage between two persons of the same sex. Chapter 2 considers the definition and elevated position of marital families under the Irish Constitution. In practical terms, the constitutional articles on the family not only permit the Oireachtas to confine marriage to opposite-sex partners but arguably prohibit legislative extension of access to other couples.

3.3 Parenting Rights and Responsibilities⁹⁹

Three pivotal concepts apply to parents' legal relationships with their children: guardianship, custody and access. Guardianship involves rights and responsibilities in relation to major decisions affecting a child's overall up-bringing (e.g. where they live, go to school, consent to adoption etc.), including the duty to maintain and properly care for a child. Married people are automatically joint guardians of any children they have or adopt together.¹⁰⁰ Where a child is born outside of marriage the biological mother is automatically the sole guardian of the child, an unmarried father is not (even where, for example, he is registered as the child's father on the birth certificate and/or is living with the child and his partner). However, the biological father can, with the consent of the child's mother, be appointed guardian by way of a statutory declaration.¹⁰¹ If the mother does not agree, the father must go to court to seek appointment as a guardian. There is no means for appointing the non-biological parent in *de facto* relationship as a child's guardian.¹⁰²

⁹⁷ Section 14(a).

⁹⁸ Section 2. See further the Equality Officer's decision in, *Donovan v Garda Donnellan*, DEC-S2001-011.

⁹⁹ For further information on the rights and responsibilities of unmarried parents see the website of Treoir - The National Federation of Services for Unmarried Parents and their Children: <http://www.treoir.ie/>

¹⁰⁰ Section 6(1), Guardianship of Infants Act 1964; section 24 Adoption Act 1952.

¹⁰¹ Subsection 2(4), Guardianship of Infants Act 1964, as amended by the Status of Children Act 1987; Section 24 Adoption Act 1952.

¹⁰² A non-biological parent may become guardian upon the death of their partner, if they have been so appointed in their partner's will (Section 7 of the 1964 Act).

Custody involves day-to-day responsibility for the care of a child. Married parents who live together are the joint custodians of their children. Unmarried partners (same or opposite sex) and spouses who separate/divorce can informally agree custody arrangements. In the event of a dispute as to custody, court proceedings can be initiated.¹⁰³ The welfare of the child is regarded as the first and paramount consideration in such hearings.¹⁰⁴ While judges frequently canvass the views of affected children, they are not obliged to do so.¹⁰⁵ An unmarried biological father can go to court to seek joint or sole custody, however he acquires no rights on the birth of the child.

Access includes the right to have a child or children reside with and go on holidays with the non-custodial parent for a proportion of each school period and may include a right to have a child stay overnight with that parent on alternating or occasional weekends. Where parents can agree between themselves about the duration, frequency and circumstances of access, the court will not usually interfere. If they cannot agree and if custody is granted to one parent, the other parent will normally be given access by the court if s/he wants it. Any person related to a child by blood or adoption or who has acted in *loco parentis* may apply to the court for leave to apply for access to the child. In making a decision the court will consider the applicant's connection with the child, the risk, if any, of the application disrupting the child's life to the extent that the child would be harmed by it and the wishes of the child's guardian(s).¹⁰⁶

Spouses are legally responsible for maintaining each other and any children of their marriage. Unmarried partners are not obliged to maintain each other. Every legally recognised parent is however responsible for the maintenance of their child.¹⁰⁷

3.4 Adoption

Adoption is the process by which links with the biological parent(s) are severed and replaced with a legal relationship between a child and his or her adopters.¹⁰⁸ The Adoption Acts 1952-1998 govern the law of adoption, and procedures are overseen by the Adoption Board, which is the only body authorised to make an adoption order.¹⁰⁹ Adopted children attain largely the same property, succession and other rights as natural children.

Before the Adoption Board will make an adoption order it must be satisfied that the applicant is of good moral character, financially capable of supporting the child, and suitable to be a parent. Married partners are the only family grouping entitled to adopt *as a couple*.¹¹⁰

3.5 Family Home

During the currency of a marriage spouses retain separate ownership of any property they may have, including the family home.¹¹¹ A financially dependent spouse is, however, afforded protection that is not available to an unmarried dependant partner. Where couples living together are married, the Family Home Protection Act 1976 protects the spouse who does not legally own the family home in the event that the home is being sold, mortgaged or leased.¹¹² Specifically, they must consent in writing to any conveyance of an interest in the property. There is no such protection if the couple are unmarried. Further, in the event of *marital* breakdown courts are empowered to make property adjustment orders and orders as to maintenance.

¹⁰³ This may arise in the context of divorce or separation proceedings, for example.

¹⁰⁴ Section 3 of the 1964 Act.

¹⁰⁵ Section 25 of the 1964 Act (as inserted by section 11 of the Children Act, 1997) stipulates that in proceedings involving custody, guardianship and access 'the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter'. The judgment of Finlay-Geoghegan J in *FN and EB v CO, HO and EK* (unreported, High Court, 26 March 2004) is a welcome acknowledgment of the importance of children's views.

¹⁰⁶ Section 9 of the Children Act 1997.

¹⁰⁷ See the Family Law (Maintenance of Spouses and Children) Act 1976 (as amended).

¹⁰⁸ Whereas foster care just involves a change in legal custody of the child, adoption involves the 'transfer' of legal guardianship.

¹⁰⁹ See the Board's website: <http://www.adoptionboard.ie/>

¹¹⁰ Section 10 of the Adoption Act 1991 specifies who can adopt, including: a married couple living together; the mother, father or relative of the child; a widow or widower; someone who is not the mother, father or relative of the child or a widow or widower, where the Adoption Board finds it desirable to allow that person to adopt; where an application is made by applicants other than a married couple it may only be made on behalf of an individual (i.e. only married couples may adopt, not unmarried couples); the applicant(s) must be at least 21 years of age and the applicant(s) must be ordinarily resident in the State, and must have been ordinarily resident here for the year immediately preceding the adoption order.

¹¹¹ An attempt to establish a common property regime in respect of married couples was found to be unconstitutional by the Supreme Court in *Re Article 26 and the Matrimonial Home Bill 1993* [1994] IR 305. Section 36(1) of the Family Law Act 1995 provides that either spouse may apply to the Circuit Court or the High Court to determine any question relating to the title or possession of any property. Section 9 of that statute empowers a court to make property adjustment orders in the event of judicial separation. The distribution of property upon divorce is governed by the Family Law (Divorce) Act 1996.

¹¹² Defined as the property in which a married couple ordinarily reside and lands ancillary to that property.

So, for example, a spouse who is not registered as the legal owner of the family home may be granted an interest in the property upon divorce or separation. No equivalent provisions apply where a relationship between unmarried partners comes to an end.

Unmarried cohabiting couples can attempt to regulate their financial position by employing two types of contract: a cohabitation agreement and a co-ownership agreement. Cohabitation agreements generally deal with the division of assets if the relationship ends, but they can also cover other issues like the care of children, the payment of maintenance, the management of household work and the payment of household expenses. However, their status in Irish law is somewhat uncertain.¹¹³ According to the Law Reform Commission cohabitation agreements may be considered legally enforceable where they are confined to regulating the financial and property affairs of partners in a non-marital relationship.¹¹⁴ While further case law is required to clarify the matter it appears that unmarried partners could draw up a cohabitation agreement to cover the crucial question of maintenance.

Co-ownership agreements are used to explicitly state the shares of each party where two or more people own property together. They usually also cover matters like obligations to pay the mortgage and other expenses associated with the property. Unlike cohabitation agreements they are clearly legally enforceable. In the event that a couple does not enter into either of these two agreements the default position is particularly harsh in the case of a partner who has no independent income. S/he will have no entitlement to maintenance and no right to a share in the ownership of the property unless s/he has contributed to the purchase of the property by way of direct or indirect contributions.

In cases where partners rent a home, Part IV of the Residential Tenancies Act 2004 allows a cohabiting partner or child who is not a named tenant to automatically be treated as a tenant after six months. This allows the partner or child to continue the tenancy if the named tenant dies, or leaves the premises in defined circumstances. However same-sex cohabittees

or cohabiting persons who are not in a conjugal relationship have to apply for a tenancy after six months; they receive no automatic tenant status.

3.6 Inheritance

In the event of the death of a married person the law provides that automatic provision is made for their surviving spouse.¹¹⁵ If a married person dies without making a will, the surviving spouse inherits the entire estate where there are no surviving children; the share is two-thirds where there are surviving children. However, there are no analogous protections for unmarried opposite-sex couples or same-sex couples. While no automatic share is provided for children, all children are entitled to make an application to a court seeking proper provision to be made for them, if they believe that the parent failed to so provide either during their lifetime or on their death.¹¹⁶

While a marital relationship attracts a number of tax advantages in this context, none of these advantages extend to unmarried couples. Property inherited by an unmarried partner is usually subject to full inheritance tax, whereas spouses and children enjoy various exemptions.¹¹⁷ Where, however, the property concerned is the family home an unmarried partner (or other cohabitee) may be exempt from capital acquisitions tax provided that certain residence and other conditions are met.¹¹⁸

3.7 Social Welfare

Serious anomalies also exist in the area of welfare rights and entitlements for unmarried cohabiting opposite-sex and same-sex couples. Although the State does not allow unmarried opposite-sex cohabiting couples to benefit from joint taxation, it does recognise

¹¹³ This as a result of the case of *Ennis v Buttery*, [1996] 1 IR 426. See also J. Mee & K. Ronayne (2000) *Partnership Rights of Same Sex Couples*, Equality Authority: Dublin, pp. 32-33.

¹¹⁴ Law Reform Commission (2004) *Consultation Paper on the Rights and Duties of Cohabitees*, Law Reform Commission: Dublin, paras 3.23-3.31.

¹¹⁵ Section 111 of the Succession Act 1965 provides that if someone dies having made no provision for their surviving spouse then s/he automatically becomes entitled to half of the estate, or one third if there are children of the marriage. This is known as a Legal Right Share.

¹¹⁶ See s. 117, Succession Act 1965. Whereas a Court is not entitled to interfere with the share of a spouse in order to increase provision for children, the Court may interfere with any provision made under a will for either an unmarried cohabiting opposite-sex partner or a same-sex partner in order to increase provision to children who successfully apply to the courts.

¹¹⁷ Property that passes absolutely to a spouse is exempt from probate tax, for example. See further the website of the Irish Revenue Commissioners: <http://www.revenue.ie/>

¹¹⁸ See section 151 of the Finance Act 2000.

the existence of the relationship for certain welfare entitlements. By way of example, individuals cannot claim the One Parent Family Payment¹¹⁹ if they are part of a cohabiting couple. Likewise, the existence of the relationship is not recognised if one of the partners dies. Opposite-sex cohabiting couples cannot apply for Widow's or Widowers (Contributory) Pension¹²⁰ or the Widowed Parents Bereavement Grant.¹²¹ However, if a person applies for Unemployment Assistance¹²², the Department of Social and Family Affairs will subject the individual and their cohabiting partner to a joint household income means test. The imposition of financial penalties in the event of cohabitation discourages or at least impedes joint responsibility for the care of children. This is clearly at odds with the vision of family life advocated in recent reports published by the Department of Social and Family Affairs.¹²³

Same-sex couples are now invisible within the welfare code. Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 specifically excludes same-sex couples from the benefits and burdens of statutory and non-statutory welfare schemes. This legislative provision was introduced to reverse the outcome of a successful Equal Status Act case.¹²⁴ As explained in Chapter 5, the unequal treatment of same-sex partners in this and some other contexts, arguably contravenes the European Convention on Human Rights.

According to the Northern Ireland Human Rights Commission treating lesbian and gay couples equally in this context "may well cause policy dilemmas".¹²⁵ The Commission notes that application of the cohabitation rule to same-sex couples raises additional sensitivities to those experienced by heterosexual partners. In order to address these concerns and those raised in Chapter 1, the ICCL recommends that people's means should be assessed on an individualised basis.

3.8 Domestic Violence

The Domestic Violence Act 1996, allows spouses to obtain a barring order, which has the effect of excluding a violent person from the family home. Parents of adult children and persons who have been living together as "husband and wife" for six months can also obtain barring orders, except where the other party has more extensive ownership rights in the property concerned.¹²⁶ Same-sex cohabitants are only entitled to apply for a safety order or interim protection order, where the applicant is of full age and resides "with the respondent in a relationship the basis of which is not primarily contractual".¹²⁷ These orders simply direct the perpetrator to discontinue their violent behaviour and do not result in exclusion from the family home. As discussed further in Chapter 5, the difference in treatment afforded same-sex and opposite-sex cohabitants runs counter to relevant ECHR standards.

3.9 Immigration

Failure to recognise unmarried partnerships poses considerable difficulties for the people seeking to migrate to or remain in the jurisdiction.¹²⁸ Persons that are lawfully resident in Ireland can, depending on their legal status, avail of a number of processes to seek family reunification.¹²⁹ These procedures generally treat married couples more favourably than their unmarried

¹¹⁹ The One Parent Family Payment is a means tested welfare payment for one-parent families.

¹²⁰ This is a non-means tested social insurance payment for widows and widowers.

¹²¹ Widowed Parents Bereavement Grant is payable to widows and widowers with dependent children upon the death of a spouse.

¹²² Unemployment Assistance is payable to individuals who are fully or partially unemployed.

¹²³ See further Chapter 4.

¹²⁴ The Equal Status Act case involved an older same-sex couple where one partner possessed a free travel pass but had been refused one for this partner. Usually both partners in married and cohabiting couples are eligible for the pass when one of them becomes eligible. In settling the case, the Department of Social and Family Affairs accepted that it had unfairly discriminated against the couple on the basis of sexual orientation under the Equal Status Act, 2000. See Equality Coalition (2004) *Submission on the Social Welfare (Miscellaneous) Bill 2004* (available from <http://www.iccl.ie>).

¹²⁵ Northern Ireland Human Rights Commission (2001) *Enhancing the Rights of Lesbian, Gay and Bisexual People in Northern Ireland*, NIHRC: Belfast, p. 76.

¹²⁶ Section 3(1)(b).

¹²⁷ Section 2(1)(b) - A Safety Order prohibits the respondent from threatening to or using violence against, molest or put in fear the applicant or any dependant child, but does not prohibit the respondent from residing in or entering the residence of the applicant and/or children. An Interim Protection Order offers the same protection as a Safety Order, but merely on an interim basis.

¹²⁸ See generally the website of Gay and Lesbian Unions Eire: <http://www.glue.ie/>

¹²⁹ See generally Irish Human Rights Commission (2005) *Position Paper on Family Reunification*, available from: http://www.ihrc.ie/_fileupload/banners/FamilyReunification.doc

For example, the position of non-EU citizens and those who are not married to EU citizens very much depends on whether the individual resides in Ireland on the basis of a work permit or a work visa. People in Ireland on the basis of work permits are not entitled to bring their spouses or children to Ireland with them, whereas those with work visas may be joined by their families. The European Council Directive on Family Reunification for Migrants or Third Country Nationals (2003/86/EC) was designed to improve this situation, however Ireland has opted out of the Directive. It allows for the reunification of a migrant with his or her spouse, children and, where the host state so allows, unmarried partner, adult dependent children and dependent ascendants. This Directive does not, therefore, automatically guarantee reunification rights to unmarried couples but could be adapted to do so at the instance of the Government.

counterparts.¹³⁰ With the exception of applications from refugees¹³¹, there are no domestic legislative provisions in place and so family reunification is governed exclusively by administrative schemes based on the discretion of the Minister for Justice, Equality and Law Reform. Since applications are processed on a case-by-case basis, the decision-making process lacks transparency.

An EU Directive, adopted in April 2004, has introduced substantial change to the area of residence and movement of persons within the EU.¹³² Member States, including Ireland, must transpose its provisions by 30 April 2006. While the automatic right to reside essentially remains limited to 'spouses', unmarried partners are to be entitled to reside where the host State has a policy of treating unmarried partnerships as being equivalent to marital unions. States that do not adopt this policy of equivalence are not, however, entitled to introduce a blanket-ban on unmarried partners entering and residing in the State.¹³³ It remains to be seen how the Government will comply with its EU law obligations. A discussion document on immigration and residence, published in 2005 by the Department of Justice, signals that a narrow definition of family will be retained in this context.¹³⁴ The Irish Human Rights Commission recommends that in light of international human rights standards the right to family reunification should be extended to extra-marital relationships and be placed on a statutory footing.¹³⁵

The ICCL supports the analysis of the Human Rights Commission and suggests that there are several good models operative in other jurisdictions, which Ireland should adopt prior to the introduction of comprehensive legislation regulating the rights of unmarried couples. For example, in 1997 the United Kingdom (UK) introduced the Unmarried Partners Concession to allow non-EU citizens to live in the UK with their partners if the relationship had subsisted for four years. In June 1999 this period was reduced to two years. Upgraded to an Immigration Rule in 2000, the rule allows

overseas nationals to enter or remain the UK as the unmarried partner of a person living in the country.¹³⁶ In order to qualify the relationship must be akin to marriage and have subsisted for two years or more. Any previous relationship/marriage must be permanently broken down and the couple must intend to live together.¹³⁷ This rule applies to the partners of EU citizens and non-British citizens with permanent residency, work permits, business permission or retired persons with independent means. Both opposite sex and same-sex couples are covered equally.

New Zealand also grants entry visas and residence permits to non-married partners in cohabiting relationships. However unlike the UK's Unmarried Partners Rule, New Zealand does not apply a two-year threshold period. Focusing on the substance of a relationship, immigration authorities grant visas and residence permits to individuals based on evidence of a partnership.¹³⁸

3.10 Discrimination in the Workplace

Although the Employment Equality Acts 1998-2004 outlaw certain types of discrimination on nine grounds, including, gender, sexual orientation and marital status, the legislation does not offer protection against discrimination in terms of employment benefits to many different types of families.

DEFINITION OF FAMILY AND MARRIAGE EXEMPTION

The Acts provide for important exceptions in relation to the family status ground. Specifically, benefits that are provided only to employees upon a change in their marital status are immune from challenge.¹³⁹ Nor is it

¹³⁰ *Ibid.*

¹³¹ The right to family reunification for refugees is governed by section 18 of the Refugee Act 1996; the category of eligible family members is confined to spouses and dependent children.

¹³² Directive 2004/58/EU of the European Parliament and of the Council on the right of citizens of the union and their family members to move and reside freely within the territory of the Member States.

¹³³ Article 3(2) states that "the host member state shall, in accordance with its own national legislation, facilitate entry and residence" for unmarried/unrecognised partners. According to the International Lesbian and Gay Association (ILGA)-Europe this provision "implies a positive duty to permit admission...yet, equally, member states cannot be obliged to admit unmarried couples and their family members in every case; a mechanism for a case-by-case assessment based on coherent criteria will need to be established": ILGA-Europe, Newsletter, (2004) 1 March 2004, p. 7 - available via <http://www.ilga-europe.org>.

¹³⁴ Department of Justice, Equality and Law Reform (2005) *Immigration and Residence in Ireland: Outline policy proposals for an Immigration and Residence Bill*, Stationery Office: Dublin, Chapter 9.

¹³⁵ Irish Human Rights Commission (2005) *Observations on the Immigration and Residence in Ireland Discussion Document*, available from: <http://www.ihrc.ie/>

¹³⁶ UK Lesbian & Gay Immigration Group (2004) *Briefing Document: Unmarried Partners Rule*, www.stonewall-immigration.org.uk/Briefing%20Doc.htm

¹³⁷ *Ibid.*

¹³⁸ This includes a proof of shared residence; financial dependence or interdependence; birth certificates for children; any documents showing public or family recognition of a relationship; correspondence; photographs of the couple together; evidence of the duration of the relationship; the degree of committed to a shared life; evidence of communication; evidence of being committed to each other emotionally and exclusively, such as evidence of joint decision making, an exclusive sexual relationship, and the sharing of household duties, parental responsibility, and spare time. Refer to <http://www.immigration.govt.nz/migrant/>

¹³⁹ See Section 34 of the EEA (as amended).

discriminatory to provide benefits for an employee's family. Family member is defined narrowly for this purpose. According to section 2 it means: a person's spouse, or a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant of a person or their spouse.

The term "spouse" does not cover benefits for non-marital partners, including same-sex partners.¹⁴⁰ So for example, an employer who offers discounts on products to the partner and children of a married employee, can legally refuse to extend that scheme to unmarried families. However, if an employer granted some form of benefit to unmarried opposite-sex partners but not to same-sex partners this would amount to direct discrimination on the grounds of sexual orientation and would not be permissible.

3.11 Relationships and Employment Leave

PARENTAL LEAVE

The natural or adoptive parent of a child is entitled to take unpaid parental leave under the Parental Leave Act 1998.¹⁴¹ Both men and women are covered and each parent has a separate entitlement to the fourteen weeks leave.¹⁴² The narrow definition of 'parent' may cause difficulty for unmarried cohabiting couples where one partner is not the natural/adoptive parent of the child and yet is caring for a child. In this respect, the proposed extension of qualifying employees to include those acting in *loco parentis* is a welcome development.¹⁴³

"FORCE MAJEURE" LEAVE

Employees are entitled to paid leave from employment if their presence with certain designated injured or ill family member is indispensable.¹⁴⁴ An employee can take three days leave in any period of twelve months or five days in any thirty-six month period. The family member who is ill or injured must come within one of

the following categories: a child or adopted child of an employee; the spouse of the employee or person with whom they are living as husband or wife; parent or grandparent of the employee; brother or sister of the employee; someone for whom they are acting in *loco parentis* (i.e. they have a special duty of care akin to a parent) and persons of any other classes (if any) as may be prescribed.

Both married couples and opposite-sex couples cohabiting are explicitly included, the phrase "living as husband or wife" suggests that same-sex conjugal relationships are excluded.¹⁴⁵ According to the European Group of Experts on Combating Sexual Orientation Discrimination *force majeure* leave, should as a matter of EU law be available equally to same-sex partners.¹⁴⁶

As can be seen from the definition above, there is scope for the deliberate addition of other categories of qualifying persons, including people in same-sex relationships. The ICCL believes that *force majeure* leave, taken as it is at a time of medical emergency, should be consistent with the provision of Carer's Leave (see below), that is, it should be available where the employee is a person who normally provides care to the injured or ill person. Potential abuse on the part of employees is offset by the minimal nature of the entitlements.

ADOPTIVE LEAVE

The Adoptive Leave Act 1995 (as amended) allows employees to avail of twenty weeks leave. Leave is currently available to an adoptive mother, a sole male adopter and an adoptive father where the adopting mother has died. It is the view of the ICCL that adoptive leave should be available to either partner in a couple, irrespective of gender or marital status.

CARER'S LEAVE

The Carer's Leave Act 2001 allows an employee to avail of temporary unpaid leave to enable him/her to personally provide full-time care and attention for

¹⁴⁰ It appears that this provision is in line with applicable EU law, even though it gives rise to indirect discrimination on the grounds of sexual orientation. The Preamble to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, provides "[t]his Directive is without prejudice to national laws on marital status and the benefits of dependent thereon."

¹⁴¹ Section 6(5) of the Parental Leave Act 1998.

¹⁴² Section 6(1).

¹⁴³ Section 2 of the Parental Leave Amendment Bill 2004.

¹⁴⁴ Under Section 13 of the Parental Leave Act 1998.

¹⁴⁵ No case has been brought to challenge whether the definition of "living as husband or wife" excludes same sex-couples, particularly in light of the requirement as of 31/12/03 to interpret all laws in compliance with the European Convention on Human Rights. Articles 8 and 14 of the ECHR would require that the law be interpreted to include both opposite and same sex couples. See further Chapter 5.

¹⁴⁶ European Group of Experts on Combating Sexual Orientation Discrimination (2004) *Combating Sexual Orientation Discrimination in Employment: Legislation in Fifteen EU Member States*, European Commission: Brussels, pp.621-22. Available from: http://europa.eu.int/comm/employment_social/fundamental_rights/public/pubs_en.htm

another person. The care recipient must be deemed to be in need of full-time care and attention by an officer at the Department of Social, Community and Family Affairs. Their decision does not rest on the relationship between the employee and person in need of care, but is based solely on a medical assessment. Consequently, the legislation does not differentiate between various family forms. This approach ought to be retained.

UNFAIR DISMISSALS LAW

The Unfair Dismissals Acts 1977-2001 afford people with family responsibilities some additional protection. Persons availing of the various leave entitlements referred to above cannot be dismissed from their job for exercising their rights.

3.12 Conclusion

The unequal constitutional position of various family forms is reinforced at legislative level. Married families are accorded the highest level of protection and subject to more onerous duties than people in other interpersonal relationships. Same-sex couples are subject to two layers of discrimination. First, since they are barred from marrying they may not assume the rights and obligations that currently attach to marriage. Second, a number of legislative provisions differentiate between unmarried opposite-sex and same-sex partners without objective justification.

CASE STUDY TWO

My name is Dil. I am 31 years old and I was born in Italy however I am a Sri Lankan national. I was based in Bahrain for five years, working for an Airline in the Arabian Gulf and during that time I met my partner Mo. She is Irish and she is the reason why I am in Ireland today. We left the airline together to come to Ireland and start our life together as a couple. We came out to our parents and even though they initially could not understand it, they gradually become accustomed to the thought of having a daughter-in-law rather than a son-in-law.

We have gained the acceptance of our families, friends and employers. However this does not apply to the Irish Government. Since the time I moved to Ireland, which was almost five years ago, it has been a struggle to stay here. I was fortunate enough to come across my present employers who applied for a work permit that allows me to remain here. However, it must be renewed annually.

Immigration laws are not the only laws that I find discriminate, so do employment laws. I have been with my employer for the past four years and I am told that I am an exemplary employee. I have always worked extremely hard and paid my taxes just like everyone else. However my service to my company and the Unfair Dismissals Act does not protect me from every eventuality. If my company was to discontinue my services tomorrow or if it closed down - I would have to leave the State as soon as possible and reapply for a permit from my country of origin. Permits are almost impossible to get at present so the wait would be extensive. This would be an absolute disaster! I do not even want to imagine how the separation would affect my partner and I emotionally, together with our mortgage and other financial commitments. What if I could not get a permit? My partner would have to dispose of the new home, which we worked so hard for and move to Sri Lanka to be with me. Sri Lanka has been for the past 20 years and continues to be in a state of emergency due its terrorist disturbances. It is not a safe environment to live in and as the economy is unstable, finding a job would not be easy.

Another factor that deters us from moving to Sri Lanka is that under Sri Lankan law homosexuality is still criminalised. The punishment is ten years imprisonment. So basically, if I lost my job tomorrow - we would be in very deep trouble.

Three years ago we made an application for residency. The application was based on three factors. The first one being that I am in a committed relationship with an Irish national. We supplied bills, bank statements and character reference letters from all our friends and family to support the depth of our devotion to one another. Then, the application referred to the civil war in Sri Lanka and that it would not be safe for me to return, especially in light of the law on homosexuality. Finally, we noted that if I were not able to remain in Ireland, Mo would have to move with me to Sri Lanka to respect her family life and thereby endangering the life of an Irish citizen. The application was a fair expense for us to incur but we were optimistic that it would be granted. Two years after we submitted the application we were contacted by the Department of Justice and told that as I already held a work permit there would be no need for me to be granted residency. If I were to give up my work permit, they would be willing to reconsider my application. Our solicitor advised us that our next step would be to approach the European courts. These legal procedures may cost us over €20,000. Even then there is no guarantee of success.

Ever since my partner and I embarked on our journey together we have had so many knocks but we have always pulled through it and found that at the end of the battle our love has been strengthened. We try not to dwell too much on how uncertain our life in Ireland is. Surely, life itself is uncertain enough as it is.

I am part of Mo's family and I have grown to love Ireland. I have been here long enough to appreciate the beauty of its people and culture. I have got used to the weather and even the accent is beginning to rub off on me. I am not bothered about attaining Irish citizenship, all I want is to be able to live here with Mo without the need for permits and without the constant fear that we might have to leave and give up the fruits of our labour in Ireland. This is our dream.

4. POLICY CONTEXT



4.1 Introduction

Policies can be differentiated from legal provisions on the basis they are not enforceable or binding. Instead, policy is employed in order to frame governmental approaches to a given area and to set out objectives to be attained.¹⁴⁷ Traditionally, policies have been structured around married couples, with other relationships regarded as deviations from that 'norm'. The *Report of the Commission on the Family* (1998) and subsequent publications issued by government departments, indicate that public policy is moving towards recognition of the 'substance' of relationships, taking cognisance of diverse families and partnerships outside of marriage. A range of state agencies, both *ad hoc* and permanent in nature, formulate public policy. This chapter sketches relevant initiatives undertaken by some key bodies in recent years.

4.2 Equality Authority Initiatives

The enactment of anti-discrimination legislation and the establishment of the Equality Authority¹⁴⁸ have acted as significant catalysts for change. The Employment Equality Acts 1998-2004 prohibit discrimination in relation to employment on the basis of: age, disability, gender, family status,¹⁴⁹ marital status, 'race', religious belief, sexual orientation, and membership of the Traveller community. Discrimination on the same grounds with regard to the supply of goods, services (including accommodation) and education, is outlawed under the Equal Status Acts 2000-2004.

The Equality Authority has been instrumental in locating discussions on partnership rights and family diversity within an equality framework. In 2000 it

published an audit of the legal position of same-sex couples¹⁵⁰ and hosted a seminar on partnerships rights organised by the Gay and Lesbian Equality Network (GLEN) and Lesbians Organising Together (LOT). Following these initiatives the Authority published a report informed by the key principles of diversity, equality and accessibility: *Implementing Equality for Lesbians, Gays and Bisexuals* advocates systematic reform of legal and policy codes so as to accord same-sex couples rights comparable to those of married heterosexual partners.¹⁵¹

On foot of the Equality Authority's 2002 report, the National Economic and Social Forum (NESF) undertook a review of relevant policy and practice.¹⁵² Having consulted with Government Departments and other State agencies, the NESF identified several barriers to the implementation of equality for the LGB community. One of the legislative changes sought was a family law statute that recognised lesbian and gay relationships and in that regard the NESF called on the Law Reform Commission to consider all possible methods of extending equal protection to same-sex couples.

More recently the Equality Authority has employed its research and education mandate to highlight the inequalities faced by carers generally.¹⁵³ According to *Implementing Equality For Carers* the role of the State has been primarily a residual one with an expectation that families provide care with little state support. Community care services are underdeveloped, income supports for carers are inadequate, and many carers experience isolation and a sense of powerlessness. The Authority called for the implementation of comprehensive strategy, which is based on promoting independence, autonomy and choice for carers and for people who need care.

¹⁴⁷ Laws and policies also emanate from different institutional sources: Under Article 15.2.1° of the Constitution "the sole and exclusive power of making laws for the State is hereby vested in Oireachtas..." The Executive (Taoiseach and Cabinet) is empowered to make decisions about policy issues both within the State and externally (Articles 28.2 and 29.4.1).

¹⁴⁸ The Equality Authority was established to oversee the implementation of Irish anti-discrimination legislation. See the Authority's website <http://www.equality.ie>.

¹⁴⁹ The definition of family status is narrow and only means having responsibility either as a parent or as a person in *loco parentis* for someone below 18 years of age, or as a parent or resident primary carer for someone 18 years or over with a disability who requires a high degree of support and attention.

¹⁵⁰ Mee & Ronayne op. cit..

¹⁵¹ Equality Authority (2002) *Implementing Equality for Lesbians, Gays and Bisexuals*, Equality Authority: Dublin.

¹⁵² National Economic and Social Forum (2003) *Equality Policies for Lesbian, Gay and Bisexual People: Implementation Issues*, NESF: Dublin.

¹⁵³ Equality Authority (2005) *Implementing Equality for Carers*, Equality Authority: Dublin.

4.3 Constitutional Reviews

The *Report of the Constitution Review Group (CRG)*¹⁵⁴ was one of the first major policy documents to consider the concept of family life set out in *Bunreacht na hÉireann*. The CRG recommended that the rights of all family members, including those of unmarried parents and their children, should be recognised, by inserting a guarantee of respect extending to all individuals for their family life “whether based on marriage or not”.¹⁵⁵ Recommending that the Constitution should still afford special protection to marriage, the CRG did not believe that such protection precluded the equal protection of non-marital families. In addition, the CRG recommended that the Constitution should include a clear obligation that in all actions concerning children: “the best interests of the child shall be the paramount consideration”.¹⁵⁶

The constitutional provisions on the family were referred to the All-Party Oireachtas Committee on the Constitution in 2004 and the resultant *Tenth Progress Report* was published in January 2006.¹⁵⁷ In all major respects the Report is disappointing. While the Committee supports the introduction of a registered partnership law for both opposite-sex and same-sex couples, it advocates only minimal change to its actual object of inquiry, the Constitution. In relation to private and family life the Report favours retention of the status quo; the Constitution it concludes should continue to protect only the family based on marriage, the clear implication being that solo parent and cohabiting families do not deserve equality of respect and recognition. The Committee appears in this regard to have been motivated primarily by pragmatic and strategic concerns rather than human rights principles:

In the case of the family, the committee takes the view that an amendment to extend the definition of the family would cause deep and long-lasting division in our society and would not necessarily be passed by a majority. Instead of inviting such anguish and uncertainty, the committee proposes to seek through a number of other constitutional changes and legislative proposals to deal in an optimal way with the problems presented to it in the submissions.¹⁵⁸

It is not satisfactory to base recommendations concerning the protection of fundamental human rights on an unsubstantiated prediction as to the likely outcome of a referendum. Since one of the primary purposes of entrenched constitutional rights is to protect minority groups from the perceived dangers of majoritarian politics, the Committee’s reasoning is in the ICCL’s opinion gravely deficient. Further, securing partnership rights through legislation without simultaneously altering the Constitution poses several practical difficulties. The Committee suggests that such legislation would be constitutionally sound provided it does not exceed the protections and duties accorded married families. However as noted in Chapters 2 and 3, to date attempts to equalise the position of *de facto* and married families have not been received favourably by the Courts. Absent constitutional change guaranteeing respect for all individuals’ family life the fate of any partnership rights law is therefore at best uncertain.

As for the position of children, the following superficial amendment is proposed:

All children, irrespective of birth, gender, race or religion, are equal before the law. In all cases where the welfare of the child so requires, regard shall be had to the best interests of that child.¹⁵⁹

The ICCL shares the view of the Ombudsman for Children who regards the Committee’s findings as a “retrograde step”.¹⁶⁰ With regard to the first limb of the suggested guarantee, children are already entitled to formal equal treatment under the terms of Article 40.1 of the Constitution. The second clause will also add little to the position of children; it simply requires that children’s best interests are taken into account in relevant proceedings and does not direct the State to *prioritise* children’s welfare as required under the UN Convention on the Rights of the Child. In essence, if adopted the proposed amendment by failing to confer any substantive rights on children would, in the ICCL’s assessment, amount to a dereliction of the State’s international human rights duties. For example, under UNCRC the Irish Government has agreed to safeguard children’s socio-economic rights including the right to

¹⁵⁴ Constitution Review Group *op. cit.*

¹⁵⁵ *Ibid.*, p. 336.

¹⁵⁶ *Ibid.*, p. 337.

¹⁵⁷ All-Party Oireachtas Committee on the Constitution (2006) *Tenth Progress Report: The Family*, Stationery Office: Dublin.

¹⁵⁸ *Ibid.*, p. 122.

¹⁵⁹ *Ibid.*, p.124.

¹⁶⁰ Press release, January 24th 2006. Available from http://www.oco.ie/press_releases/

health¹⁶¹, the right to education¹⁶², and to an adequate standard of living.¹⁶³ As already noted (Chapter 2.5) the Courts have found that they are inhibited from enforcing orders designed to advance such rights in the absence of express constitutional authorisation. The All-Party Report neglects to avail of the opportunity to remedy this gap in the constitutional order. It also fails to give effect to the child's right to participate and be represented in decisions affecting their lives, as specified under Articles 9 and 12 of UNCRC.

For these reasons the ICCL calls on the Government not to follow the *Tenth Progress Report*. Instead the Oireachtas should present the electorate with constitutional reform proposals that fulfil the State's international human rights obligations to the greatest extent possible (see Chapter 8.2).

4.4. Legislative Reform

An inter-departmental Committee¹⁶⁴ is charged with conducting a review of Irish laws regulating marriage. While the Committee is tasked with considering the question of marriage following gender re-assignment, the question of same-sex marriage was not included in its terms of reference.¹⁶⁵ The sequencing of the Committee's reports is unfortunate. In particular the ICCL believes that an examination of transsexual people's right to marry should have preceded or have been included in the Committee's discussion paper covering: (1) the definition of marriage, (2) who can marry and (3) capacity to marry.¹⁶⁶ The document was published in September 2004 after the entry into force of the European Convention on Human Rights Act on 31 December 2003. However the discussion paper does not allude to Ireland's international human rights obligations and unfortunately gives scant consideration to the definition of marriage. It recommends that legislation should adopt the definition currently set out in case law: "the voluntary and permanent union of

one man and one woman to the exclusion of all others for life".¹⁶⁷ No reference is made to Articles 12¹⁶⁸ and 14 of the European Convention on Human Rights (ECHR) on the right to marry and the principle of non-discrimination respectively. This omission is significant given that Irish law breaches the Convention standards set out in *Goodwin v UK*, which established that post-operative transsexuals have the right to marry people of their birth gender.¹⁶⁹

The Law Reform Commission's consultation paper on the *Rights and Duties of Cohabitees*¹⁷⁰ considers, to some extent, inequalities in family life. The document introduces the notion of 'qualified cohabitees'¹⁷¹ and advocates a presumptive scheme of rights and entitlements for cohabiting couples. Cognisant of Ireland's obligations under the ECHR, the Commission's definition of cohabitees includes both opposite-sex and same-sex couples.

The Commission's interim proposals, however, are limited to relatively non-contentious policy areas and in the ICCL's assessment advocate inadequate adjustments to the current legal framework. The ICCL welcomes the opportunity for debate afforded by the consultation paper and hopes that legislative provision for registered civil partnerships along with other significant substantive areas affecting cohabiting couples, including immigration and parental rights/responsibilities, will be further considered in the Commission's final report.

4.5 Family Policy

The Department of Social and Family Affairs plays a central role in devising and administering family policy. Both the regulatory and distributive¹⁷² aspects of family policy legitimate and protect particular family forms.¹⁷³ In recent years the Department has commissioned numerous studies and research reports that support

¹⁶¹ Article 24 UNCRC.

¹⁶² Article 28 UNCRC.

¹⁶³ Article 27 UNCRC.

¹⁶⁴ The Inter-Departmental Committee on Reform of Marriage Law's ongoing work can be found at: http://www.groireland.ie/reform_of_marriage_law.htm.

¹⁶⁵ Inter-Departmental Committee on Reform of Marriage Law, (2004) *Discussion Paper No. 5*, Department of Health and Children, Stationery Office: Dublin, para. 1.5.

¹⁶⁶ *Ibid.*

¹⁶⁷ B v R [1995] 1 ILRM 491.

¹⁶⁸ Article 12 of the ECHR provides: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

¹⁶⁹ Irish law does not permit the marriage of transsexual people on the basis of their actual gender identity, as opposed to their sex assigned at birth. This is contrary to *Goodwin v. United Kingdom and I v. United Kingdom*, (2002) 35 EHRR 18. See also E. Collins and B. Sheehan (2004) *Access to Health Services for Transsexual People*, Equality Authority: Dublin.

¹⁷⁰ Law Reform Commission *op. cit.*

¹⁷¹ Described as "persons who, although they are not married to one another, live together in a 'marriage like' relationship for a continuous period of three years or where there is a child of the relationship for two years". *Ibid.*, p. 1.

¹⁷² The term 'distributive' refers to State expenditure and provision of services in support of families.

¹⁷³ See T. Fahey (2004) 'Family in Ireland: Trends and Perspectives', *Presentation to Annual Conference of the Irish Social Policy Association*, 16-17 September 2004, Croke Park, Dublin.

reconsideration of the State's role in family life. For example, the 2004 publication *Families and Family Life in Ireland: Challenges for the Future*¹⁷⁴ is based on a number of public consultations and acknowledges the need for the State to modernise its social systems and to take account of recent changes in family formation. More recently the Department played an instrumental role in the production of a Government discussion paper, which proposes dropping the cohabitation rule in the context of eligibility for the One-Parent Family Payment.¹⁷⁵ The ICCL welcomes this suggested change to the social welfare code, since its implementation may encourage more effective sharing of parental responsibilities.¹⁷⁶

4.6 Policy on Children

Ireland's human rights and equality infrastructure was enhanced by the establishment of an Ombudsman for Children.¹⁷⁷ The Ombudsman has two key functions: to promote the rights and welfare of children in all aspects of public policy, practices, procedures and the law; and to conduct investigations of complaints about government services. In its submission to the All Party Oireachtas Committee on the Constitution, the Ombudsman's Office underlined the need for express constitutional rights for children. In line with Ireland's obligations under the UN Convention on the Rights of the Child, the Ombudsman recommended that the Constitution be amended to ensure that the protection of children's welfare is accorded paramount importance.¹⁷⁸

The *National Children's Strategy* (2000) expresses various commitments to advancing children's rights, as elaborated in UNCRC.¹⁷⁹ The Strategy incorporates the views of children and envisages the development of inclusive and child-centred government policy. However, to date it has had a limited impact on legislative developments. As outlined in Chapters 2 and 3 children's civil, political, social and economic rights are not secured effectively within the jurisdiction.

4.7 Conclusion

Within the policy arena divergent approaches have emanated from law reform/review bodies and agencies with a broader equality or social policy remit. The latter have tended to adopt more holistic approaches designed to address a range of inequalities. In the aggregate, public policy is not coherent, is somewhat inconsistent and does not appear to be driven by core principles. Reports commissioned by government departments increasingly suggest that Irish policy needs to embrace diverse family groups and adopt a child-centred focus, yet the positive aspirations contained in such documents need to be translated into a binding legal form to have any concrete effects. Previous experience suggests that if the Government fails to legislate for changing realities in family life it is likely that developments related to the European Convention on Human Rights Act 2003 and/or policies of the European Union will lead to changes in the law.¹⁸⁰ ICCL believes it is preferable that Irish civil society and elected representatives debate and implement the requisite reforms.

¹⁷⁴ <http://www.welfare.ie/publications/index.html>.

¹⁷⁵ The payment is to be replaced by a Parental Allowance: Government of Ireland (2006) *Government Discussion Paper: Proposals for Supporting Lone Parents*, Dublin: Stationery Office.

¹⁷⁶ The wider set of proposals contained in the discussion paper should, however, be carefully scrutinised for their potential impact on solo parents, especially those that are not in a conjugal relationship.

¹⁷⁷ The office was established under the Ombudsman for Children Act 2002. See further: <http://www.oco.ie/>

¹⁷⁸ Available from: <http://www.oco.ie/>

¹⁷⁹ *The National Children's Strategy: Our Children - Their Lives* (2000), Stationery Office: Dublin.

¹⁸⁰ W. Binchy (2004) 'New Models of Marriage and Partnership Law in Ireland', Paper presented at Irish Human Rights Commission and Law Society of Ireland Public Conference, *ECHR Act Review And Human Rights in Committed Relationships*, 16 October 2004, Law Society of Ireland. See Chapter 7 for significant EU law developments.

CASE STUDY THREE

Mark and I met five years ago and have lived together for all but six months of that time; we knew within a very short time of meeting that ours would be a deeply committed relationship; that we intended to make a life together. Our relationship has been a blessing to us both, and a very great challenge. It has provided us with the space and support that has allowed us to grow as individuals and as a couple; a relationship that challenges us both to be the best of who we are.

We are currently building a new home and own the property jointly. In building a home together, we pay insurance so that if one of us dies, the other will neither lose our shared home nor incur significant tax liabilities. We recognise that this will no longer be such a worry once we have lived in our new home for a number of years but in the meantime we have to incur the extra cost of life insurance to protect against that possible liability. We also recognise that any other joint assets that we build together will be subject to inheritance tax in the event of one of our deaths.

We both have put in place private pension schemes despite the fact that there can be no guarantee that the surviving partner will benefit following the death of either one of us.

Mark and I have the extraordinary privilege of caring for a child together. Tom is seven years old and has lived with us full time for the past eighteen months. Tom's mother is a close friend of mine who has a terminal illness, when she discovered she was pregnant and the father refused to be involved in caring for her child she asked me to become her child's guardian in the event of her death. I was present at Tom's birth in 1997 and have been involved in his life since that time, supporting him financially and playing a role as father to him. Tom has always been aware that I am not his biological father but has called me Dad since he could first speak. In recent years his mother's health has declined and in 2002 I was appointed joint guardian with his mother and given custody with her full consent. Mark, my partner, has known Tom since we first met five years ago and we jointly decided to agree to his mother's request to care for him full time in 2002.

We have taken great care to parent Tom with respect and care, ensuring that he knows his origins and his family history. Since he has been able to speak he has known that he had another father before he was born, that this father was too young and not ready to be a father and that his mother asked me to be his dad. He knows that he is loved and that I made that clear choice to have this relationship with him. He also knows that my partner Mark has made the same clearly considered and committed choice to parent him. We will support Tom together in an honest and appropriate way in any issue in relation to his life history; if at any stage when he is old enough he wishes to trace his birth father then we will support and care for him in that process.

We have been guided in this process of becoming a family by Tom's needs. When he first came to live with us 18 months ago we wondered what he would call us; what we would be known to him as. In the end we left it to him and followed his lead. We did not lay down any name or title for him to adopt and simply let him use his own words; he very organically began to call us both Dad, we learn to instinctively understand which one of us he meant if we were both with him; if we get it wrong, which rarely happens, he lets us know quickly enough. He has two Dads, that is his definition and understanding of his family; it's that simple and that uncomplicated for him. His friends know this and it's no big deal to them; it's just how it is. In fact, the only way in which his friends reflect the difference between our family and theirs is when they hear Tom express how lucky he feels to have two dads and a mother who love him. Children as usual are much less complicated than us adults. Tom is thriving and Mark and I are blessed.

I am now legally Tom's guardian; however Mark has no legal status as Tom's parent. In the event of my death Tom is not assured of any security and may well lose not only me as his carer but the only other adult in his life who has parented him. His mother will in all likelihood die in the next few years; we are the only security and family that Tom has. Yet we have no way to give him the security that he as a child needs and has no less a right to than a child being parented by heterosexual parents. We do not view this as a matter of our rights as his parents; this is about Tom's rights. We do not believe that parenting is a right; we believe it is an extraordinary privilege and one that we are deeply thankful for.

In truth Mark and I can provide protection against some of the tax and inheritance difficulties we face as a gay couple; we cannot however overcome the serious and potentially devastating difficulties that our son Tom will face if I die. Tom will have to face the death of one parent in the near future, should I die he may well end up losing all of the three people who have loved and parented him. This is the issue we need dealt with; it is the only one that truly matters in the end to us as parents and as a family.



5. INTERNATIONAL HUMAN RIGHTS STANDARDS

5.1 Introduction

Ireland has ratified numerous human rights treaties, which provide for guarantees and standards that protect an individual's family life and private life. Of specific relevance are the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Ireland is also party to UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the UN Covenant on Economic, Social and Cultural Rights (ICESCR) and the UN Convention on the Rights of the Child (CRC). In ensuring that reform of law and policies regulating personal relationships takes place within a human rights framework it is essential that, at a minimum, relevant international legal benchmarks are followed.

Although the Irish Constitution includes a range of personal rights, as discussed in Chapter 2, it is seriously deficient in the area of family life, gender equality and children's rights. By upholding the principle of non-discrimination and by recognising the substance, as well as the form of relationships, human rights law provides more protection to unmarried parents and cohabiting couples than equivalent Irish provisions. UNCRC details a range of civil, political, social, economic and cultural rights, which are not currently secured to all children within the jurisdiction on an equal basis.

Human rights conventions cannot be enforced by the Irish courts unless they have been incorporated into domestic law by the Oireachtas. Most conventions have not been so incorporated. However, the ECHR has been given further effect in national law by way of the European Convention on Human Rights Act 2003. As a result the European Convention on Human Rights has a particular significance in defining relationships between individuals and its provisions are the primary focus of this Chapter.

The ECHR Act 2003 means that if a person believes that their rights under the ECHR have been violated they can seek a remedy before the domestic courts. Moreover, as a result of the Act, all other laws are now to be interpreted where possible, in conformity with the ECHR and all public bodies must have regard to the Convention's provisions when carrying out their various functions.¹⁸¹

In addition, the European Union's courts have long recognised that the fundamental rights principles underpinning the ECHR form part of the general principles of law protected by the Union.¹⁸² Consequently when an area of policy falls within the EU's remit, Convention standards acquire great significance (see Chapter 7).

5.2 Family Life and the Parent-Child Relationship

Both the Council of Europe and United Nations systems recognise that interpersonal relationships are central to people's overall well being.

ECHR STANDARDS

Article 8 of the ECHR provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹⁸¹ For useful papers on the status of the ECHR in Irish law see the website of the Law Society of Ireland: <http://www.lawsociety.ie>.

¹⁸² The Court's jurisprudence is reflected in several Treaty provisions, for example, Article 6(2) of the Treaty on European Union (1992) requires the Union to "respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Article 52(3) of the Charter of Fundamental Rights of the European Union sets out a commitment to construe Charter rights in compliance with those outlined in the ECHR: "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

Article 14 of the ECHR provides:

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, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Members of non-traditional families can invoke these provisions to challenge their treatment under national legal systems. Significantly, the Convention is treated by the European Court of Human Rights (ECtHR)¹⁸³ as a “living instrument” to be interpreted in light of developments of law and practice within the various contracting States and changes in social attitudes.¹⁸⁴ As a result, the ECHR is subject to progressive interpretation and the Court may revise its earlier judgments if it determines that conditions have developed to a stage where previously acceptable limitations on the exercise of rights are no longer sustainable.¹⁸⁵ So although countries enjoy a certain amount of discretion (a ‘margin of appreciation’) in applying Convention standards, the Court in assessing a given State’s record will have regard to progressive developments in other jurisdictions.

Unlike parallel provisions under the Irish Constitution, ‘family life’ as protected by Article 8 is not confined solely to marriage-based relationships.¹⁸⁶ The ECtHR interprets Article 8 in a flexible manner: by looking to the nature and extent of close personal ties that exist within a relationship, it focuses on the social and *de facto* reality of family life. A relationship between unmarried opposite-sex partners is covered by the guarantee provided such relationship is sufficiently

enduring. Factors taken into account include the stability of the relationship, the intention of the parties and cohabitation, although living together is not a prerequisite.¹⁸⁷ The European Court has not yet definitively considered whether same-sex relationships constitute ‘family life’.¹⁸⁸ However, recent decisions indicate that the Court would be favourably disposed to such an outcome. In particular the judgment in *Karner v Austria*¹⁸⁹ emphasised that any difference in treatment based on sexual orientation requires particularly serious reasons by way of justification. In addition, as the number of European States that afford legal recognition to same-sex couples grows, the margin of discretion afforded recalcitrant States will become more narrow.

Employing ECHR standards, the UK House of Lords has found that same-sex couples amount to a ‘family’ for certain purposes and confirmed that a same-sex partner is covered by the term ‘spouse’ under tenancy legislation.¹⁹⁰ Irish law does not comply with the ECtHR decision in *Karner*. As discussed in Chapter 5, the Residential Tenancies Act, 2004 omits same-sex cohabitants from the list of persons eligible to take over a tenancy on the death of the tenant. However, a domestic court may follow the House of Lords decision in *Ghaidan* should a suitable case arise.

Another key relationship protected by Article 8 is that between parents and children. According to the ECtHR the concept of family life embraces the tie between a parent and his or her child, whether the child is born within or outside of marriage.¹⁹¹ Family life will generally exist between a father and his biological child where a sufficient connection between them is maintained.¹⁹²

¹⁸³ Application of the ECHR is overseen by the European Court of Human Rights based in Strasbourg, France. Until 1 November 1998, when Protocol 11 of the ECHR came into force there was also a European Commission of Human Rights, which was the adjudication body of first instance. The Commission would reach a decision in applications made by alleged victims of ECHR violations. An application could then be forwarded to the Court for final judgment if either the State involved or the Commission requested. As of 1 November 1998, there is only one full-time permanent Court that receives all applications under the ECHR.

¹⁸⁴ The notion of the Convention being a “living instrument” to be interpreted in light of present-day conditions is firmly rooted in the Court’s case law. See for example: *Dudgeon v. the United Kingdom* (1982) 4 EHRR 149; *Soering v. the United Kingdom* (Judgment of 7 July 1989, Series A no. 161 at § 102); *Sigurjónsson v. Iceland* (Judgment of 30 June 1993 Series A 264 at § 35); *X, Y and Z v. the United Kingdom* (Judgment of 22 April 1997, Reports 1997-II); *V. v. the United Kingdom* ([GC], Judgment no. 24888/94, § 72, ECHR 1999-IX); *Matthews v. the United Kingdom* ([GC], Judgment no. 24833/94, § 39, ECHR 1999-I).

¹⁸⁵ The evolution of Convention standards is illustrated by a series of cases from the 1980’s through to 2002 in which the Court addressed the issue of the civil status of transgendered persons. Laws in the UK, amongst other countries, which denied the full recognition of transgendered identity, requiring transgender people to retain their biological identity on their birth certificates, and thereby barring them from marriage were repeatedly challenged as violations of private life and the right to marry. However in each case the Court found that there was no consensus or sufficient progress on issues related to transgender identity to require the UK to change their laws. However one can see from the voting pattern that there was progression. In *Rees v. United Kingdom* (1986) 9 E.H.R.R. 56 the majority on Article 8 was twelve to three with the court being unanimous on Article 12 (the right to marry). In *Cossey v. United Kingdom* (1991) 13 E.H.R.R. 622 the majority was ten to eight on Article 8, and fourteen to four on Article 12. In *Sheffield and Horsham v. United Kingdom* (1999) 27 EHRR 163 the majority was eleven to nine on Article 8 and eighteen to two on Article 12. The Commission in *Rees* and in *Sheffield and Horsham* took the view that there had been a breach of Article 8. In *Goodwin and I*, (2002) 35 EHRR 18 the Court found a violation of both Articles 8 and 12.

¹⁸⁶ See in particular *Johnston v Ireland* (1986) 9 EHRR 203, para. 55; and *Keegan v Ireland* (1994) 18 EHRR 342, para. 44.

¹⁸⁷ *Kroon v Netherlands* (1995) 19 EHRR 263, para. 30.

¹⁸⁸ The Commission decided to deal with stable relationships between same sex partners under the rubric of private life as opposed to family life. For example in *Kerkhoven and Others v. the Netherlands* (15666/89, unpublished 19 May 1992), the European Commission of Human Rights failed to find that a stable relationship between two women and the child born to one of them by artificial insemination amounted to family life.

¹⁸⁹ Application No. 40016/98, 24 July 2003.

¹⁹⁰ *Fitzpatrick v. Sterling Housing Association* [1999] 4 All E.R. 1113 (H.L. (Eng.)); *Ghaidan v. Godin-Mendoza* [2004] UKHL 30.

¹⁹¹ *Berrehab v. the Netherlands* (1989) 11 EHRR 322, para. 21.

¹⁹² *Kroon v The Netherlands* (1994) 19 EHRR 263, para 30.

More recently in *Soderback v Sweden*¹⁹³ the Court held that family life could be established between a father and child where there has been no cohabitation and very limited contact between the parties. Such ties can persist where the parents do not cohabit or their relationship has ended.¹⁹⁴

A finding to the effect that family life exists between two or more individuals can have a range of consequences depending on the circumstances of the case. It is well established that States need not accord all families the same treatment or general legal status. Case law concerning Article 14 establishes that not every distinction or difference in treatment amounts to discrimination. As the ECHR explains “a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’”.¹⁹⁵

The ECtHR accepts that protection of the traditional family is a legitimate aim that States may pursue, but it will scrutinise any measures used for discriminatory effects and governments must demonstrate that any steps taken to protect conventional family forms are *necessary*. In *Karner* the Court stressed that:

The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to member States is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary ...in order to achieve that aim.¹⁹⁶

The *Karner* case also illustrates that interference with a close relationship may amount to a violation of Article 8 even if ‘family life’ has not been established. In other words the ‘private life’ element of the guarantee also affords a degree of protection to same-sex relationships. Mr Karner lived in an apartment rented

by his deceased male partner. Although Austria’s domestic legislation provided that persons living as life partners could leave rental leases to each other, when Mr Karner’s partner died, the Austrian Supreme Court held that the landlord could evict him. It found that the legislature had not intended to include same-sex couples. The ECHR ruled there had been a breach of Article 8 together with Article 14. It found that the provision at issue protected persons who had been living together for a long time against sudden homelessness, irrespective of their sexual orientation. The Court did not consider it necessary to stipulate whether the Austrian Government had interfered with the plaintiff’s family life, thereby leaving open the status of same-sex relationships under that limb of Article 8.

As for the degree of protection afforded parent-child relationships once family life has been established, it is clear that States are obliged to provide for immediate legal recognition of the guardianship rights of all mothers.¹⁹⁷ The position of biological fathers is less clear-cut.

Although the rights of a father in relation to his child are not determined exclusively by his marital status, states such as Ireland that do not provide for the automatic recognition of an unmarried father’s guardianship or similar rights, do not violate the Convention.¹⁹⁸ Nevertheless Article 8 requires the State to both respect and protect family life. European Court judgments increasingly acknowledge these obligations may necessitate the imposition of positive duties, so that once family life is established a Government must not only refrain from arbitrary interference, but should take positive steps to ensure that family life is recognised in law and safeguarded. This positive duty creates procedural obligations designed to ensure that all parties have an opportunity to be heard in proceedings that affect their familial relationships. Of particular relevance is the decision in *Keegan v Ireland*.¹⁹⁹ Keegan was the father of a daughter, but was not married to her mother. The mother placed the child for adoption, as she was allowed to do without the knowledge or consent of Keegan. According to the Supreme Court, the relationship between an unmarried father and his child

¹⁹³ (33124/96), October 22 1997. See also *Boughanemi v France* (1996) 2 EHRR 228.

¹⁹⁴ See *Keegan v. Ireland* (1994) 18 EHRR 342; *Berrehab v. the Netherlands* (1989) 11 EHRR 322, para. 21; *Gül v. Switzerland*, 19 February 1996, Reports 1996-I, pp. 173-74, para. 32.

¹⁹⁵ *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985) 7 EHRR 471.

¹⁹⁶ Application No. 40016/98, 24 July 2003, para. 49.

¹⁹⁷ *Marckx v Belgium* (1979-80) 2 EHRR 330.

¹⁹⁸ *McMichael v UK* (1995) 20 EHRR 205. The relationship between children born outside of marriage and their biological fathers has been the subject of much case law in Strasbourg. In relation to Article 8 and its compatibility with Irish Law, see further U. Kilkelly (2004) “Child and Family Law” in U. Kilkelly (ed.), *ECHR and Irish Law*, Jordan Publishing.

¹⁹⁹ (1994) 18 EHRR 342.

was not recognised under the Constitution and so Keegan did not have a right to participate in the adoption proceedings.²⁰⁰ The ECtHR found that the Convention had been breached, and that Keegan's right to family life had been violated. Irish law was subsequently rectified so that a father now has a right to be consulted prior to the making of an adoption order.²⁰¹ However the underlying position remains unchanged, that is, Irish law continues to differentiate between fathers solely on the basis of their marital status.

Other aspects of Irish law for example, whereby a stepparent must adopt a child to acquire guardianship rights, thereby severing the rights of the natural parent do not appear to comply with Article 8. When examining the law in the Netherlands, which provided that the biological father of a child was not recognised in law where the mother was still married to another man, the Court set out the following principles:

A solution which only allows a father to create a legal tie with a child with whom he has a bond amounting to family life if he marries the child's mother cannot be regarded as compatible with the notion of "respect" for family life.... In the Court's opinion, "respect" for "family life" requires that biological and social reality prevail over a legal presumption which ... flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone.²⁰²

The Strasbourg Court has also determined that the sexual orientation of a parent should not affect rights *vis-à-vis* their children. A Portuguese court decision that awarded custody to a mother based on the father's homosexuality violated Articles 8 and 14 of the Convention.²⁰³ Irish family law does not provide explicit protection against discrimination on the grounds of sexual orientation. While the Supreme Court has reiterated that parents' conduct is relevant only in so far as it affects the welfare of the child²⁰⁴ an express prohibition of discrimination is desirable in the ICCL's opinion.

In *X, Y and Z v UK*²⁰⁵ the ECtHR found that family life existed between a non-biological parent (X) and a child conceived through assisted reproduction. Nevertheless

when asked to rule that UK law should therefore allow X's name be entered as the father on the child (Z's) birth certificate, the Court failed to find that X's inability to register his name on Z's birth certificate was a violation of that right to family life. The position of non-biological or social parents is therefore quite weak under the Convention, however governments are free to enact higher standards of protection, having regard in particular to the best interests of the child.²⁰⁶

UNITED NATIONS STANDARDS

In relation to the United Nations system, the body of decisions on Article 23²⁰⁷ of the International Covenant on Civil and Political Rights is less developed than that concerning Article 8 ECHR, but the UN Human Rights Committee (HRC)²⁰⁸ has made it clear that 'family' under this provision is also to be interpreted broadly and necessarily embraces the relationship between parent and child, irrespective of the marital status of the parent.²⁰⁹

Article 26 ICCPR protects individuals against discriminatory treatment, it provides:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.

The Committee has specified that: "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".²¹⁰ In a series of communications unmarried couples have unsuccessfully claimed that failure to accord them the same rights as married couples amounts to a violation of Article 26.²¹¹ Differences in treatment based on marital status are generally not considered discriminatory because persons have the

²⁰⁰ *J.K. v. V.W.* [1990] 2 I.R. 437.

²⁰¹ See the Adoption Act 1998.

²⁰² *Kroon v Netherlands*, Judgment of 21 October 1994 Series A297-C.

²⁰³ *Salgueiro da Silva Mouta v Portugal*, (33290/96) [1999] ECHR 176.

²⁰⁴ *In S. v. S.* [1992] I.L.R.M. 732.

²⁰⁵ (1997) 24 EHRR 143.

²⁰⁶ See Chapter 6.2 on the South African position.

²⁰⁷ Article 23: (1.) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

²⁰⁸ The UN Human Rights Committee (HRC), comprised of independent experts, is the body that monitors the steps taken by State parties to carry out their obligations to protect human rights as guaranteed by the International Covenant on Civil and Political Rights (ICCPR). The HRC can hear and issue opinions on cases filed by individuals alleging violations of their rights.

²⁰⁹ See General Comments 16 and 19 and *Hendriks v Netherlands* (201/1985).

²¹⁰ General Comment No. 18, para 13.

²¹¹ See for example, *Danning v. Netherlands* (180/1984), *Sprenger v. Netherlands* (395/1990), *Hoofdman v Netherlands* (602/1994).

option of choosing whether to assume the burdens and benefits that stem from such a legal contract. While States may lawfully treat married couples more favourably, unequal treatment of unmarried opposite-sex and same-sex partners potentially contravenes the Covenant. In *Young v. Australia*²¹² the HRC found that it was discriminatory to deny pensions to surviving same-sex partners, when unmarried different-sex partners qualified. This was a case of direct discrimination on the ground of sexual orientation. The HRC has yet to consider an application that alleges indirect discrimination on the grounds of sexual orientation, though it is clear that the right to marry set out in Article 23 does not extend to same-sex partners (see below).

5.3 Access to Marriage

The right to marry is protected under Article 12 and Article 23 of the ECHR and the ICCPR respectively. Both provisions refer to the right of men and women to marry.²¹³ The EU Charter in Article 9 refers only to the right to marry without any reference to sex or gender.²¹⁴

To date, the HRC has found that the express reference to the gender of the parties in Article 23 of the ICCPR means that failure to provide for same-sex marriage will not lead to a violation of the Covenant.²¹⁵

The scope of Article 12 ECHR has clearly evolved with *Goodwin v United Kingdom*²¹⁶ marking the beginning of a more enlightened stance on the part of the Strasbourg Court. It found that although the right to marry is subject to national laws, any limitations must not restrict or reduce it in such a way or to such an extent that the very essence of the right is impaired. UK laws, by prohibiting a post-operative transsexual from marrying a member of their former ascribed gender impaired the very right to marry and was in violation of the Convention. The Court acknowledged that although the first sentence of Article 12 refers in express terms to the right of a man and woman to

marry, in 2002 it could not be assumed that these terms must refer to a determination of gender by purely biological criteria, or required some pre-requisite capacity to procreate.

In its submission to the Inter-Departmental Committee on Reform of Marriage (2004) the ICCL raised the fact that Irish law, by failing to extend the right to marry to transsexual people, is in violation of the ECHR. As section 3 of the European Convention on Human Rights Act 2003 requires that State bodies act in compliance with the ECHR, Irish law must either be re-interpreted, amended or failing such action persons affected have a cause of action against the Government. Dr. Lydia Foy - a post-operative transsexual woman - has commenced litigation seeking recognition of her gender identity. The High Court had rejected her application,²¹⁷ however, in light of *Goodwin*, and the ECHR Act 2003, the case is to be reconsidered.²¹⁸

5.4 Children's Rights

Core to reform in the area of family life is respect for children's rights. The UN Convention on the Rights of the Child is the primary human rights instrument in this field.²¹⁹ Ireland has not incorporated UNCRC into domestic law, and respect for many of its provisions is not secured within the jurisdiction.²²⁰ As discussed in Chapters 2 and 4 the Constitution is particularly deficient in this regard: it contains no explicit reference to children's rights.

Article 12 of the UNCRC sets out the general principle that children have the right to be involved in decision-making. Article 9 deals with a child's right to the company and care of his/her parents. Subsection 2 specifies that in any related proceedings "all interested parties shall be given an opportunity to participate in the proceedings and make their views known". Current legal protections for children's right to participate in decisions affecting their lives fall far short of what is required under the Convention.²²¹

²¹² (941/2000), 6 August 2003.

²¹³ Article 12 of the ECHR provides that: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. Article 23 (2) of the ICCPR provides that: The right of men and women of marriageable age to marry and to found a family shall be recognized.

²¹⁴ EU Charter on Fundamental Rights and Freedom, Article 9: The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

²¹⁵ *Joslin v. New Zealand* (902/1999).

²¹⁶ (2002) 35 EHRR 18.

²¹⁷ *Foy v. An t-Ard Chlaraitheoir & Ors* [2002] IEHC 116 (9 July 2002).

²¹⁸ On 8 November 2005, the Supreme Court held that the case should be re-heard by the High Court in light of the developments in the law and that the appeal would be suspended pending the outcome of a fresh case before the High Court.

²¹⁹ The European Court of Human Rights increasingly draws on the UNCRC in its judgments, see further U. Kil Kelly (2001) 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child', *Human Rights Quarterly* 23:2, 308-326.

²²⁰ See generally, Law Reform Committee of the Law Society of Ireland (2005) *Rights-Based Child Law: The Case for Reform: Part 1*, Law Society of Ireland: Dublin.

²²¹ *Ibid.*

Under UNCRC the Irish Government has also agreed to safeguard children's socio-economic rights including the right to health²²², the right to education²²³, and to an adequate standard of living.²²⁴ As already noted (Chapter 2.5) the Courts have found that they are inhibited from enforcing orders designed to advance such rights in the absence of express constitutional authorisation.

The UN Committee on the Rights of the Child recommended in 1998 that the Irish Government should "accelerate measures to implement recommendations from the Constitutional Review Group for the inclusion of all the principles and provisions of the Convention."²²⁵ As discussed in Chapter 2 ICCL favours a constitutional referendum designed to secure full respect for the rights set out under UNCRC.

5.5 Conclusion

Ireland is bound by a number of human rights conventions under which people living in Ireland have been given the right to standards of respect for their personal and private lives. Those standards are not met under the current legal framework. Litigation relying on the ECHR Act 2003 provides one course of action to rectify some of these deficiencies, but rather than waiting for such *ad hoc* changes the Government should bring the law into line with the ECHR and the UN Convention on the Rights of the Child.

²²² Article 24 UNCRC.

²²³ Article 28 UNCRC.

²²⁴ Article 27 UNCRC.

²²⁵ Recommendation No. 24. Concluding Observations of the Committee on the Rights of the Child, Ireland, UN Doc. CRC/C/15/Add.85 (1998).

6. COMPARATIVE LAW



6.1 Introduction

In many other jurisdictions, both courts and parliaments have taken steps to eliminate the inequalities and discrimination historically faced by non-marital families. Unlike the recent legislative provisions passed by the Irish Government²²⁶ the trend across other legal systems is to recognize same-sex relationships either through marriage or more commonly a form of civil partnership or union.²²⁷ Ireland also lags behind its European counterparts in the arena of transsexual rights. For example, the introduction of the Gender Recognition Act 2004 in the UK means that transsexual people have the legal right to live in their actual gender. This Chapter highlights progress in the field of LGBT partnerships as an exemplar of family law reform initiatives in comparable jurisdictions.

6.2 Marriage

The national parliaments of Belgium, the Netherlands and Spain have lifted the ban on same-sex marriage.²²⁸ In a number of other countries, courts have employed constitutional equality guarantees so as to include same-sex couples within the common law definition of marriage.

Upon a reference from Parliament, the Canadian Supreme Court ruled that opening the definition of marriage to same-sex partners was compatible with and indeed promoted constitutional norms, in particular the equality guarantee of the Canadian Charter of Rights and Freedoms.²²⁹ The Civil Marriage Act defining marriage as “the lawful union of two persons to the exclusion of all others” came into force on 20 July 2005. Since there is no residency requirement non-resident same-sex couples are also eligible to marry in Canada.²³⁰

In the sphere of LGBT relationship recognition the most progressive judgments issued to date are those of the South African Supreme Court of Appeal and Constitutional Court in *Fourie and Bonthuys v. Minister for Home Affairs and Director-General of Home Affairs*²³¹ and a 2003 decision of the Massachusetts Supreme Court.²³² These decisions established that same-sex couples had a *right* to marry and rejected arguments to the effect that the injustices suffered by lesbian and gay couples could be remedied without access to marriage.

Prior to the *Fourie* case South Africa's Constitutional Court determined that same-sex life partners could jointly adopt children.²³³ In a 2003 decision the Court also held that when a same-sex couple has a child through artificial insemination, both are automatically the legal parents of the child.²³⁴ The applicants had been involved in a committed same-sex relationship since 1995. When one of the women gave birth to twins in 2001 both applicants sought to register as parents. The Constitutional Court found the legislation that barred them from doing so unconstitutional on the basis that it unfairly discriminated against the children concerned.

6.3 Registered Partnerships

New Zealand has recently passed legislation creating civil unions, open to both opposite-sex and same-sex couples, which have exactly the same legal consequences as marriage.²³⁵ This law was explicitly passed in recognition of New Zealand's human rights obligation not to discriminate against same-sex couples.

Since 1989 several European countries have provided for registered partnerships to allow non-marital opposite-sex and same-sex couples acquire legal recognition of their relationship and commitment to one another. Initially, registered partnership was aimed at couples who were not *allowed* to get married because of the different-sex requirement of marriage

²²⁶ See Equality Coalition (2004) *Submission on the Social Welfare (Miscellaneous) Bill 2004* (available from <http://www.iccl.ie/>).

²²⁷ See in general R. Wintemute (ed.) & M. Andenæs (hon. co-ed.) (2001) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Hart Publishing: Oxford; R. Wintemute (2004) 'The Massachusetts Same Sex Marriage Case: Could Decisions from Canada, Europe and South Africa help the SJC?' *New England Law Review* 38:3, 505-11; K. Waaldijk (ed.) (2005) *More or less together: Levels of legal consequences of marriage, co-habitation and registered partnerships for different and same sex partners. A comparative study of nine European countries*, Institute National d'Etudes Demographique, Paris. Excellent information is also available from ILGA-Europe's website: <http://www.ilga-europe.org/>

²²⁸ The Netherlands passed legislation in 2001, Belgium followed suit in 2003 and the Spanish Parliament enacted a same-sex marriage law in 2005. For a full description of the Dutch and Belgian developments see K. Waaldijk (2004) 'The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries', *New England Law Review* 38:3, 569.

²²⁹ *Reference re Same-Sex Marriage* [2004] SCR 698, 2004 SCC 79 (CanLII).

²³⁰ Uncertainty remains as to the status of Canadian marriages between persons of the same-sex in this jurisdiction, although Canadian marriages between persons of the opposite sex are clearly recognised here.

²³¹ Case no: 232/2003, Judgment 30/11/04; CCT 60/04 and 10/04, Judgment 01/12/05.

²³² 440 Mass. 309, 798 NE2d 941. November 18, 2003.

²³³ *Du Toit and Another v Minister of Welfare and Population Development and Others*, CCT 40/01 2002 (10) BCLR 1006 (CC).

²³⁴ *J & B v Director General of Home Affairs, Minister of Home Affairs, & President of the Republic of South Africa*, CCT 46/02.

²³⁵ The Civil Union Act 2004 came into effect on 26 April 2005. For further information see <http://www.dia.govt.nz/>.

laws.²³⁶ More recent legislation on registered partnership in the Netherlands (1998), France (1999) and Belgium (2000) was not only aimed at such same-sex couples, but also at heterosexual couples who did not want to get married. Nevertheless, some more recent partnership laws introduced in Germany (2001), Finland (2002) and the United Kingdom (2004) restrict access to same-sex couples. In the Netherlands and Belgium, where marriage is open to same-sex couples, registered partnerships are also open to all non-marital couples irrespective of sexual orientation.

In 1999 France introduced the *Pacte Civil de Solidarité* (PACS), which is open to all couples. PACS attracts significant rights and responsibilities, although these are not as extensive as those applicable upon marriage. Of the approximately 37,000 PACS created in the sixteen-month period following its enactment a significant proportion involved opposite-sex couples with children.²³⁷ The operation of PACS reflects the different functions that such schemes play in jurisdictions where marriage is not open to all; they widen the choices available to opposite-sex couples but constitute the only option for same-sex partners. The ICCL believes it is preferable that all couples would be in a position to choose their family form, as opposed to perpetuating a situation whereby opposite-sex partners retain the capacity to enter into an elevated legal framework.

Diverse legal consequences flow from the registered partnerships that may be contracted in various European countries. Some registered partnerships attract almost all of the legal consequences of marriage, while others cover only a limited range of substantive areas. The subject matter concerned potentially includes parenting, property matters, pension/insurance rights, inheritance, taxation, social welfare entitlements, immigration rights, medical issues, employment benefits, domestic violence legislation, maintenance entitlements, and the distribution of property on the dissolution of the partnership.

Significantly many partnership laws that were initially restricted to same-sex couples were subsequently amended to bring them closer in substance to marriage, in recognition that justifications for the distinctions (e.g.

those pertaining to parental rights) ultimately failed to withstand scrutiny. For example by permitting joint adoption, several countries including Denmark and Sweden have further eroded the demarcation between marriage and registered partnerships.

UK CIVIL PARTNERSHIP ACT 2004

As of 5 December 2005 same-sex couples can register their partnerships in England, Wales, Scotland and Northern Ireland. The Civil Partnership Act 2004 as passed by the United Kingdom's Parliament includes provision for:

- > a duty to provide reasonable maintenance for one's partner and any children of the family.
- > employment and pension benefits.
- > recognition under intestacy rules.
- > access to fatal accidents compensation.
- > protection from domestic violence; and
- > recognition for immigration and nationality purposes.²³⁸

Under the Good Friday Agreement, the Irish Government undertook to provide at least equivalent protection of rights in the Republic of Ireland as exist in Northern Ireland.²³⁹ The Civil Partnership Act 2004 provides protection for the rights of same-sex couples that currently has no parallel in the South. According to research commissioned by the Equality Authority and the Equality Commission for Northern Ireland the lack of corresponding protection in the Republic represents, "a lack of equivalence" contrary to the Agreement.²⁴⁰ Since the civil partnership law and the Gender Recognition Act 2004 were designed to remedy a deficiency in the application of human rights standards as developed by the ECtHR, the Irish Government is obliged to follow suit.

Moreover as the registration requirements for Northern Ireland do not specify any residency requirements, the 2004 Act will facilitate the registration of same-sex relationships between persons living in the Republic of Ireland. Although, in the absence of appropriate legislative action on the part of the Oireachtas, such partnerships will go unrecognised within this jurisdiction.

²³⁶ Denmark, 1989; Norway, 1993; Sweden, 1995; Iceland, 1996.

²³⁷ P. Festy (2001) 'The "Civil Solidarity Pact" (PACS) in France: an impossible evaluation', *Population & Sociétés* 369, 1.

²³⁸ Explanatory notes on the Act are available from the website of the UK government's Women and Equality Unit: <http://www.womenandequalityunit.gov.uk/>.

²³⁹ *Agreement Reached in the Multi-Party Negotiations* (Cm 3883, 1998); 37 I.L.M. 751 (1998), Rights, Safeguards and Equality of Opportunity, para. 9.

²⁴⁰ C. Ó Cinnéide (2005) *Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the further development of equality measures for Northern Ireland and Ireland*, Equality Authority: Dublin.

6. 4

Conclusion

The growing trend towards recognition of same-sex relationships throughout Europe and in other common law jurisdictions represents an emergent consensus on the human rights of lesbian and gay people; the Irish position is increasingly marginal. In addition, migration patterns mean that a large number of same-sex couples resident in Ireland are party to lawful marriages and partnerships that remain unrecognised. Clarification of the status of such relationships takes on an additional urgency in light of recent developments at European Union level.²⁴¹ The ICCL submits that in order to secure equality and respect for autonomy Ireland should replicate the approach of the Belgian, Spanish, Dutch and Canadian parliaments by providing for civil marriages between persons of the same sex, in addition to introducing alternative schemes for the recognition of extra-marital relationships between adults.

²⁴¹ See further Chapter 7.

CASE STUDY FOUR

Baby J. has been a part of our family since the day he came out of the maternity hospital two and a half years ago. His birth mother lives in another county and has only visited him a handful of times since his birth and as such, she plays no part in his care or his upbringing. He has brothers, grandparents, cousins, aunts and uncles with our families. He has two loving and devoted parents in us. In short, he has all of the necessary emotional and physical security that a child requires, but none of the legal protection to which he is entitled.

We were certified as foster carers with the Southern Health Board four years ago after a lengthy training and assessment procedure. We were the first lesbians to be assessed as a couple by the Fostering Unit of the SHB. After an initial placement, we were contacted by the Adoption Unit of the SHB who asked if we would accept a pre-adoptive placement of a new-born infant, as their panel of pre-adoptive carers were full. Having agreed to the placement, Baby J. arrived into our home at four days old. We understood and accepted that this arrangement would last until his birth mother had agreed a placement with one of the prospective adoptive couples proposed to her by the Adoption Unit.

After four months Baby J.'s birth mother advised us that her strong preference was for him to remain living with us if we were agreeable. Both she and we pursued this matter with our own Social Workers. We were told categorically by both the Adoption Unit and the Fostering Resource Unit that adoption by either or both of us was an impossibility. Following this, the Adoption Unit took the step of discharging Baby J. from their care giving as their reason that his birth mother "does not wish to proceed with adoption through this department". They further stated that a referral had been sent to the relevant Community Care team, thereby appearing to imply that Baby J.'s care would be taken over by that department. Both we and our Link Worker understood that we would remain as Baby J.'s foster carers as there was no reason for him to be moved from his current foster placement. Throughout this process, his birth mother made it very clear to the SHB and to us that she had no desire, or intention to take over Baby J.'s care herself at this, or at any time in the future.

However, the SHB subsequently informed us that Baby J.'s foster placement had been terminated at the time of his discharge by the Adoption Unit. Baby J. was now no longer in the care of the Health Board, and no provision was made for his care by the Health Board. We were now caring for a child that had been placed with us six months previously by the Health Board, without the legal or financial support of that Health Board. Despite verbal and written requests by Baby J.'s birth mother, the Health Board then refused to place him in long-term foster care.

Since that time we have made numerous inquiries about one of us being assessed to adopt Baby J. (The current laws do not allow us to adopt as a couple and as Baby J.'s welfare is clearly dependent on securing permanence with us, we are pursuing a single person adoption as the only avenue available to us.) Almost a year ago we wrote both to the Adoption Board and the Adoption Unit to inquire about this possibility and received a prompt response from the Adoption Board. They advised us that they had referred the matter to the Adoption Unit of the SHB whose responsibility it would be to progress, and who they felt sure would be in contact with us shortly. To date, the Adoption Unit has failed to respond to any inquiries we have made of them directly with regard to being assessed as prospective adoptive parents.

As a result of this impasse, we have engaged a solicitor to act on our behalf. The situation remains the same, with no substantive response from the Adoption Unit. The matter has once again been definitively referred to the Unit on the direction of the Registrar of the Adoption Board, but this has not yielded results. We are now facing the prospect of initiating judicial proceedings against the SHB on the grounds that they have neglected the care and interests of a child who was entrusted to them.

There is no legal facility for the birth mother to transfer guardianship rights/duties to us, so while we act in loco parentis we are, in legal terms, strangers to Baby J. We have been placed in this wholly unsatisfactory situation by default because of the actions of the Health Board. We have continued to care for a child who was placed with us by them and for whom no other option has been presented to us.

We continue to foster (other children) for the Health Board and have maintained a satisfactory relationship with all parties involved throughout. We have been told that if we were to apply to adopt Baby J., our social workers would give us their full backing.

The Health Board found us, a lesbian couple, suitable for fostering some of society's neediest and most vulnerable children. They do not find themselves, however, in a position to allow one of those children the safety and security of a permanent home, with the parents he has known and loved since birth, as his legal parents.

7. EUROPEAN UNION FAMILY LAW



7.1 Introduction

This chapter explains the implications of European Union (EU) family law, human rights and equality measures. As explained in Chapter 2, EU law takes precedence over domestic legal provisions. The superior status of EU law means whether or not the Government is willing to take the lead on essential reform, there are developments at the European level that will necessitate change. It is important to note nonetheless that the Union's competence is confined to those areas in which it has been granted powers by the Member States. For the purposes of this report the most significant fields are immigration, the mutual recognition of family law judgments and employment.

7.2 Immigration

As previously noted (Chapter 3.9) in order to comply with EU rules in the area of free movement of persons, the Irish Government must introduce legislation which at a minimum facilitates the reunification of unmarried families.

7.3 Brussels II²⁴²

With increasing migration of European citizens between Member States, the EU has identified a need to lay down uniform rules concerning court judgments on family matters. The most recent measure in this area is the Brussels II Regulation concerning the jurisdiction, recognition and enforcement of judgments in matrimonial matters together with matters of parental responsibility.

The main purpose of Brussels II is to facilitate the relocation of EU citizens and their families within the Union. It applies to any judgment²⁴³ in relation to:

(1) divorce, legal separation or marriage annulment and
(2) the attribution, exercise, delegation, restriction or termination of parental responsibility.²⁴⁴ Brussels II came into force on 1 March 2005 and now forms part of Irish law.²⁴⁵

Family law concerning marriage differs throughout the EU so Brussels II will have serious ramifications. This is recognised in a European Commission Green Paper on applicable law and jurisdiction in divorce matters.²⁴⁶ The Commission believes that there is a lack of legal certainty in this area and its consultation aims to identify difficulties that might arise in the context of international divorces or on harmonising relevant rules.

Brussels II is likely to be important in relation to the recognition of same-sex marriages, which are currently available in the Netherlands, Spain and Belgium. If a same-sex married couple move to Ireland to work and the State does not recognise their marriage or any legal judgment relating to the breakdown of the marriage, Ireland may be restricting the family's freedom of movement. Upon his appointment Franco Frattini, the EU commissioner-delegate for Justice, Freedom and Security, stated: "The right of freedom of movement for individuals... is a basic right that must be guaranteed irrespective of the fact that some member states have or do not have legal rules regarding same-sex couples. That is an obvious principle."²⁴⁷

The impact of Brussels II on the definition of marriage under Irish law may be significant. Any concepts to be applied across the Member States must have an autonomous, single meaning in order to ensure the coherence of EU law. A single definition of marriage for EU purposes will emerge and it will need to encompass the fact that at least three EU countries recognise marriage as including unions of same-sex couples, while many others provide equivalent protection for civil unions. The definition will also be informed by Article 9 of the EU Charter on Fundamental Rights, which recognises the right of all to marry, irrespective of sexual orientation. It is therefore difficult to see how the concept of marriage under Brussels II can be anything but a committed union between two persons to the exclusion of all others without being limited to opposite-sex couples.

²⁴² Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters relating to parental responsibility, repealing Regulation (EC) No. 1347/2000.

²⁴³ Article 2(4) defines the term judgement as meaning "a divorce, legal separation or marriage annulment, as well as a judgement relating to parental responsibility, pronounced by a court of a Member State, whatever the judgement may be called, including a decree, order or decision".

²⁴⁴ Article 2(7) defines parental responsibility as meaning "all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgement by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access".

²⁴⁵ EU regulations are automatically applicable in Irish law, that is, they do not require any further step to become enforceable.

²⁴⁶ Commission of the European Communities (2005) *Green Paper on applicable law and jurisdiction in divorce matters*, COM 205 (82). http://europa.eu.int/comm/justice_home/doc_centre/civil/doc/com_2005_082_en.pdf

²⁴⁷ B. Waterfield, (15 November 2004) 'Frattini backs EU rights for married gay couples' at <http://www.eupolitix.com/EN/News/200411/e2733571-ddd2-4ed0-a594-9ed47f5b264f.htm>

Brussels II does outline grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment, including refusal where “such recognition is manifestly contrary to the public policy of the Member State”.²⁴⁸ Ireland may seek to invoke this provision in refusing to recognise an international same-sex marriage. However, ‘public policy’ has a very strict meaning in the context of EU law, and cannot be invoked to deny recognition simply on the basis that Irish law does not provide for same-sex marriage.²⁴⁹

Indeed, Article 25 of Brussels II explicitly provides that “recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts”. Hence, it is clear that the State could not question the validity of a Belgian, Dutch or Spanish same-sex marriage.

As mentioned above, Brussels II covers judgments and orders in relation to parental responsibility. The ICCL believes that this could be significant for unmarried opposite-sex and same-sex couples. Through consultations conducted for the purposes of this report, the ICCL is aware of circumstances in which the Irish State does not recognise residence orders from other jurisdictions because of parents’ sexual orientation.²⁵⁰ For example, a lesbian couple informed the ICCL that they had been living in the UK for a number of years and that one of them had adopted a child. The other partner had been appointed legal guardian through a residence order and the family subsequently moved to Ireland. However, the Irish Government refuses to recognise the validity of the residence order. The ICCL believes that such a course of action is not permissible under Brussels II.

Article 23 (a) of Brussels II does provide that a judgment relating to parental responsibility shall not be recognised “if such recognition is contrary to the public policy of the Member State in which recognition is sought taking into account the best in interests of the child”. However, the ICCL fails to see how denying the relationship between a child and its legal guardian is in the best interests of the

child. Again, the same principles relating to the narrow circumstances in which a “public policy” defence can be invoked apply. Further, in this case, the Government would need to advance evidence as to how the public policy exemption secures the best interests of the child.

7.4 EU Equality and Human Rights Law

The European Union has a considerable track record in the field of employment rights and in particular as regards the prevention of discrimination on the ground of sex/gender within paid employment.²⁵¹ In relation to sexual orientation discrimination a significant lacuna in EU law was filled by the adoption of the so-called Framework Directive.²⁵² It is now clear that within the field of employment and occupation such discrimination is generally not permissible.²⁵³ However unequal treatment of lesbian and gay people is still possible even within the employment arena because EU law permits Member States to confer more favourable treatment on married partners.²⁵⁴ It can be expected, however, that this exemption will be challenged in future case law because it raises the question of indirect discrimination on the ground of sexual orientation. As noted in Chapter 6 with the exception of three countries same-sex marriage is not allowed within the various EU jurisdictions. Since same-sex couples cannot meet the requirement of being married the application of a preference for married families adversely affects them.

In 1996 the European Court of Justice (ECJ) expanded the reach of the Equal Treatment Directive which prohibits employment discrimination based on gender by holding in *P. v S. and Cornwall County Council*²⁵⁵ that unequal treatment of transgendered persons amounts to discrimination on the grounds of sex. Subsequently in *K.B.*

²⁴⁸ Article 22(a).

²⁴⁹ See *Krombach & Bamberski* (Case C-7/98) [2000] E.C.R. I -1935; *Hofmann v Kreig* (Case C-145/86) [1998] E.C.R. 645. See also Shannon *op. cit.*, para. 12-109: “A court in one member State shall not recognise any decision that is “manifestly contrary to the public policy” of the Member State. Such a conflict must be extremely profound in order to justify refusal.

²⁵⁰ This case was reported to the ICCL consultation on Partnership Rights and Family Diversity held in Cork on 13 November 2005. Refer to Appendix 2.

²⁵¹ See generally E. Ellis (2005) *EU Anti-Discrimination Law*, 3rd edition, Oxford University Press: Oxford.

²⁵² Directive 2000/78 (known as the ‘Framework Directive’) was adopted in November 2000. It covers discrimination on grounds of religion or belief, disability, age and sexual orientation, in the field of employment and occupation (due to be implemented by December 2nd 2003 and adopted here via the Equality Act 2004).

²⁵³ The Directive remedies the situation that arose in *Grant v South West Trains Ltd.*, Case C-249/99 [1998] ECR I-621 a case involving the refusal of travel concessions to cohabitants of the same-sex. In the absence of specific EC legislation differential treatment between same-sex and opposite-sex couples did not violate EC law. Employment-related benefits, such as travel concessions, are now covered by the Framework Directive.

²⁵⁴ *D & Sweden v. Council of Ministers* (C-122/99 P and C 125/99 P) concerned a claim by an employee of the Council of Ministers who had entered into a registered partnership with his same-sex partner under Swedish law. D challenged the Council’s refusal to allocate supplemental employee benefits provided to married employees. The Court of Justice held that: “[A]s regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner.” *Ibid.* at para 47.

²⁵⁵ Case C13-/94 [1996] ECR I-2143.

*v National Health Services*²⁵⁶ the ECJ found that exclusion of a transgendered partner from a survivor's pension scheme conflicted with guarantee of equal pay (which includes benefits like pensions). Because UK law did not at that time recognise gender reassignment the couple in question could not get married and were therefore barred from accessing an employment related benefit on the grounds of sex. States such as Ireland where a couple designated the same sex at birth may not lawfully marry should now align their national laws in order to avoid falling foul of EU law.

In 1999 EU leaders agreed that a new Charter of rights applicable at European Union level should be drawn up. After agreement by the drafting body²⁵⁷ on a final text, the Presidents of the European Parliament, the Council of the European Union and the European Commission proclaimed the Charter on the 7th December 2000.²⁵⁸

At present the Charter is not legally binding, but it is intended to have legal effects. According to the European Commission ultimately the Charter will acquire legal status via the decisions of the ECJ.²⁵⁹ Although the Charter does not confer any new powers on the European Union the Union's legislative bodies must have regard to its provisions when carrying out their functions. Similarly, "it is highly likely that the Court of Justice will seek inspiration in it, as it already does in other fundamental rights instruments. It can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law."²⁶⁰ The Charter also forms part of the proposed European Constitution signed by the Member States in October 2004.²⁶¹ However, even if the Constitution is not ratified by the deadline of November 2006 the Charter will continue to acquire significant legal ramifications through decisions of the ECJ.

The exact role to be played by the Charter in the development of the EU's human rights jurisprudence awaits further case law.²⁶² However, the Court of First Instance and the Advocates General (officials who supply opinions to assist the European courts in advance of their decisions) have begun to refer to Charter provisions in the course of their judgments and opinions. Many recent decisions of the

ECJ that touch on human rights issues have not drawn heavily on the Charter but relied instead upon the ECHR.²⁶³ For example in *K.B. v National Health Services Pensions Agency and Secretary of State for Health*²⁶⁴ the ECJ did not allude to the Charter and quoted with approval a ECtHR decision on the rights of transsexual persons. It ruled that the UK's failure to allow K.B. to marry her transsexual partner (and thereby allow him inherit a widower's pension) was in principle a breach of EU law. The case was remitted to the national court for a decision on the facts.

In a provision that shadows Article 8 of the ECHR, Article 7 provides that "everyone has the right to respect for his or her private and family life, home and communications". Article 9 states that "the right to marry and found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". Further, Article 21 prohibits *any* discrimination based on *any* ground including gender/sex and sexual orientation.

The scope of Article 9 on the right to marry differs from Article 12 of the ECHR, as it does not specifically exclude same-sex couples from marrying. Rather it recognises that the right to marry extends to same-sex couples in some jurisdictions throughout the EU.²⁶⁵ The explanatory memorandum to the Charter notes "this article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex".²⁶⁶ Accordingly anyone lawfully married under national law should also be treated as married for the purposes of EU law.

7.4 Conclusion

The direction of EU law is clear. Movement of persons throughout the EU will increasingly require States to recognise and protect the various family forms of workers. As a member of the EU, these developments are not ones that Ireland will be able to ignore. An onus now lies on the Government to enact reforms that will allow equal recognition and treatment of all families living in Ireland, whatever their country of origin.

²⁵⁶ Case C-117/01 (7th January, 2004).

²⁵⁷ This body, known as the Convention, included members of the European Parliament, a delegation from the European Commission, representatives of national parliaments and nominees of the various Heads of State. In addition, the European Court of Justice and the Council of Europe, including the European Court of Human Rights, participated as observers. In the course of the drafting process submissions were sought and received from NGOs, independent experts and the states seeking admission to the EU.

²⁵⁸ [2000] OJ C 364/8, 18 December 2000.

²⁵⁹ Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, Brussels, 11.10.2000 Com (2000) 644.

²⁶⁰ *Ibid.*

²⁶¹ Treaty establishing a Constitution for Europe, OJ C310/47, 16.12.2004. Title II of the European Constitution comprises the Charter in a form that is essentially unchanged from that proclaimed in 2000. A guide to the draft Constitution is available from: http://europa.eu.int/futurum/comm/documents/guidecitoyen_en.pdf.

²⁶² D. Walsh (2003) 'The EU Charter of Fundamental Rights: What Practical Effects' Paper delivered at the Human Rights Commission and Law Society of Ireland conference, New Human Rights Legislation, Law Society, Blackhall Place, 18th October 2003.

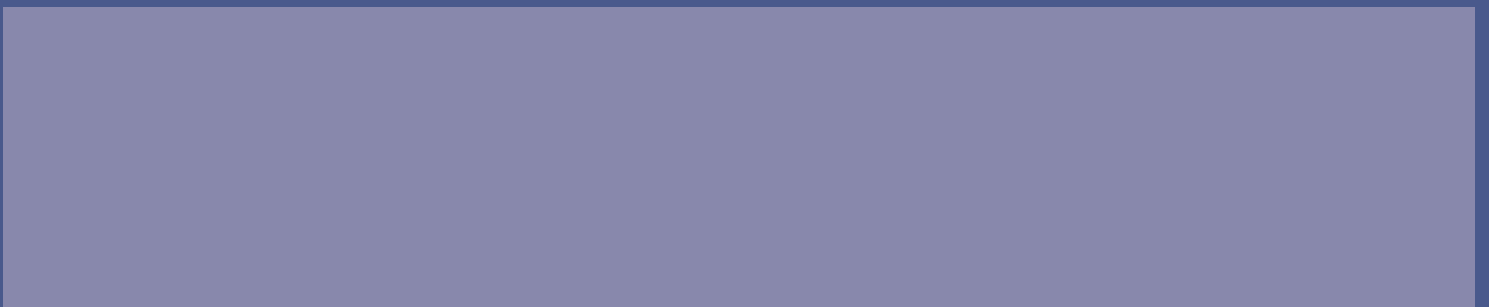
²⁶³ K. Starmer (2004) *Introduction to Fundamental Rights in EU Law and the Charter of Fundamental Rights*, <http://www.justice.org.uk/>.

²⁶⁴ Case C-117/01 (7th January, 2004).

²⁶⁵ The European Court of Human Rights noted in its judgment in *Goodwin v. The United Kingdom*, (2002) 35 EHRR 18, that Article II-9 deliberately departs from the wording of Article 12 in the ECHR in removing the reference to men and women.

²⁶⁶ Convention document CHARTE 4473/00, p.12.

8. RECOMMENDATIONS



8.1 Introduction

Unmarried couples, solo parents and children experience serious inequalities and major difficulties because of the State's failure to recognise their relationships and families. Recognising and supporting all personal relationships that involve caring and interdependence should be an important State objective.²⁶⁷ This is not least because the emotional and material support that people get from their families "plays a vital role in sustaining their capacity to function as workers and citizens".²⁶⁸

The ICCL therefore believes that fundamental changes to current constitutional and statutory regulation of family and child law are necessary, in order to both recognise and respect people's legitimate choices about their relationships and also to ensure that children are in no way disadvantaged or stigmatised through law or policy on the basis of the family unit into which they are born or in which they are parented. In relationships where children are involved, the best interests of the child must give rise to effective parenting rights and duties for the couple concerned irrespective of gender or sexual orientation.

8.2 Constitutional Reform

As already considered, the provisions on family life contained in *Bunreacht na hÉireann* are out of sync with the international human rights conventions ratified by Ireland (Chapter 2). For example, Articles 41 and 42 fail to accord equality of respect and recognition to diverse family forms unlike Article 8 of the ECHR, and they fail to recognise the child as "a juristic person with individual rights"²⁶⁹ contrary to both the best interests principle and broader requirements of the UN Convention on the Rights of the Child.

Without constitutional change any legislative reform will take place within extremely limited parameters. Decided case law illustrates that the constitutional priority accorded the marital family unit will prevent the enactment of laws ensuring that all children are treated equally and that people in extra-marital relationships are protected to the greatest extent possible from potential exploitation. Constitutional reform is central to ensuring human rights-based and

child centred family policy and should be a political priority for the government. The revised provisions should include the following:

- > A guarantee to all individuals of respect for their family life, subject to an express statement of the circumstances in which State intervention is permissible, modelled on Article 8(2) of the ECHR. In order to protect children's rights in particular, the family based on marriage should no longer be privileged.
- > A right for all persons to marry in accordance with the law and found a family, in line with Article 9 of the EU Charter on Fundamental Rights, which is notably not gender-specific.
- > An express guarantee of children's rights based on similar provisions in section 28 of the South African Constitution and the UN Convention on the Rights of the Child. The provision must contain explicit recognition of the obligation that the best interest of the child shall be paramount in decisions impacting on the life of the child, and that in decisions concerning parenting of the child there shall be no discrimination on express grounds including gender, marital status, sexual orientation, nationality, race and ethnic origin or disability.
- > The repeal of Article 41.2, and the inclusion of a gender-neutral provision recognising the work of carers in the home.

8.3 Legislative Change

Following a constitutional referendum along the lines set out above, the State should enact comprehensive legislative reform designed to secure equality between different types of families, while respecting individual autonomy and ensuring that persons are treated equally within the relationships they form.

MARRIAGE

Marriage is a social custom, religious concept, and more importantly, a legal contract. The secular purpose of marriage is to provide a framework that enables people to express their commitment to one other, receive public recognition and support, and voluntarily assume a range of legal rights and duties. As the South African Supreme Court has recognised, confining access to opposite-sex couples reinforces the social exclusion experienced by LGBT people. Further, the ICCL believes that since the State's involvement in marriage is secular in nature, the

²⁶⁷ Law Commission of Canada, *op. cit.*

²⁶⁸ Baker et al *op. cit.*, p. 28.

²⁶⁹ Shannon *op. cit.*, p.3.

current distinction between opposite-sex and same-sex couples cannot be justified.

In short same-sex couples should no longer be barred from entering into a civil marriage. Section 2(2) (e) of the Civil Registration Act 2004 should be repealed allowing persons to marry each other irrespective of their gender (whether ascribed at birth or not). Religious institutions should continue to regulate their own ceremonies, separate from the State with no obligation to marry same-sex couples if this is incompatible with their doctrine. This would, of course, require a strict separation of civil and religious marriage, which ICCL has previously recommended in the context of the Inter-Departmental Committee on the Reform of Marriage Law.²⁷⁰ The ICCL believes that the State has no legitimate interest in regulating the manner in which religious faiths conduct ceremonies and that such separation between the State and religious bodies would reflect best practice in many European countries, upholding respect for freedom of conscience and belief. An onus now rests on the Government to take the lead in the introduction of legislative amendments that will remove long-standing and unjustified stigmatisation of same-sex couples. This challenge is based firmly on compliance with equality norms and human rights principles, and is one that public representatives in Canada, Spain, the Netherlands and Belgium have met.

In addition to achieving parity between marital and *de facto* families, the ICCL is also concerned with the equalisation of power relations within a marital relationship itself. To this end the ICCL recommends an extensive reconsideration of the potential for the introduction of community property within marriage and alerts the Government to the widespread acceptance of such a regime in other common and civil law jurisdictions. In addition, the ICCL stresses that the introduction of a presumptive community property scheme on the marriage of a couple merely accelerates the process of proper provision, property division and automatic shares of the estate of a deceased spouse as already provided for by the Succession Act 1965, the Family Law Act 1995 and the Family Law (Divorce) Act 1996. The ICCL therefore recommends that the Government endeavour to take the necessary steps to introduce such a scheme including any necessary constitutional amendments in light of *In Re Article 26 of the Constitution and the Matrimonial Homes Bill 1993*.²⁷¹

RELATIONSHIP RECOGNITION

Many couples that have the option to do so choose not to marry. As argued in Chapter 1 respect for people's autonomy is undermined if the State attaches more benefits to some relationships, while effectively penalising others.²⁷² Chapters 2-3 catalogued a range of inequalities experienced by unmarried families because such relationships are not afforded recognition. To this end the ICCL believes that the State should consider the introduction of a subsidiary system for the protection of rights between members of a *de facto* family, i.e. a system which is different to marriage but which couples may choose to enter into as a result of ideological, religious, political or other objections to the institution of marriage itself. Such a move would recognise that the rights of co-habiting non-marital couples can be met through a variety of approaches including, in particular, registered partnerships analogous to those in existence in many neighbouring jurisdictions. As noted in Chapter 6 the Government is in fact now obliged to introduce such a scheme, at least for same-sex couples, pursuant to the Good Friday Agreement. The ICCL recommends the introduction of civil or registered partnerships *in addition* to removal of the bar on same-sex marriage. The ICCL particularly notes that this model of inclusive marriage *and* partnership is provided for in both Belgium and the Netherlands and is not, therefore, without precedent.

In particular the ICCL opposes any suggestion of introducing registered partnership absent the removal of the marriage ban, noting the inherent paradox in the adage 'separate but equal'. Even where registered partnerships are introduced that carry all the rights of marriage, excluding lesbian and gay couples from marriage retains the designation of that group as second-class citizens. Yuval Merin notes that assumptions of separate but equal fail "to consider the impact of segregation that the exclusion from marriage, a highly esteemed institution that has social and cultural meanings that transcend the 'bundle of rights', has on gay men and lesbians. Both registered partnership and domestic partnership single out gays as an unprivileged group that is in need of special treatment. Substantive equality is to be achieved *only* by the inclusion of same-sex couples in existing marriage legislation".²⁷³

This notwithstanding the ICCL is aware, through its consultations with affected groups, that many families urgently require recognition of their relationships and therefore recommends the immediate introduction of

²⁷⁰ See ICCL's Submission to the Inter-Departmental Committee on Reform of Marriage Law (2003), available from <http://www.iccl.ie/>.

²⁷¹ [1994] 1 IR 305.

²⁷² Professor William Binchy refers to the law, as currently constituted, as nudging people towards marriage as a result of the privilege afforded to that institution. See Binchy, "New Models of Marriage and Partnership in Ireland", presented to the Irish Human Rights Commission and Law Society Conference, ECHR Act Review, 16th October 2004.

²⁷³ Y. Merin, (2002) *Equality for Same-Sex Couples*, University of Chicago Press: Chicago, p. 279.

registered partnerships *with a view* to the imminent removal of the marriage ban in addition thereto.

The State could establish a legal framework for civil partnerships through a single statute, as occurred in the United Kingdom, and by making minor amendments to key pieces of legislation. Given the vast number of areas currently affected by one's relationship status the ICCL does not purport to address all of the changes required here but argues that the following indicative areas should be covered:

- > **Taxation** - The partnership may qualify for some, but not all, the benefits of marriage. Promoting security of the relationship, partners should benefit from a waiver of inheritance tax and of stamp duty on transfers of the family home. Further, registered partners should be entitled to be treated jointly for income tax purposes, should they elect to do so, as is currently the case with married couples.
- > **Housing** - Partners should benefit from protections in the Family Home Protection Act 1976 and the Residential Tenancies Act 2004, together with being eligible for local authority housing.
- > **Succession and Intestacy** - The ICCL recommends that registered partners should be recognised as next-of-kin for the purposes of intestacy. Where a registered partner dies testate but fails to make proper or any provision for their surviving partner that partner should be entitled to make an application for proper provision to be made by the Court. This would be analogous to the current procedure for children to make applications for proper provision (section 117, Succession Act 1965) although it clearly differs from the automatic legal right share provided to married partners (section 111, Succession Act 1965). The ICCL favours an application-based procedure in the context of registered partners as it is more in-keeping with the nature of that relationship, i.e. one within which particular rights and obligations are assumed towards one another but within which there is also a level of autonomy and flexibility about mutual provision that differentiates it from the strict schemes governing marriage, including the proposed community property scheme. Individual surviving partners should then be entitled to make an application for increased provision, which is assessed by the Courts bearing in mind the nature and circumstances of that particular relationship and the extent to which the mutual moral obligations of both partners, assumed as a result of their relationship and their decision to register that relationship, have been fulfilled.
- > **Welfare** - For as long as joint assessment persists, registered partners should be treated as a couple when, for example, calculating eligibility for Unemployment Assistance. However the ICCL reiterates its previous recommendation that welfare assessments should be individualised across the board in order to ensure a level of independence and autonomy for otherwise dependant members of a relationship. In order to address serious anomalies within the welfare code, registered partners should be entitled to a Widow's or Widowers (Contributory) Pension or the Widowed Parents Bereavement Grant. In line with ECHR standards there should also be no distinction in treatment between opposite-sex and same-sex couples.
- > **Domestic Violence** - Registered partners should be included within the definition of 'spouse' for the purposes of the Domestic Violence Act 1996.
- > **Immigration** - The existence of a registered partnership should be recognised for family reunification purposes. Third country nationals who have entered into a registered partnership with EU or third country nationals with permanent residency, work permits, business permission or retired persons of independent means, should be permitted to enter and reside in Ireland.
- > **Employment** - All employment rights or benefits that accrue to married persons should be extended to registered partners. For example, pension benefits, health insurance and travel concessions available to a worker's spouse should also be on offer to an employee's registered partner. Further, as a matter of EU law employees should be entitled to force majeure leave in the event that their registered partner becomes ill or is injured. The definition of 'family' and 'marital status' in the Employment Equality Acts 1998-2004 should also be amended to ensure that employees in registered partnerships are not discriminated against.
- > **Maintenance** - On the dissolution of a partnership some provision must be made for dependent partners and some reallocation of partnership assets must occur. These would potentially not be as extensive as those available on divorce. The principles of detriment and expectation would apply. Thus a partner would be entitled to maintenance or other provision if he/she suffered a detriment because of entering the partnership, for example, due to loss of earnings, educational opportunities and career prospects. Similarly, partnership property purchased for the purposes of civil partnership should be jointly owned and shared accordingly. Unlike divorce, there should not generally be open-ended mutual obligations and personal property remains such, but only in so far as is consistent with the detriment principle.

PRESUMPTIVE REGIME FOR COHABITING PERSONS

The ICCL believes that a presumptive regime is necessary for unmarried cohabiting couples that choose not to enter marriage or a registered partnership. While both marriage and registered partnerships are opt-in schemes, a presumptive regime such as that discussed by the Law Reform Commission operates so that certain rights/duties automatically accrue once persons have cohabited usually for a specified number of years (see Chapter 4.4). A wide variety of such schemes are now operative across Europe and in comparable common law countries such as Canada, New Zealand and Australia. Chapter 3 discussed a number of legislative provisions that already recognise the existence of unregistered conjugal relationships for some purposes. In order to comply with the ECHR those provisions that differentiate between same-sex and opposite-sex couples without objective justification ought to be amended.

A number of jurisdictions, most notably, the Australian State of New South Wales and the Australian Capital Territory, also apply a presumptive regime to persons living in defined domestic relationships that are not conjugal in nature.²⁷⁴ As the Law Commission of Canada notes key features of sexual partnerships such as economic and emotional interdependence are also present in other close adult interpersonal relationships.²⁷⁵ The Australian provisions recognise that persons who live together and provide each other with domestic support and care may be in the same substantive position as members of a *de facto* couple. To that end adults in certain non-conjugal relationships acquire a limited set of rights and duties towards one another. The ICCL believes that any presumptive scheme enacted by the Government should also have regard to any co-habiting persons likely to suffer detriment as a result of their relationship.

As explained previously the ICCL is guided by the principles of equality and autonomy. The value of autonomy in particular militates against the imposition of obligations or commitments beyond that which people have voluntarily or constructively through their actions, agreed to assume. However this must be balanced by the need in inter-personal relationships to protect individuals from exploitation providing for, to the greatest extent possible, equality within relationships. In particular some individuals may suffer undue hardship because of a unilateral decision on the part of their partner not to register the relationship or to marry.

Consequently irrespective of a relationship's formal status, amendments need to be made to key pieces of legislation to provide rights, entitlements and duties such as the following:

- > **Taxation** - Long-term cohabitees should benefit from a waiver of inheritance tax and stamp duty on transfers for the family home. To this end section 151 of the Finance Act 2000 should be reviewed to ensure extensive application.
- > **Housing** - Long-term cohabitees should benefit from protections in the Family Home Protection Act 1976 and the Residential Tenancies Act 2004, together with being eligible for local authority housing.
- > **Succession and intestacy** - Long-term cohabitees should be permitted to apply for a share of a deceased cohabitee's estate and have some tenancy and/or occupancy protection.
- > **Welfare** - The Department of Social and Family Affairs conducts joint household income means tests of unmarried opposite-sex cohabiting couples when one partner applies for Unemployment Assistance. The ICCL recommends that if unmarried cohabiting couples are treated in this way, they must also be entitled to Widow's or Widowers (Contributory) Pension or the Widowed Parents Bereavement Grant. Again, there should be no distinction in treatment between opposite-sex and same-sex couples. The ICCL again reiterates our preference for the general individualisation of welfare assessment.
- > **Immigration** - The existence of a committed cohabiting relationship should be recognised for family reunification purposes. New Zealand offers a useful model to follow in this regard, where couples establish proof of a substantive relationship and co-habitation, through a range of evidential possibilities (see Chapter 3.9).
- > **Employment** - Based on proof of an existing cohabiting relationship, all employment rights/benefits that accrue to married persons should be extended to unmarried and non-registered cohabiting couples. With respect to non-conjugal relationships consideration should also be given to allowing employees to designate given individuals for receipt of employment-related entitlements
- > **Maintenance** - The courts should have a discretionary power to grant maintenance, again taking account of the principles of detriment and expectation.

²⁷⁴ The Property (Relationships) Legislation Amendment Act 1999 (N.S.W.); Domestic Relationships Act 1994 (A.C.T).

²⁷⁵ *Op. cit.*, Chapter 1.

CHILDREN

All family law measures, including the changes proposed in this Chapter must prioritise the best interests of children. Children should not be discriminated against because of the status of their parents' relationship. Indeed, the law must encourage and facilitate the development of a relationship between a child and both of his or her parents where applicable and other individuals acting in a parental role. Therefore irrespective of whether non-marital relationships are defined by a registered partnership or through co-habitation, the ICCL recommends the following common changes to current law and practice:

- > **Guardianship** - Where a partner in a relationship is a non-biological parent and is caring for and residing with a child, this relationship needs to be given recognition. The State ought to pay particular attention to reconstituted families and should review the guardianship model to take account of non-biological parents. This would enable a child to maintain a relationship with his or her non-biological parent upon the dissolution of the adults' relationship or if the natural parent dies. Further, non-biological parents who are legal guardians would be obliged to provide maintenance for the child if the relationship between the couple ends.
- > **Adoption** - Unmarried opposite-sex and same-sex couples should be permitted to adopt jointly - the determining factor being the best interests of the child - assessing each potential couple individually - irrespective of sexual orientation or marital status. In particular, this would facilitate couples where there are children from a former relationship. Permitting unmarried couples to adopt would ensure that a child has two legally recognised parents. As in the case of marital breakdown, the child would have a right to maintain a relationship with both parents upon dissolution of the relationship.
- > **Employment leave** - Parental leave should be available to any individual acting in a parental role to a child. The ICCL welcomes the proposed amendment to the Parental Leave Act 1998 enabling all those acting in *loco parentis* to take time off to care for their children (Chapter 3.11).

APPENDICES



Appendix 1: Mapping Exercise

1. INTRODUCTION

In order to address the inequalities experienced by diverse family forms the ICCL Executive convened a Working Group on Partnership Rights and Family Diversity. As a first step, the Working Groups undertook a mapping exercise with family diversity and Lesbian, Gay, Bisexual and Transgender (LGBT) organisations in the NGO sector. The aim of the mapping exercise was to find out what research and campaigning efforts had been initiated to secure partnership rights and promote family diversity and to learn about the successes achieved and obstacles encountered by various organisations. In addition, recommendations and policy proposals were sought.

2. METHODOLOGY

Commencing in June 2004, the ICCL Policy Intern first compiled a database of LGBT and family diversity organisations. An introductory letter/e-mail was then sent to the organisations and individuals involved in the sector. The ICCL Policy Intern contacted 21 organisations, of which nine were available for an interview. Semi-structured interviews were carried out in July and August 2004.²⁷⁶ The response was positive, although many individuals were on holidays during that period. Each organisation provided valuable insights into issues relevant to LGBT and family diversity sectors, some of which are mentioned below.

3. MAIN OBSTACLES TO PARTNERSHIP RIGHTS AND FAMILY DIVERSITY

Conservatism

Almost all organisations contacted identified conservative attitudes/atmosphere as the main obstacle to achieving equality for the LGBT community and the recognition of diverse family forms. Parents' Support suggested that conservatism within Irish society still prevents people from endorsing non-traditional relationships. However, the higher profile of the LGBT community indicates that a significant proportion of society will no longer tolerate this. One respondent organisation believed that among Irish civil servants there is still a residue of conservatism, often evident in the Department of Justice, Equality and Law Reform.

Prejudiced Attitudes/Homophobia

Conservatism can also be closely linked to homophobia and prejudicial attitudes. One respondent identified homophobia and prejudices about homosexuals within the political sector as a major obstacle. Many legislators are

not likely to support the recognition of same-sex unions because they fear a loss of support amongst their electoral constituency. Indeed, it was felt that lack of awareness of LGBT rights and associated issues amongst politicians directly influences the consolidation of prejudicial views in their constituencies. Traditional attitudes, lack of recognition and resistance to change are also barriers and often problematic. Statements such as "why don't you just get married?" when the couple in question is of opposite-sex, reflects the common thinking. One Family emphasised the importance of choice over coercion, and claims that taxation, among other legal issues, should not be the prime motive for getting married.

Political Climate

Many organisations identified the current political climate as a significant obstacle to achieving equality for all couples and families, and optimism about possible future changes under the current government vary widely. One respondent noted that any move forward on recognition of same-sex unions and diverse family forms ultimately depends on political will, while another's experience was that currently most social welfare lobbying seems to meet with complete indifference. However, one respondent was of the opinion that there is an element of inevitability about the introduction of legally recognised partnership rights, as no political party has spoken openly against it. Another organisation emphasised that the recognition of civil unions is an extremely topical issue which could mean that the government was under some pressure and this gave rise to a positive climate for action. One organisation pointed out that nearly every piece of progressive legislation in this area has actually been introduced under a Fianna Fáil government. Finally, the Catholic Church continues to have a significant influence on perceptions of family life in Ireland.

Campaigning Initiatives

GLEN has a long-standing history campaigning for the rights of LGBT persons. Initially focusing on the decriminalisation of homosexuality, in the past three or four years GLEN has collaborated and worked in consultation with the Equality Authority and National Economic and Social Forum (NESF) on several documents. GLEN has also lobbied the Government to respond to the Equality Authority's guidelines, as well as supporting other people taking initiatives, such as Senator David Norris's private members bill on domestic partnerships and civil unions.

Other organisations representing or working for the LGBT community have prioritised community development and creating social and support spaces for LGBT people to exist rather than campaigning for partnership rights. For example, OUTHouse explained that given the existence of GLEN, it decided to focus more on service provision. This of course

²⁷⁶ The following people were interviewed: Anne Bowen, One Family/Family Diversity Initiative; Eleanor Edmund, Free Legal Advice Centre (FLAC); Louise Tierney, Outhouse; Brian Granger, Gay Switchboard; Siobhan Fearon, Labour LGBT; Louise O'Donovan, Parents' Support; Chris Robson, Gay and Lesbian Equality Network (GLEN); Geoffrey Shannon, Law Society of Ireland and Dil Wickremasinghe, Gay and Lesbian Unions Ireland (GLUE).

reflects a huge diversity of needs and experiences amongst LGBT people today.

Established in 2002, the Family Diversity Initiative (FDI) is a coalition²⁷⁷ of organisations working with and representing the interests of diverse families in Ireland. The FDI vision is to: “achieve an Ireland in which people define their own families and in which all families are treated equally.”²⁷⁸ Although the FDI has not launched a stand-alone campaign on partnership rights, it does promote legal recognition of opposite-sex and same-sex couples. In addition, One Family has also set up a legal working group on family diversity which is looking at the possibility of assisting new legal strategies to support family diversity.

The Free Legal Advice Centre (FLAC) has taken a test case on the recognition of post-operative gender identity (the Lydia Foy case) and is optimistic about the outcome. FLAC is also considering supporting litigants and initiating test cases on tax and social welfare discrepancies which perpetuate a wide range of inequalities. Finally, FLAC also indicated they would be interested in supporting a litigation strategy to secure partnership rights for heterosexual non-married and same-sex couples.

Established in the summer of 2004, GLUE is new to the sector and campaigns for the recognition of relationships where one of the partners is a non-EU citizen. GLUE recognises the complex nature of the issues of immigration, residency and citizenship, which face couples in this situation. GLUE also points to the ways one can get around such problems, but emphasises that laws will remain unchanged if everyone opts for loopholes and avoids fighting for rights. Thus GLUE, advised by their solicitor, is planning to take a group action of 20-25 couples affected by these circumstances. While GLUE believes the Irish courts are problematic, the organisation believes that the European Court on Human Rights will be much more sympathetic to their cause, particularly in light of judgments from Strasbourg. However, fighting a legal battle, with a risk of losing, is time-consuming, expensive and emotionally draining, and finding 20-25 couples with the same level of commitment can be difficult.

5. RECOMMENDATIONS

Networking, Linking Resources and Dialogue

A common recommendation arising from the LGBT and family diversity sector was the importance of networking, linking resources and engaging in dialogue with others in the effort to gain recognition for same-sex and opposite-sex cohabiting couples.

Political Lobbying

Lobbying key policy decision makers is a core task and requires a cohesive strategy. One respondent emphasised that it was vital to engage in a dialogue with all political parties

and not only to select ones that are thought to be more sympathetic to the cause. Rational arguments are required to convince political parties to press them for change.

Coalition Building

One of the most common recommendations made to the ICCL was the suggestion of some sort of broad-based coalition. Several respondents believed it to be essential in achieving equality for same-sex couples and opposite-sex cohabiting couples. Two organisations recommended that ICCL should keep its remit broad to include the whole family diversity sector in order to reach all adversely affected. It was noted that since the present law affects both same-sex and opposite-sex couples, it should be possible to work together in a wide coalition to introduce new laws.

Constitutional Change and Focusing on Children

Geoffrey Shannon, solicitor and one of Ireland’s leading experts on family law, strongly advocates for constitutional change on family rights. He believes that the Irish Constitution provides for a ‘parental republic’, to such an extent that even in cases of family based abuse the State is hamstrung in its ability to intervene in the interests of the child. Shannon argues that the Constitution needs to be reformulated in order to adopt a child-centred approach where the rights of the child are paramount.

Nomination

It was recommended that the ICCL should call for a ‘right to nominate’ as part of a strategy to recognise relationships of dependency and care. This would include a right to nominate a partner or successor, to designate a ‘next of kin’ for medical issues, to nominate a beneficiary of pensions and inheritance and to nominate a partner as a co-parent or guardian of a child. It was also noted that the Finance Act 2000 already paves the way for a system of nomination.

European Convention on Human Rights Audit

It was recommended that the ICCL should campaign/lobby for an audit of all the State’s policies to ensure they comply with Article 8 (right to family and private life) and case law from the European Court on Human Rights relating to breaches of Article 8.

Community and Grass Roots

It was recommended that those adversely affected by the State’s current anti-family policies should be involved in decision-making and initiatives designed to address their needs.

Awareness Raising and Information

It was recommended that the ICCL do more awareness raising to highlight the plight of unmarried opposite sex and same-sex couples and keep other organisations informed on the organisation’s activities.

²⁷⁷ The FDI includes: Age Action Ireland, Children’s Rights Alliance, Gay and Lesbian Equality Network (GLEN), Focus Ireland, Forum of People with Disabilities, National Consultative Committee on Racism and Interculturalism (NCCRI), One Family, OPEN and Treoir.

²⁷⁸ The FDI’s main objectives include: (1) Co-ordinate and develop effective partnership working between community and voluntary organisations who promote and represent diverse families, including the sharing of relevant resources; (2) identify key knowledge gaps in the experience of diverse families and seek to address these by research or other appropriate means; (3) support and co-ordinate policy interventions that address the institutional and social barriers to equality and social inclusion faced by diverse family groups and (4) co-ordinate an effective public awareness campaign on family diversity in Ireland.

Appendix 2: Feedback from consultations in Dublin and Cork

1. INTRODUCTION

The ICCL organised two consultation sessions in September (Dublin)²⁷⁹ and November (Cork)²⁸⁰ 2004. The main objective of these sessions was to gather views and perspectives of those adversely affected by Ireland's failure to recognise diverse family forms. Approximately 35 people attended the Dublin event and 20 individuals attended the event in Cork. The following section summarises the views expressed at both events.

2. MAIN ISSUES OF CONCERN

Participants outlined the following issues of concern:

- > Some participants were frustrated with the exclusionary nature of marriage.
- > The rights of a surviving partner in the event of death, inheritance, visitation rights, consent and medical decision-making, immigration rights were all raised as basic rights violations.
- > It was pointed out that many same-sex couples would be financially worse off if their relationship is legally recognised, in particular, in the area of welfare.
- > One participant worked for a state sponsored body which has a company pension plan. However, he was extremely reluctant to enquire about allowances because of his sexual orientation. He fears harassment and that his job prospects may be damaged in the company.
- > International gym companies do not discriminate against same-sex couples in the United States (US) when providing benefits. However, the same companies do discriminate in Ireland.
- > The Employment Equality Act 1998 (as amended) only refers to 'marriage'.
- > Many were frustrated at the high legal costs facing same-sex couples wishing to assert their rights.
- > Many participants were confused by legal advice they received from solicitors in relation to wills and succession.
- > Upon death, surviving partners from unmarried couples can be denied access and a role in their partner's funeral.
- > The religious ethos of hospitals can have a negative impact upon the rights of same-sex couples.
- > Institutions that are responsible for protecting rights are very often conservative and homophobic.

- > It is not for the State to define who is family and ascribe what bonds can be formed. As same-sex parents already exist, their rights need to be addressed and equality for children realised.
- > Parental relationships with children were raised consistently, particularly, upon dissolution of a partnership.

Participants expressed the following views on marriage, civil registration and nomination:

3. MARRIAGE RIGHTS

- > The simplest resolution is for the Government to de-gender marriage.
- > As with opposite-sex couples, it is important to remember that marriage tends to benefit those who are in a financially secure position.
- > Marriage should be defined as a legal contract with the State. The religious connotation in Ireland has tended to mean that people only marry to have children.
- > There is a danger of leaving some vulnerable people behind who do not wish to marry, for example, older same-sex couples.
- > Some participants were not interested in challenging marriage as defined by religious institutions because they wanted a new option.

4. CIVIL REGISTRATION

- > It is important that couples are given the choice to enter a civil partnership registration.
- > The introduction of civil partnership would require significant amount of additional legislation which may prove time-consuming and become a delay tactic.
- > Same-sex couples should be given the opportunity to sign a contract with the State and benefit from this contract. Currently only a portion of the population may sign the marriage register and this is unjust.
- > Participants were concerned about dissolution and what duties cohabiting partners had to each other.

5. RIGHTS TO NOMINATE

- > The term 'kinship' and not 'family' would enable legislation to sidestep the Constitution.
- > Nomination avoids the partnership issue irresponsibly.
- > Nomination is not necessarily reciprocal between partners and one partner may later chose to remove another.
- > Should this model be approved, it would not appear in a single Act but a series of Acts.

²⁷⁹ This session was organised in Trinity College Dublin with the assistance of the LGBT TCD society.

²⁸⁰ The LGBT UCC society helped organise this session in University College Cork.

6. DIRECTIONS FOR THE ICCL

Individuals and organisations made the following recommendations to the ICCL:

- > The ICCL should work for partnership rights through coalitions. Campaigning for lesbian and gay rights is often problematic and a coalition would appeal to a larger quota of cohabiting people experiencing the similar difficulties.
- > The ICCL should lend its support to David Norris's Private Members Bill.
- > If Norris's Bill fails because the Government claim legislation is in progress, the gay and lesbian community may be left waiting for years. It is important that the public acknowledge that the recognition of ideals outside of marriage is not an attack on marriage.
- > The issue of partnership rights affects a large proportion of the population. Politicians should be encouraged to realise what a big 'vote winner' it is.
- > It is important that those who do not opt for marriage or civil registration are not left behind.
- > The group agreed that the use of case studies would de-mystify the partnership issue and help break down stereotypes.
- > The ICCL should compile a list of solicitors who can advise non-married cohabiting couples on their rights and entitlements.
- > The campaign for promoting partnership rights should be seen to offer positive visions of an all-inclusive Ireland, rather than descend into an angry and negative debate. One participant referred to the use of a mother figure as a spokesperson for the decriminalisation campaign, which proved to be particularly effective in addressing politicians and the media. Similarly, families concerned about the welfare of their LGBT relations may evoke empathy with the general public.

