

IHRC and Law Society of Ireland

8th Annual Human Rights Conference Emerging Human Rights Issues

20 November 2010

The passing of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 represented an important moment in Irish history and an important acknowledgement by the State that lesbian and gay people exist and have rights and entitlement to protection by the State. However, the Act does not provide for equality for gay couples and their families. It does not provide for recognition of marriage between same sex couples and it has only a very minimal reference to protection for the children of families involving two parents of the same sex. Thus although the Act does constitute an advance in the rights of gay people, it is simply not enough. Without undermining the importance of the Act as a step, it doesn't alter the fundamental argument at hand – everyone should have the freedom to marry the person they love. The Irish Council for Civil Liberties has said of the Act, it is a staging post and not a milestone- only a stop on the way to true equality.

Ann Louise Gilligan and Katherine Zappone are taking their High Court judgement on appeal to the Supreme Court – it looks like a February date for the hearing has been set. As a married couple (married legally in Canada, they were seeking to have their foreign marriage recognised in Irish law for tax purposes – a move which all married heterosexuals legally permitted to live and work in Ireland usually apply for producing their marriage certificate). Revenue refused to recognise their Canadian marriage, and the High Court was asked to review that decision. As you know the High Court's Justice Dunne found that the Revenue was correct to refuse to recognise their Canadian marriage in Ireland, because she said the court found that marriage is a contract historically between a man and a woman and the Civil Registration Act of 2004 had spelt this out. Katherine and Ann Louise's appeal is based on the premise that the Irish Constitution/Bunreacht na hEireann is a living document and while those involved in drafting the Constitution decades ago might not have foreseen same sex marriage on the horizon, many other aspects of Irish life have changed and the Constitution has been interpreted to reflect such changes or has been amended to specifically change the text to

better reflect the lived reality of Irish life. KAL's legal team also suggests that the Constitution is actually silent on the issue of gender in relation to marriage! and that there is a need and a demand for, as Evan Wolfson, US attorney and activist, said in Dublin earlier this week – there is a need to ensure the freedom to marry. Access to civil marriage by same sex couples in Ireland is denied – on what grounds? Evan also issued a challenge to the legal eagles of Ireland to present to him and us reasoned arguments which show that the Constitution in his view (like me not a constitutional lawyer) actually contains very good reasons why the inclusion of lesbian and gay people in that institution of marriage would be a good thing and would in fact support the State in its commitment to protect families. Evan is by no means at all convinced that the Dunne judgement indicates that a referendum on the issue is necessary – he was amazed at the silence of legal minds and legal journals in Ireland on this matter. Whatever about politicians hiding behind the response of 'we can't do it, it needs a referendum' he argued that lawyers in Ireland should quickly set about the task of argumentation prior to the KAL judgement – proper examination of the text and lay out the reasons why Ireland like 12 other countries across 4 continents should allow freedom to marry for lesbian and gay people.

So while we await Katherine and Ann Louise's Supreme Court judgement hearing and decision it is appropriate this morning that we ask – what is it that drives them to want to be married, to want to be treated equally before the law for tax, legal and other social purposes? And is there any sense that Irish society is in agreement with them?

The answer is simple – it is the same desire that drives other men and women who wish to be married, to publicly in front of friends and relatives proclaim their wish to love each other and protect each other and their family for the future, to avail of the protections provided by the Constitution and benefits which accrue from the legal and social status that follows from being married. There is a residual resistance amongst those who would wish to continue to see gay and lesbians as 'other' or not quite like us ... a resistance to open up the institutions of the State to all the citizens – for some the resistance is homophobic in origin! A dislike and mistrust of gay and lesbian people which is

visible in the resistance to allow us access to institutions and protections provided by the State to all citizens or in a wider context by States to all human beings. This resistance in Ireland has been fuelled somewhat by Catholic church and Vatican comment on same sex loving relationships as evil – it is vital that in our modern constitutional republic that the views of church and state are acknowledged but that we render unto Caesar what is his – contrary to recent suggestions the legislators in our houses of the Oireachtas or the judiciary in our courts may be Catholic or not but they may not, in our secular State act as Catholic legislators or Catholic judiciary! So what should inform their thinking on this matter?

Since KAL took their case to the High Court Freedom to marry has been making huge progress. The list of those countries which provide for the freedom to marry for same sex people includes Netherlands; Belgium, Canada, Spain, Portugal, South Africa, Iceland, Norway, Sweden, and in USA – Connecticut, Washington DC, IOWA, Massachusetts, New Hampshire and Vermont – and most recently Argentina has joined the list - nine of these have been recognised since KALs High Court case decision.

Law does not remain static. It is a malleable creature that changes with time as much as we do – significantly, the creation of the new institution of CP for same sex couples and marriage for opposite sex couples, facilitates a lingering sense of homophobia, an inequality, an injustice. It allows the state to give rights to one group and not to another by virtue of their sexual orientation. Is this still acceptable? Is sexual orientation still an allowable grounds for different treatment? I don't think so!

Only some of the countries that have created a 'separate but equal' institution of registered civil partnership for same sex couples have upgraded to civil marriage. As Brian Barrington in his address to PILA earlier this week reminded us, it's not as if the Irish CP act is like the UK legislation where all relevant pieces of legislation were listed and updated to include same sex couples, the Irish CP act is not a complete transposition of all elements relevant to same sex couples and is not equality nor pretending to be. So the Irish legislators have not gone for freedom to marry – they acknowledge us and our rights to a

lesser set of rights and entitlements but not equality – have they or indeed the judiciary – have they public support on this matter?

In Ireland support for Freedom to Marry has risen even since the KAL case. In 2009 Marriage Equality using Landsdowne Polling found that in a national survey 81% of people (8 out of 10) said they agreed that everyone in Ireland, regardless of whether they were gay or lesbian, should receive equal treatment before the law – the highest agreement was amongst those in the 25-34 age group where the agreement rose to 90%

The recent Irish Times Poll published in September, Asked the direct question of the Irish Public – Do you think gay couples should be allowed to marry?

67% said yes, a majority and very close to a super majority! almost 10 % didn't know and 25% were against – again huge public support, with massive levels up in the 80 percentiles amongst 18-34 year olds and still well up in the 70 percentages amongst 34-54 year olds! So there is public support for civil marriage for same sex couples amongst the Irish public, over 91% said they would not think less of a person if s/he revealed they were gay or lesbian ...and 60% say the introduction of CP A does not undermine the institution of marriage! The polls show Irish society is clear that Civil Marriage access for gay and lesbian people is overdue – we are convinced that all of the major parties have moved towards the position of supporting marriage equality - even in the debates on the CP Act in the Oireachtas, speaker after speaker introduced their remarks by saying 'I know this act is not Equality...' The CP Act does not go far enough, the Irish people know it's not equality and does not go far enough and Marriage Equality through our awareness campaigns and discussions with politicians and our Out to Your TD campaign has worked hard to get the ME goal onto the political tables and are working to ensure it's part of the next programme for govt for whatever govt we get in the forthcoming general election! The judiciary must also be reading the polls, examining the international, EU and global trends on the issue – they will tell us soon enough what their views are and we look forward to the reasoned judgements I'm sure they will issue.

European rulings on the matter are of interest to us here in Ireland - In mid 2010 the ECHR ruled that the 47 member States to the Convention are under no obligation to grant same sex couples the right to marry – though they did state that as the numbers of states that are granting move upwards and become a majority in time, this may have to change. Furthermore judgements from the same court in recent years have shown that different treatment for people of different sexual orientations is not very popular with the Court – again a space to be watched with interest!

ME are completing a Marriage Audit at present which we hope to publish in the new year when the revenue and social welfare elements of the Act are published and the Act finally enacted. This audit shows clearly that CP Act does not go far enough – it does not deliver equality – there are some 300 differences between the current Act and Civil Marriage rights, duties and entitlements – and that's before the financial elements are published or analysed! There are just two of these I would like to share with you this morning to show why the Act does not go far enough and why the freedom to marry is so necessary.

Brian Barrington reminded us the other evening of the importance of language in shaping our understanding of life and in describing lived reality. The use of the term 'shared home' instead of 'family home' in the CP Act is a matter that has gained some attention – this conscious change of term from family home to shared home is a denial that lesbian and gay civilly partnered people are family. Whether as committed couples we have children or not, the suggestions that we have a shared home but not a family home like other loving couples is both insulting and demeaning of our family life! So after 25 years of living with my partner it seems we no longer have a family home according to the CP act we only have a 'shared home'!

The second and serious omission of the Act is the almost total failure to acknowledge the fact that so many gay and lesbian families have children – whether these children are from previous relationships or were conceived using new reproductive technologies – the fact is there are dozens of such families in Ireland – providing loving homes and joyful childhoods to their children, however, the children have no rights to their non biological parent.

ME recently published 'Voices of Children' a report in which children of lesbian and gay parents spoke out about how this lack of legal connection to one of their parents is discriminatory and caused harm and upset even in day to day situations – for example in a case of medical emergency – let's say John falls and breaks his arm in the school yard – the non biological parent, even if civilly partnered to his biological parent does not have the legal right to sign a medical permission form - these simple everyday insults are what the voices of children tell us cause problems for them in their daily lives – not the fact that they have two, loving committed parents who want to provide the family security to their family that all heterosexual couples who wish to marry can! Without the freedom to marry for these parents, these families are not protected by the State and these children fall into the category of what we might call the New illegitimate child – we removed this stigma and tag from children in Ireland decades ago and in doing so promised to cherish all the children equally – we are failing these children and the silence about their existence is yet another silence about children's lives in Ireland which we must break! Providing Marriage Equality would go some way towards resolving some of the issues facing these families – amendment of the Adoption Act to allow parents apply for leave to adopt the child they are parenting would also help! The Ombudsman for Children has criticised the recent CP Act and the recent Adoption Act amendments for what she calls 'causing a legal vacuum for this group of children'. More evidence, if evidence needed that the act does not go far enough! Again earlier this week we heard Geoffrey Shannon, Chair of the New Adoption Authority and legal expert and advocate for children's rights – he spoke of how taking the child centred approach in the matter of marriage equality would lead us to open that institution to same sex couples so that the children can be fully given the full protection of the State in their loving families

Grainne Healy

Chairwoman of Marriage Equality

