

THE RIGHTS OF *DE FACTO* COUPLES



A research report by
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commissioned by the Irish Human Rights Commission

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The Rights of *De Facto* Couples

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FOREWORD

Maurice Manning
President, Irish Human Rights Commission

The Irish Human Rights Commission hopes this report will make a helpful contribution from a human rights perspective to the current public debate on what is termed *de facto* couples. It was commissioned in the hope of providing clarity and legal certainty, where such is possible, and highlighting areas of doubt, uncertainty or ambiguity with a view to having such issues addressed.

The report deals with non-marital conjugal relationships involving both opposite-sex and same-sex partners. It contains a comprehensive account of the international human rights standards applicable to *de facto* couples. These include European Community law measures; Council of Europe instruments, with particular emphasis on the European Convention on Human Rights; as well as relevant United Nations instruments. Against this detailed backdrop, the report goes on to assess the adequacy of Irish law in the light of that international legal framework. In this regard, a broad range of issues which concern *de facto* couples is canvassed, including access to marriage, rights on relationship breakdown, property rights, succession rights, health and personal safety issues, duties in respect of children, financial support from the State, employment rights, consumer rights and privacy rights. The authors highlight specific areas of domestic law which require legislative amendment in the light of international standards, as well as predicting that other areas may need revision in the future as the interpretation of international norms evolve. At a more fundamental level, they conclude that there is a compelling case to be made for the State to provide some formal level of legal recognition to same-sex partners. They also propose the enactment of a statutory duty to equality proof legislation as a means of ensuring that Ireland complies with its international human rights obligations in this area.

The Commission wishes to thank the authors, Judy Walsh and Fergus Ryan, for the high quality and comprehensive nature of this report, which we believe will make a useful contribution to the ongoing debate.

Maurice Manning

Executive Summary

1. Introduction

- The purpose of this report is to supply a comprehensive account of the international human rights standards applicable to *de facto* couples, and to assess the adequacy of Irish law in light of that international legal framework.
- Prompted by normative considerations and demographic change, various statutory bodies have recently highlighted the inequalities experienced by *de facto* families. Although the nature and extent of recommended reforms varies, there is a rough consensus to the effect that the status quo is no longer sustainable.

Principal findings:

2. European Community Law

- EC measures relevant to *de facto* couples concern two primary areas: employment and freedom of movement.
- Community law within these fields does not directly prohibit discrimination on the basis of marital status; instead, limited equality of treatment as between *de facto* couples is attained in a secondary manner through use of the sex/gender and sexual orientation grounds.
- In elucidating the content of fundamental rights protected by EC law, the European Court of Justice draws heavily on the jurisprudence of the European Court of Human Rights. The Charter of Fundamental Rights of the European Union further strengthens this adherence to ECHR values.
- The Court of Justice has interpreted ‘sex’ for the purposes of discrimination law as including adverse treatment based on transsexuality but not sexual orientation.
- Member States are generally free to accord married couples more favourable treatment than their unmarried counterparts.
- Where marriage amounts to a pre-condition for accessing a right protected by Community law, a Member State that does not permit transgendered persons to marry will in principle violate EC sex equality law.
- Direct and indirect discrimination within employment on the grounds of sexual orientation is prohibited under the Framework Directive.
- Where private and public sector employers provide benefits for opposite-sex *de facto* couples, those benefits should also be made available to same-sex partners.
- Differential treatment of married and unmarried persons may amount to indirect discrimination on the grounds of sexual orientation. Although the Framework Directive seeks to exempt national laws that accord different treatment on the basis of marital status, in light of relevant ECHR jurisprudence any blanket immunity for measures that may amount to sexual orientation discrimination is questionable.
- The exact parameters of the indirect discrimination prohibition in this context will probably be tested in future case law.

- Increasing recognition of *de facto* families under the ECHR may lead to a narrowing of the margin of appreciation afforded to Member States, especially as regards the treatment of same-sex partners in areas where the Community has competence.
- Several interpretive ambiguities stem from the terms of Directive 2004/58/EC; the distinction made between registered partnerships and marriage may give rise to sexual orientation discrimination in the context of free movement of EC citizens.
- Member States must also put in place mechanisms for facilitating the entry of workers' unregistered/unmarried partners; in establishing the criteria for the recognition of such partnerships, Member States may not discriminate between couples of the same sex and those of the opposite sex.

3. International Human Rights Instruments

Council of Europe Instruments

- Two substantive rights protected under the European Convention on Human Rights (ECHR), the right to protection of one's private and family life (Article 8) and the right to property (Article 1 of Protocol 1), are of especial relevance to *de facto* couples. These provisions assume particular importance when combined with the Convention's non-discrimination prohibition (Article 14). With respect to same-sex couples, Article 12, which upholds the right to marry, is also material.
- The European Court of Human Rights has established that discrimination based on sexual orientation and marital status is prohibited. *De facto* couples that have children are afforded some derivative safeguards owing to the Convention's protection of children born outside marital relationships. Reliance can only be placed upon Article 14 when another Convention right is in issue.
- Both direct and indirect discrimination are prohibited.
- Not every distinction or difference in treatment amounts to discrimination; differential treatment can be justified if it (1) pursues a legitimate aim, and (2) the means employed to realise that aim are proportionate.
- While sexual orientation discrimination is now afforded a form of strict scrutiny, States are afforded a wide margin of appreciation *vis-à-vis* preferential treatment of married families.
- The Strasbourg Court adopts a functional approach to the definition of 'family life' for the purposes of protection under Article 8. The cumulative effect of the European Court for Human Rights' (ECtHR) jurisprudence is that 'family life' exists between cohabiting parents and their children (including children conceived through donor insemination), and between long-term heterosexual cohabitantes without children. Although lesbian and gay partnerships have not traditionally been construed as relationships protected under Article 8, recent jurisprudence indicates that this stance may be revised.
- The consequences of establishing 'family life' vary according to the circumstances of the case. They may include not only a negative duty of non-interference in the relationship but also may impose positive duties on the Contracting States.

- States are not obliged to treat married and *de facto* couples in the same manner; protection of traditional family forms is considered a legitimate aim that may justify differences in treatment.
- The relationship between a mother and child must be afforded immediate legal recognition. Omission to provide automatic guardianship rights for unmarried fathers does not contravene the Convention. At present, there is no obligation to make available mechanisms for the legal recognition of the relationships between social (i.e. non-biological) parents and their children.
- No positive duty is imposed on States to provide for the legal recognition of *de facto* couples generally. In cases concerning pensions, maintenance and ownership of the family home, the Strasbourg Court has found that *de facto* couples may be excluded from benefits or protections availed of by spouses.
- Given the elevation of sexual orientation to a suspect ground, differential treatment as between *de facto* heterosexual and homosexual couples may fall foul of Article 14.
- Contracting States must recognise gender reassignment and permit the marriage of a transsexual person to a person of the gender opposite to that to which the person has been reassigned.
- The right to marry protected under the Convention does not currently extend to lesbian and gay partners. Such an outcome is not arguably precluded, however.
- Article 1, Protocol 1 protects a wide variety of proprietary interests from undue interference on the part of State authorities. Discrimination in the field of social security and social aid is prohibited under relevant jurisprudence. Since the provision only protects vested property interests and not a right to acquire possessions, as such, claims to a beneficial interest in a home may fall outside its ambit. However, while a right to inherit property is not covered by Article 1, succession may come within the ambit of Article 8.
- Given the wide margin of appreciation afforded States in differentiating between married and *de facto* couples, the prospects of successful property and discrimination claims are arguably higher for lesbian or gay partners, who may claim that failure on the part of a given State to treat them differently in this context amounts to indirect discrimination.
- If ratified by the Irish Government, Protocol 12 ECHR might prove significant in extending the range of public authority functions subject to discrimination law.
- Application of the European Social Charter has to date generated little concrete material of assistance to *de facto* couples. The advent of a cross-cutting discrimination clause under the Revised Charter may, however, prove significant in the future.

United Nations Instruments

- Of the various rights protected under the International Covenant on Civil and Political Rights, those of most immediate relevance to *de facto* couples concern private life and protection of the family (Articles 17 and 23 respectively) and Article 26, which provides for a general principle of non-discrimination.

- The list of grounds protected under Article 26 is not exhaustive; the Human Rights Committee (HRC) has heard communications alleging discrimination on the basis of sexual orientation and marital status.
- The Article has a very broad scope of application covering discrimination in law or in fact in any field regulated and protected by public authorities and placing a general obligation on legislatures not to introduce discriminatory legislation.
- As with the parallel ECHR provision, both direct and indirect discrimination is prohibited. A difference in treatment does not constitute discrimination where the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose that is legitimate under the Covenant.
- The HRC generally regards differential treatment between *de facto* and married couples as legitimate, since marriage is a freely chosen status that confers distinct rights and obligations on spouses.
- Recently the Committee has clarified that, although adults who ‘choose’ not to marry may not generally complain of differential treatment based on marital status, where children are adversely affected by such a distinction in treatment the same outcome may not issue.
- Treating a same-sex *de facto* partnership less favourably than a heterosexual *de facto* couple may amount to unlawful sexual orientation discrimination.
- For the purposes of assessing compliance with both Article 17 and Article 23, the HRC prefers that a flexible interpretation be given to the term ‘family’, which to a large extent reflects that of the State concerned.
- States are not obliged to afford *de facto* couples positive recognition of their relationships in the form of, for example, a registration scheme.
- A State’s discretion is not unfettered, however: the Covenant does not permit differential treatment of the children of married and non-marital relationships. Family life as between unmarried parties is regularly protected in the context of deportation orders, for example.
- However, certain rights such as those pertaining to ‘founding a family’ under Article 23 appear to be reserved to married couples, indicating that the HRC would not entertain communications from *de facto* couples pertaining to adoption or access to assisted reproduction technology.
- Given the express reference in Article 23 to the right of men and women to marry, the Human Rights Committee has found that failure to provide for same-sex marriage will not lead to a violation of the Covenant.
- It is not clear whether the HRC will follow the ECtHR in extending the right to marry to certain individuals that have undergone gender reassignment surgery.
- As with the ECHR, the prospect of benefits afforded to married couples being challenged on the basis that they constitute indirect sexual orientation discrimination remains open.
- Article 2(2) of the International Covenant on Economic, Social and Cultural Rights prohibits direct and indirect discrimination in relation to the Covenant rights on a non-exhaustive range of grounds. Sexual orientation discrimination is prohibited and the CESCR has frequently condemned unequal treatment of the children of unmarried parents.
- While the substantive rights set out under the Covenant are to be progressively realised, the prohibition on discrimination has immediate effect.

- Article 2(2) is arguably not adequately respected within this jurisdiction. The broad exemptions allowed under the Equal Status Acts effectively removes large areas of public activity from the purview of anti-discrimination law and the enactment of legislation permitting blanket discriminatory treatment of same-sex *de facto* couples runs counter to the Covenant's discrimination prohibition.
- Although the primary concern of the Convention on the Elimination of all Forms of Discrimination Against Women is discrimination based on sex/gender, the text of the Convention and associated General Recommendations acknowledge that marital status discrimination may adversely affect women.
- While the Committee's reviews of State Parties reports have, to date, focused on the removal of provisions that directly discriminate against married women in particular, given the continued development of standards under CEDAW it is possible that, indirectly, discriminatory practices will be subject to critical appraisal in the future. In particular, the Committee has already problematised the absence of redistributive measures for members of (heterosexual) *de facto* couples upon relationship breakdown.
- The Convention on the Rights of the Child has generated little material concerning derivative protection for the parents of children born into *de facto* relationships. Article 7, which recognises the child's right to know and to be cared for by his or her parents, does give rise to certain procedural obligations *vis-à-vis* the ties between natural parents and children.
- The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families has not been ratified by Ireland, as of yet.

4. Domestic Law

- The Irish Constitution reserves constitutional recognition solely to the family based on marriage. Similarly, legislation governing families generally has regard only to marital relationships.
- A limited number of domestic laws recognise *de facto* couples as being entitled to avail of certain rights usually restricted to married persons. Such legislation, however, is more often than not confined to opposite-sex relationships.
- In particular, the following measures, insofar as they are confined to opposite-sex non-marital couples, potentially contravene Article 14 of the ECHR:
 - Domestic Violence Act 1996, section 3
 - Civil Liability (Amendment) Act 1996, section 1
 - Parental Leave Act 1998, section 13
 - Residential Tenancies Act 2004, section 39
- Given the broad meaning afforded the term 'pay' in ECJ jurisprudence, it would appear that section 13 of the Irish Parental Leave Act 1998, by apparently confining *force majeure* leave to opposite-sex unmarried partners, also contravenes the prohibition on direct discrimination set out in the Framework Directive.
- It is difficult to discern any legitimate reason which would necessitate the State allowing only opposite-sex couples to seek a barring order, to succeed to a tenancy, or to seek compensation for the wrongful death of a partner. In line

with ECtHR jurisprudence, the State cannot rely on broad abstract arguments concerning protection of traditional (heterosexual) families, but must demonstrate that the differentiation is necessary to advance that aim.

- Under the ECHR Act 2003, Irish courts are now obliged to take judicial notice of relevant ECtHR jurisprudence. The terms of these statutes may be interpreted so as to include same-sex couples, particularly as equal treatment of heterosexual and homosexual *de facto* couples poses no apparent constitutional difficulties.
- Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 falls outside the ambit of the Framework Directive but arguably runs counter to applicable ECHR jurisprudence by differentiating between individuals solely on the basis of their sexual orientation, without any apparent objective and reasonable justification. Furthermore, while the Government may claim some latitude with respect to the need to incrementally adjust law and policy in light of social changes, it is unlikely that such a ‘breathing space’ is applicable in the case of legislation that is enacted with the object of *removing* entitlements (and liabilities) that were already in situ. Section 19 also arguably contravenes Article 26 ICCPR, which requires that the content of legislation adopted by a State Party must not be discriminatory. The unambiguous language employed means that there is no latitude for reading section 19 in a manner that would be compatible with the ECHR, as courts are now obliged to do under section 2 of the ECHR Act 2003.
- With respect to lesbian or gay couples, the current position under Irish and ECHR law is that the right to marry does not extend to such partnerships.
- Domestic law does not provide for maintenance as between *de facto* partners upon relationship breakdown; property adjustment orders in this context are also confined to married couples. Succession law also provides for legal right shares only where the parties were married to one another. Redistribution of property as between *de facto* partners would appear to fall outside the scope of the European Convention’s substantive human rights guarantees, or at least within the State’s margin of appreciation. Failure to treat same-sex couples differently, as is arguably required under the Strasbourg Court’s indirect discrimination jurisprudence, could give rise to a violation of Article 1, Protocol 1. It might further be tentatively argued that the Government’s failure to extend interpersonal financial support obligations to heterosexual unmarried couples constitutes indirect discrimination under CEDAW. Where Article 26 ICCPR is applicable, however, it is doubtful whether the HRC will impose a positive duty on the State to accommodate the needs of *de facto* couples. Despite the deference afforded States in this general area, the prospect of a successful indirect discrimination finding in relation to same-sex couples cannot be ruled out.
- The Irish courts’ reluctance to uphold cohabitation contracts may need to be revisited in the light of ECHR standards; such a contractual interest may give rise to a claim of interference with one’s ‘possessions’, combined with a putative Article 14 violation. The State could seek to justify the interference as being one that pursues the legitimate aim of supporting the traditional family. Arguably, however, such interference is not proportionate to that aim.
- The Pensions Acts 1990–2005 contain an exemption that protects occupational pension schemes which only provide a survivor’s pension to married partners. Although such schemes fall within the remit of the Framework Directive and

the exclusion of *de facto* couples raises the prospect of indirect discrimination on the sexual orientation ground because same-sex partners may not marry under Irish law, the differential treatment may be justified. Nevertheless, when the provision is read in light of ECHR jurisprudence and the Directive as a whole, it would appear that any blanket immunity for such measures is questionable. The exemption provided for under the Pensions Acts may be tested in future litigation. A particular candidate for any such case might be the ‘spouses and children’ pension fund operative in the public sector. The Human Rights Committee has signalled that, notwithstanding the wide margin of discretion available to States in this area, it is willing to interrogate measures that adversely affect children.

- Where pension entitlements are accorded *de facto* couples, they must be extended to both same- and opposite-sex *de facto* couples on an equal basis under EC law, and probably also under Article 26 ICCPR and Article 14 ECHR.
- Taxation law provides for a range of benefits and exemptions for married couples that are unavailable to *de facto* couples. Cases brought to date under the ECHR have been unsuccessful. Again, same-sex couples may have a greater prospect of success in future case law since the possibility of marriage is not open to them.
- At present Irish immigration law largely fails to recognise *de facto* couples for the purposes of family reunification. If not remedied prior to 30 April 2006, the State will be in breach of Directive 2004/58/EC. This will require remedial action, which most likely will occur in the context of the enactment of the Immigration and Residency Bill 2005.
- Medical Council guidelines concerning decisions made on behalf of an incapacitated adult are subject to the discrimination prohibitions set out under the terms of the Equal Status Acts 2000–2004 and must also comply with ECHR standards.
- Certain differentiations between same-sex and opposite-sex couples under the Domestic Violence Acts 1996–2002 arguably do not comply with Article 14 ECHR. The compatibility with the ECHR of the property ownership threshold test, which must be met by *de facto* partners applying for barring orders, has yet to be probed.
- Irish family law concerning guardianship, custody and access to children appears to comply with the ECHR. The Strasbourg Court has held that governments are free to differentiate between married and unmarried fathers in relation to the acquisition of automatic guardianship rights. Further, the ECHR does not, as of yet, require legal recognition of social parents (even though such relationships may amount to family life under Article 8).
- As a public body, the Adoption Board is obliged under section 3 of the ECHR Act 2003 to perform its functions in a manner that is compatible with the Convention. However, direct discrimination against a gay/lesbian prospective adoptive parent appears to fall within the State’s margin of appreciation.
- Both marital and non-marital parents can avail of parental and maternity leave. However, the implicit definition of ‘parent’ set out in section 6 of the Parental Leave Act 1998 is potentially problematic in relation to the entitlements of social parents. The proposal to define a ‘parent’, under section 2 of the Parental Leave (Amendment) Bill 2004, as including an employee acting in

loco parentis is a welcome development from the perspective of certain *de facto* couples.

- The Employment Equality Acts 1998–2004 and the Equal Status Acts 2000–2004 are equivocal with regard to the position of *de facto* couples, and need to be clarified. On a literal interpretation of the Act, discrimination on the basis of cohabitation *per se* is not directly banned, a position that may undermine the efficacy of the legislation.
- Section 14 of the Equal Status Acts 2000–2004 provides for a broad exemption that arguably does not comply with Article 26 ICCPR and Article 2(2) ICESCR, which impose a duty on States not to discriminate in the fields of economic, social and cultural rights.
- Failure to hold proceedings involving disputes between *de facto* couples *in camera* may infringe Article 8 of the ECHR, in that it arguably fails to respect the couple's right to a private life.

5. General Recommendations

- While ECHR and ICCPR standards in particular warrant immediate changes to discrete legal provisions, such reforms would perhaps be best introduced through an overarching statute providing for relationship recognition.
- Constitutional reform, though not prescribed under applicable international law, is desirable from a pragmatic and normative point of view: a guarantee of respect for private and family life extending beyond marital relationships would anchor any attempts to legislate in the area of relationship recognition.
- An incremental approach to change arguably gives rise to inefficiencies. Such an approach also risks creating inconsistency in the treatment of *de facto* couples, who may find themselves meeting the definition of 'cohabitee' (or allied concepts) for certain specified purposes but not others. International standards are in a state of flux. Failure to instantiate a fundamental change to the legal framework governing relationships may generate adverse litigation outcomes and consequent needs for continual, *ad hoc* realignment between domestic and international laws.
- Introduction of a civil partnership scheme for same-sex couples is arguably required to fulfil the State's obligations under the Belfast Agreement of 1998.
- From an international human rights vantage point, the State should provide some formal level of protection and recognition to same-sex couples, if not to *de facto* couples generally. A variety of models are open, including an opt-in civil registration scheme, a presumptive scheme and a nomination-based option.
- In order to ensure that legislation remains compliant with Article 14 ECHR and Article 26 ICCPR in particular, a statutory duty to equality proof legislation should be introduced.

Chapter 1: Introduction

1.1 Aims and Structure

This report has two core objectives: to supply a comprehensive account of the international human rights standards applicable to *de facto* couples; and to assess the adequacy of Irish law in light of that international legal framework.

The report is structured as follows: this chapter places the research within a general social and policy context, while the following two chapters deal with the international legal position. Applicable European Community (EC) law is discussed in Chapter 2. The primary areas addressed are those that currently fall within the EC's competence, *viz.* employment and freedom of movement. Chapter 3 reviews relevant provisions and associated jurisprudence under the international human rights conventions that Ireland has ratified. It opens with an account of case law concerning the European Convention Human Rights (ECHR), and goes on to consider the European Social Charter. Relevant UN human rights instruments are then discussed, with the analysis centring on the International Covenant on Civil and Political Rights (ICCPR). Chapter 4 supplies a comprehensive survey of domestic legal provisions applicable to *de facto* couples, highlighting those that do not comply with Ireland's international human rights obligations as elaborated in Chapters 2 and 3. The report concludes with some tentative recommendations for reform, drawing on the paths followed in other jurisdictions.

This report primarily addresses the position of adults in non-marital relationships. Reference is made to children's rights only insofar as those rights are affected by the marital status of parents.¹ It is, nevertheless, worth bearing in mind the international legal principle, as enunciated in particular under the UN Convention on the Rights of the Child (UNCRC), that in all relevant cases the best interests of the child is the primary consideration.²

Furthermore, although the concern of this report is to consider the position of *de facto* couples, the question of access to marriage is relevant. The distinction made in this regard between same-sex and opposite-sex couples may constitute indirect discrimination on the basis of sexual orientation. Given that marriage provides exclusive access to a range of rights and responsibilities, legal regulation of capacity to marry merits consideration.

¹ On the legal rights of children generally, see Law Reform Committee of the Law Society of Ireland (2006) *Rights-based Child Law: The Case for Reform* (Dublin: Law Society of Ireland) and G. Shannon (2004) *Child Law* (Dublin: Thomson Round Hall).

² See generally P. Alston and J. Tobin (2005) *Laying the Foundations for Children's Rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (Florence: UNICEF Innocenti Research Centre).

1.2 Context

This section provides an empirical picture of non-marital conjugal cohabitation in Ireland, and goes on to place the report within a wider domestic and international policy context.

1.2.1 Statistical Background

The 2002 Census reported a marked increase in the prevalence of non-traditional family arrangements in Ireland. According to the Census, in 2002 there were 77,600 couples cohabiting outside marriage, representing 8.4% of all family units in the State at that time and more than double the figure recorded six years earlier. Of these families, 29,700 include children.³ When one adds to this the 153,900 households headed by a lone parent,⁴ the prevalence of families not currently founded on the constitutional ideal of a subsisting marriage between cohabiting persons peaks at almost 20% of all family units in the State. Indeed, while birth rates generally have slumped in recent decades, almost one-third of children born in Ireland between 1999 and 2004 were born outside marriage.⁵ The census also bore witness to a growing phenomenon of cohabiting same-sex couples, with 1,300 couples enumerated. In the intervening period, it is likely that these figures have further increased.

Notably, these advances have not dented the popularity of marriage. In the past decade, the marriage rate has in fact increased, from 4.3 per 1,000 of the population in 1995 to 5.1 in 2004, the latter figure being only marginally lower than the corresponding figure for 1951 (5.4).⁶ This apparent paradox is best explained by the growing tendency amongst heterosexual couples to delay marriage, with non-marital arrangements acting as a prelude to marriage rather than an alternative thereto.

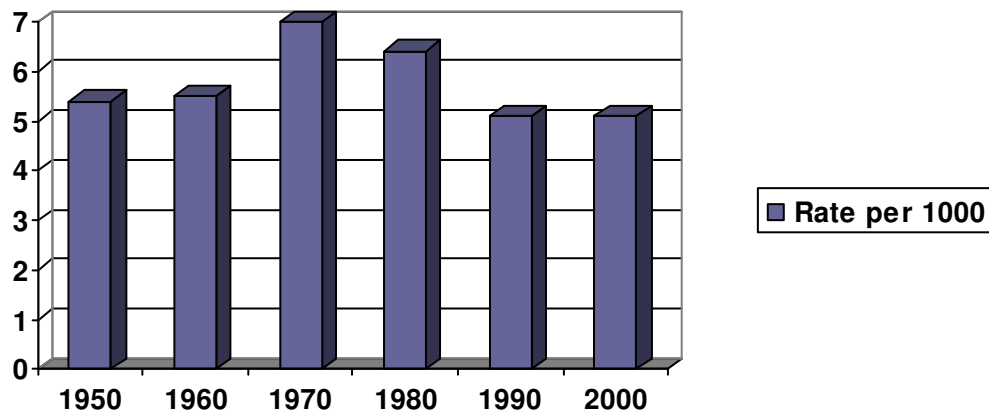
³ See *Census 2002, Volume 3, Household Composition and Family Status* (Dublin: Central Statistics Office, 2004).

⁴ *Ibid.* Although significant, this statistic is likely to be an underestimation. There is arguably a lack of accurate and adequate collection methods for taking account of the many diverse situations within which one-parent families live, including a growing level of shared parenting arrangements and continuing patterns of inter-generational households.

⁵ This represents a tenfold increase on the 1972 figure of 3%. See, generally, the annual CSO, *Vital Statistics* (Dublin: Central Statistics Office, various years).

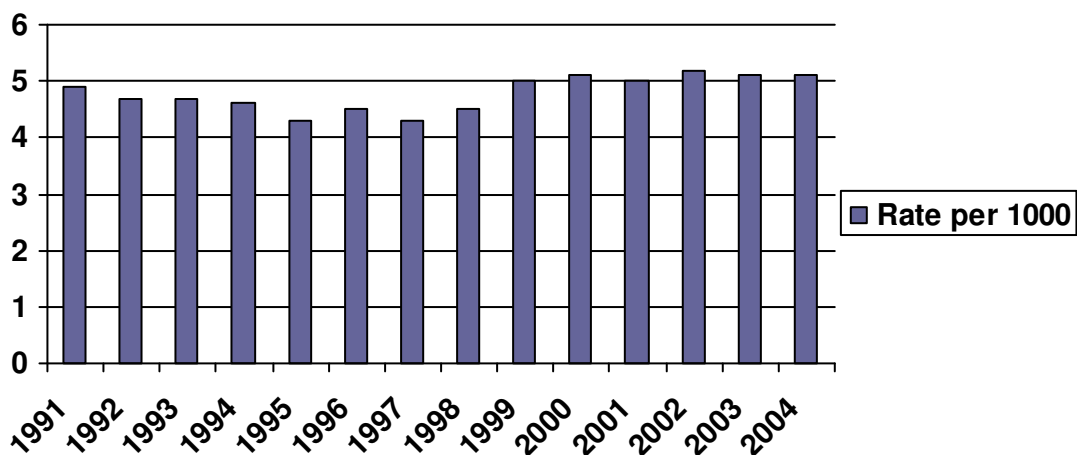
⁶ See *Marriages 2002* (Dublin: Central Statistics Office, 2004), indicating that the average age of marriage in 2002 was 32.5 for men and 30.4 for women, representing an increase of four years on the average figure for 1990. See also the figures cited above.

Fig. 1. Average rate of marriage per 1,000 of the population. Selected years 1960–2000.



Source: Central Statistics Office (<http://www.cso.ie/statistics/bthsdthsmarriages.htm>).

Fig. 2. Average rate of marriage per 1,000 of the population, 1991–2004.



Source: Central Statistics Office (<http://www.cso.ie/statistics/bthsdthsmarriages.htm>).

1.2.2 National Law Reform and Policy Initiatives

A number of significant statutory reports dealing with the general position of *de facto* couples have been published in recent years. Of those we have selected to review here, two deal primarily with same-sex partnerships, while both the Law Reform Commission's report (2004) and that of the All-Party Oireachtas Committee on the Constitution (2006) address extra-marital relationships in general.

Law Reform Commission: Consultation Paper on the Rights and Duties of Cohabitees (2004)

As the most comprehensive official review on the subject to date, the Commission's consultation paper (2004) is an important source of information on the legal position of *de facto* couples.⁷

In the main, the paper leans against the provision of an 'opt-in' scheme, preferring instead the inception of a presumptive scheme that would apply to all couples who meet certain criteria. This scheme would extend limited rights and duties to 'qualified cohabittees', defined as non-marital couples that have cohabited for at least three years in a 'marriage-like' relationship, two years if the couple has resident children. The Commission, however, expressly excludes from consideration extra-marital (as opposed to non-marital) cohabitation, thus denying to persons who are simultaneously married and living with a non-marital partner the status of 'qualified cohabitee' in respect of that partner. This would, if implemented, significantly reduce the scope of the reforms proposed. The consultation paper is also confined in its application to potentially sexual or conjugal relationships, thus excluding other domestic arrangements.

Insofar as succession rights are concerned, the Commission recommends the extension to qualified cohabittees of a right to apply for judicial relief similar to those rights provided by section 117 of the Succession Act, 1965 and section 18 of the Family Law (Divorce) Act 1996. These measures provide that a court may make provision from the estate of a deceased person where proper provision has not been made for his or her child or former spouse respectively during the lifetime of the donor or on his or her death. In exceptional cases, the Commission suggests, qualified cohabittees should enjoy a similar right.

The Commission further recommends the extension of the right to obtain maintenance from a partner and the right to apply for property adjustment orders on the breakdown of a relationship, but only in 'exceptional cases' where hardship would otherwise arise. Public pension entitlements are also addressed, the Commission suggesting that qualified cohabittees should be entitled to benefit on the same basis as spouses. The Commission also recommends an increase in the CAT exemption available to a surviving cohabitee on the death of his or her partner, effectively suggesting that the amount should equate with that available to a child of the donor.

Cognisant of ECHR standards, the proposed reforms are designed to embrace both same-sex and opposite-sex cohabittees. In particular, the Commission proposes the extension of the Civil Liability Amendment Act 1996 – which extended the right to sue for wrongful death to heterosexual cohabittees – to include same-sex partners.

In many respects, however, the suggested reforms are cautious and limited.⁸ The Commission declined to support any extension to unmarried couples of the Family Home Protection Act. Arguing that it would be too complex to determine whether a relationship met defined criteria and cohabitation requirements, the Paper likewise declined to recommend any change to immigration law so as to allow for the recognition of non-marital unions. The Income Tax code, the Commission proposed,

⁷ Law Reform Commission (2004) *Consultation Paper on the Rights and Duties of Cohabittees*, LRC-32-3004 (Dublin: LRC).

⁸ See F. Ryan (2005) 'Editorial: LRC Report on Cohabittees' *Irish Journal of Family Law* [2005] 1, p. 2.

should also be left intact, thus affording married couples a potentially lower tax burden than applies to *de facto* couples.

Maintenance and property adjustment orders should be available, the Commission proposes, only in 'exceptional cases' and where 'just and equitable' in the circumstances. It is thus possible that many qualified cohabitants will be denied appropriate relief. The paper also limits the time within which such remedies may be sought, requiring that such proceedings be commenced within one year of the relationship breakdown. This is arguably too short a limitation period and may encourage qualified cohabitants to rush to court before all other options have been exhausted.

The All-Party Oireachtas Committee on the Constitution: Tenth Progress Report (2006)

The Report of the Constitution Review Group recommended certain changes to the definition of family life set out in *Bunreacht na hÉireann*.⁹ While the privileged position of married families ought to be retained, the Group considered that a guarantee extending to all individuals respect for their family life, 'whether based on marriage or not', be included in the Constitution.¹⁰ Moreover, the Constitution should explicitly acknowledge that in all actions concerning children: 'the best interests of the child shall be the paramount consideration'.¹¹ These recommendations were subsequently referred to the All-Party Oireachtas Committee on the Constitution and its report on Articles 41 and 42 of the Constitution was published in 2006.¹²

The All-Party Committee, however, did not favour amendment of the constitutional definition of the family:

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.¹³

While this stance appears to be grounded in pragmatic considerations, a minority of the Committee argued that change is preferable, to ensure that the Constitution is 'not out of step with Article 8 of the European Convention on Human Rights'.¹⁴ In this

⁹ Constitution Review Group (1996) *Report of the Constitution Review Group* (Dublin: Stationery Office).

¹⁰ *Ibid.*, p. 336.

¹¹ *Ibid.*, p. 337.

¹² All-Party Oireachtas Committee on the Constitution (2006) *Tenth Progress Report: The Family* (Dublin: Stationery Office).

¹³ *Ibid.*, p. 122. The Committee unanimously agreed to recommend a modest repositioning of children's rights in the Constitution, suggesting the inclusion of a clause according an express rights to equal treatment for all children, regardless of the circumstances of their birth: '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' (*Ibid.*, p. 124). It is arguable, however, that the express enumeration of certain grounds of discrimination (which appear to be exhaustive in scope), without reference to others, may confine the ambit of this provision. The Committee notably did not suggest that the child's best interests should be deemed to be the 'primary' or 'paramount' consideration, a stance that jars with the provisions of the UN Convention on the Rights of the Child (see Chapter 3.3.5).

¹⁴ *Ibid.*, p. 128.

regard, the minority members proposed that the following provision be inserted at the end of Article 41:

The state also recognises and respects family life not based on marriage. All persons, irrespective of their marital status, have a right to family life. The Oireachtas is entitled to legislate for the benefit of such families and of their individual members.¹⁵

The Committee as a whole agreed that a packet of distinct legislative reforms, designed to ameliorate the position of same-sex and opposite-sex partners, should be enacted. In relation to heterosexual couples, two options are offered: either a civil partnership scheme requiring the parties to ‘opt-in’ to a formal scheme, or a presumptive scheme such as that endorsed by the Law Reform Commission in its Consultation Paper.¹⁶ These routes appear to be mutually exclusive. Same-sex couples are hived off from their heterosexual counterparts, apparently on the basis that access to marriage is precluded (at least for the foreseeable future) and because in the Committee’s view ‘a presumptive scheme would not be appropriate’.¹⁷ It therefore recommends that civil partnership legislation should be provided for same-sex couples.¹⁸

It is submitted that the Committee’s proposals are problematic for a number of reasons. First, the decision to follow a legislative route without simultaneously altering the Constitution poses the risk that the legislation in question may be deemed invalid upon judicial review. Taking note of relevant Article 41 jurisprudence, the Committee tentatively concludes that legislation extending ‘marriage-like’ privileges to both heterosexual and gay or lesbian couples would survive constitutional scrutiny provided it does not surpass the protections and duties accorded married families. As we note in Chapter 4, this terrain is largely untried; the precedents in place suggest that even minimal attempts to equate the position of heterosexual *de facto* couples with married partners are unconstitutional. Should the Committee’s recommendations be followed, two likely scenarios emerge: the first canvassed above is that any attempt to extend marriage-like privileges will be struck down upon, say, an Article 26 reference, generating at best delay and potentially a state of inertia with respect to reform in this area. Alternatively the Oireachtas may well seek to pre-empt any adverse finding upon judicial review by enacting very limited reforms or indeed confining these to same-sex couples, since, it could be argued, a court is less likely to regard the extension of rights to lesbian and gay partners as undermining the institution of marriage. Inclusion of a wider guarantee of respect for family life along the lines suggested by a minority of the Committee, while arguably not ruling out any finding of unconstitutionality, renders it less likely.

Second, the exclusion of same-sex couples from any presumptive scheme, if implemented, risks contravening Article 14 (read in conjunction with Article 8) of the European Convention on Human Rights (see Chapter 3.2.2–5). Indeed, the fact that the Committee discusses separately the position of these couples is indicative in itself of an approach that sees these essentially similar categories as worthy of separate treatment. While same-sex couples are not similarly situated in relation to access to

¹⁵ *Ibid.*, p. 129.

¹⁶ *Ibid.*, p. 122.

¹⁷ *Ibid.*, p. 123.

¹⁸ *Ibid.*

marriage, the State would have to meet the objective justification test set by the European Court of Human Rights (ECtHR) if it sought to exclude one group of couples that had not registered their relationship solely on the ground of sexual orientation. It is significant to note that the Committee's recommendation regarding the extension of a civil partnership scheme to same-sex couples directly precedes a statement that similar legislation should be extended 'to meet the needs of other long-term cohabiting couples'.¹⁹ On one reading, this juxtaposition suggests that same-sex couples should be grouped alongside non-conjugal cohabiting arrangements and thus separately from opposite-sex couples.

Equality Authority: Implementing Equality for Lesbians, Gays and Bisexuals (2002); National Economic and Social Forum: Equality Policies for Lesbian, Gay and Bisexual People: Implementation Issues (2003)

We now turn to sketch the proposals set out in two recent reports that deal primarily with lesbian and gay partners. *Implementing Equality for Lesbians, Gays and Bisexuals*²⁰ builds in turn on a report compiled by Mee and Ronayne.²¹ Both highlight the gaps in protection for same-sex couples on a variety of fronts. The Equality Authority observes that:

[t]he relative invisibility of lesbian, gay and bisexual ('LGB') people is perhaps most marked in the absence of official, statutory and legislative recognition of same-sex relationships. Few of the rights, responsibilities, commitments and benefits assigned to married heterosexuals are available to same-sex couples and only a few are enjoyed by non-marital heterosexuals.²²

It notes, in particular, that while marital status impacts significantly on the rights and responsibilities of married couples, for lesbian and gay couples marriage is not an option. As a result, gay and lesbian couples are placed in a particularly vulnerable position, particularly on the occasion of important life events, such as the death or serious illness of a partner, the birth or adoption of a child, and the breakdown of a relationship. The Authority contrasts the 'serious attention' given to the issue in other European jurisdictions with the lack of recognition in Ireland, highlighting particularly the areas of state pensions, taxation relief, duties and rights in respect of children, as well as housing, property and succession rights. The report makes particular reference to differentiation between same-sex and opposite-sex non-marital couples in the context of social welfare and the difficulties faced by same-sex couples where one party is a non-EEA national.

In response to these concerns, the Authority recommends reform informed by three key principles: diversity, equality and accessibility. The Authority argues that any legal reform should reflect the diversity of partnership arrangements among LGB couples, and thus that one model of reform in itself may not be adequate. It therefore suggests the creation of a range of options, including legal marriage, registered partnerships as well as a presumptive scheme recognising more informal arrangements. Further, such reforms should not be confined to same-sex couples:

¹⁹ *Ibid.*

²⁰ Equality Authority (2002) *Implementing Equality for Lesbians, Gays and Bisexuals* (Dublin: Equality Authority).

²¹ J. Mee and K. Ronayne (2000) *Partnership Rights of Same-Sex Couples* (Dublin: Equality Authority).

²² *Op. cit.*, p. 20.

Rights and responsibilities currently conferred on married heterosexual couples...should be equally conferred on lesbian and gay couples as well as heterosexual unmarried couples.²³

On foot of the Equality Authority's recommendations, the National Economic and Social Forum (NESF) addressed the implementation of equality for lesbian, gay and bisexual people across a range of policy areas.²⁴ It identified the absence of equal legal recognition for same-sex couples as a substantial barrier to the advancement of the goals set by the Equality Authority. The NESF proposed legislative change to provide for an array of partnership rights, including the right to nominate a partner or successor; to nominate a beneficiary of pensions and inheritance; to designate a next-of-kin for medical reasons; to nominate a partner as co-parent or guardian of a child; the right of a non-EU partner of an Irish person to live and work in Ireland; and the civil recognition of the partnership.²⁵

1.2.3 Developments in other Jurisdictions

Both the European Parliament²⁶ and the Council of Europe's Parliamentary Assembly have endorsed the adoption of partnership laws in a large number of European States and have called on other countries to follow suit.²⁷ As such, these declarations reflect an emergent recognition throughout Europe that significant interpersonal relationships outside marriage should attract formal State endorsement.²⁸ We review the paths followed in neighbouring jurisdictions briefly in Chapter 5, drawing particular attention to the position in Northern Ireland. For now it should be noted that, while some countries have dealt with the position of all *de facto* couples, a majority have tended to treat same-sex partners *sui generis*, given their traditional exclusion from civil marriage.

1.3 Concepts and Definitions

1.3.1 Overview

Throughout the report we make reference to a number of key concepts applicable in the field of human rights law; the most salient are explained briefly here. The potential of international standards to effect change for *de facto* couples is best understood with reference to the general parameters of transnational human rights systems. In particular, the overarching principle of subsidiarity means that national legal systems are regarded as the primary site for the articulation and protection of human rights norms, with international courts and other bodies playing a secondary,

²³ *Ibid.*, p. 28.

²⁴ National Economic and Social Forum (2003) *Equality Policies for Lesbian, Gay and Bisexual People: Implementation Issues* (Dublin: NESF).

²⁵ *Ibid.*, p. 56.

²⁶ *European Parliament Resolution on Respect for Human Rights in the European Union (1998–1999)* (11350/1999 - C5-0265/1999 - 1999/2001(INI)). See also *European Parliament: Resolution on Equal Rights for Homosexuals and Lesbians in the European Community* (A3 - 0028/94), 8 February 1994.

²⁷ Parliamentary Assembly (2000) *The Situation of Gays and Lesbians in Council of Europe Member States*, Doc. 8755, 6 June 2000 (Council of Europe).

²⁸ See, for example, K. Waaldijk (2004) 'Others May Follow: The Introduction of Marriage, Quasi-Marriage and Semi-Marriage for Same-Sex Couples in European Countries', *New England Law Review* 38, pp. 569–90.

supervisory role.²⁹ This principle is reflected at both a procedural and substantive level within the architecture of the United Nations and the Council of Europe. For example, Article 35 of the ECHR requires the exhaustion of domestic remedies prior to commencing litigation before the Strasbourg Court, while the ECtHR's jurisprudence affords States a margin of appreciation in assessing violations (see section 1.3.4). In a similar vein, the enforcement mechanisms attached to the ICCPR, including the supervisory role of the Human Rights Committee, are designed to be a secondary source of rights protection: 'The primacy conferred on national enforcement manifests a concession to State sovereignty, as well as a recognition of the superior efficiency, expediency, and effectiveness of municipal enforcement systems.'³⁰

Given the wide variety of family forms recognised at both a regional and global level, it is to be expected that the articulation of human rights standards in the sphere of interpersonal relationships will not be a straightforward task. The flexibility afforded States means that international bodies tend not to be overly prescriptive; a considerable degree of deference is evident in relation to national measures that promote conventional family arrangements, paradigmatically marriage. On the other hand, the dynamism inherent in the margin of appreciation doctrine means that standards evolve and adapt to reflect wider sociological and political change. At a European level in particular, ongoing progress in the field of lesbian, gay and transgendered rights arguably has the capacity to 'ratchet up' the level of protection in recalcitrant States (see Chapters 2 and 3).³¹ In this regard, the prohibitions of discrimination contained in the Council of Europe's human rights instruments, as well as European Community equality measures, have proved useful and can be expected to play an even greater role in future (see, further, Chapters 2 and 3).

1.3.2 Definition of a *de facto* Couple

There is no universal definition of what is meant by a '*de facto* couple' in Irish or international law. Given that there is little or no recognition of non-marital relationships in Irish law, this is not surprising. The term is clearly used to describe persons who are not married to each other, but, beyond this, there is little guidance as to the parameters of the concept. Although the term 'common law' spouse is sometimes used colloquially to describe a long-term cohabitee in a relationship similar to marriage, this term is in fact a legal misnomer. The common law does not currently recognise such a status, whether as an equivalent to marriage, or as an alternative thereto.

The formula normally used to describe a *de facto* couple is, however, instructive in this regard. Terminology such as 'living together as husband and wife' is often employed to denote the status of a heterosexual couple living together outside of

²⁹ See generally P. Carroza (2003) 'Subsidiarity as a Structural Principle of International Human Rights Law', *American Journal of International Law* 97, pp. 38–79.

³⁰ S. Joseph, J. Schultz and M. Castan (2004) *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd edition (Oxford/New York: Oxford University Press), p. 13.

³¹ As discussed in Chapter 3.2, the overall trajectory of the Court's jurisprudence concerning sexual minorities is to strengthen the level of protection afforded. At the same time, however, the absence of a broad consensus can mean that ECHR standards are slow to evolve and the ECtHR may not seek to impose a uniform position, especially in relation to concepts of morality closely tied to national cultural and historical traditions.

marriage in a relationship that shares many of the key features of marriage.³² This formulation suggests that such a relationship is conjugal in nature, involving the existence of, or potential for, a sexual relationship. It also presupposes that the parties cohabit.

Although this formula may be interpreted as excluding couples of the same sex (see Chapter 4.2.5), the term *de facto* couple for the purposes of this report is intended definitively to include both opposite-sex and same-sex partners. People of course live in a variety of dependency relationships that are non-conjugal in nature.³³ Examples include solo-parent families, adult siblings living together and multi-generational households.³⁴ While many of these personal relationships share attributes ascribed to sexual partnerships, including emotional and economic interdependence,³⁵ the present report is confined to non-marital conjugal relationships.

1.3.3 Discrimination

Equality is a key principle underpinning all of the major human rights conventions ratified by Ireland.³⁶ The concept is a contested one capable of embracing various ideologies; the theoretical underpinnings of the equality measures considered in this report derive from variants of liberal equality of opportunity and so are concerned with ensuring that people should have an equal chance to compete for social advantage.³⁷ Realisation of this principle primarily takes the form of discrimination prohibitions framed around grounds or bases of comparison. For example, at a domestic level under both the Equal Status Acts 2000–2004 and the Employment Equality Acts 1998–2004, four principal categories of discrimination,³⁸ based on nine grounds, are prohibited.³⁹

With respect to *de facto* couples, prohibitions of direct discrimination and indirect discrimination are the most salient form of legal measure, while the germane grounds of discrimination are those concerned with sex/gender, marital status and sexual orientation. Although the various anti-discrimination provisions considered in the body of this report vary considerably in terms of approach and scope, they share certain common features. As a preliminary matter, not every distinction or difference in treatment between *de facto* and unmarried couples amounts to unlawful discrimination. Rather, claimants must meet a variety of criteria in order to establish that the impugned measure discloses either direct or indirect discrimination.

³² See, for example, the Social Welfare (Consolidation) Act 1993, the Domestic Violence Act 1996, the Civil Liability (Amendment) Act 1996, the Parental Leave Act 1998, the Residential Tenancies Act 2004.

³³ See Law Commission of Canada (2001) *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada).

³⁴ *Ibid.*, Chapter 1. For an empirical picture of the composition of Irish households, see Central Statistics Office (2003) *Census 2002: Volume 3, Household Composition and Family Units* (Dublin: Stationery Office).

³⁵ See also B. Cossman and B. Ryder (2001) 'What Is Marriage-Like Like? The Irrelevance of Conjuality', *Canadian Journal of Family Law* 18, pp. 269–326.

³⁶ See A. F. Bayefsky (1990) 'The Principle of Equality or Non-Discrimination in International Law', *Human Rights Law Journal* 11, pp. 1–34, and A. McColgan (2003) 'Principles of Equality and Protection from Discrimination in International Human Rights Law', *European Human Rights Law Review* 2, pp. 157–75.

³⁷ See J. Baker, K. Lynch, S. Cantillon and J. Walsh (2004) *Equality: From Theory to Action* (Basingstoke: Palgrave MacMillan), Chapters 2 and 7.

³⁸ Direct discrimination, indirect discrimination, harassment and victimisation.

³⁹ Age, disability, gender, family status, membership of the Travelling community, marital status, race, religion and sexual orientation.

Essentially, direct discrimination is less favourable treatment of a person on one (or several) of the grounds covered by a given law. It is associated with the pursuit of formal equality. Formal equality demands that those who are similarly situated should be treated in the same manner. Under this approach anti-discrimination law is a vehicle for removing objectionable considerations generated by prejudice from decision-making processes. Direct discrimination thus tends to capture measures, practices or rules that openly distinguish between certain groups and individuals. As we demonstrate in Chapter 4, Irish law draws several such distinctions between married and *de facto* couples and a number of legislative provisions further differentiate between same-sex and opposite-sex couples. A key hurdle faced by all *de facto* couples in this regard is establishing that they are similarly situated to their married counterparts, and so entitled to equal treatment. In practice this has proved difficult, largely because differentiation on the basis of marital status is not regarded as a badge of discrimination.⁴⁰ Because discrimination law has been conceived as an instrument designed to protect groups that have historically been subject to adverse treatment based on stereotypical assumptions about their respective attributes, the tendency has been to ban unequal treatment that can be linked to immutable characteristics.⁴¹ Since one's marital status is not considered immutable, but a freely chosen state, traditionally human rights law tends not to regard married and unmarried couples as comparable for the purposes of anti-discrimination guarantees.⁴² There is, however, some evidence that the conventional stance is changing incrementally.

As noted above, same-sex partners are in a somewhat different position to other *de facto* couples. Discrimination on the basis of sexual orientation is prohibited under several international human rights instruments, although it is generally not listed explicitly but rather forms one of a non-exhaustive list. As a result, it is increasingly the case that same-sex couples and heterosexual unmarried partners are considered to be similarly situated for the purposes of direct discrimination prohibitions (see generally Chapter 3).

Same-sex couples are in a more 'favourable' position than their heterosexual unmarried equivalents *vis-à-vis* indirect discrimination claims. Indirect discrimination focuses on the effect that ostensibly neutral treatment may have on an individual or group. A condition, practice, requirement or rule that does not openly distinguish between the protected individuals/groups, but has a disproportionate impact on them, may be considered unlawful. This concept is designed to outlaw subtle and institutionalised forms of discrimination; it has the potential to move beyond formal equality to secure a stronger form of equality of opportunity, which is not simply concerned with ensuring that decision-making processes are free of animus towards certain individuals/groups. Formal equality is often contrasted with substantive equality or equality of substance. For our purposes, the label 'substantive' embraces robust liberal conceptions of equality that are concerned with achieving equality of outcome or results. Substantive equality looks beyond the surface (or form) of a law/practice to examine its effects.

⁴⁰ By contrast, discrimination experienced by children as a result of their parent/s' marital status has long been recognised as implicating a violation of human rights norms (see Chapter 3).

⁴¹ See, for example, N. Iyer (1993) 'Categorical Denials: Equality Rights and the Shaping of Social Identity', *Queen's Law Journal* 19, pp. 179–207, and C. Sheppard (2001) 'Grounds of Discrimination: Towards an Inclusive and Contextual Approach', *Canadian Bar Review* 80, pp. 893–916.

⁴² Moreover, where unequal treatment of married and *de facto* couples adversely affects children, a different set of considerations comes into play (see generally Chapter 3 and Chapter 4.2.6).

The indirect discrimination prohibitions found in the instruments considered in this report have the capacity to deliver substantive equality because such provisions can capture the application of ‘innocent’ criteria that in fact have an adverse effect on a given group. But the concept’s more radical potential relies on how the legal system regards the disparate impact established in a given case.⁴³ It can simply be used to *detect discrimination*; if a discriminatory provision is in place, the claimant has overcome the first hurdle, by, for example, proving that benefits contingent on marriage disqualify gay and lesbian couples. However, the claim may not be successful if the criterion in question can be justified. As we illustrate below, this is the form indirect discrimination currently takes at both the domestic and international level. A more expansive version of indirect discrimination would centre on achieving equality of outcome or results; proof of a disproportionate effect on a protected group would be enough to satisfy the claim. Nevertheless, the requirement that an indirectly discriminatory measure be objectively justified allows for greater interrogation of the various national laws that accord preferences to married people, at least insofar as same-sex couples are concerned.

1.3.4 Margin of Appreciation and Principle of Proportionality

The term ‘margin of appreciation’ is used to denote the area of discretion afforded Contracting States under the European Convention on Human Rights. As Yourow notes, the structural arrangements put in place to enforce the Convention ‘create a vertical tension between the international and the national authorities’ and the Strasbourg organs employ the margin of appreciation doctrine to alleviate this conflict.⁴⁴

When considering communications under the International Covenant on Civil and Political Rights, the UN Human Rights Committee also accords States a margin of discretion (see Chapter 3.3.2).⁴⁵

In essence, the principle of proportionality requires that action undertaken must be proportionate to its objectives; that is, no more than is necessary to achieve the latter. The principle is a core feature of ECHR and ICCPR jurisprudence⁴⁶ and is also

⁴³ See S. Fredman (2002) *Discrimination Law* (Oxford: Oxford University Press) and S. Fredman (2001) ‘Equality: A New Generation’, *Industrial Law Journal* 30, pp. 145–68.

⁴⁴ H. C. Yourow (1996) *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague/Boston/London: Kluwer), p. 9.

⁴⁵ See E. Benvenisti (1999) ‘Margin of Appreciation, Consensus and Universal Standards’, *New York University Journal of International Law and Politics* 31, pp. 843–54; D. McGoldrick (1994) *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press), p. 160; M. Schmidt (1995) ‘The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments’ in D. Harris and S. Joseph (eds.) *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press), pp. 629–659, at pp. 656–8.

⁴⁶ See R. Clayton (2001) ‘Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle’, *European Human Rights Law Review* 5, pp. 504–25; D. Harris (1995) ‘The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction’ in D. Harris and S. Joseph, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press); and P. Van Dijk and G. F. H. van Hoof (1998) *Theory and Practice of the European Convention on Human Rights*, 3rd edition (The Hague: Kluwer Law International), pp. 80–2.

employed as a fundamental principle of law by the European Court of Justice⁴⁷ and increasingly by the domestic courts.⁴⁸ While the test is context-dependent and so not deployed in a uniform manner, the underlying notion is that courts must strike a fair balance between various competing interests, classically those of the individual and the wider community. A preliminary task in any proportionality inquiry then is the identification of the interests affected by an impugned measure and ascription of weight or value to those interests. Within the sphere of familial relations, international human rights institutions accept that the protection of traditional family forms is a legitimate State aim but require that associated measures be assessed in light of any adverse impact on the human rights of other persons. As discussed further in Chapter 3, there is some evidence that the margin of appreciation afforded States in this area is narrowing and in turn the respective weight ascribed to protecting conventional values on the one hand, and the protection of *de facto* families on the other, is shifting.⁴⁹

⁴⁷ See P. Craig and G. de Búrca (2003) *EU Law – Texts, Cases and Materials*, 3rd edition (Oxford: Oxford University Press), Chapter 9.

⁴⁸ See J. Casey (2000) *Constitutional Law in Ireland* (Dublin: Sweet & Maxwell), pp. 390–1. The test was first developed in *Cox v. Ireland* [1992] 2 IR 503. See also *Re Article 26 and the Matrimonial Home Bill 1993*[1994] 1 IR 305, and the judgment of Costello J. in *Heaney v. Ireland* [1994] 3 IR 593, which relied on both ECHR and Canadian understandings of the concept. Justice Costello's formulation of the test[**text?**] has been approved by the Supreme Court; see, for example, *Re Article 26 and the Planning and Development Bill 1999* [2000] 2 IR 321. In *Rock v. Ireland* [1997] 3 IR 484, Hamilton C.J. noted that the principle of proportionality is now a well-established tenet of Irish constitutional law.

⁴⁹ It is not possible to adopt a definitive stance on the breadth of the margin of appreciation in this context; however, the ECtHR judgments in *Goodwin* (2002) 35 E.H.R.R. 18, *Soderback* [1999] 1 F.L.R. 250, *X, Y and Z* (1997) 24 E.H.R.R. 143, and *Karner* (Application No. 40016/98, 24 July 2003), in particular suggest that the reasons advanced for differential treatment are subject to increasingly rigorous scrutiny.

Chapter 2: European Community Law

2.1 Introduction

The supranational character of the European Community (EC) means that laws produced by its constituent institutions enjoy an elevated status within the domestic legal order. In line with the doctrine of supremacy elaborated by the European Court of Justice (ECJ),⁵⁰ the Irish courts have accepted that European Community laws take precedence over all domestic laws, including provisions of the Constitution.⁵¹

While it is now well established that the EC has competence in the general area of human rights,⁵² such competence is delimited by the terms of the various treaties concluded by the Member States down through the years.⁵³ Identifying the ambit of Community law in the field of family relations is therefore necessarily a central consideration in this report. Although it is not possible to delineate its scope with exact precision, decided case law has clarified to an extent the reach of EC law, both in terms of the areas of activity that are subject to Community control and of the bases upon which claims of discrimination may be taken. As we discuss below, measures relevant to *de facto* couples concern two primary areas: employment and freedom of movement. Further, EC law within these fields does not directly prohibit discrimination on the basis of marital status; instead, limited equality of treatment as between *de facto* couples is attained in a secondary manner through use of the sex/gender and sexual orientation grounds.⁵⁴

The EC does not have express competence in the field of family law.⁵⁵ Legislation in this sphere is confined to that governing the *jurisdiction* of Member State courts in relation to divorce, legal separation, annulment and parental responsibility: The ‘Brussels II bis Regulation’⁵⁶ sets out the rules for determining jurisdiction in the first

⁵⁰ C-6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585, [1964] C.M.L.R. 425, *Amministrazione delle Finanze v. Simmenthal (No. 2)* [1978] E.C.R. 629. See also Article I-6 of the Draft Constitution of the European Union declaring ‘The Constitution and law adopted by the institutions of the European Union in exercising competences conferred on it shall have primacy over the law of the Member States.’

⁵¹ See Article 29.4.10 of the Constitution and the decisions in *Campus Oil v. Minister for Industry and Energy* [1983] I.R. 88, *Murphy v. An Bord Telecom Éireann* [1988] I.L.R.M. 53. In *Lawlor v. Minister for Agriculture* [1990] 1 I.R. 356 the High Court accepted that laws passed by the EU cannot be challenged in an Irish court. This was the case, *Murphy J.* acknowledged, even where it was alleged that the laws in question infringed the Treaties of the EC: ‘it is no part of the function of this court to determine whether or not any part of the EEC regulations is invalid’ (*ibid.*, at p. 378). Only the European Court of Justice may entertain such a challenge. See Article 230 of the Treaty of the European Community (henceforth ‘EC’) and Article 234 EC and *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] E.C.R. 4199. For further discussion, see J. M. Kelly (with G. Hogan and G. Whyte) (2003) *The Irish Constitution*, 4th edition (Dublin: LexisNexis), pp. 512–44, and Casey *op. cit.*, pp. 221–30.

⁵² See also Craig and de Búrca *op. cit.*, Chapter 7, and S. Douglas-Scott (2002) *Constitutional Law of the European Union* (Essex: Pearson Education), Chapter 13.

⁵³ See in particular Article 5 EC.

⁵⁴ The selection of grounds or bases of discrimination is linked to the Member States’ understandings of economic and social imperatives of the EC; see also L. Flynn (1999) ‘The Implications of Article 13 EC – After Amsterdam, Will some Forms of Discrimination Be More Equal than Others?’ *Common Market Law Review* 36, pp. 1127–52, and S. Fredman (2001) ‘Equality: A New Generation’, *Industrial Law Journal* 30, pp. 145–68.

⁵⁵ See generally E. Di Torella and Annick Masselot (2004) ‘Under Construction: EU Family Law’, *European Law Review* 29, pp. 32–51.

⁵⁶ Council Reg. No. 2201/2003.

instance and for mutual recognition and enforcement of judgments. It does not purport to effect consistency as regards the right to marry, nor the conditions under which persons may be regarded as married. Nor does the Regulation require harmonisation of laws relating to divorce, legal separation and annulment. These matters remain within the exclusive competence of the individual Member States. It is likely, however, that the terms of the Brussels II Regulation require the mutual recognition of divorce and court-ordered decrees of separation where the parties involved are of the same sex.⁵⁷ Although Ireland might seek to rely upon the public policy exceptions to the Regulation, such exceptions are interpreted strictly and are subject to fundamental rights review,⁵⁸ their construction being a matter of Community law and not a matter for individual states to determine. Where a person is a party to a registered partnership, there is no automatic right to recognition under general principles of EC law, although new developments in the area of free movement of persons mark an important change in this regard (see section 2.4).

Although the recognition of relationships generally falls outside the Community's domain, the European Parliament has expressed important symbolic support for such initiatives. In its 2001 Resolution on Fundamental Rights in the European Union, the Parliament called on 'Member States to guarantee one-parent families, unmarried couples and same-sex couples rights equal to those enjoyed by traditional couples and families, particularly as regards tax law, pecuniary rights and social rights.'⁵⁹ It further welcomed the growing legal recognition of extra-marital cohabitation in the form of registered partnerships and called on those Member States that had not already done so to enact legislation along these lines.⁶⁰

2.2 Overview of EC Human Rights Law and Sphere of Application

From the outset, the European Court of Justice (ECJ) regarded the European Community's legal system as an autonomous one, founded on the rule of law. In the process of developing a European legal order, it constructed general principles of law derived from the EC Treaty, the legal systems of the various Member States and from international agreements ratified by those Member States. For the purposes of this report, fundamental rights are a significant subset of these general principles.

The ECJ first asserted the existence of a Community doctrine of fundamental rights in the late 1960s.⁶¹ In this regard the ECHR has proved an increasingly significant

⁵⁷ See P. McEleavy (2003) 'New Belgium Law on Same-Sex Marriage and its PIL Implications', *International and Comparative Law Quarterly* 52, 1039–49, and P. McEleavy (2004) 'Brussels II bis: The Communitarisation of Family Law Continues', *Irish Journal of Family Law* [2004] 2, p. 14.

⁵⁸ See F. G. Jacobs (2001) 'Human Rights in the European Union: The Role of the Court of Justice', *European Law Review* 26, pp. 331–41, at pp. 337–8.

⁵⁹ European Parliament resolution on respect for human rights in the European Union (1998–1999) (11350/1999 - C5-0265/1999 - 1999/2001(INI)), at para. 56.

⁶⁰ *Ibid.*, para. 57.

⁶¹ *Stauder v. Ulm*, C-29/69 [1969] E.C.R. p. 419, at p. 425; *Internationale Handelsgesellschaft*, C-11/70 [1970] E.C.R. 112, at p. 1134. See generally, P. Alston and J. H. H. Weiler (1998) 'An "Ever Closer Union" in Need of a Human Rights Policy', *European Journal of International Law* 9, p. 658, and A. Von Bogdandy (2000) 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', *Common Market Law Review* 37, pp. 1307–38.

source of substantive principles.⁶² While Treaty provisions and jurisprudence have forged a strong link with the European Convention on Human Rights, the ECJ remains the exclusive arbiter of how ECHR standards are to be interpreted in this context.⁶³ The ECJ does not, in other words, simply defer to the relevant jurisprudence of the ECtHR but develops autonomous standards.⁶⁴ Nevertheless, the fact that the Court frequently cites with approval decisions of the Strasbourg Court gives the Convention additional purchase within the Irish legal order. Notably, in *K.B. v. National Health Service Pension Agency*,⁶⁵ the ECJ relied heavily on the decision of the European Court of Human Rights in *Goodwin v. United Kingdom*. We revert to the implications of the ECJ's judgment below.

Although initially driven by the ECJ, various treaties concluded since 1986 have provided a sound foundation for the Community's adherence to fundamental rights norms.⁶⁶ For example, the Preamble to the Treaty on European Union (1992) confirms the attachment of Member States 'to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'. Article 6(2) of the Treaty 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.⁶⁷

The Amsterdam Treaty further endorsed this trend in adding a new clause to Article 6 to the effect that:

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.⁶⁸

Article 6(4) appears to expand the competence of the Union in this regard in requiring that the Union provide itself with the necessary means to attain its objectives and carry through its policies. Indeed, Article 7 of the Treaty permits the Union to suspend certain rights of Member States found to be in serious breach of the principles contained in Article 6(1). More recently, an extensive number of specific rights have been codified in the EU Charter (see section 2.3.4 below).

⁶² See O. De Schutter (2005) *The Prohibition of Discrimination under European Human Rights Law: Relevance for EU Racial and Employment Equality Directives* (Luxembourg: Office for Official Publications of the European Communities); M. Reid (1990) *The Impact of Community Law on the Irish Constitution* (Dublin: Irish Centre for European Law); J. Wetzel (2003) 'Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion between the Luxembourg and Strasbourg Courts', *Fordham Law Review* 71, pp. 2823–62.

⁶³ See, for example, *Hauer v. Land Rheinland-Pfalz* C-44/79 [1979] E.C.R. 3727, para. 14.

⁶⁴ B. de Witte (1999) 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed.) *The EU and Human Rights* (Oxford: Oxford University Press), 859–97, and A. Van Hamme (1994) 'Human Rights and the Treaty of Rome' in Liz Heffernan (ed.) *Human Rights: A European Perspective* (Dublin: Round Hall).

⁶⁵ C-117/01, NYR, 7 January 2004.

⁶⁶ The Single European Act (1986) contains the first constitutional reference to the principle of human rights, the preamble to the Act alluding to the ECHR.

⁶⁷ Article 6(2) TEU. Article 46 of the TEU, however, states that this measure shall be justiciable before the Court of Justice only insofar as 'it relates to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty'.

⁶⁸ Article 6(1) TEU.

Jurisprudence has established that equality is a general principle of EC law.⁶⁹ The Court has ruled that ‘similar situations shall not be treated differently unless differentiation is objectively justified’.⁷⁰ Similarly, EC law prohibits the like treatment of two essentially different situations.⁷¹ According to the Court, the general principle of equality has been *given expression* in certain provisions of EC law that expressly prohibit discrimination.⁷² Equal pay as between men and women, provided for under Article 141 EC, is therefore but one facet of the overarching principle of equality. It is important to note, however, that in relation to activities of the Member States the principle cannot of itself confer enforceable rights; non-discrimination cases must be grounded in an express provision of EC law.⁷³ Those provisions of direct and potential relevance to *de facto* couples are considered below.⁷⁴

In general it can be said that the ECJ and the other Community institutions, in exercising their legislative powers, have adopted a liberal conception of equality – equality of opportunity – which for the most part is equated with prohibitions on both direct and indirect discrimination.⁷⁵ Alleged discriminatory treatment must be linked to an established ground. Consequently, the cases considered in this chapter address several interrelated questions: whether *de facto* and married couples are similarly situated; the meaning of the terms ‘sex’ or ‘gender’ for the purposes of EC anti-discrimination law; and the reach of both direct and indirect discrimination clauses within this context.

⁶⁹ See C-130/75, *Prais v. Council of the European Communities* [1976] E.C.R. 1589, Joined Cases C-124/76 and 20/77 *Moulin v. Office Interprofessionnel* [1977] E.C.R. 1795, Joined Cases C-75 and 117/82 *Razzouk and Beydoun v. Commission* [1984] E.C.R. 1509 and C-106/83 *Sermide v. Casa Conguaglio Zuccheri* [1984] E.C.R. 4209. The terms ‘equality’ and ‘non-discrimination’ are sometimes used synonymously by the ECJ. See generally Craig and de Búrca *op. cit.*, Chapter 9.

⁷⁰ *Moulin v. Office Interprofessionnel*, *op. cit.*, at paras. 16 and 17. See also *Prais v. Council of the European Communities*, *op. cit.*

⁷¹ *Sermide v. Casa Conguaglio Zuccheri*, *op. cit.*

⁷² Joined Cases 201 and 202/85 *Klensch v. Secrétaire d’Etat* [1986] ECR 3477.

⁷³ Claims involving the staff of the Community itself are exceptional in this regard, as their rights derive directly from the entire corpus of EU law, which includes respect for the general principles of law protected by the Court. See, for example, Joined Cases 75 and 117/82, *Razzouk and Beydoun v. Commission* [1984] ECR 1509, in which the ECJ struck down certain provision of the Staff Regulations, as they violated the principle of equal treatment on the gender ground. The Court stated that ‘in relations between the Community institutions, on the one hand, and their employees and the dependants of employees, on the other, the requirements imposed by the principle of equal treatment are in no way limited to those resulting from Article 119 of the EEC Treaty or from the Community directives adopted in this field’ (ground 17).

⁷⁴ Article 12 EC expressly bans discrimination on the grounds of nationality, a theme replicated in the establishment of the four freedoms of EC law – the free movement of goods (Article 28 EC) and persons (Article 39EC), the freedom to move throughout the Community in order to provide and access services (Article 49 EC), and the free movement of capital (Article 56EC). Elimination of barriers to the free movement of persons in particular has generated important EC laws that concern interpersonal relationships. These measures are considered in section 2.4 below. Article 13 EC supplies the Community with the power to take action against discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (see section 2.3.3).

⁷⁵ See C. Barnard (2001) ‘The Changing Scope of the Fundamental Principle of Equality?’, *McGill Law Journal* 46, pp. 955–77, and European Commission (2004) *Critical Review of Academic Literature Relating to the EU Directives to Combat Discrimination* (Brussels: European Commission).

2.3 Employment

2.3.1 Introduction

The EC has made extensive use of its powers, derived from various treaties, to combat discrimination within the field of employment. Given the limits of Community competence, no instrument, to date, has explicitly addressed equality as between people of different marital status. Power, for instance, notes the ‘absence of an EC law foundation’ in this context.⁷⁶ Nevertheless, measures tackling discrimination on the grounds of gender and sexual orientation have established limited protections for certain *de facto* couples. We deal with Community law on gender discrimination first, illustrating its impact, to date, on the position of persons who have undergone gender reassignment and their partners. Discrimination on the ground of sexual orientation is then reviewed for its relevance to same-sex couples. We conclude by assessing potential developments, particularly in light of the Charter of Fundamental Rights and the continued close alignment between ECHR and Community standards in the domain of human rights protection generally.

2.3.2 Equal Treatment on the Grounds of Sex

From its inception, the European Community has prohibited discrimination on the basis of sex in the fields in which it has competence.⁷⁷ Article 141 EC prohibits, for instance, differential pay scales based on gender, thus requiring equal pay for equal work without regard to the gender of the parties.⁷⁸ This principle, moreover, has been deemed to be directly applicable – that is, of direct effect – in each of the Member States such that it may be relied upon without the need to resort to national implementing legislation.⁷⁹

The Gender Equal Treatment Directive 76/207/EEC,⁸⁰ as amended, expands upon this principle, requiring the elimination in the field of employment generally of policies and practices that serve to discriminate on the basis of gender.⁸¹ Article 2(1) of the

⁷⁶ C. Power (2003) ‘Marital Status and Family Status’ in C. Costello and E. Barry, *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law), p. 316.

⁷⁷ Although Article 119(141) EC was not considered directly effective until 1976: C-43/75, *Defrenne v. SABENA* (II) [1976] E.C.R. 455.

⁷⁸ The Amsterdam Treaty considerably expanded Community competence in the arena of sex discrimination. Article 119 (4) provides: ‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’

⁷⁹ *Defrenne v. SABENA* (II), *op. cit.*

⁸⁰ Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

⁸¹ A similar principle arises from Directive 79/7/EEC. In *Cotter and McDermott v. Minister for Social Welfare*, C-377/89 [1991] E.C.R.-I 1155, the ECJ found Ireland in breach of EC law in continuing to treat married men and married women differently for social welfare purposes, in breach of Council Directive 79/7/EEC requiring the elimination of gender-based differentiation in the context of social security. More recently, the Council has enacted a Directive which extends the principle of equal treatment into the field of access to goods and services. The Directive is due to be implemented by 21 December 2007: Council Directive 2004/113/EC (13 December 2004) *Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services*.

Directive expressly refers to marital status as a factor of relevance in assessing whether discrimination on the basis of sex has occurred:

For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

Measures that discriminate on the basis of marital status may be deemed to be illegal if such measures serve indirectly to favour men over women (or vice versa). According to Power, '[t]he very sound legislative assumption was that women were disfavoured in employment when they are married or have children in a way that men were not'.⁸² The Directive and Article 141 do not apply, however, where discrimination on the basis of marital status cannot be linked to the gender of the parties.⁸³ Consequently, these measures have not been of particular assistance to couples claiming discrimination on the grounds of marital status. As the European Court of Justice noted in *K.B.*:

The decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is discrimination on grounds of sex, prohibited by Community law.⁸⁴

Furthermore, the ECJ has decided that discrimination on the grounds of sex does not embrace unequal treatment that it considers traceable instead to the sexual orientation of the claimant. This latter point was confirmed in *Grant v. South-West Trains*.⁸⁵ The applicant asserted that she had been discriminated against on the grounds of sex in relation to benefits arising from her employment. The employer in question had extended to the spouses and the non-marital opposite sex partners of its employees, but not to same-sex partners, the right to avail of certain travel concessions. Ms Grant's partner was denied access to the benefits in question on the basis that Ms Grant and her partner were of the same sex.

Ms Grant argued that such treatment constituted discrimination on the basis of her sex and was thus contrary to Article 141 EC and Council Directive 75/117. While the female partner of a male employee was entitled to such benefits, the female partner of a female employee was precluded from these entitlements. The difference, the plaintiff argued, was based solely on her gender: if Ms Grant were male, her female partner would have been entitled to source the benefits in question.

⁸² Power *op. cit.*, p. 314.

⁸³ See, for instance, *Murray v. Navy Army Air Force Institute* (1998) 36 E.O.R. Digest 15. See generally K. Ahtela (2005) 'The Revised Provisions on Sex Discrimination in European Law: A Critical Assessment', *European Law Journal* 11, pp. 57–78, at pp. 62–3.

⁸⁴ *Op. cit.*, para. 28.

⁸⁵ C-249/96 [1998] ECR I-621. See C. Stychin (2000) 'Grant-ing Rights: The Politics of Rights, Sexuality and the European Union', *Northern Ireland Legal Quarterly* 51, pp. 281–302.

The ECJ declined to follow this reasoning. It concluded that the impugned treatment was not sex-based, as neither men nor women were entitled to concessions in favour of their same-sex partners:

Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex. Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex.⁸⁶

Rather, the discrimination in question was based on the sexual orientation of the claimant and discrimination on that ground was outside the competence of the Community.⁸⁷ Wintemute argues that the 'judgment was very poorly reasoned and made no attempt to explain why Lisa Grant could not compare herself with an unmarried male employee living, as she was, with a female partner'.⁸⁸

The Court concluded further that, *as the law stood at that time* within the EC, stable relationships between two persons of the same sex could not be equated with marriage or with stable relationships outside marriage between persons of the opposite sex.⁸⁹ As such, employers were not obliged by Community law to treat opposite-sex and same-sex couples as being similarly situated; if such measures were to be adopted, it was a matter for the legislature alone to do so.

While the ECJ did refer to the European Convention on Human Rights, it concluded that the Convention did not at that time afford protection to the claimant:

The European Commission of Human Rights for its part considers that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Convention⁹⁰ and that national provisions which, for the purpose of protecting the family, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to Article 14 of the Convention, which prohibits *inter alia* discrimination on the ground of sex.⁹¹

⁸⁶ *Ibid.*, paras. 27–8.

⁸⁷ The decision was issued prior to the adoption of the Framework Directive under Article 13 EC.

⁸⁸ R. Wintemute (2000) 'Lesbian and Gay Inequality 2000: The Potential of the Human Rights Act 1998' *European Human Rights Law Review* 6, pp. 603–26, at p. 618.

⁸⁹ *Ibid.*, para. 35.

⁹⁰ The Court cited in support of its decision Application No 9369/81, *X. and Y. v. the United Kingdom*, 3 May 1983, D.R. 32, p. 220; Application No 11716/85, *S. v. the United Kingdom*, 14 May 1986, D.R. 47, p. 274, para. 2; and Application No 15666/89, *Kerkhoven and Hinke v. the Netherlands*, 19 May 1992, unpublished, para. 1.

⁹¹ *Op. cit.*, para. 33.

It also noted jurisprudence of the ECtHR interpreting Article 12 of the Convention as applying only to traditional marriage between persons of the opposite sex.⁹²

Arguably, however, both points have since been superseded by shifts in the Strasbourg Court's stance.⁹³ First, in *Salguiero Da Silva Mouta v. Portugal*⁹⁴ and *Karner v. Austria*⁹⁵ the European Court of Human Rights ruled that discrimination on the basis of sexual orientation in the application of Article 8 did in fact contravene Article 14 of the Convention (see further sections 3.2.2–3). While the ECtHR has yet to find that lesbian and gay relationships amount to 'family life' for the purposes of the Convention, the Court established in *Karner* that less favourable treatment of a same-sex partner, as compared with a party to a *de facto* heterosexual relationship, violated the right to a home protected under Article 8.⁹⁶ The reasoning of the Court of Justice has also been undermined by the ECtHR's decision in *Goodwin v. United Kingdom*,⁹⁷ ruling that the non-recognition of transgendered status infringed the right to marry under Article 12 of the Convention. The latter decision represents a salient move from previous decisions confining marriage to persons who are respectively biologically male and female at the time of birth. Significantly the European Court of Justice had relied upon the ECHR's commitment to traditional marriage in *Grant*, a position which is obviously no longer open to the Court.

Given these developments and the commitment set out in Article 52(3) of the Charter on Fundamental Rights to according the same meaning and scope to Community rights that find parallels in the ECHR, the reasoning in *Grant* is open to revision. Even with the advent of EC legislation combating sexual orientation discrimination (see also section 2.3.3), this may prove significant on two levels. First, the scope of Community sex discrimination law is wider than that explicitly concerning sexual orientation. Second, the ECJ's stance towards same-sex and opposite-sex *de facto* couples will prove significant in any future interpretation of the Framework Directive. We revert to these points below.

Commentators have derived further support for a more expansive approach towards sexual orientation discrimination from the ECJ's own prior decision in *P. v. S. and Cornwall County Council*.⁹⁸ In that case the Court ruled that the sex discrimination provisions of EC law extended to the protection of persons who are transsexual. The Court concluded that discrimination or other differential treatment on the basis that a person intends to or has undergone gender reassignment constitutes sex

⁹² *Rees v. UK* (1987) 9 EHRR 56, *Cossey v. UK* (1991) 13 EHRR 622. But see also *B. v. France* (1992) 16 E.H.R.R. 1 and *Goodwin v. United Kingdom* (2002) 35 E.H.R.R. 18.

⁹³ See N. Bamforth (2000) 'Sexual Orientation Discrimination after *Grant v. South-West Trains*', *Modern Law Review* 63, pp. 694–720, and Di Torella and Masselot *op. cit.*

⁹⁴ (1999) 31 E.H.R.R. 47.

⁹⁵ (2003) 2 F.L.R. 623.

⁹⁶ At a national level, the UK House of Lords in *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 has concluded that discrimination between opposite-sex and same-sex *de facto* couples infringes Article 14 of the Convention when read in conjunction with Article 8. See F. Ryan (2005) 'Casenote: *Ghaidan v. Godin-Mendoza*', *Journal of Social Welfare and Family Law* 27(3), p. 355.

⁹⁷ (2002) 35 E.H.R.R. 18.

⁹⁸ C-13/94 [1996] I E.C.R. 2143. Bamforth *op. cit.*

discrimination *per se* under the Gender Equal Treatment Directive 76/207. Despite arguments to the effect that the sex discrimination provisions should be interpreted restrictively, the Court ruled that such discrimination was in essence based, if not exclusively, on the sex of the person concerned. The Court relied in part on the fact that the equality provisions in question, Article 141 EC and Directive 76/207, were merely a reflection of the wider fundamental principle of equality recognised under EC law. This being the case, the Court concluded that an extensive interpretation of the Directive was warranted. We suggest below that the inclusion of the Chapter on Equality in the EU Charter reinstates the broader vision articulated in *P. v. S.* (section 2.3.4).

The Court returned to this theme in *K.B. v. National Health Service Pensions Agency and others*,⁹⁹ a case that involved K.B., a female nurse who had worked for the National Health Service. B's partner, R., was a female-to-male transsexual who had undergone surgery for the purpose of gender reassignment. B. wanted her partner R. to be able to draw, on B.'s death, a survivor's pension, but this was available only to the spouse of the pension holder. As UK law (at the relevant time) did not recognise R.'s gender reassignment,¹⁰⁰ the parties were precluded from marrying and R. thus would, on B.'s death, be denied access to the widower's pension.¹⁰¹

The ECJ reiterated that Community law did not preclude the restriction of benefits to married couples. This was a matter solely within the remit of national legislatures. The European Court of Justice none the less concluded that, in principle, the treatment of B. and R. constituted unlawful sex discrimination. The Court reasoned that, because of the failure to recognise his gender reassignment, R. had been denied the right to meet the requirements of applicable marriage law and thus precluded from sourcing the widower's pension. The Court relied on the decision in *Goodwin v. United Kingdom*,¹⁰² in which the European Court of Human Rights ruled that the failure to recognise gender reassignment for legal purposes constituted a breach of the applicant's right to marry under Article 12 ECHR. The European Court of Justice thus concluded that :

Legislation...which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.¹⁰³

The decision is salient for transsexual people and their partners, at least in States such as Ireland, where a couple designated the same sex at birth may not lawfully

⁹⁹ C-117/01 (7 January 2004).

¹⁰⁰ See *Corbett v. Corbett* [1971] P. 83, and *Bellinger v. Bellinger*, [2003] 2 WLR 1174, [2003] 2 A.C. 467. This stance has since been reversed by the Gender Recognition Act 2004 (UK), which permits such recognition provided certain specified criteria are met.

¹⁰¹ See A. Barlow (2001) 'A New Approach to Transsexualism and a Missed Opportunity', *Child and Family Law Quarterly* 13(2), pp. 225–40.

¹⁰² (2002) 35 E.H.R.R. 18.

¹⁰³ *Ibid.* para. 34.

marry, and is also of potentially wider import. Significantly, the Court accepted the Advocate General's reasoning to the effect that, where inequality of treatment concerns not the right protected by Community law (equal pay for men and women in this instance) but one of the conditions for accessing such a right (here capacity to marry), Article 141 is infringed in principle. Were such a stance to be adopted with respect to EC non-discrimination provisions in general, it would mean that marital status, where it amounts to a pre-condition for accessing an employment-related benefit, comes within the purview of Community law. While this is unlikely to be of consequence for opposite-sex couples, it may prove significant for gay and lesbian partners that are denied the right to marry under national law, because such couples may argue that unequal treatment based on marital status discloses indirect discrimination. We revisit this issue in the following section.

2.3.3. Equal Treatment on Grounds of Sexual Orientation

2.3.3.1 General

As will be evident from the preceding section, prior to the enactment of Article 13 EC, Community law as interpreted by the ECJ did not prohibit discrimination on the basis of sexual orientation. In 1998, by virtue of the Amsterdam Treaty, a clause was added to the EC Treaty enabling the Community to ban, amongst other things, such discrimination. Article 13 provides that:

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

Article 13 EC differs in two important respects from its ECHR counterpart (see Chapter 3.2.2). First, the list of grounds is clearly exhaustive; the Council may not enact measures to combat discrimination on any grounds other than those enumerated (such as marital status). The second difference is that Article 13 is merely facilitative and not mandatory in nature;¹⁰⁴ it does not in itself ban discrimination on the delineated grounds but simply confers the power, in areas where the Community has competence, to take appropriate action. As the ECJ noted in *Grant v. South-West Trains*,¹⁰⁵ in the absence of a Council measure, the Article does not in its own right create a freestanding ban on discrimination.

Under Article 13, the European Community enacted Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation,

¹⁰⁴ Flynn (1999) *op. cit.*, pp. 1132–8.

¹⁰⁵ [1998] E.C.R. I-621.

otherwise known as the 'Framework Directive'.¹⁰⁶ The Directive bans discrimination on four specified grounds: religion or belief, disability, age and sexual orientation. It is broadly concerned with equal treatment in the context of employment and vocational training, and prohibits, in particular, discrimination in relation to recruitment and promotion, employment and working conditions, including dismissals and pay, and access to vocational training. Article 3 makes it clear that the Directive applies to 'all persons, as regards both the public and private sectors'.¹⁰⁷

The ECJ has interpreted 'pay' for the purposes of Article 141 widely.¹⁰⁸ Jurisprudence establishes that 'pay' encompasses benefits provided to partners such as travel concessions¹⁰⁹ and contributory pensions, which qualify as 'consideration received by the worker from the employer in respect of his employment'.¹¹⁰ As a result, the Directive can be understood as covering 'the full variety of benefits which employers may provide in respect of employees' partners'.¹¹¹

The Directive prohibits both direct and indirect discrimination. Direct discrimination occurs 'where one person is treated less favourably than another is, has been, or would be treated in a comparable situation' on one of the stated grounds.¹¹² As noted above in *Grant*, the ECJ held that differential treatment between same-sex and opposite-sex couples did not amount to sex discrimination under EC law. However, in that case the Court acknowledged that the treatment in question amounted to sexual orientation discrimination, which fell outside the ambit of Community law at the time but is now prohibited under the Framework Directive.¹¹³ To avoid falling foul of the direct discrimination prohibition, where an employer provides benefits for opposite sex *de facto* couples those benefits should also be made available to same-sex partners.¹¹⁴

2.3.3.2 Marital Status: Indirect Discrimination on the Grounds of Sexual Orientation

The position in relation to differential treatment between married and *de facto* couples is less clear-cut. Although the Directive does not expressly cover discrimination on the basis of marital status, differential treatment of married and unmarried persons may amount to indirect discrimination on the grounds of sexual orientation. This arises where an apparently neutral provision, criterion or practice would put persons having a particular sexual orientation at a particular disadvantage compared with other

¹⁰⁶ See generally C. Costello and E. Barry (2003) *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law).

¹⁰⁷ The Directive has been implemented in Ireland via the Employment Equality Acts 1998–2004.

¹⁰⁸ Craig and de Búrca *op. cit.*, pp. 865–84.

¹⁰⁹ *Grant v. South-West Trains, op. cit.*

¹¹⁰ C-170/84, *Bilka-Kaufhaus v. Weber* [1986] ECR 1607, paras. 20–2. See also Case C-262/88 *Barber* [1990] ECR I-1889, para. 28, and Case C-351/00 *Niemi* [2002] ECR I-7007, para. 40.

¹¹¹ M. Bell (2001) 'Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union' in R. Wintemute and M. Andeneas (eds.) *Legal Recognition of Same-Sex Couples: A Study of National, European and International Law* (Oxford: Hart), pp. 653–76, at p. 656.

¹¹² Framework Directive, Article 2(2)(a).

¹¹³ *Grant v. South-West Trains, op. cit.*, para. 47.

¹¹⁴ See Chapter 4.2.5 on the compatibility of domestic provisions concerning *force majeure* leave with the Directive.

persons.¹¹⁵ Bell, for instance, suggests that ‘limiting benefits to married couples is a form of indirect discrimination on grounds of sexual orientation’, as ‘benefits conditional on being married place lesbian and gay workers at a particular disadvantage for the purpose of Article 2(2)(b) of the Directive’.¹¹⁶

Recital 22 of the Directive, however, indicates that discrimination on the basis of marital status may be exempt:

This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

This suggests that the Directive may not apply to invalidate employment benefits that apply only to married persons, even if such measures indirectly prejudice employees who are gay or lesbian. The Commission expressly confirms this view, noting that ‘this proposal does not affect marital status and therefore it does not impinge upon entitlements to benefits for married couples’.¹¹⁷ Nevertheless, the recital is not binding and no reference is made in the actual text of the Directive to an exemption for benefits that are dependent on marital status. In order to be justified, indirect discrimination must pursue a legitimate aim and the means of achieving that aim must be appropriate and necessary.¹¹⁸ In *Karner*¹¹⁹ the ECtHR established that, while the protection of the traditional family is a legitimate aim that might justify differential treatment for the purposes of the ECHR, measures designed to implement that aim must be proportionate. The Court went on to suggest that proportionality should be assessed with reference to the circumstances of the case in question.¹²⁰ Such jurisprudence and the absence of a specific binding exemption under the Directive suggests that any blanket immunity for measures that may amount to sexual orientation discrimination is questionable.¹²¹ We can then expect that the exact parameters of the indirect discrimination prohibition in this context will be tested in future case law.¹²²

In the primary case on the issue to date, the ECJ has proved reluctant to acknowledge that discrimination on the basis of marital status may amount to indirect discrimination on the grounds of sexual orientation. In *D. v. Council*¹²³ an employee of the European Council contested a refusal to extend the household allowance payable under Staff Regulations beyond married persons.¹²⁴ The complainant, D., a

¹¹⁵ *Ibid.*, Article 2(2)(b).

¹¹⁶ M. Bell (2003) ‘Equality Dialogues: Comparing the Framework Directive with the Regulation of Sexual Orientation Discrimination in Ireland’ in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directive* (Dublin: Irish Centre for European Law), at p. 335. Bell’s observation holds at least in the 22 EU states that currently do not permit the civil marriage of persons of the same sex, including Ireland.

¹¹⁷ *Commission Proposal for a Directive Establishing a General Framework for Equal Treatment Between Persons* (COM (1999) 565 final), p. 8.

¹¹⁸ Framework Directive, Article 2(2)(b) (i).

¹¹⁹ Application no. 40016/98, 24 July 2003.

¹²⁰ *Ibid.*, para. 40.

¹²¹ European Group of Experts on Combating Sexual Orientation Discrimination *op. cit.*, p. 34.

¹²² *Ibid.*, pp. 33–5. We assess the potential applicability of indirect sexual orientation discrimination to pensions in section 4.5.3.

¹²³ Joined Cases C-122/99 and C-125/99 [2001] ECR I-4319.

¹²⁴ Article 1(2) of Annex VII to the Staff Regulations of Officials of the European Communities restricted the application of the household allowance to: (a) a married official; (b) an official who is widowed, divorced, legally separated or unmarried and has one or more dependent children within the meaning of Article 2(2) and (3) below; (c) by special reasoned decision of the appointing authority

Swedish national, was a party to a same-sex registered partnership recognised in Swedish law and designated thereby to be equivalent to a married couple.¹²⁵ The ECJ nevertheless upheld the decision of the Court of First Instance, concluding that D. was not entitled to be treated as a married person:

[T]he Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. The intention of the Community legislature was to grant entitlement to the household allowance...only to married couples.¹²⁶

The Court noted that the then existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflected a great diversity of laws and a lack of any general assimilation between marriage and other legally recognised unions. In line with *Grant*, it further ruled that such treatment did not infringe the ban on sex discrimination as the Regulations applied equally whether the official in question was male or female. With respect to the argument that there had been discrimination on the grounds of sexual orientation, the ECJ found:

[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.¹²⁷

The Court did not address the question of indirect discrimination and simply considered the Council's decision as a matter of justifiable differential treatment on the basis of marital status. It also refused to find that the treatment of the official contravened Article 8 of the ECHR. The Article 8 argument appears to have been narrowly framed; the applicant sought to establish that the failure to recognise his relationship affected his civil status in wider society. The Court reasoned that, because the refusal of the allowance did not involve the transmission of personal data outside the Community administration, as such it was incapable of constituting an interference with the official's private and family life.

Additional arguments based on the free movement of persons were not entertained, as they had not been raised in the original pleas before the Court of First Instance. This leaves open the possibility that a future court may regard the non-recognition of same-sex partners and non-marital partners as an impermissible restriction on the free movement of persons, contrary to Article 39 EC. As Lenaerts and de Smijter note, the prohibition of sexual orientation discrimination now contained in Article 21(1) of the EU Charter on Fundamental Rights is applicable to Member State action in this field.¹²⁸ Since invocation of Article 39 entails the implementation of Community law, an appropriate nexus exists and any restriction may be scrutinised by the ECJ. The

based on supporting documents, an official who, while not fulfilling the conditions laid down in (a) and (b), nevertheless actually assumes family responsibilities.

¹²⁵ Article 1 of Chapter 1 of Lagen (1994:1117) om registrerat partnerskap of 23 June 1994 (the Swedish law on registered partnership) provides that '[t]wo persons of the same sex may apply for registration of their partnership'. Article 1 of Chapter 3 of the same law provides that '[a] registered partnership shall have the same legal effects as a marriage, subject to the exceptions provided for...'.
¹²⁶ *Ibid.*, at para. 37. See also case T-65/92 *Arauxo-Dumay v. Commission* [1993] ECR II-597, para. 28.

¹²⁷ Para. 47.

¹²⁸ K. Lenaerts and E. de Smijter (2001) 'A "Bill of Rights" for the European Union', *Common Market Law Review* 38, 273–300, at p. 278 fn 75.

likelihood of a decision favourable to the recognition of non-marital partners is indeed enhanced by the adoption of Directive 2004/58/EC on the right to free movement, a Directive that expressly requires recognition of family relationships not based on marriage. This being the case, it is likely that the reasoning in *D.* would not prevail in future litigation. The issue of free movement is addressed below in section 2.4. It is worth noting, moreover, that since the decision in *D.* the impugned Community Staff Regulations have been amended to respect the diverse family arrangements of persons employed by the EC.¹²⁹

2.3.4 Potential Developments

Recent factors arguably serve to qualify significantly existing decisions on the parameters of EC anti-discrimination law, such as that in *Grant*. These include the advent of the EU Charter on Fundamental Rights, recent jurisprudence of the ECtHR and developments in the law and practice of various Member States concerning same-sex relationships in particular.

The Presidents of the European Parliament, the Council and the Commission proclaimed the Charter of Fundamental Rights of the EU in December 2000 as part of the Nice European Council.¹³⁰ Part II of the proposed Treaty establishing a Constitution for Europe comprises the Charter (essentially unchanged from that proclaimed in 2000). Although the Charter's legal status remains unresolved and is not binding as of yet, it is intended to have legal effects.¹³¹ According to the Commission:

[I]t is highly likely that the Court of Justice will seek inspiration in [the Charter], 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.¹³²

Two facets of the Charter are of particular relevance to *de facto* couples; the provisions on equality and the commitment to the values enunciated in the ECHR.

Article 20 of the Charter (Article II-80 of the Constitution) states simply: 'Everyone is equal before the law.' This commitment to equality is elaborated upon in Article 21(1) (Article II-81 of the Constitution):

¹²⁹ European Group of Experts on Combating Sexual Orientation Discrimination *op. cit.*, para. 2.1.5.

¹³⁰ [2000] OJ C 364/8, 18 December 2000. See G. De Búrca (2001) 'The Drafting of the European Union Charter of Fundamental Rights', *European Law Review* 26, pp. 126–38, and Lenaerts and de Smijter *op. cit.*

¹³¹ See C. Costello (2000) 'The Legal Status and Legal Effect of the Charter of Fundamental Rights of the European Union' in Costello (ed.) *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights* (Dublin: European Movement) and D. Walsh (2003) 'The EU Charter of Fundamental Rights: What Practical Effects', paper delivered at conference, *New Human Rights Legislation*, Human Rights Commission and Law Society of Ireland, President's Hall, Law Society, Blackhall Place, 18 October 2003.

¹³² *Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union*, Brussels, 11 October 2000, Com (2000) 644.

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 23(Article II-83 of the Constitution), moreover, provides that:

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 21 in particular exhibits a relatively narrow conception of equality, one that equates equality with non-discrimination. While this approach may be criticised as overly focused on procedural equality at the expense of a more substantive conception, the Article is in other respects notably broad. In particular, in common with Article 14 of the ECHR, it is not exhaustive in scope, leaving open the possibility that other grounds may be elucidated (subject to the proviso, discussed below, that the Charter does not confer any new competences on the EC institutions).

Thus, although Article 21 makes no direct reference to discrimination on the grounds of marital status, it is possible that a court could interpret the Article as conferring a right not to be discriminated against on these grounds. The ban on sexual orientation discrimination may, indeed, suggest the existence of an unenumerated ground of marital status discrimination: Article 14 of the ECHR covers discrimination on the basis of marital status and Article 8 has been interpreted as applying to both marital and non-marital couples (see Chapter 3.2.3). While the Convention does not preclude differential treatment on the basis of marital status,¹³³ its inclusion through case law as a discriminatory ground strengthens the prospect that Article 21 will be so interpreted in the future.

Article 52(3) of the Charter 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.

The wording of several provisions mirrors closely their Convention counterparts. Article 7 of the Charter (Article II-67 of the Constitution), entitled 'Respect for Private and Family Life', stipulates that:

Everyone has the right to respect for his or her private and family life, home and communications.

¹³³ See, for instance, *McMichael v. UK* (1995) 20 E.H.R.R. 205, *B. v. UK*, [2000] 1 F.L.R.1, *Sahin v. Germany* Application No. 30943/96, 11 October 2001.

The terms of this Article replicate almost verbatim the terms of Article 8 of the ECHR. As such, and given the regular reliance by the Court of Justice on the terms of the Convention, it is likely that the ECJ will interpret this Article consistently with the current jurisprudence of the Strasbourg Court. When read alongside Article 21, moreover, it is likely that Article 7 will be read in a manner consonant with the principle of non-discrimination. Drawing on the jurisprudence of the European Court of Human Rights, it is thus likely that differential treatment in the application of Article 7, where such differentiation is based on sexual orientation, will not be tolerated.

While the EC and its Member States may be entitled to a margin of appreciation in respect of the privileged treatment afforded to marriage and marital couples, there is nevertheless a requirement (by reference to Article 8 of the Convention on Human Rights) to respect family life in all its manifestations, whether such family life springs from a marital or *de facto* union (see section 3.2.3). It remains to be seen whether the Charter of Fundamental Rights will affect the margin of appreciation concerning marriage.

The inception of an outright ban on sexual orientation discrimination in the Charter ameliorates the position of same-sex couples, at least in the context of employment and related areas in which the Community has competence. Related developments at an ECHR level are also noteworthy. It is evident in recent case law, such as *Karner* and *Da Silva Mouta*,¹³⁴ that the European Court of Human Rights has abandoned its previously equivocal approach to same-sex relationships in favour of a more robust anti-discrimination jurisprudence. Although the Court of Justice is not legally obliged to follow this jurisprudence, the existence of such developments undermines significantly the claim that human rights were not breached in *D.* and in *Grant*. Indeed the reasoning employed in those decisions has been heavily critiqued. For example, Craig and de Búrca argue that it amounted to a ‘retreat from the strong principle of equality as a fundamental right’.¹³⁵ Arguably, that principle has now been reinstated under the Charter.

The most compelling development has, however, been experienced at a national level. The European Court of Human Rights regularly draws upon the development of a consensus in the Contracting States. This was a key factor, for instance, in *Goodwin v. UK*,¹³⁶ the Court alluding to the increasing tendency throughout Europe to recognise transgendered status, all but four Council of Europe States (at that time) having updated their laws to recognise reassignment. Change tends to be incremental, as the voting pattern in cases concerning transgendered status illustrates.¹³⁷ Nevertheless, a

¹³⁴ *Op. cit.*

¹³⁵ *Op. cit.*, p. 356.

¹³⁶ (2002) 35 E.H.R.R. 18.

¹³⁷ Until the unanimous judgment in *Goodwin and I* (2002) 35 E.H.R.R. 18, the ECtHR found that the Convention did not require a change to UK law on birth registration and eligibility to marry. In *Rees v. United Kingdom* (1986) 9 E.H.R.R. 56, the majority on Article 8 was twelve to three, while the Court was unanimous in holding that there was no violation of Article 12 (the right to marry). The Court adopted the same position re Article 8 in *Cossey v. United Kingdom* (1991) 13 E.H.R.R. 622, but this time the majority was ten to eight, while fourteen of the eighteen judges again dismissed the applicant’s Article 12 arguments. 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. In 1992 the Court, by a majority of seventeen to one, found France to be in breach of Article 8 by refusing to recognise gender reassignment: *B v. France* (1992) 16 E.H.R.R. 1. The case was distinguished from *Rees* and *Cossey* on

similar development may occur as regards same-sex unions. Three EC States¹³⁸ now permit the marriage of persons of the same sex. Several others offer registered partnership regimes which afford substantially the same rights and obligations as marriage.¹³⁹ All but three of the pre-accession states¹⁴⁰ and several post-accession states¹⁴¹ now offer some form of registered partnership facility, whether exclusively to same-sex couples or to all unmarried couples. Although this is not conclusive, the development of a critical mass weighs heavily in favour of a more liberal interpretation of EC law on the part of the European Court of Justice. Stafford, in particular, notes the increasing disjunction between the ECJ's relatively restrictive understanding of 'family' and the much wider definition developed by the European Court of Human Rights, a disparity that may need to be rectified in the light of the Community's formal commitment to accede to the ECHR and to interpret its own Charter in consonance with the ECHR.¹⁴²

The Charter also contains in Article 9 (Article II-69 of the Constitution) a provision guaranteeing the right to marry and right to found a family.

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.

While reflecting in part the terms of Article 12 of the Convention on Human Rights, Article 9 of the Charter differs in one important respect. Unlike the Convention, the Charter makes no allusion, indirect or otherwise, to the gender of the parties marrying. Indeed, the provisions of Article 9 were deployed by the ECtHR as support for its judgment on the rights of transsexual people to marry in *Goodwin*. However the EC does not have competence to act in respect of the definition of marriage: the Member States individually retain sole authority to designate who may and may not marry under their laws. Indeed, the Article expressly predicates the validity of such marriages on national laws governing these rights, effectively endorsing the view that the matter is one for national legislatures alone to determine.

Even so, the decision to omit reference to gender in Article 9 of the Charter is significant. It certainly confers on the EC a responsibility to respect and support the decision of individual Members to permit same-sex marriage and arguably requires the Community institutions to recognise such marriages.¹⁴³ In particular, it is arguable that Article 9 requires the Community, in measures pertaining to the Free Movement

the basis that French people are required to carry identity cards at all times, so the degree of interference with the transsexual person's right to respect for her private life was much greater than in the United Kingdom. The decision did not address the right to marry.

¹³⁸ Belgium, the Netherlands and Spain.

¹³⁹ Denmark, the Netherlands, Sweden, Finland, the United Kingdom.

¹⁴⁰ The exceptions are Ireland, Italy and Greece.

¹⁴¹ For example, Hungary and Slovenia.

¹⁴² G. Stafford (2002) 'Concepts of Family under EU Law: Lessons from the ECHR', *International Journal of Law, Policy and the Family* 16, p. 410.

¹⁴³ According to the Council, '[t]he wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides': Council of the European Union (2000) *Charter of Fundamental Rights of the European Union: Explanations Relating to the Complete Text of the Charter* (Luxembourg: Office for Official Publications of the European Communities), p. 27.

of Workers, to recognise as a spouse a person who is a party to such a marriage, legally recognised in a Member State. Indeed, the Community Staff Regulations have been amended to respect the diverse family arrangements of persons employed by the EC.¹⁴⁴

The Charter is subject, of course, to significant limitations. The first point is that it is not universal in its application. It applies specifically to the institutions of the EC and does not generally impact on national laws of the Member States.¹⁴⁵ Consonant with the principle of subsidiarity, it applies to national legal institutions only insofar as they are engaged in implementing EC law – by, for instance, incorporating a Directive, or applying the terms of a Regulation.¹⁴⁶ It cannot be used to strike down a wholly indigenous national law. The range of the Charter, moreover, is restricted to areas in which the Community has acquired competence. The Charter does not, in itself, expand such competence.¹⁴⁷

Charter rights may be subject, moreover, to limitations, although these:

must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.¹⁴⁸

Despite these constraints, it is evident that the law pertaining to both sexual orientation and sex discrimination is in a state of flux. As the ECtHR moves to afford stricter scrutiny to measures that discriminate against lesbian and gay people and the Member States afford greater recognition to *de facto* couples, the premise of the ECJ's findings in *Grant* and *D.* is less than secure and may be revised in the future. Although the Charter itself does not appear to effect a significant break from the status quo, it 'will enable existing measures to be interpreted more broadly and in a more extensive fashion'.¹⁴⁹ In particular, we can expect significant references from the national courts on the question of indirect discrimination against lesbian and gay employees with respect to partner benefits.¹⁵⁰

¹⁴⁴ European Group of Experts on Combating Sexual Orientation Discrimination *op. cit.*, para. 2.1.5.

¹⁴⁵ Article 51(1).

¹⁴⁶ Article 51(1).

¹⁴⁷ Article 51(2).

¹⁴⁸ Article 52(1). See generally Craig and de Búrca *op. cit.*, Chapter 8.5.

¹⁴⁹ C. McGlynn (2001) 'Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?', *European Law Review* 26, pp. 582–98, at p. 586.

¹⁵⁰ European Group of Experts on Combating Sexual Orientation Discrimination *op. cit.*, pp. 33–5.

2.4 Free Movement of Persons and Family Reunification within the EC

2.4.1 Introduction

EC law, as originally constituted, provided for the free movement of Community nationals for three specified purposes: to establish oneself as a worker, to provide or access services and to establish oneself in a chosen profession, vocation or trade. The right to move between Member States has since been extended to students, retired persons and persons who are economically self-reliant.¹⁵¹ As such, the link between economic activity and freedom of movement has gradually lessened, so that the right has acquired an independent standing.¹⁵²

The EC has long recognised the impact of family relationships on the ability to move freely from one Member State to another.¹⁵³ Consequently, measures giving effect to the free movement of workers have typically granted a right to be accompanied to a host state by given family members.¹⁵⁴ The right has generally been reserved to spouses and minor children; however, Directive 2004/58/EC heralds significant new developments in favour of *de facto* families.

2.4.2 Regulation 1612/68

Regulation 1612/68 is one of a number of measures elaborating on the right to free movement under EC law.¹⁵⁵ Under Title III certain members of workers' families have the right to enter and reside in a state in which the worker is employed. The family member need not be an EC citizen¹⁵⁶ and Member States are obliged to admit the following categories of people:

- (a) the spouse of the worker;
- (b) the descendants of the worker and his or her spouse who are under the age of 21 years or are dependants;
- (c) dependent relatives in the ascending line of the worker and his or her spouse.

In addition, Article 10(2) specifies that Member States are obliged to *facilitate* the admission of any other family member if that person is dependent on the worker or lives under the roof of the worker in the country in which the worker previously lived. Once the right to accompany the worker is exercised, the family members acquire various rights aimed at ensuring broadly equal treatment to that of the host state's nationals.¹⁵⁷ Application of the Regulation is only triggered when the right to free movement is exercised.¹⁵⁸

¹⁵¹ See also C. Barnard (2004) *The Substantive Law of the EU: The Four Freedoms* (Oxford: Oxford University Press), Chapter 10.

¹⁵² See Barnard (2004) *op. cit.*, Chapter 15, and ILGA-Europe (2005) *EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process* (Brussels: ILGA-Europe), p. 3.

¹⁵³ See, for example, the Preamble to Council Regulation 1612/68/EC.

¹⁵⁴ Barnard (2004) *op. cit.*, Chapter 11.

¹⁵⁵ It concerns specifically the free movement of *workers*.

¹⁵⁶ See C-131/85 *Emir Gül v. Regierungspräsident Düsseldorf*, [1986] ECR 1573.

¹⁵⁷ See Barnard (2004) *op. cit.*, Chapter 11.

¹⁵⁸ Joined cases 35 and 36/82, *Morson v. Netherlands, Sweradjie Jhanjan v. Netherlands* [1982] ECR. 3723.

The term 'spouse' in this context excludes non-marital partners. In *Netherlands v. Reed*¹⁵⁹ the European Court of Justice ruled that, for the purpose of the Regulation, the term 'spouse' did not include a person in a stable non-marital relationship with a worker. The respondent in this case, Ms Reed, was a British National living with Mr W., her partner of five years. The latter, who was also British, had secured employment in the Netherlands and had moved there for the purpose of taking up employment. Having failed to obtain employment in the Netherlands, Ms Reed applied for a residence permit on the basis of her relationship with Mr W. The Netherlands had at the time a policy that a non-Dutch national in a stable relationship with a Dutch national, with a refugee or a person entitled to asylum, or with a holder of a permanent residence permit, might be permitted residence in the Netherlands on the condition that:

- (1) the persons concerned live together as one household, or have lived together as such before arriving in the Netherlands, and
- (2) the resident possesses adequate means of support and appropriate accommodation for the foreign partner.

Nevertheless, the Netherlands refused to grant Ms Reed a residence permit.

The Court noted the absence of a community consensus on the extension of spousal rights to non-marital partners. Although it did agree that a dynamic approach could be taken to interpretation, one that had regard to 'developments in social and legal conceptions',¹⁶⁰ these developments had to be 'visible in the whole of the community; such an argument cannot be based on social and legal developments in only one or a few Member States'.¹⁶¹ It thus concluded that:

there is no reason, therefore, to give the term 'spouse' an interpretation which goes beyond the legal implications of that term, which embrace rights and obligations which do not exist between unmarried companions.¹⁶²

The ECJ nevertheless concluded that, where a state recognised relationships not based on marriage between citizens of the state in question, or between citizens of the state and non-nationals, such states were required to accord similar recognition to migrant EC workers in like relationships. The Court reasoned that such recognition constituted a social advantage extended to workers. Article 7(2) of the Regulation required that such social advantages should be equally available to workers establishing themselves in the state under the provisions of EU law. The Court noted, in particular, that the possibility of a migrant worker obtaining permission to be accompanied by an unmarried partner:

can assist his integration in the host state and thus contribute to the achievement of freedom of movement for workers...It must therefore be concluded that the Member State which grants such an advantage to its own nationals cannot refuse to grant it to workers who are nationals of other

¹⁵⁹ C-59/85 [1986] E.C.R. 1283.

¹⁶⁰ *Ibid.*, para. 10.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

Member States without being guilty of discrimination on grounds of nationality, contrary to Articles [12] and [39] of the Treaty.¹⁶³

Thus,

a Member State which permits the unmarried companions of its nationals, who are not themselves nationals of that Member State, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other Member States.¹⁶⁴

In summary, the Court concluded that Member States were not obliged to grant recognition to non-marital relationships. If they did, however, accord recognition to the partners of citizens of the State in question, they were required to extend such recognition to the partners of migrant workers seeking to establish themselves in the State.

The decision in *Reed* may usefully be contrasted with that in *Diatta v. Land Berlin*.¹⁶⁵ In *Diatta* the European Court of Justice ruled that a person living separately from her spouse might nevertheless be considered a 'spouse' for the purposes of Regulation 1612/68. The Regulation is not conditional on the parties' cohabitation. Thus a person who is living separately and apart from her lawful spouse, in contemplation of divorce, is entitled to be treated as a 'spouse' for the purposes of EC law, while cohabiting non-marital partners are not.¹⁶⁶ In *Commission v. Germany*¹⁶⁷ the Court held that Regulation 1612/68 must be interpreted in light of the requirement of respect for family life under Article 8 of the ECHR.

Although the Regulation remains in force, the provisions in relation to family reunification have been superseded by the enactment of Directive 2004/58/EC, the provisions of which repeal those contained in Articles 10 and 11 of the Regulation. Given the significantly broader approach taken by the Directive, it is clear that the decision in *Reed* is open to revision and is unlikely to be followed in future jurisprudence. The terms of the Directive are discussed further immediately below.

2.4.3 Directive 2004/58/EC

The provisions and decisions noted above suggest a relatively restrictive approach to the definition of family. In more recent times, however, the Community has exhibited a more extensive outlook, one that is reflected in particular in Directive 2004/58/EC on the right of European Union citizens and their family members to move and reside freely within the territory of the Member States. The Directive requires that Member States bring their laws into compliance with its terms by 30 April 2006 at the latest.

¹⁶³ *Ibid.*, para. 28.

¹⁶⁴ *Ibid.*, para. 29.

¹⁶⁵ C-267/83 [1985] ECR 567. A similar result arose in C-370/90 *R. v. IAT and Singh ex p Secretary of State for the Home Department* [1992] E.C.R.-I 4265.

¹⁶⁶ A situation which Stafford justifiably describes as 'superficial', *op. cit.*, p. 415.

¹⁶⁷ Case 249/86 [1989] ECR 1263, para. 10.

For the purposes of the 2004 Directive, the term ‘family member’ is defined more expansively than in its predecessor. Although the term is defined to include a spouse, it also includes a partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State. Such recognition is, however, conditional on the existence in the host Member State of legislation treating registered partnerships as equivalent to marriage.

Several difficulties arise in this context. The first concerns the definition of a registered partnership. Although ILGA-Europe suggests that the Directive might be interpreted as necessarily implying equivalence between marriage and registered partnerships, it notes the difficulty in predicting how the courts might resolve a dispute on this point.¹⁶⁸ Some Member States do regard registered partnerships as equivalent to marriage. Denmark, the Netherlands, Finland, the United Kingdom and possibly Germany fall into this category.¹⁶⁹ On the other hand, other EC States, such as France, Hungary, Slovenia and Portugal, while providing for the registration of non-marital relationships, have adopted various regimes that manifestly lack many of the attributes of marriage and thus will probably fall outside the definition outlined in the Directive.

The second difficulty is that, although a person may be a party to a registered partnership (as defined) in their state of origin, such registration will provide little benefit where the host Member State does not facilitate the conferral of an equivalent status on its citizens. In this regard, a person who is a party to a registered partnership conferred abroad would not be entitled to recognition in Ireland or Greece, such States lacking a facility for the registration of a non-marital partnership.

The EU Network of Independent Experts on Fundamental Rights maintains that the distinct treatment accorded to marriage and registered partnerships is problematic from a freedom of movement perspective:

The possibility that is thus given to the host Member State to rule out that a registered partnership grants the right to family reunification implies that, unless the partners have Belgian or Dutch nationality or permanently reside in one of those two countries, which gives them access to marriage in those countries, the freedom of movement recognised by Article 45 of the Charter of Fundamental Rights – which is inconceivable without the holder of this right being able to be reunited with his family – will in actual fact be less effective for persons of homosexual orientation than for other Union citizens, so that the difference in treatment that is established between marriage and registered partnership in terms of the impact on the right to family reunification results in discrimination on grounds of sexual orientation.¹⁷⁰

ILGA-Europe nevertheless suggests that the Directive may have implications even in States where registered partnerships are not yet offered, pointing out that, where the State in question is considering adopting such legislation, ‘draft national legislation should include appropriate measures to amend immigration legislation to extend the

¹⁶⁸ ILGA-Europe (2005) *op. cit.*, p. 6.

¹⁶⁹ *Ibid.*

¹⁷⁰ EU Network of Independent Experts on Fundamental Rights (2005) *Synthesis Report: Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and Its Member States in 2004* (http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm), pp. 130–1.

right to enter and reside to individuals who have formed a registered partnership in other EU Member States'.¹⁷¹

The Directive, however, extends beyond registered partners to unmarried couples in what it terms a 'durable relationship'. Article 3(2)(b) of the Directive requires that Member States facilitate the entry and residence of a partner with whom an EU citizen has a durable relationship, duly attested. Although this does not confer an absolute right on such partners to enter and reside in the host State, it does require the Member State in question to have regard to the relationship as a relevant factor. The host Member State is obliged, in particular, to 'undertake an extensive examination of the personal circumstances...'. It may only deny entry or residence where it can provide justification for so doing. The Directive, moreover, stipulates that, where a refusal issues, clear reasons must be given justifying such refusal.

Although the onus is on the partners to establish that their relationship is sufficiently durable, it is clear from Article 3 of the Directive that the Member States are not entitled to enforce a total ban on the entry and residence of unmarried partners. The Directive stipulates a duty to facilitate entry and residence in appropriate cases. It reserves to the Member States the right to decide what is a durable relationship, and by what means it may be proved to exist, but it nevertheless requires the Member States to put in place legal mechanisms enabling unmarried partners to request admission.

ILGA-Europe suggests, furthermore, that:

In order to ensure consistency and fairness, states should identify which criteria they will take into account when exercising their discretion on such applications.¹⁷²

It is worth noting that recital 31 of the Directive, in keeping with Article 13 EC and the terms of the Charter of Fundamental Rights, requires that Member States implement the Directive without discrimination between beneficiaries on certain grounds. In tandem with the Charter, the grounds listed are not exhaustive but do include sex, birth and sexual orientation. This means that, in establishing the criteria for the recognition of non-marital partnerships, Member States may not discriminate between couples of the same sex and those of the opposite sex.

It may also mean that discrimination between married and unmarried couples in the application of the Directive may itself constitute indirect discrimination on the basis that such discrimination would impact more harshly on same-sex couples than on opposite-sex couples. Given that same-sex couples are generally precluded from marrying in most Member States, a measure that favoured married couples over their unmarried counterparts might be deemed to infringe indirectly on the proscription in the Directive itself, against discrimination on the basis of sexual orientation.

Article 24 of the Directive, moreover, stipulates that all Union citizens residing in another Member State on the basis of the Directive 'shall enjoy equal treatment with the nationals of that Member State, within the scope of the treaty'. This statement

¹⁷¹ ILGA-Europe (2005) *op. cit.*, p. 6.

¹⁷² *Ibid.*, p. 8.

thus reinforces the second principle established in *Reed*, that entitlements granted to nationals of the Member State in question must also be made available to other EU nationals on a like basis.

2.5 Family Reunification of Third-Country Nationals

Whereas the 2004 Directive concerns family reunification for nationals of EU Member States with non-EU national spouses, partners and relatives, Council Directive 2003/86/EC concerns the right to family reunification of persons who are nationals of third countries residing lawfully within the European Union. Although Ireland has opted out of this Directive, and is thus not subject to its terms, the Directive is none the less instructive as regards current trends in EC legislation on the matter of family recognition.

Although the Directive is generally confined in its application to spouses and minor children, Article 4(3) provides that:

The Member States may, by law or regulation, authorise the entry and residence...of the unmarried partner, being a third-country national, with whom the sponsor is in a duly attested stable long-term relationship.

Member States may also ‘decide that registered partners are to be treated equally as spouses with respect to family reunification’.

The formula used in the Directive is facilitative rather than mandatory. As noted in recital 10 to the Preamble, the Directive does not require recognition of non-marital partners: ‘It is for the Member State to decide whether they wish to authorise family reunification for...unmarried or registered partners...’.

It is arguable, however, that this margin of appreciation narrows when one considers the terms of recital 5 of the Preamble to the Directive requiring that Member States give effect to the provisions of the Directive without discrimination on the basis *inter alia* of sex, birth or sexual orientation. It is at least possible that discrimination by reference to the marital status of the individuals would indirectly infringe on the last-mentioned ground. In other words, a measure that confined family reunification to married persons would impact with greater force on partners of the same sex, who are generally precluded from marrying under the laws of the various EC states. As such, a decision on the part of a Member State to implement the Directive in favour of marital couples alone might possibly be found to breach the terms of the Directive itself.

Chapter 3: International Human Rights Law

3.1 Introduction

3.1.1 Chapter Outline

Ireland is a member of both the United Nations (UN) and the Council of Europe (CoE) and in that connection has ratified a substantial number of international human rights treaties. The following instruments are of particular relevance to the status of *de facto* couples:

- The European Convention on Human Rights (CoE)
- The European Social Charter (CoE)
- The International Covenant on Civil and Political Rights (UN)
- The International Covenant on Economic, Social and Cultural Rights (UN)
- The Convention on the Rights of the Child (UN)
- The Convention on the Elimination of All Forms of Discrimination Against Women (UN)

We address the two Council of Europe instruments in section 3.2, turning to those promulgated by the United Nations in section 3.3, including a brief review of the Convention on the Rights of All Migrant Workers and Members of their Families, although it has not as of yet been ratified by Ireland. Before discussing these treaties in further detail, we first outline their status within the domestic legal system.

3.1.2 Council of Europe Instruments

For the purposes of this report, the European Convention on Human Rights (ECHR) is arguably the most significant international agreement ratified by Ireland.¹⁷³ primarily because the Convention enjoys a superior legal status to comparable UN instruments, but also because considerable guidance as to its implications is available in the form of an extensive body of jurisprudence from the Strasbourg Court. Ireland is also party to the European Social Charter, the Council of Europe treaty that protects economic, social and cultural rights (see section 3.2.7).

Under Article 29.4 of the Constitution, the government is authorised to ratify treaties on behalf of the State. Unless an international agreement is incorporated into Irish law by the Oireachtas, it is not enforceable within the jurisdiction.¹⁷⁴ In the absence of incorporation, a court is precluded from giving full legal force to international treaties; it cannot regard such provisions as part of domestic law, in the sense that an action cannot be grounded solely in given provisions of a treaty.¹⁷⁵ However, international agreements may be used as an aid to the interpretation of domestic law.¹⁷⁶ While the ECHR was deployed in that manner with increasing frequency

¹⁷³ European Convention for the Protection of Human Rights and Fundamental Freedoms CETS No: 005. Signed by Ireland, 4 November 1950. Ratified by Ireland, 25 February 1953. Incorporated into national law by the European Convention on Human Rights Act 2003.

¹⁷⁴ Article 29.6.

¹⁷⁵ *Re O'Laighleis* [1960] IR 93; *Norris v. A.G.* [1984] IR 36; *Doyle v. The Commissioner of An Garda Siochána* [1999] 1 IR 249; *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97.

¹⁷⁶ *Ó Domhnaill v. Merrick* [1985] I.R. 151; *Desmond v. Glackin (No.2)* [1993] 3 IR 67; *Finucane v. McMahon* [1990] 1 IR 165; *Murphy v. IRTC* [1997] 2 ILRM 467; *Hanahoe v. Hussey* [1998] 3 I.R. 69.

during the 1990s,¹⁷⁷ courts have demonstrated less willingness to rely on UN instruments.¹⁷⁸

The status of the ECHR was strengthened following the passage of the European Convention on Human Rights Act 2003, which came into force on 31 December 2003 and gives further effect to the ECHR within the State. The ‘interpretation’ model adopted in the Act is somewhat problematic.¹⁷⁹ The Convention could have been incorporated into the Constitution through a referendum or have been fully adopted through legislation.¹⁸⁰ Instead, the Irish Government chose to give the ECHR a type of indirect effect, in that Irish courts are now required, in interpreting and applying any statutory provisions or rule of law, to do so ‘in a manner compatible with the State’s obligations under the Convention provisions’ (section 2).¹⁸¹ None of the relevant judgments issued to date have generated substantive changes to pre-existing law. Because the 2003 Act does not have retroactive effect, it remains to be seen how section 2 will operate in practice.¹⁸² A case taken by Dr Lydia Foy, a post-operative transsexual, may prove to be one of the first salient post-ECHR Act judgments. Dr Foy was seeking to have her gender identity recognised under the Irish birth registration system. The High Court did not find in her favour and the decision was appealed to the Supreme Court.¹⁸³ However, since that date, the European Court of Human Rights ruled in *Goodwin v. United Kingdom*¹⁸⁴ that States must recognise the gender identity of post-operative transsexuals and permit them to marry.¹⁸⁵ In light of these developments, the Supreme Court has held that the case should be re-heard by the High Court.¹⁸⁶

Experience in the UK and Northern Ireland pursuant to the Human Rights Act 1998 may offer some guidance.¹⁸⁷ However, the status of the Convention in those

¹⁷⁷ Perhaps the strongest judicial endorsement of employing ECHR standards was found in the judgment of Kinlen J. in *Hanahoe v. Hussey* [1998] 3 I.R. 69, who stated: ‘The judgment of the European Court of Human Rights is not simply of persuasive authority. It has been accepted that in cases of doubt or where jurisprudence is not settled, the courts should have regard to the Convention for the Protection of Human Rights.’

¹⁷⁸ See C. McCrudden (2000) ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’, *Oxford Journal of Legal Studies* 20(4), pp. 499–532.

¹⁷⁹ See further S. Egan (2003) ‘The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation’, *Dublin University Law Journal* 25, pp. 230–48; G. Hogan (2004) ‘Incorporation of the ECHR: Some Issues of Methodology and Process’ in U. Kilkelly (ed.) *ECHR and Irish Law* (Bristol: Jordans), pp. 13–34; R. Murphy (2001) ‘The Incorporation of the ECHR into Irish Domestic Law’, *European Human Rights Law Review* 6, pp. 40–56; and D. O’Connell (2004) ‘The ECHR Act: A Critical Perspective’ in U. Kilkelly (ed.) *ECHR and Irish Law* (Bristol: Jordans), pp. 1–11.

¹⁸⁰ On the various incorporation possibilities, see Irish Human Rights Commission (2002) *Irish Human Rights Commission European Convention on Human Rights Submission* (Dublin: IHRC).

¹⁸¹ Cf. Human Rights Act 1998 (UK), section 3.

¹⁸² *Dublin City Council v. Fennell* [2005] IESC 33 (12 May 2005).

¹⁸³ *Foy v. An t-Ard Chlaraitheoir & Ors* [2002] IEHC 116 (9 July 2002).

¹⁸⁴ *Goodwin v. United Kingdom and I v. United Kingdom* (2002) 35 EHRR 18.

¹⁸⁵ See also F. Ryan (2002) ‘Editorial: *Goodwin v. United Kingdom*’ *Irish Journal of Family Law* [2002] 4, p. 1, and F. Ryan (2004) ‘Marriage at the Boundaries of Gender: The ‘Transsexual Dilemma’ Resolved?’, *Irish Journal of Family Law* [2004] 1, p. 15.

¹⁸⁶ *Irish Times*, 9 November 2005.

¹⁸⁷ A substantial literature on the interpretive and other questions generated by the Human Rights Act exists; see, for example, D. Feldman (1998) ‘Remedies for Violations of Convention Rights under the Human Rights Act’, *European Human Rights Law Review* 6, pp. 691–711; A. Kavanagh (2004) ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’ *Oxford*

jurisdictions, while appearing similar on its face to the position in the Republic, is markedly different in practice, primarily because the UK and Northern Ireland adhere to a model of governance that pivots on parliamentary supremacy and because they do not currently have recourse to a single written constitution incorporating a bill of rights. While the Convention now supplies the main human rights framework in those jurisdictions, Irish courts will continue to rely upon the Constitution's fundamental rights guarantees, which remain a superior source of law.¹⁸⁸

Section 3 of the 2003 Act provides that, 'subject to any statutory provision...or rule of law', organs of the State shall comply with the Convention's provisions when carrying out their functions. Thus, while all public bodies must respect the ECHR if following the terms of a statute/other law that prompts a different result, the compatibility of the statute/law itself with the ECHR will be in issue.

The picture becomes more complex where a court establishes that a domestic law *conflicts* with the Convention.¹⁸⁹ The Irish Human Rights Commission was particularly concerned with this issue and the associated scheme of remedies outlined in the ECHR Bill, which were not substantially altered in the final text passed by the Oireachtas.¹⁹⁰ Under Section 5, the Court can make a 'declaration of incompatibility' with the Convention's provisions but is unable to strike down legislation or make any other order, such as an injunction preventing ongoing breaches. This form of remedial action is effectively ruled out by section 5(2).¹⁹¹

A declaration of incompatibility is instead placed before the Houses of the Oireachtas within 21 days of the court hearing; there is no further guidance as to what should occur at that juncture. Section 5 goes on to stipulate that a party to a case in which a declaration has been made can apply to the Attorney General for payment of compensation, which may then be forthcoming at the discretion of the government.

Given the sub-constitutional level at which the Convention was incorporated into Irish law, it is also evident that, where the Convention right is found to infringe or to conflict with principles elucidated in the Constitution, the Constitution will prevail. Neither a court nor the Oireachtas, in such circumstances, is empowered to act contrary to the Constitution. This poses particular difficulties in the context of family recognition, given that the ECtHR and the Supreme Court diverge considerably on the definition of family for the purposes of, respectively, the ECHR and the Irish Constitution (see Chapter 4.2).

Some key decisions of the European Court of Human Rights have already generated legal reform with respect to *de facto* couples: Irish adoption procedures came under scrutiny in *Keegan*¹⁹² and unequal status resulting from birth outside marriage was remedied following the decision in *Johnston*.¹⁹³ These decisions are considered in

Journal of Legal Studies 24, p. 259; D. Nicol (2004) 'Statutory Interpretation and Human Rights after *Anderson*', *Public Law* [2004], pp. 274–82.

¹⁸⁸ See discussion by Hogan (2004) *op. cit.*

¹⁸⁹ Cf. Human Rights Act 1998 (UK), section 4.

¹⁹⁰ IHRC 2002 *op. cit.*

¹⁹¹ 5 (2) A declaration of incompatibility – (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made.

¹⁹² (1994) 18 E.H.R.R. 342; this resulted in the enactment of the Adoption Act 1998.

¹⁹³ (1986) 9 E.H.R.R. 203; this resulted in the enactment of the Status of Children Act 1987.

some detail below. Further effects of ECHR law are evident from the remit of the Interdepartmental Committee on Reform of Marriage Law.¹⁹⁴ It is to consider the position of people following gender reassignment, which is no doubt due to the ECtHR decision in *Goodwin v. UK*.¹⁹⁵

With respect to matters falling within the competence of the EC, the position is different. As outlined in Chapter 2, the ECHR forms part of the general principles of EC law. Although there is an increasingly close alignment between the jurisprudence of the Strasbourg Court and that of the ECJ, the Luxembourg Court is the sole arbiter of what the Convention means for the purposes of EC law.

3.1.3 United Nations Instruments

Since the government has not incorporated the four UN instruments dealt with in this report¹⁹⁶ into domestic law, the standards set out in those treaties are enforced largely through various reporting mechanisms.¹⁹⁷ Rights of individual petition are available under two of the treaties discussed in section 3.3, *viz.* the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The right of individual petition permits an individual to bring a complaint alleging a violation of their rights under a given treaty before the relevant supervisory body. If a communication is declared admissible, the treaty body considers the case on the basis of written submissions and delivers its 'Views' or 'Opinion'. Decisions are not binding, as such; however, remedial action is often recommended and in that event the State concerned is requested to respond within a specified period. Several communications alleging violations of the rights of *de facto* couples under ICCPR have been considered by the Human Rights Committee (see section 3.3.2).

¹⁹⁴ Interdepartmental Committee on Reform of Marriage Law (2004) *Discussion Paper No. 5: Definition of Marriage, Who Can Marry, Capacity to Marry*, at p. 7.

¹⁹⁵ Application No. 28957/95, 11 July 2002.

¹⁹⁶ The International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women.

¹⁹⁷ See generally J. Winter (2002) *Human Rights, Human Wrongs: A Guide to the Human Rights Machinery of the United Nations*, 3rd edition (Belfast/London: British Irish Rights Watch, Northern Ireland Human Rights Commission).

3.2 Council of Europe Instruments

3.2.1 Overview of ECHR

The ECHR is primarily concerned with civil and political rights and contains a non-discrimination clause requiring States to prohibit discrimination with regard to those rights and freedoms. Part I of the Convention sets out twelve rights,¹⁹⁸ which have been supplemented by rights contained in additional protocols agreed by the Contracting States over the years.¹⁹⁹

Two substantive rights, the right to protection of one's private and family life (Article 8) and the right to property, contained in Article 1 of Protocol 1, are of especial relevance to *de facto* couples. These provisions assume particular importance when combined with the Convention's non-discrimination prohibition (Article 14). With respect to same-sex couples, Article 12, which upholds the right to marry, is also material. In the next section we outline the scope and nature of Article 14, then turn to look at case law on family and private life, marriage and finally property.

As mentioned previously (Chapter 1.3.4), the Strasbourg Court allows a 'margin of appreciation' to national authorities in assessing alleged violations of the Convention.²⁰⁰ Some deference is considered appropriate because the ECtHR is not always as well placed as national actors in striking an appropriate balance between competing interests in complex areas of law and policy. At the same time, any discretion is subject to European supervision that empowers the Court to ultimately decide whether an impugned measure violates the Convention.²⁰¹

The breadth of the margin depends on several factors, including the type of measure involved. For example, a wide margin of appreciation is accorded in the framing and implementation of policies in the area of taxation.²⁰² Furthermore, the form of Convention right at stake is a material consideration. According to the Court:

This margin will vary considerably according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim persuaded by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights.²⁰³

¹⁹⁸ The right to life (Article 2); freedom from torture and inhuman or degrading treatment of punishment (Article 3); freedom from slavery and servitude (Article 4); the right to liberty and security of the person (Article 5); the right to a fair trial (Article 6); protection against retroactivity of the criminal law (Article 7); the right to respect for private and family life, the home and correspondence (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); the right to marry and found a family (Article 12); and the right to an effective remedy if one's rights are violated (Article 13).

¹⁹⁹ Protocol 1 includes the right to property (Article 1) and is considered further below.

²⁰⁰ See also M. Hutchinson (1999) 'The Margin of Appreciation Doctrine in the European Court of Human Rights', *The International and Comparative Law Quarterly* 48 (3), pp. 638–50; N. Lavender (1997) 'The Problem of the Margin of Appreciation', *European Human Rights Law Review* 4, pp. 380–90; Yourow *op. cit.*

²⁰¹ *Sunday Times v. United Kingdom* (1979–80) 2 E.H.R.R. 245, para. 36.

²⁰² *National and Provincial Building Society and Others v. the United Kingdom* (1998) 25 E.H.R.R. 127, para. 80.

²⁰³ *Connors v. United Kingdom*, Application No. 66746/01, 27th May 2004, para. 82.

Yourow points out that the progressive achievement of a common European position has the effect of narrowing the margin of appreciation in favour of applicants challenging national provisions.²⁰⁴ It is well established that the ECHR is a 'living instrument', meaning that standards must be interpreted in light of present-day conditions.²⁰⁵ The Court is not bound by its own precedents and so the effects of the Convention can develop over time.²⁰⁶ In this regard the ECtHR frequently has regard to changing conditions in Contracting States and the existence or non-existence of common ground between various jurisdictions.²⁰⁷ The emergence of a broad consensus among Contracting States was particularly instrumental in the decision of the ECtHR in *Goodwin v. UK* concerning the recognition of transgendered status and gender reassignment on foot of such status. Although the Court had previously proved willing to afford a wide margin of appreciation as regards recognition,²⁰⁸ the growing critical mass of States recognising reassignment ultimately proved crucial in prompting the Court in *Goodwin* to reverse its prior stance.

In this manner the Court frequently flags potentially problematic areas for signatory States without finding actual violations, allowing governments to anticipate the possibility that unless remedial action is taken it may be deemed non-complaint in a future case.²⁰⁹ As a result, the overall trajectory of Strasbourg jurisprudence and its implications for Irish law is treated as a significant factor in this report. It should also be noted that, while the existence of consensus on an issue is one factor employed in assessing the margin of appreciation, it is not determinative. The Court does not require adherence to a uniform position²¹⁰ and has, for example, indicated that Contracting States will have wide discretion in relation to the protection of morals.²¹¹ Matrimony is considered one such field, being 'closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit'.²¹²

²⁰⁴ *Op. cit.*, p.194.

²⁰⁵ *Tyrer v. United Kingdom* (1979-1980) 2 E.H.R.R. 1, para. 30.

²⁰⁶ See e.g. *Cossey v. United Kingdom* (1991) 13 E.H.R.R. 622, para. 35. For instance, in *Sutherland v. UK* (1981) 24 E.H.R.R. 22 the Commission overturned its previous case law (*X v. UK* 3 E.H.R.R. 63) holding that a difference in the age of consent for homosexuals and heterosexuals was no longer sustainable in light of contemporary medical opinion in particular.

²⁰⁷ *Stafford v. United Kingdom* (2002) 35 E.H.R.R. 32, para. 68.

²⁰⁸ See for instance, *Rees v. UK* (1987) 9 E.H.R.R. 56 and *Cossey v. UK* (1991) 13 E.H.R.R. 622. But see also *B. v. France* (1992) 16 E.H.R.R. 1, in which the Court held that France had violated Article 8 by refusing to recognise transgendered status on the basis that French law and practice entailed much greater interference with an individual's private life than parallel U.K provisions.

²⁰⁹ For example in *Rees op.cit.*, the Court did not consider that Article 8 required recognition of gender reassignment but stated that it was 'conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in light of the current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to the scientific and societal developments' (para. 47). See further L. Helfer (1993) 'Consensus, Coherence and the European Convention on Human Rights', *Cornell International Law Journal* 26, 133-165.

²¹⁰ See J. Sweeney (2005) 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', *International and Comparative Law Quarterly* 54, 459-474.

²¹¹ See, for example, *Handyside v. United Kingdom* (1979-1980) 1 E.H.R.R. 737. However, the ECtHR grants a narrower margin of appreciation where the interference involves an intimate aspect of private life; see *ADT v. United Kingdom* [2000] 2 F.L.R. 697; *Dudgeon v. United Kingdom* (1983) 5 E.H.R.R. 573. See C. Ovey and R. White (2006) *Jacobs and White, The European Convention on Human Rights*, 4th edition (Oxford: Oxford University Press), pp. 232-9.

²¹² *F v. Switzerland* (1987) 10 E.H.R.R. 411, para. 33.

Nevertheless, in *Goodwin* the ECtHR found that, while fewer States recognised the right to marry than a change of gender, the matter could not remain discretionary.²¹³

Increasingly the ECtHR is inclined to hold that Convention standards are not met simply by non-interference on the part of States but require the implementation of positive measures.²¹⁴ Expansive readings of rights, which would impose extensive financial obligations on the Contracting States, are not, however, favoured. For example, the ECtHR has consistently refused to recognise that Article 8 implies a right to housing.²¹⁵ In *Sentges v. Netherlands*²¹⁶ the Court reiterated that States enjoy a wide margin of appreciation, especially where the issue involved an assessment of priorities for the allocation of limited resources, which the national authorities were better placed to carry out than an international court. Nevertheless, in discussing protection of the right to private and family life, the Court has stated:

[W]hile the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the state to abstain from such interference: in addition, to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the latter's private life.²¹⁷

We consider the extent to which this positive duty affects *de facto* couples below.

3.2.2 Article 14: Non-Discrimination

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.

Grounds of discrimination

The 'other status' element of Article 14 provides protection to *de facto* couples. The Court has established that discrimination based on sexual orientation²¹⁸ and marital

²¹³ *Op. cit.*, para. 103.

²¹⁴ See generally A. Mowbray (2004) *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford/Portland: Hart).

²¹⁵ See, for example, *Chapman v. United Kingdom* (2001) 33 E.H.R.R. 399. In *Airey v. Ireland* (1979) 2 E.H.R.R. 305, at para. 26, the Court stated: 'The Court is aware that the further realisation of social and economic rights is largely dependent on the situation – notably financial – reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.'

²¹⁶ Application No. 27677/02, 8 July 2003.

²¹⁷ *Marzari v. Italy* (1999) 28 E.H.R.R. 175, at p. 179.

²¹⁸ *Sutherland v. United Kingdom* (1998) E.H.R.R. 117; *Salgueiro Da Silva Mouta v. Portugal* (1999) 31 E.H.R.R. 47.

status²¹⁹ is covered by the Convention. In addition, the enumerated ground of 'birth' status safeguards the rights of children born outside marital relationships,²²⁰ affording some derivative protection to their parents.

Convention jurisprudence suggests that certain bases for different treatment are more difficult to justify than others. Sex discrimination clearly falls into this category; the Court has found on several occasions that 'weighty reasons' will be needed to justify different treatment on the grounds of sex.²²¹ Other suspect grounds include so-called 'illegitimacy'²²² and, more recently, sexual orientation.²²³

Scope

As the Council of Europe acknowledges, the scope of Article 14 is quite limited because it is not a free-standing non-discrimination clause. Reliance can only be placed upon it when another Convention right is in issue,²²⁴ leading commentators to describe Article 14 as 'parasitic'.²²⁵ Protocol 12, which was opened for signature on 4 November 2000, seeks to provide a wider guarantee against discrimination; its potential impact is reviewed separately below.

Nevertheless, once a protected right is in issue, the ECtHR has demonstrated a willingness to find a breach of Article 14 even where the substantive Article has not been infringed. For example in *Abdulaziz, Cabales and Balkandali v. the UK*,²²⁶ which involved family re-unification under UK immigration law, three people claimed that Articles 8 and 14 were infringed by the imposition of more stringent conditions on the entry to the State of their male spouses than those which would have applied to a man in similar circumstances. The Court found that Article 8 was applicable but was not violated as it does 'not extend to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country'. Nevertheless, it decided that the distinction in the immigration rules treated women less favourably than men and was without proper justification. There was discrimination on the grounds of sex, contrary to Article 14 read in conjunction with Article 8.²²⁷

²¹⁹ *P.M. v. United Kingdom*, Application No. 6638/08, 19 July 2005; *Wessels-Bergervoet v. the Netherlands*, Application No. 34462/97, 4 June 2002.

²²⁰ *Inze v. Austria* (1988) 10 E.H.R.R. 394; *Marckx v. Belgium* (1979) 2 E.H.R.R. 330.

²²¹ See e.g. *Karlheinz Schmidt v. Germany* (1994) 18 E.H.R.R. 513.

²²² *Inze v. Austria*, *op. cit.*, para. 41.

²²³ *Karner v. Austria*, Application No. 40016/98, 24 July 2003, para. 37.

²²⁴ See, for example, *Petrovic v. Austria* (2001) 3 E.H.R.R. 14, para. 22. The Court reaffirmed this interpretation of Article 14 in *Mizzi v. Malta*, Application No. 26111/02, 12 January 2006, stating, at para. 126: 'As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.'

²²⁵ D. Harris, M. O'Boyle and C. Warbrick (1995) *Law of the European Convention on Human Rights* (London: Butterworths), p. 463.

²²⁶ (1985) 7 E.H.R.R. 471.

²²⁷ This decision contrasts with that of the Irish High Court in *Somjee v. Minister for Justice* [1981] I.L.R.M. 324, in which Keane J. ruled that differential treatment of male and female spouses of Irish nationals in relation to the acquisition of citizenship did not infringe the equality guarantee under Article 40.1 of the Irish Constitution. The judge maintained that the State was justified in considering

Definition of discrimination

Case law makes it clear that not every distinction or difference of treatment amounts to discrimination for the purposes of Article 14. For example, in *Abdulaziz*²²⁸ the Court stated:

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’.

In essence then differential treatment can be justified if it (1) pursues a legitimate aim, and (2) the means employed to realise that aim are proportionate.²²⁹ As discussed below, protection of the traditional family is considered one such legitimate aim. States cannot generally seek to justify differences in treatment on the basis of administrative convenience.²³⁰ However, certain concessions are made with respect to the timing of changes where these reflect emergent shifts in societal attitudes. In *Petrovic v. Austria*²³¹ the Court observed that the extension of parental leave to fathers was a recent development and found that the Austrian government was entitled to ‘roll out’ such provision in a gradual manner. Since there was no common standard amongst Contracting States at that time, and the measure was a progressive one, the State did not exceed its margin of appreciation.

Although case law is not entirely coherent on the proportionality element of the test, the ECtHR applies different levels of scrutiny depending on the ground of discrimination involved and the subject matter under consideration.²³² The principle of proportionality is reflected in the language employed in Articles 8–11 of the Convention, which envisage limitations on rights that are ‘necessary in a democratic society’ and in other textual references to the scope of permissible curtailments. In essence, a proportionality inquiry entails striking a fair balance between the private interest protected by Convention rights and the public interest in the impugned measure: ‘The proportionality principle may be stated as a requirement that the disadvantage or impingement on a Convention right suffered by the individual is not excessive in pursuit of the public interest aim in question.’²³³ In considering whether a measure is excessive or disproportionate the Court has regard to the States’ margin of appreciation:

The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin of appreciation will vary according to the circumstances, the subject matter and its background.²³⁴

that male spouses should reside in Ireland for a longer period than female spouses, on the basis that male spouses were, according to the Court, more likely to engage in activities that may undermine their application for citizenship.

²²⁸ *Op. cit.*, para. 72.

²²⁹ See O. M. Arnardóttir (2003) *Equality and Non-Discrimination under the European Convention on Human Rights* (The Hague: Kluwer Law International), pp. 42–51.

²³⁰ *Darby v. Sweden*, Application No. 11581/85, 23 October 1990.

²³¹ *Op. cit.*

²³² See also Arnardóttir *op. cit.*, Chapter 5, and De Schutter *op. cit.*, pp. 14–15.

²³³ Arnardóttir *op. cit.*, p. 48.

²³⁴ *Inze v. Austria* (1988) E.H.R.R. 394, para. 41.

As mentioned above, some grounds attract a form of strict scrutiny, so that ‘very weighty reasons’ must be advanced to uphold the distinction in question, the most salient for our purposes being ‘gender/sex’, ‘illegitimacy’ and ‘sexual orientation’. In relation to such grounds, Contracting States enjoy a narrow margin of appreciation. Apart from these instances of discrimination, Arnardóttir contends that there are ‘no structured guidelines to follow in inducing the necessary characteristics of public or private interest or the degree of fit required’.²³⁵ One of the factors frequently considered in assessing the ‘fit’ between the measures in question and the aim sought to be realised is the existence or non-existence of common ground between the laws of the States.²³⁶ As discussed below, since marital status is not considered to be an inherently suspect badge of discrimination and no consensus on the respective position of married and unmarried people exists amongst the Contracting States, differentiation based on that ground generally attracts a low level of review.

Both direct and indirect discrimination are prohibited under Article 14. In *Marckx* the Court indicated that the Article covered measures whose ‘object or result’ was to discriminate against a particular group.²³⁷ The first established finding of indirect discrimination occurred in *Thlimmenos*,²³⁸ where the Court specified that failure to treat people in analogous situations in the same manner without a reasonable and objective justification was not the only aspect to Article 14:

The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.²³⁹

However, both forms of discrimination are also capable of being justified under the conditions mentioned above.

3.2.3 Article 8: The Right to Respect for Private and Family Life

In recent years the most dynamic field of ECtHR case law has concerned Article 8,²⁴⁰ which 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,

²³⁵ *Op. cit.*, p. 51.

²³⁶ See e.g. *Rasmussen v. Denmark* (1985) 7 E.H.R.R. 352, para. 40.

²³⁷ (1979) 2 E.H.R.R. 330, para. 40.

²³⁸ *Thlimmenos v. Greece* (2001) 31 E.H.R.R. 411.

²³⁹ *Op. cit.*, para. 44. See also *Price v. United Kingdom* (2001) 34 E.H.R.R. 1285.

²⁴⁰ See generally D. Feldman (1997) ‘The Developing Scope of Article 8 of the European Convention on Human Rights’, *European Human Rights Law Review* 3, pp. 265–74; C. Gooding (2003) ‘The Application of the ECHR in British Courts in Relation to Disability Issues’ (paper delivered at Global Trends in Disability Law Conference): available from <http://www.lawsociety.ie/>; Mowbray *op. cit.*, Chapter 6.

for the protection of health or morals, or for the protection of the rights and freedoms of others.²⁴¹

The Article has been accorded an extensive reach, so that it covers matters such as the right to express one's identity and sexuality, parental leave allowances,²⁴² dismissal from employment,²⁴³ access to children and a right to form and maintain social relationships.²⁴⁴ There is some doubt as to whether Article 8 embraces protection for prospective adoptive parents even where a legislative or administrative scheme for assessing such applications is in place; three of the four majority opinions in the main precedent to date on the issue considered that it fell outside the scope of the guarantee, on the basis that its primary purpose is to protect existing family ties as opposed to the desire to start a family.²⁴⁵

Wintemute contends that, since one's sexual orientation necessarily concerns a deeply intimate aspect of an individual's private life, 'every instance of discrimination because of sexual orientation' falls 'within the ambit' of Article 8, making Article 14 applicable. Thus, even if the discrimination occurs in a public situation such as a workplace or school, or relates to public kissing or semi-public sexual activity, the individual's 'private life' is affected, because the discrimination creates a disincentive to their being lesbian or gay, thereby interfering with their private decisions about their sexual orientation.'²⁴⁶ The Court has yet to adopt such an approach.²⁴⁷

While the right to privacy applies to all individuals, important relationships are afforded additional protection under the 'family life' limb of the guarantee. A finding to the effect that a given relationship constitutes 'family life' can have various implications depending on the circumstances of the case.

The existence of family life

From the outset, it has been clear that the relationship between married partners²⁴⁸ and that between marital parents and their children constitutes 'family life' and so attracts the protection of Article 8.²⁴⁹

According to settled ECtHR jurisprudence, Article 8 also applies to certain *de facto* families. *Johnston v. Ireland*²⁵⁰ established that family life existed between a heterosexual couple that had cohabited for some fifteen years.²⁵¹

²⁴¹ Note the closely corresponding wording of Article II-67 of the Draft EU Constitution: 'Everyone has the right to respect for his or her private and family life, home and communications.'

²⁴² *Petrovic v. Austria*, *op. cit.*

²⁴³ *Smith v. UK* (2000) 29 E.H.R.R. 493; *Lustig-Preen and Beckett v. UK* (2000) 29 E.H.R.R. 548.

²⁴⁴ See generally Gooding *op. cit.*

²⁴⁵ *Fretté v. France*, Application no. 36515/97, 26 February 2002, para. 32.

²⁴⁶ R. Wintemute (2000) 'Lesbian and Gay Inequality 2000: The Potential of the Human Rights Act 1998', *European Human Rights Law Review* 6, pp. 603–26, at p. 616.

²⁴⁷ See R. Wintemute "'Within the Ambit': How Big is the 'Gap' in Article 14 European Convention on Human Rights: Part 1", *European Human Rights Law Review* 4, pp. 366–82.

²⁴⁸ *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 E.H.R.R. 471.

²⁴⁹ In *Gul v. Switzerland* (1996) 22 E.H.R.R. 93, the Court emphasised that a child born of a marital relationship is part of a family unit 'from the moment of' birth and that a bond amounting to 'family life' exists which subsequent events cannot break, save in exceptional circumstances.

²⁵⁰ (1987) 9 E.H.R.R. 203.

In the *Marckx* case²⁵² the Court established that family life exists between a single mother and her child. Whether ‘family life’ extends to the connection between a natural father and a child depends on a number of factors. Cohabitation is usually regarded as definitive evidence of a bond amounting to family life.²⁵³ In *Keegan* the Court found that where people are living together outside of marriage a ‘child born out of such a relationship is *ipso iure* part of that “family” unit from the moment of his birth and by the very fact of it’. It went on to state that a bond amounting to family life as between the child and his or parents continues to exist ‘even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has then ended’.²⁵⁴

That stance was reiterated in *Kroon v. Netherlands*.²⁵⁵ In its decision, the Court stipulated that, while ‘as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto ‘family ties’.²⁵⁶ On the facts before it, since the couple concerned had four children together, family life had been established. Article 8 was therefore applicable to the relationship between a child and his father, ‘whatever the contribution of the latter to his son’s care and upbringing’.²⁵⁷ More recently in *Soderback v. Sweden*²⁵⁸ the Court held that family life could exist between a father and child where there has been no cohabitation and very limited contact between the parties.

According to the Council of Europe’s Committee on Legal Co-operation (CDCJ) in attributing parental responsibility:

The main difficulty to apply presumptions in these cases of unmarried couples is to prove the beginning and the end of cohabitation. This difficulty could be solved, for instance, by applying only the presumptions to couples that are living or have been living in a relationship and circumstances comparable to a marriage or have their cohabitation registered by a competent authority.²⁵⁹

The Committee went on to state that nevertheless States should take into account ECtHR decisions to the effect that the absence of cohabitation is not conclusive.²⁶⁰

Second relationships

Family life as between parents and their children continues to exist after a period of cohabitation, divorce or separation. It also continues where a parent subsequently

²⁵¹ *Ibid.*, paras. 55–6. See also *Saucedo Gomez v. Spain* (Application No. 37784/97, 26 January 1999), in which the Court stated that the relationship between a heterosexual couple who had cohabited for approximately 18 years certainly gave rise to family life for the purposes of Article 8.

²⁵² *Marckx v. Belgium* (1979-80) 2 E.H.R.R. 330.

²⁵³ *Keegan v. Ireland* (1994) 18 E.H.R.R. 342.

²⁵⁴ *Ibid.*, para. 44.

²⁵⁵ *Kroon v. Netherlands* (1994) 19 E.H.R.R. 263.

²⁵⁶ *Ibid.*, para. 30.

²⁵⁷ *Ibid.*

²⁵⁸ [1999] 1 F.L.R. 250. See also *Boughanemi v. France* (1996) 2 E.H.R.R. 228.

²⁵⁹ Committee of Experts on Family Law, *White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage* (CJ-FA (2001) 16 rev), para. 27.

²⁶⁰ *Ibid.*

enters into a same-sex relationship. In *Salgueiro da Silva Mouta v. Portugal*,²⁶¹ the applicant was the father of a girl born during his marriage. After the relationship with his wife ended, he began cohabiting with a man. In assessing the question of custody and access the national court had made ‘a distinction dictated by considerations relating to the sexual orientation of the father, a distinction which cannot be tolerated under the Convention’. The ECtHR found a violation of both Article 8 and Article 14.

Same-sex relationships

Before the European Commission on Human Rights, same-sex relationships were consistently not considered as amounting to ‘family life’ protected via Article 8.²⁶² While claims taken by lesbians and gay men have succeeded, to date, the various impugned laws were found to have violated the *individual* right to privacy.²⁶³

However, recent decisions such as that in *Karner v. Austria*²⁶⁴ mark the beginning of a more stringent approach to the margin of appreciation. The Court ruled that a gay man who lost his tenancy when his partner died was the victim of unlawful discrimination. It held by six votes to one that there had been a violation of the victim’s rights under Article 14 and Article 8, finding that ‘differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification’. The Austrian government’s rationale for the eviction of Karner was ‘protection of the family in the traditional sense’. However, the Court indicated that the reasons advanced for sexual orientation discrimination merited stricter scrutiny than that afforded in its previous decisions:

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 to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act in order to achieve that aim. The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion.²⁶⁵

Mr Karner should have been placed on an equal footing with an opposite-sex unmarried partner with respect to tenancy rights. Because the applicant had framed his case around the ‘right to respect for his home’, the ECtHR did not consider it necessary to explore the private life and family life dimensions of his claim. Consequently, the question of whether family life exists between lesbian and gay partners remains open. Arguably, given factors such as the trajectory of the Court’s jurisprudence on the rights of transsexual people to marry (see below), the Commission’s stance may be overturned in a suitable case. As van Dijk and van Hoof

²⁶¹ (1999) 31 E.H.R.R. 47.

²⁶² In *X and Y v. UK* (9369/81) (1983) 32 DR, the Commission held that recognition of a same-sex relationship for immigration purposes did not fall within the ambit of the right to respect for family life but concerned the individual’s right to respect for private life. See also *Kerkhoven, Hinke & Hinke v. the Netherlands* (15666/89), 19 May 1992, and *S. v. UK* (1989) 47 DR 274, para. 2.

²⁶³ *Norris v. Ireland* (1988) 13 E.H.R.R. 186; *Dudgeon v. United Kingdom* (1981) 4 E.H.R.R. 149.

²⁶⁴ Application No. 40016/98, 24 July 2003.

²⁶⁵ *Ibid*, para. 49.

observe, ‘the difference with an unmarried [heterosexual] couple in relevant respects is not evident, while there seems to be a clear similarity of interests. Developments in the law of the Member States of the Council of Europe in this area may be expected to have their impact on the Strasbourg case law.’²⁶⁶ This prediction holds even more so in 2006, with the advent of full access to marriage in three jurisdictions and other partnership recognition schemes in several others. Potentially same-sex and opposite *de facto* couples will be accorded equal status in the future, while married couples may be accorded priority over both.

A similar result arises from the application of the Convention by the English and Welsh House of Lords in *Ghaidan v. Godin- Mendoza*.²⁶⁷ The House of Lords in this case ruled, when interpreted in the light of the Convention, that the phrase ‘living with the tenant as husband and wife’ had to be given a construction that embraced both same-sex and opposite-sex couples. Although the House was divided on this construction, all of the law lords were nevertheless unanimous in agreeing that the opposite conclusion would have been incompatible with the requirements of the Convention, and in particular with Article 14 read alongside Article 8.²⁶⁸

The ECtHR adopts a functional approach to the question of whether a family exists that ought to be protected by law. As a result the Convention recognises a wider range of family forms than the Irish Constitution (in particular see Chapter 4.2.1–2). The cumulative effect of the ECtHR’s jurisprudence is that ‘family life’ exists between cohabiting parents and their children, and as between an unmarried father and his child absent cohabitation where other factors show a relationship of sufficient constancy and commitment to create *de facto* ties. *Soderback* suggests, moreover, that the potential development of such ties between father and child may be adequate to establish a relationship that ought to be protected. Article 8 also embraces the connection between parents and their children born through donor insemination.²⁶⁹ According to relevant dicta in *Johnston and Saucedo Gomez*,²⁷⁰ the relationship between long-term heterosexual cohabitantes may also amount to ‘family life’ where the couple do not have children. Because the court regards relations of dependency as a key determinant, ‘family life’ between extended family member such as grandparents and grandchildren, uncles and aunts, nephews and nieces and so on may also be protected.²⁷¹

Consequences of establishing ‘family life’

A finding to the effect that family life exists as between two or more people ‘implies the right to recognition of a legal relationship between members of a family’.²⁷² However, the precise parameters of recognition and in particular the type of rights or benefits it imports is contingent on the circumstances of the case.

²⁶⁶ *Op. cit.*, p. 506.

²⁶⁷ [2004] UKHL 30.

²⁶⁸ See also F. Ryan (2005) ‘Casenote: *Ghaidan v. Godin-Mendoza*’, *Journal of Social Welfare and Family Law* 27(3), p. 355.

²⁶⁹ *X, Y and Z v. UK* (1997) 24 E.H.R.R. 143.

²⁷⁰ Application No. 37784/97, 26 January 1999.

²⁷¹ See also U. Kilkelly (2004) ‘Children’s Rights in the Committed Relationships of their Parents’, paper presented at *ECHR Act Review and Human Rights in Committed Relationships*, Irish Human Rights Commission and Law Society of Ireland Conference, Dublin, 16 October 2004.

²⁷² Van Dijk and van Hoof *op. cit.*, at p. 508.

Judgments of the Strasbourg Court increasingly acknowledge that the effective protection of rights requires more than obliging States not to act in given ways, and may necessitate the imposition of positive duties.²⁷³ According to the Court in *Kroon v. the Netherlands*,²⁷⁴ where the existence of a family tie with a child has been established:

[T]he State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration into the family.²⁷⁵

It is also clear, however, that States need not treat married and *de facto* relationships in the same manner. As stated above, under Article 14 a difference in treatment is not discriminatory if it can be justified on objective and reasonable grounds. An objective justification will be established if the differential treatment pursues a legitimate aim, and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.²⁷⁶

The vast bulk of cases falling under this rubric have dealt with the rights of individual parents *vis-à-vis* their children. According to the *Marckx* judgment, States should provide for the immediate recognition of the relationship between an unmarried mother and her child.²⁷⁷ The position of fathers is much more tenuous. Case law has established that ensuring respect for family life imposes certain procedural obligations on public authorities.²⁷⁸ *Keegan* for instance established that an unmarried father had a right to be consulted in advance of any decision to place his child for adoption. The Court has also established that procedures concerning access to a child, which place unmarried fathers in a less favourable position than divorced fathers, contravene Article 14 in combination with Article 8.²⁷⁹

However, 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. *McMichael v. UK*²⁸⁰ involved Scottish legislation that parallels the current applicable Irish law, in that an unmarried father was not granted automatic guardianship rights but could apply to the courts to be so appointed. Because of his legal status, the father in this case had no right to participate in the care proceedings, which led to his child being put forward for adoption. The applicant claimed that the UK government had discriminated against him in contravention of Article 14, taken together with Articles 6 and 8. The Court, however, found that the difference in treatment between married and unmarried fathers was justified:

²⁷³ See Mowbray *op. cit.*, Chapter 6.

²⁷⁴ (1994) 19 E.H.R.R. 263.

²⁷⁵ *Ibid.*, para. 32.

²⁷⁶ *Belgian Linguistics Case (No. 2)* (1968) 1 E.H.R.R. 252.

²⁷⁷ In this respect Irish law complies with the Convention. In *G v. An Bord Uchtala* [1980] IR 36, the Supreme Court established that a mother was automatically the guardian of her child under the Constitution, a position which is replicated at legislative level.

²⁷⁸ Frequently in conjunction with Article 6; see, for example, *Keegan, op. cit.*, and *Hoffmann v. Germany* (Application No. 3405/96, 11 October 2001.)

²⁷⁹ *Sahin v. Germany* (Application No. 30943/96, 11 October 2001) and *Sommerfeld v. Germany* (Application No. 3187/96, 8 July 2001).

²⁸⁰ (1995) 20 E.H.R.R. 205.

It is axiomatic that the nature of relationships of natural fathers with their children will inevitably vary from ignorance and indifference at one end of the spectrum to a close stable relationship indistinguishable from the conventional matrimonial based family unit at the other. The aim of the relevant legislation is to provide a mechanism for identifying ‘meritorious’ fathers who might be accorded parental rights, thereby protecting the interests of the child and the mother. In the Court’s view this aim is legitimate and the conditions imposed on natural fathers for obtaining recognition of their parental role respect the principle of proportionality.

*X, Y and Z v. UK*²⁸¹ established that the relationship between a mother, her partner (a female-to-male transsexual) and their child conceived through donor insemination amounted to family life within the terms of Article 8. Nevertheless the Court found that there was no consensus amongst the Contracting States as to the recognition of transsexuals’ parental rights. As such, governments enjoyed a wide margin of appreciation in complying with the obligation to respect family life in these circumstances. The UK has not breached Article 8 in refusing to register the first applicant as the child’s father on her birth certificate:

In conclusion, given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father. That being so the fact that the law of the United Kingdom does not allow special recognition of the relationship between X and Z does not amount to failure to respect family life within the meaning of that provision.

Mowbray notes that, while the general trend has been to narrow the discretion afforded States in officially recognising family relationships outside marriage, *X, Y and Z* demonstrates the limits of this positive obligation.²⁸² He concludes: ‘[t]ime will tell if the European consensus moves towards according such social family relationships similar recognition as biological ones’.²⁸³

Similarly, beyond patent forms of discrimination such as that disclosed in *Salgueiro*, ‘the question of what protection Article 8 offers adults in same-sex relationships and by extension their children is far less certain’.²⁸⁴ In 1993 the Commission determined that despite the evolution of attitudes towards homosexuality Article 8 did not impose a positive obligation on a State to grant parental rights to a child’s co-parent in a lesbian relationship.²⁸⁵ Indeed, the connection between the social parent and child did not amount to family life, according to the Commission. However, this finding is now arguably overruled by the decision in *X, Y and Z*. As stated above, unfortunately *Karner* did not directly clarify this matter. However, it can be said with some certainty that, given the elevation of sexual orientation to a suspect ground, any differential treatment as between *de facto* heterosexual and homosexual couples will fall foul of Article 14. The English Court of Appeal has recently determined that a

²⁸¹ (1997) 24 E.H.R.R. 143.

²⁸² *Op. cit.*, pp. 154–5.

²⁸³ *Ibid.*, p. 155.

²⁸⁴ Kil Kelly (2004) *op. cit.*, p. 3.

²⁸⁵ *Kerkhoven v. Netherlands, op. cit.*

difference in treatment under a housing benefit scheme, which was based solely on the sexual orientation of a *de facto* family member, amounted to unlawful discrimination under the Human Rights Act 1998.²⁸⁶

As noted above, there is some doubt as to whether ‘family life’ includes prospective adopters. In *Fretté v. France*²⁸⁷ the Court found that a decision not to allow a gay man to adopt a child fell within the State’s margin of appreciation.²⁸⁸ There was no contravention of Article 14 because the State was pursuing a legitimate aim, that is protection of the rights and health of children that might be eligible for adoption. The Court noted that there was very little common ground between the Member States – in general the issue seemed to be going through a transitional phase – and so a broad margin of appreciation had to be left to the authorities of each State, who were in direct and continuous contact with the vital forces of their countries and were, in principle, better placed than an international court to evaluate local needs and conditions. It is worth noting that the decision was based on the narrowest of margins: four members of the Court dismissed the applicant’s claim, while three found in favour. However, three of the seven judges found that Article 8 was inapplicable and so did not agree that it was necessary to consider whether the difference in treatment accorded to Mr Fretté was justified. As a result the exact implications of the Convention’s jurisprudence for Irish adoption law are difficult to quantify.

Judgments pertaining to matters other than the parent–child relationship also establish that governments can prioritise conventional family forms. The Court found in *Johnston* that Article 8 did not impose a positive obligation on States to provide for legal recognition of the status of cohabitation. In a 1986 admissibility decision²⁸⁹ the Commission on Human Rights found that the situation of a married and *de facto* couple could not be considered equivalent for the purposes of taxation assessments, on the basis that marriage is a social and legal institution with a particular status. Article 14 was inapplicable as a result.

The Court has since found on a number of occasions that married and *de facto* couples may be regarded as being in an analogous position for the purposes of an Article 14 assessment, and so any difference in treatment must at least be justified on objective grounds. However, the margin of appreciation afforded to States is very wide. *Saucedo Gomez v. Spain*²⁹⁰ dealt with national provisions on the allocation of the family home and maintenance payments. The applicant had cohabited with her partner for some 18 years. Following the breakdown of their relationship, she sought a court order granting use of the family home and financial support; the claim was dismissed by the national court on the basis that the relevant legislation did not apply to *de facto* relationships. While the Strasbourg Court accepted that the facts disclosed the existence of family life, the differential treatment of spouses and cohabitants pursued a legitimate aim (protection of the traditional family) and the means used to advance that aim were reasonable and objective. Regulation of the legal status of married and

²⁸⁶ *M. v. Secretary of State for Work and Pensions* [2004] EWCA Civ 1343; [2005] 2 W.L.R. 740.

²⁸⁷ Application No. 36515/97, 26 February 2002.

²⁸⁸ See discussion by T. Stone (2003) ‘Margin of Appreciation Gone Awry: The European Court of Human Rights’ Implicit Use of the Precautionary Principle in *Frette v. France* to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation’, *Connecticut Public Interest Law Journal* 3, pp. 270–94.

²⁸⁹ *Lindsay v. United Kingdom*, Application No. 11089/84, 11 November 1986, 49 D & R 181.

²⁹⁰ Application No. 37784/97, 26 January 1999.

unmarried couples fell into the Member States' margin of appreciation. The Court stated that 'social reality shows the existence of stable unions between men and women [outside marriage]...It is not however for the Court to dictate, nor even to indicate, the measures to be taken in relation to such unions, the question being one within the margin of appreciation of the respondent government, which has the free choice of the means to be employed, as long as they are consistent with the obligation to respect family life protected by the Convention.'²⁹¹

The ECtHR applied the same reasoning in *Shackell v. UK*,²⁹² holding that the surviving partner of a 17-year *de facto* relationship was not entitled to the same benefits afforded to widows.²⁹³

*Mata Estevez v. Spain*²⁹⁴ concerned pension rights. The applicant complained that the Spanish Government's refusal to award him a survivor's pension after his male partner's death amounted to discriminatory treatment infringing his right to respect for private and family life. His claim did not succeed, because the Court accepted that reservation of eligibility for such benefits to spouses pursued the legitimate aim of 'the protection of the family based on marriage bonds'. Since unmarried heterosexual partners that were unable to marry prior to the introduction of divorce were also eligible for the pension, the case implicates direct discrimination on the grounds of sexual orientation and so raises distinct concerns to those addressed in *Mata Estevez* and *Shackell*. It was submitted that marital status (at that time) ought to have been considered immutable in relation to the applicant and other members of lesbian or gay *de facto* couples. De Schutter maintains that the admissibility decision was 'very poorly reasoned'²⁹⁵ and Wintemute points out that the outcome may have been influenced by the fact that the applicant was not represented by a lawyer.²⁹⁶ The judgment was also issued prior to that in *Karner*, which signals that a higher level of justification will be required in future cases concerning sexual orientation discrimination. In that decision the ECtHR emphasised that Contracting States affording more favourable treatment to 'traditional' heterosexual families would be required to demonstrate that measures aimed at advancing that goal were *necessary*. While the Court's jurisprudence indicates that it will continue to afford considerable discretion to Member States on the question of preferences for married couples, differences in treatment as between same-sex and opposite-sex *de facto* partners entail direct discrimination on the basis of sexual orientation and so fall into a distinct category.

²⁹¹ *Information Note No. 2 on the Case Law of the Court* (January 1999).

²⁹² Application No. 45851/99, 27 April 2000.

²⁹³ See note on the case by De Schutter *op. cit.*, p. 44.

²⁹⁴ Application No. 56501/00, 10 May 2001.

²⁹⁵ *Op. cit.*, p. 44.

²⁹⁶ 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), pp. 505–26, at p. 514.

3.2.4 Article 12: The Right to Marry

Article 12 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.

While the right is subject to ‘the national laws governing the exercise of this right’, this does not mean that the scope accorded the right is entirely a matter for the Contracting State. If that were the case, as the European Commission has noted, Article 12 would be redundant.²⁹⁷

The ECtHR will act where a Contracting State, in refusing to recognise gender reassignment, prevents the marriage of a transsexual person to a person of the gender opposite to that to which the person has been reassigned. Thus, in *Goodwin*²⁹⁸ the Court ruled that the failure to recognise Ms Goodwin’s gender reassignment constituted an infringement of Article 12, as it prevented her from marrying her male partner. The Court emphasised that any restrictions, limitations or prohibitions on the right must be in pursuit of a legitimate aim and must be proportionate. Proportionality includes the requirement that they must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.

With respect to lesbian or gay couples, the current position is that the right to marry does not extend to such partnerships. However, it should be noted that in *Goodwin* the Court departed from precedents which stipulated that the partners to a marriage had to be of opposite *biological* sex.²⁹⁹ It is submitted that the wording of the Article may be sufficiently broad to allow for a finding in future to the effect that the right to marry be extended to opposite-sex couples. The provision does not explicitly state that men and women may only marry *each other*. Such a prospect is strengthened by at least two further factors. First, in *Goodwin* the Court held that ‘the inability of *any* couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision’.³⁰⁰ In addition, the Court noted that any reference to men and women has been removed from the parallel EC provision, Article 9 of the European Charter of Fundamental Rights. Second, should the critical mass of States that recognise lesbian and gay marriage grow, arguably the margin of appreciation afforded other countries would correspondingly contract. However, as noted above, the Court accords States a degree of discretion on certain ‘moral’ issues and does not require adherence to a uniform position in the realisation of Convention standards (section 3.2.1). Consequently, a finding to the effect that Article 12 embraces the right of lesbian and gay people to marry may not issue, even in the event that same-sex marriage is widely established at national level throughout Europe.

²⁹⁷ *Hamer v. United Kingdom* 24 DR 5 (1979) 14, Eur Comm HR, para. 60.

²⁹⁸ *Goodwin v. United Kingdom and I v. United Kingdom*, *op. cit.*

²⁹⁹ *S. v. UK*, 47 DR 274 [1986], ECtHR; *Rees v. UK* (1986) E.H.R.R. 56.

³⁰⁰ *Op. cit.*, para. 58 (emphasis added).

3.2.5 The Right to Property: Protocol 1, Article 1

Article 1 of Protocol 1 provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The guarantee is aimed at reconciling the public interest with the rights of property owners and the Court has traditionally afforded the signatory States a wide margin of appreciation in assessing how that balance should be struck.³⁰¹ Where, however, the badge of differentiation in issue is one that the ECtHR considers ‘suspect’, a difference in treatment may command strict scrutiny. For example, claims of sex discrimination with respect to social security benefits were upheld in *Van Raalte v. The Netherlands*³⁰² and *Willis v. United Kingdom*.³⁰³ Because the difference in treatment between men and women was not based on any ‘objective and reasonable justification’, Article 1 taken together with Article 14 were violated.

The meaning of property for the purposes of Article 1 is autonomous and quite wide.³⁰⁴ According to case law, compulsory contributions to state benefit schemes constitute ‘contributions’ within the meaning of section 2 of that Article.³⁰⁵ For example, in *X v. Sweden*³⁰⁶ the Commission found that, although there is no right under the Convention to a pension as such, the payment of contributions may give rise to a proprietary right to derive benefit from the fund in question.

Stec and others v. United Kingdom,³⁰⁷ albeit an admissibility decision, must be regarded as clarifying the Court’s jurisprudence on the question of whether non-contributory social welfare schemes also constitute ‘possessions’ for these purposes.³⁰⁸ The ECtHR considered that its approach to Article 1 should reflect the reality of the way in which welfare provision is currently organised within the Contracting States. Across the Council of Europe a wide range of social security benefits are designed to confer entitlements that arise as of right and those benefits are

³⁰¹ See also Arnardóttir *op. cit.*, pp. 160–4, and van Dijk and van Hoof *op. cit.*, pp. 618–43.

³⁰² (1997) 24 E.H.R.R. 503.

³⁰³ Application No. 36042/97, 11 May 1999.

³⁰⁴ See generally A. R. Coban (2004) *Protection of Property Rights Within the European Convention on Human Rights* (Aldershot: Ashgate), Chapter 6.

³⁰⁵ See *Van Raalte v. the Netherlands*, *op. cit.*; *Roshka v. Russia*, Application No. 63343/00, 6 November 2003; *Frátrik v. Slovakia*, Application No. 51224/99, 25 May 2004.

³⁰⁶ (1986) 8 E.H.R.R. 425.

³⁰⁷ Application Nos: 65731/01 and 65900/01, 6 July 2005.

³⁰⁸ Although the decision in *Gaygusuz v. Austria* (1996) 23 E.H.R.R. 364 was indicative of a shift towards recognising both contributory and non-contributory pension schemes as falling within the ambit of Article 1, the Court’s dicta to that effect were *obiter*. See also Coban *op. cit.*, pp. 157–60, and C. Krause and M. Schenin (2000) ‘The Right not to be Discriminated Against: The Case of Social Security’ in T. Orlin et al (eds.) *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Turku/Åbo: Institute for Human Rights), pp. 253–86, at pp.263–9.

funded in a large variety of ways (some are paid for by contributions to a specific fund, while some are paid out of general taxation). Given the variety of funding mechanisms, and the interlocking nature of benefits under most welfare systems, in the ECtHR's view it was increasingly artificial to hold that only benefits financed by contributions to a specific fund fell within the scope of the Protocol's guarantee. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of tax. The Court concluded:

If...a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements...In cases, such as the present, concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question...Although Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14.³⁰⁹

De Schutter sums up the position with respect to public law claims in stating that 'the European Convention on Human Rights in fact prohibits any discrimination in the field of social security or social aid'.³¹⁰

While Protocol 1 does not protect a right to acquire possessions or to inherit property, succession may come within the ambit of the right to family life. Article 8 does not, however, guarantee a definite share.³¹¹ According to the Northern Ireland Human Rights Commission, Article 1 is also 'directly relevant to ancillary relief and distribution of assets' upon the breakdown of relationships.³¹² However, because the Convention does not confer a right to acquire possessions, claims to a beneficial interest in a home may fall outside the ambit of Article 1 and Article 8.³¹³ Protocol 12 may prove significant in this respect.³¹⁴

Despite this uncertainty, a range of domestic laws covering both private and public interests fall within the scope of Protocol 1 and so are capable of engaging Article 14.

Denying legal protection to cohabiting couples, heterosexual or homosexual, may well involve breaches of their property rights under this provision when combined with the Convention's prohibition of discrimination. In line with the case law considered above, a difference in any treatment as between married and *de facto*

³⁰⁹ *Ibid.*, paras. 54–5.

³¹⁰ *Op. cit.*, p. 23.

³¹¹ *Marckx v. Belgium* (1979) 2 E.H.R.R. 330, para. 50, and discussion by Coban *op. cit.*, pp. 146–7.

³¹² Northern Ireland Human Rights Commission (2001) *Enhancing the Rights of Lesbian, Gay and Bisexual People in Northern Ireland* (Belfast: NIHRC), p. 22.

³¹³ See S. Wong (2005) 'The Human Rights Act 1998 and the Shared Home: Issues for Cohabitants', *Journal of Social Welfare and Family Law* 27(3–4), pp. 265–79, at pp. 267–8.

³¹⁴ *Ibid.*

couples must be justified on reasonable and objective grounds. In *PM v. United Kingdom*³¹⁵ the Court considered whether the denial of income tax relief on a father's maintenance payments on the basis that he had never been married to the child's mother breached Article 14 in conjunction with Protocol 1, Article 1. The Court was careful to distinguish the applicant's situation from cases where *de facto* couples compared themselves to subsisting married couples, and further stated that in some cases differential treatment on the basis of marital status could have an objective and reasonable justification. However, as a general rule unmarried fathers who had established family life with their children could claim equal rights of contact and residence with married fathers under the terms of the Convention. On the facts there was no justification for treating the applicant differently from a married father who had divorced and separated from the mother as regards the deductibility of the maintenance payments. The applicant had been acknowledged as the father of the child and had acted in that role, including fulfilling his financial obligations towards her. The Court noted that the purpose of the deductions was purportedly to make it easier for married fathers to support a new family; it was not clear why that relief should not also be available to unmarried fathers also wishing to enter into new relationships. While the Court underlined that the finding of discrimination on the basis of marital status was tied to the facts before it, the judgment arguably heralds a more stringent stance towards the margin of appreciation in this area.

In future case law it is to be expected that the Court will be confronted directly with the issue of indirect discrimination on the grounds of sexual orientation. Given that same-sex couples may not currently marry in all but three of the Contracting States, members of such partnerships may claim that the ECtHR, in line with the principles enunciated in *Thlimmenos*, ought to regard failure on the part of a State to treat gay and lesbian relationships differently to their opposite sex counterparts as amounting to discriminatory treatment.

3.2.6 Potential Impact of Protocol 12

The recently concluded Protocol 12 creates an independent guarantee of equal treatment and so affords protection that extends beyond non-discrimination in relation to the other Convention rights.³¹⁶ Its potential derives to a large extent from the fact that, like the parallel provision in Article 26 ICCPR (see section 3.3.2 below), it will enable the Strasbourg Court to hear cases implicating access to social, economic and cultural rights. According to De Schutter, the principal areas of concern will be access to public places, the provision of goods and services, access to citizenship, and access to employment.³¹⁷ While the Irish government has signed the Protocol, it has not yet ratified it.³¹⁸ The Protocol came into force on 1 April 2005 but at the time of writing only binds eleven countries.

³¹⁵ Application No. 6638/03, 19 July 2005.

³¹⁶ See generally G. Moon (2000) 'The Draft Discrimination Protocol to the European Convention on Human Rights: A Progress Report', *European Human Rights Law Review* 1, pp. 49–53, and R. Wintemute (2004) 'Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No. 12 ECHR: Part 2', *European Human Rights Law Review* 5, pp. 484–99.

³¹⁷ *Op. cit.*, p. 24.

³¹⁸ By signing a treaty, a State signals its intention to become a party; it is not, however, bound by the signature.

According to the Protocol's explanatory memorandum, the Strasbourg Court's interpretation of Article 14 is intended to apply to the new equality guarantee. As a result, pre-existing case law to some extent may throw light on what one can expect the new measure to deliver. Article 1 of the Protocol provides:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The list of protected grounds contained mirrors those of Article 14.³¹⁹ Ultimately the Council of Europe considered the inclusion of additional express grounds unnecessary, since the list is not exhaustive, and because of the perceived danger that inclusion of any particular additional ground could be interpreted as excluding others not specifically alluded to. As noted above, the Court has interpreted Article 14 as including discrimination against people falling within the following grounds: sexual orientation, birth inside or outside marriage and marital status.

As to whether Article 1 *obliges* Contracting States to take positive steps to prevent discrimination, the Explanatory Memorandum states that, 'while such positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals'.³²⁰ It goes on to stipulate that nevertheless 'the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination.' This mirrors comments made by the Court in several judgments, including *Botta v. Italy*³²¹ and *Airey v. Ireland*.³²² Although Article 1 is directed in the first instance against discrimination on the part of the State through laws or the actions of public authorities, including courts, the reference to the 'enjoyment' of rights being 'secured' indicates there is an obligation upon States to ensure that steps are taken to prevent discrimination as between private parties. Arguably a stronger case for horizontal application could be made in relation to private entities that are performing functions contracted out by the State.³²³ The extent to which the guarantee will be accorded horizontal effect must await appropriate case law.

³¹⁹ Article 1 of the Protocol provides: '1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.' **[Why is this repeated here? Should it give the text of Article 14?]**

³²⁰ Para. 24.

³²¹ (1998) 26 E.H.R.R. 241. Bratza J. stated that, although the object of the right to respect for one's family life (Article 8) 'is essentially that of protecting the individual against arbitrary interference by the public authorities . . . this provision may nonetheless, in certain cases, impose on those States positive obligations inherent in an effective respect for private life. These positive obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.'

³²² (1979) 2 E.H.R.R. 305.

³²³ See generally M. Sunkin (2004) 'Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority under the Human Rights Act', *Public Law* [2004], pp. 643–58.

The term ‘public authority’, in line with Article 8 (2) and Article 10 (1), covers not only administrative authorities but also the courts and legislative bodies. Paragraph 22 of the Explanatory Memorandum provides:

In particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

If ratified by the Irish Government, Protocol 12 may be of some importance in relation to the acts of public authorities. In particular it would appear to cover a wider range of activities than the ‘services’ addressed by the Equal Status Acts 2000–2004. As discussed further in Chapter 4 (4.2.5; 4.6.2.1; 4.10), the domestic legislation does not cover some key functions of public bodies; there is no such limitation in Protocol 12. Furthermore, the Acts do not prohibit the taking of any action that is required by or under ‘any enactment or order of a court’.³²⁴ Protocol 12, in direct contrast, is applicable to ‘any right set forth by law’.

3.2.7 The European Social Charter

The European Social Charter³²⁵ recognises a considerable number of social rights, including the rights to work (Articles 1, 2, 3, 4, 7, 8, 9, 10 and 15), to social security and assistance (Articles 11–14), to family protection (Article 16) and certain migrants’ rights (Articles 18–19). A Revised Social Charter came into force in 1999³²⁶ and provides further safeguards for economic and social rights through, for example, the right to protection from poverty and social exclusion.³²⁷ Ireland ratified the Revised Charter in 2000³²⁸ and has also accepted the right of collective complaint, set out under a 1995 Additional Protocol, which allows given trade unions, employers’ organisations or NGOs to bring complaints against States to the European Committee of Social Rights.³²⁹

³²⁴ Section 14(a) (i), ESA 2000.

³²⁵ The *European Social Charter* (E.T.S. No. 35) opened for signature on 18 October 1961 and entered into force on 26 February 1965. Ireland ratified the Charter on 7 October 1964.

³²⁶ The *European Social Charter (Revised)* (ETS No. 163) opened for signature on 3 May 1996 and entered into force on 1 July 1999.

³²⁷ *Ibid.*, Article 31.

³²⁸ In a Declaration contained in the instrument of ratification of the Revised Charter and in a letter from the Permanent Representative of Ireland to the Council of Europe dated 4 November 2000, the Government of Ireland opted out of Article 31 on the right to housing.

³²⁹ *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (E.T.S. No. 158); opened for signature on 9 November 1995 and entered into force on 1 July 1998.

To date, application of the Charter through both the reporting system and collective complaints mechanism has generated little concrete material of assistance to *de facto* couples.³³⁰ The European Committee of Social Rights affords a high degree of deference to States Parties when affording legal protection to the family, as required under Article 16.³³¹ Measures such as housing policy, social welfare benefits and protection against domestic violence are generally not interrogated for potentially discriminatory effects on the grounds of marital status (except insofar as single-parent families are concerned).³³²

In part this may be due to the absence of a right to be free from discrimination as such under the 1961 Charter, and the limited number of grounds set out in the Preamble:

Considering that the enjoyment of social rights should be secured without discrimination on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin.

Both ‘sexual orientation’ and ‘marital status’ are notably absent from the list.

The Appendix to the 1961 Charter defines ‘family’ in the context of the protection of migrant workers as ‘at least his wife and dependent children under the age of 21 years’. Article 19(6) of the Charter states that ‘[w]ith a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance on the territory of any other contracting party, the contracting parties undertake to facilitate as far as possible the family reunion of a foreign worker authorised to establish himself on the territory’. While the Revised Social Charter renders certain provisions gender neutral (replacing the term ‘wife’ with ‘spouse’) and allows entry of ‘unmarried children, as long as the latter are considered to be minors by the receiving state and are dependent on the migrant worker’, a clear preference for married couples is retained.³³³

The advent of an explicit, cross-cutting non-discrimination provision in the form of Article E of the Revised Charter may, however, prove significant in future:

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

Notably, the ESCR has reinforced the stance adopted by the ECtHR by underlining that the list of discriminatory grounds set out in Article E is not exhaustive and that both direct and indirect discrimination are prohibited.³³⁴

³³⁰ See generally Krause and Schenin *op. cit.*, pp. 269–77, and L. Samuel (1997) *Fundamental Social Rights: Case Law of the European Social Charter* (Strasbourg: Council of Europe).

³³¹ Article 16 provides that ‘[w]ith a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life’.

³³² The Committee considers Ireland to be in compliance with Article 16 and has not as of yet questioned the manner in which the State defines the family for the purposes of that provision: *Conclusions: Ireland 2004*, pp. 23–4 (<http://www.coe.int>).

³³³ The scope of these articles is also limited to migrant workers who are nationals of States parties to the Charter.

³³⁴ See Explanatory Report, paras. 135–6 (<http://conventions.coe.int/Treaty/EN/Reports/HTML/163.htm>).

3.3 United Nations Instruments

3.3.1 Introduction

This section opens with an account of the International Covenant on Civil and Political Rights and the associated jurisprudence of the UN Human Rights Committee (HRC). It goes on to survey briefly a number of other relevant UN instruments, focusing on discrimination prohibitions contained in CEDAW, UNCRC and ICESCR, and closes with a review of the Convention on the Rights of Migrant Workers.

3.3.2 International Covenant on Civil and Political Rights

The UN's most widely recognised instrument, the International Covenant on Civil and Political Rights (ICCPR), was ratified by Ireland in 1989. In ratifying the First Optional Protocol to ICCPR Ireland also accepted the jurisdiction of the Human Rights Committee to hear individual petitions alleging violations of the Covenant's provisions.³³⁵ If a communication is declared admissible, the HRC considers the case on the basis of written submissions and delivers its 'views'. The Committee is not a judicial body and its decisions are not binding as such;³³⁶ however, remedial action is often recommended and in that event the State concerned is requested to respond within a specified period.³³⁷

Of the various rights protected we discuss those of most immediate relevance to *de facto* couples: those concerning private life and protection of the family (Articles 17 and 23 respectively) and Article 26, which provides for a general principle of non-discrimination.

Article 26: Non-Discrimination

Article 26 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.

Through its jurisprudence under the Optional Protocol, General Comments³³⁸ and Concluding Observations to State party reports, the Human Rights Committee has

³³⁵ Individual complaints can only be made against States that have ratified the First Optional Protocol to the ICCPR (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entering into force 23 March 1976, in accordance with Article 9). See McGoldrick *op. cit.*, Chapter 4.

³³⁶ McGoldrick *op. cit.*, pp. 54–5, 150–6.

³³⁷ See generally P. Alston and H. Steiner (2000) *International Human Rights in Context: Law, Politics, Morals*, 2nd edition (Oxford: Oxford University Press), Chapter 9, and H. Steiner (2000) 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee' in P. Alston and J. Crawford (eds.) *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press), pp. 15–54.

³³⁸ See, in particular, General Comment 18, Non-discrimination, UN Doc. HRI/GEN/1/Rev. 3 (1989), 26–29, and General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004).

elaborated on the nature of this obligation. Articles 2(1) and 3 buttress the free-standing discrimination prohibition contained in Article 26.

Grounds of discrimination

As will be clear from the wording of the Article, while some prohibited grounds of discrimination are explicitly identified, the list is not exhaustive. Although the Committee has yet to supply clear guidance as to how it decides whether a difference in treatment falls within the category of ‘other status’, it has admitted communications alleging discrimination on the basis of ‘marital status’³³⁹ and ‘sexual orientation’.³⁴⁰ Furthermore, in its comments on State reports the Committee has specified that Article 26 also covers ‘illegitimacy’³⁴¹ and ‘family responsibility’.³⁴²

In practice the HRC considers that some grounds, in particular sex and ‘race’, merit strict scrutiny.³⁴³ Sex discrimination is further explicitly prohibited in Article 3, which places a duty on States Parties to ensure ‘the equal right of men and women to the enjoyment of all civil and political rights’.³⁴⁴ The approach adopted with respect to discrimination on the basis of marital status and sexual orientation is dealt with below.

Scope

All public bodies must comply with Article 26.³⁴⁵ Unlike Article 8 of the ECHR, the right not to be discriminated against under Article 26 is an independent human right. In other words, its scope extends beyond the civil and political rights set out in the Covenant to encompass rights found in other treaties such as the International Covenant on Economic Social and Cultural Rights.³⁴⁶ In *Broeks v. The Netherlands*³⁴⁷ the HRC confirmed that Article 26 extends to all government action:

Although Article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligations with respect to matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State’s sovereign power, then such legislation must comply with Article 26 of the Covenant.³⁴⁸

³³⁹ *Danning v. Netherlands* (180/1984), *Sprenger v. Netherlands* (395/1990), *Hoofdman v. Netherlands* (602/1994).

³⁴⁰ In *Toonen v. Australia* (488/1992) the HRC established that sexual orientation falls under the prohibition of discrimination on the grounds of ‘sex’ under Article 26 (para. 8.7).

³⁴¹ (2001) UN doc. CCPR/CO/73/UK, para. 30; (2001) UN doc. CCPR/CO/72/NET, para. 21.

³⁴² (1996) UN doc. CCPR/C/79/Add.57, para. 13.

³⁴³ See Lord Lester of Herne Hill and S. Joseph (1995) ‘Obligations of Non-Discrimination’ in D. Harris and S. Joseph *The International Covenant on Civil and Political Rights and the United Kingdom Law* (Oxford: Clarendon Press), at pp. 575–6, and G. Moon (2003) ‘Complying with its International Human Rights Obligations: The United Kingdom and Article 26 of the International Covenant on Civil and Political Rights’, *European Human Rights Law Review* [2003] 3, pp. 283–307, at pp. 291–3.

³⁴⁴ See also General Comment 28, Equality of Rights between Men and Women (Article 3), CCPR/C/21/Rev.1/Add.10 (2000).

³⁴⁵ See C. Edelenbos (2001) ‘Article 26, the Human Rights Committee’s Views and Decisions: The Way of the Future?’ in G. Alfredsson et al (eds.) *International Human Rights Monitoring Mechanisms* (The Hague: Kluwer Law International), at pp. 126–7.

³⁴⁶ See generally T. Choudhury (2003) ‘Interpreting the Right to Equality Under Article 26 of the International Covenant on Civil and Political Rights’, *European Human Rights Law Review* 1, pp. 24–52, and Krause and Schenin *op. cit.*

³⁴⁷ Communication No. 172/1984.

³⁴⁸ *Ibid.*, para. 12.4.

This approach is reinforced in General Comment 18, which stipulates that:

While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.³⁴⁹

As outlined below, the extensive reach of the non-discrimination guarantee has proved significant with respect to individual communications by *de facto* couples. In particular it has meant that a number of complaints addressing substantive issues such as social protection payments have been based solely on Article 26.

Definition of discrimination

As Moon notes, Article 26 comprises three elements.³⁵⁰ Paralleling the Irish Constitution's guarantee of equality before the law,³⁵¹ the first limb requires that laws be applied in a formally equal manner, at a minimum forbidding arbitrary application of the law. A second element stipulates that all persons 'are entitled without any discrimination to the equal protection of the law', and so obliges the State Parties to refrain from any discrimination when enacting laws. According to General Comment 18, 'when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory'.³⁵² Article 26 further obliges the State to actively prohibit discrimination.³⁵³ For example, the HRC has called on states to repeal laws criminalising homosexuality and, more recently, to also specifically prohibit any discrimination based on sexual orientation.³⁵⁴

While Article 26 does not define 'discrimination', 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

³⁴⁹ *Op. cit.*, para. 12.

³⁵⁰ G. Moon (2003) 'Complying with Its International Human Rights Obligations: The United Kingdom and Article 26 of the International Covenant on Civil and Political Rights', *European Human Rights Law Review* [2003] 3, pp. 283–307.

³⁵¹ On which, see Chapter 4.2.

³⁵² *Op. cit.*, para. 12. On the distinction between equality before the law and equal protection of the law as it applies in the Canadian context, see E. Grabham (2002) 'Law v. Canada: New Directions for Equality under the Canadian Charter?' *Oxford Journal of Legal Studies* 22, pp. 641–61.

³⁵³ General Comment 31, *op. cit.*, para. 8.

³⁵⁴ See, for example, the Committee's Concluding Observations re Poland: 29/07/1999, CCPR/C/79/Add.110, para. 23; Poland 02/12/2004 CCPR/CO/82/POL, para. 18.

which is legitimate under the Covenant'.³⁵⁵ Use of the term 'purpose or effect' in the textual provision signals that both direct and indirect discrimination are impermissible.³⁵⁶ A discriminatory provision cannot be justified on the basis of administrative convenience.³⁵⁷

In the field of social security, the Committee traditionally considered that indirect discrimination was beyond the reach of Article 26.³⁵⁸ However, more recently it has declared admissible a communication that sought to establish disparate impact with respect to such provisions. In *Althammer v. Austria*³⁵⁹ the Committee, although not establishing a violation of the facts, stated that:

A violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affects persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁶⁰

*Danning v. the Netherlands*³⁶¹ involved a Dutch law which provided greater social security payments to a married person compared to an unmarried cohabiting person. The HRC found that the differentiation was based on objective and reasonable criteria and so did not amount to discrimination. Specifically, the differential treatment was justified on the basis that marriage entailed obligations towards one's spouse, such as those concerning maintenance, which were not assumed by *de facto* couples. The Committee also emphasised that the decision to enter into such a marital contract rested 'entirely with the cohabiting persons', thereby placing same-sex partners that cannot marry in a distinct position.³⁶²

Again, in *Sprenger v. the Netherlands*,³⁶³ the HRC found that it was reasonable to treat unmarried opposite-sex couples less favourably than their married counterparts. Similarly in *Hoofdman v. the Netherlands*³⁶⁴ differences in survivor's benefits between married and unmarried couples did not violate Article 26, largely since the Committee considered that the marital status of the heterosexual applicant was freely chosen:

³⁵⁵ General Comment 18, *op. cit.*, para. 13.

³⁵⁶ See, for example, *K. Singh Binder v. Canada* (208/1986), 9 November 1989.

³⁵⁷ *Gueye et al. v. France* (196/1985), para. 9.5.

³⁵⁸ For example, the Committee stated that the 'scope of article 26 of the Covenant does not extend to differences resulting from the equal application of a rule in the allocation of benefits' in *P.C.C. v. Netherlands* (212/1986), 24 March 1988, para. 6.3. See also Choudhury *op. cit.*

³⁵⁹ Communication No. 998/2001, *Rupert Althammer et al. v. Austria*, adoption of views on 8 August 2003, UN Doc. CCPR/C/78/D/998/2001.

³⁶⁰ *Ibid.*, para. 10.2. In a 2004 decision concerning social welfare benefits paid to *de facto* and married couples, the HRC again stated that indirect discrimination was prohibited in that context: Communication No. 976/2001, *Cecilia Derksen et al v. the Netherlands*, adoption of views on 1 April 2004, UN Doc. CCPR/C/80/D/976/2001, para. 9.3.

³⁶¹ Communication No. 180/1984, adoption of views on 9 April 1987, UN Doc. CCPR/C/OP/2, at p. 205.

³⁶² *Ibid.*, para. 14.

³⁶³ Communication No. 395/1990.

³⁶⁴ Communication No. 602/1994.

The Committee recalls its jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party has argued, and this has not been contested by the author, that married and unmarried couples are still subject to different sets of laws and regulations. The Committee observes that the decision to enter into a legal status by marriage, which provides under Dutch law for certain benefits and for certain duties and responsibilities, lies entirely with the cohabiting persons. By choosing not to enter into marriage, the author has not, in law, assumed the full extent of the duties and responsibilities incumbent on married persons. Consequently, the author does not receive the full benefits provided for by law to married persons. The Committee finds that this differentiation does not constitute discrimination within the meaning of article 26 of the Covenant.³⁶⁵

More recently the Committee has clarified that, although adults who ‘choose’ not to marry may not generally complain of differential treatment based on marital status, where children are adversely affected by such a distinction in treatment the same outcome may not issue. *Derksen v. Netherlands*³⁶⁶ involved a differentiation between married and unmarried couples in the field of social security, which the Committee found violated Article 26. While the Dutch government was under no obligation to provide full equivalence in respect of a statutory widows and orphans payment made to *de facto* and married couples, it was under an obligation to treat the children of such unions in a non-discriminatory manner. The facts of the case are quite unusual in that the difference in treatment complained of involved a law that equalised the position of unmarried and *de facto* partners in relation to certain benefits, but only from a given date. In essence the violation of Article 26 stemmed from the fact that, having decided to accord equal treatment to these two groups, the measure introduced an arbitrary distinction between children born on given dates. While its value as a general precedent is yet to be determined, it does indicate that the Committee is willing to interrogate the supposed mutability of the marital ground insofar as children are affected.

In *Young v. Australia*³⁶⁷ the Human Rights Committee found that it was unlawful discrimination to deny pensions to surviving same-sex partners of veterans, when unmarried different-sex partners qualified. As such this was an instance of direct discrimination on the grounds of sexual orientation:

In the instant case, it is clear that the author, as a same-sex partner, did not have the possibility of entering into marriage. Neither was he recognised as a cohabiting partner of Mr C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee

³⁶⁵ *Ibid.*, para. 11.4.

³⁶⁶ Communication No. 976/2001, 15 June 2004.

³⁶⁷ Communication No. 941/2000, 6 August 2003.

finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.³⁶⁸

The HRC has yet to consider an application that alleges indirect discrimination on the grounds of sexual orientation, although its comments in *Joslin*³⁶⁹ (discussed below) and *Althammer*³⁷⁰ indicate that the Committee may be favourably disposed towards such a finding. As indicated above, same-sex partners are, in those countries where they cannot marry, in a materially different position to their heterosexual complements. Jurisprudence on indirect discrimination is, however, somewhat inconsistent and so it is difficult to predict the HRC's approach towards the disparate impact of marriage requirements.³⁷¹

Protection of private and family life: Articles 17 and 23

When assessing compliance with both Article 17 and Article 23, the HRC prefers that a flexible interpretation be given to the term 'family', which to a large extent reflects that of the State concerned.³⁷² In practice this means that the Committee does not generally dictate how States should positively protect relationships, but it will intervene in the case of a negative violation of rights (see below).³⁷³

Article 17: Right to privacy

Article 17 provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The majority of Article 17 cases that concern the family element of the provision have also involved Article 23³⁷⁴ and so these are considered together below. It should first be noted that, similar to the ECHR, the individual right to privacy prevents undue State interference in one's sexual relationships. In *Toonen v. Australia*³⁷⁵ the HRC communicated its view to the Australian Government that a Tasmanian law criminalising consensual sex between men was inconsistent with ICCPR. Specifically, Article 17 in conjunction with Article 2 had been violated.

Article 23: Protection of the family

Article 23 ICCPR provides:

³⁶⁸ *Ibid.*, para. 10.4.

³⁶⁹ *Joslin v. New Zealand* (902/1999), 30 July 2002.

³⁷⁰ *Op. cit.*, para. 10.2.

³⁷¹ See Choudhury *op. cit.*; Joseph et al *op. cit.*, paras. 23.35–23.40; Lester and Joseph *op. cit.*, pp. 575–7.

³⁷² On Article 17, see General Comment 16: The right to respect of privacy, family, home and correspondence and protection of honour and reputation, 32nd Session, 1988, at para. 5. On Article 23, see General Comment 19: Protection of the family, the right to marriage and equality of the spouses, 39th Session, 1990, at para. 2.

³⁷³ See L. Hodson (2004) 'Family Values: The Recognition of Same-Sex Relationships in International Law', *Netherlands Quarterly of Human Rights* 22(1), pp. 33–57, at pp. 36–8.

³⁷⁴ Joseph et al *op. cit.*, p. 489.

³⁷⁵ Communication No. 488/1992.

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognised.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

As mentioned above, when assessing communications the HRC generally defers to the position under national law. In General Comment 16 the Committee underlined:

Regarding the term ‘family’, the objectives of the Covenant require that for the purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.³⁷⁶

Consequently, States are not obliged to afford *de facto* couples positive recognition of their relationships in the form of, for example, a registration scheme.³⁷⁷ However, a State’s discretion is not unfettered: ‘A State could not limit the definition by applying structures or values which breach international human rights standards. Furthermore, a State cannot prescribe a narrower definition of ‘family’ than that adopted within that State’s society.’³⁷⁸ Thus international law, in particular the UN Convention on the Rights of the Child, does not tolerate differences in treatment as between children born outside or within marriage.³⁷⁹ Protection of the parent–child relationship irrespective of marital status is addressed in *Hendriks Netherlands*:³⁸⁰

In examining the communication, the Committee considers it important to stress that article 23, paragraphs 1 and 4, of the Covenant set out three rules of equal importance, namely, that the family should be protected, that steps should be taken to ensure equality of rights of spouses upon the dissolution of the marriage and that provision should be made for the necessary protection of any children. The words ‘the family’ in article 23, paragraph 1, do not refer solely to the family home as it exists during the marriage. The idea of the family must necessarily embrace the relations between parents and child. Although divorce legally ends a marriage, it cannot dissolve the bond uniting father – or mother – and child; this bond does not depend on the continuation of the parents’ marriage. It would seem that the priority given to the child’s interests is compatible with this rule.³⁸¹

³⁷⁶ General Comment 16, *op.cit.*, para. 5.

³⁷⁷ See Hodson *op. cit.*

³⁷⁸ Joseph at al *op. cit.*, p. 587.

³⁷⁹ See also Article 24 ICCPR.

³⁸⁰ Communication No. 201/1985 [1988] UNHRC 12.

³⁸¹ *Ibid.*, para. 10.3. See also *Balaguer v. Spain*, Communication No. 417/1990 [1994] UNHRC 36 (29 July 1994), para. 10.2: ‘the term ‘family’ must be understood broadly; it reaffirms that the concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child. Some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationship, etc.’

*Ngambi v. France*³⁸² further illustrates the delicate balance between deference to a State's practices and affording individuals protection under Article 23:

Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification. The Committee recalls that the term 'family', for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect.³⁸³

A *de facto* heterosexual couple and their child were afforded protection under Articles 17, 23 and 24, in the context of immigration, in *Winata v. Australia*.³⁸⁴ Notably, their status as a qualifying family was not contested.

The HRC has yet to decide whether lesbian and gay couples (with or without children) fall within the concept of 'family'. As is the case under the ECHR, while *de facto* relationships may amount to a 'family', they need not be treated in the same manner as marital ones. The jurisprudence canvassed above, concerning Article 26, clearly illustrates this stance. Furthermore, subsections (2) (3) and (4) of Article 23 confer special rights on married couples and as between spouses. The 'right to found a family' is guaranteed only to those who have a right to marry and therefore probably excludes same-sex couples,³⁸⁵ indicating that the HRC would not entertain complaints from such couples pertaining to adoption or access to assisted reproduction facilities.

Article 23 refers to the right of men and women to marry.³⁸⁶ The Human Rights Committee has found that the express reference to gender means that failure to provide for same-sex marriage will not lead to a violation of the prohibition on discrimination on grounds of sexual orientation under the Covenant.³⁸⁷ The *obiter* statement in the Individual Opinion of Mr Lallah and Mr Scheinin is worth noting, since it raises the prospect of indirect discrimination constituting a violation of the Covenant in future cases:

No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognised same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited

³⁸² Communication No. 1179/2003 (16 July 2004).

³⁸³ *Ibid.*, para. 6.4.

³⁸⁴ Communication No. 930/00 (16 August 2001). See also R. Burchill (2003) 'The Right to Live Wherever You Want?: The Right to Family Life Following the UN Human Rights Committee's Decision in *Winata*', *Netherlands Quarterly of Human Rights* 21(2), pp. 225–45.

³⁸⁵ See S. Joseph (2003) 'Human Rights Committee: Recent Cases', *Human Rights Law Review* 3, p. 91, at p. 101.

³⁸⁶ As noted in Chapter 2, the EU Charter in Article 9 refers only to the right to marry, without any reference to sex or gender, thereby not precluding removal of bars on same-sex marriage: '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.'

³⁸⁷ *Joslin v. New Zealand*, Communication No. 902/1999 (30 July 2002).

under [ICCPR] article 26, unless otherwise justified on reasonable and objective criteria.

It is not clear whether the HRC will follow the ECtHR in extending the right to marry to certain individuals that have undergone gender reassignment surgery.

Concluding Observations concerning Ireland

The UN Human Rights Committee considered Ireland's second periodic report at its July 2000 session. As was the case with comments made after review of the government's first report in 1993, the bulk of Committee's recommendations relate to operation of the criminal justice system. However, it also raised some issues that are germane to this report:

- The fact that the references to women in the Constitution could perpetuate traditional attitudes;
- The Committee expressed concern that exemptions under the Employment Equality Act, which allow religious bodies directing hospitals and schools to discriminate in certain circumstances on the ground of religion in employing persons whose functions are not religious.³⁸⁸

These issues are addressed in Chapter 4.

3.3.3 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the 'sister' covenant to the ICCPR and is primarily concerned, as the name suggests, with economic, social and cultural rights, such as those pertaining to social security, housing and an adequate standard of living.³⁸⁹ It sets out a general principle of non-discrimination on the same grounds as the ICCPR in Article 2(2):

The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

While the substantive rights set out under the Covenant are to be progressively realised, the prohibition on discrimination has immediate effect.³⁹⁰

Article 3 reinforces the obligation in Article 2(2) by underlining that Covenant rights should be enjoyed without discrimination based on sex:

³⁸⁸ A/55/40, paras. 422–51, at para. 22.

³⁸⁹ International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46. See generally A. Eide, C. Krause and A. Rosas (2001) *Economic, Social and Cultural Rights: A Textbook*, 2nd edition (The Hague: Kluwer Law International).

³⁹⁰ General Comment 3: The nature of States parties' obligations, UN Doc. E/1991/23, pp. 83-87, para. 1. See also *The Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights*, UN Doc. E/CN.4/1987/17, and the *Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights* (1997), *Human Rights Quarterly* 20, 691 (reprinted in UN Doc. E/C.12/2000/13). On the characterisation of the duties imposed under international human rights law generally, see I. Koch (2005) 'Dichotomies, Trichotomies or Waves of Duties?', *Human Rights Law Review* 5, pp. 81–103.

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Currently there is no individual complaint mechanism under the ICESCR and so there is no jurisprudence to guide interpretation of the Covenant. However, interpretive principles are available in the form of General Comments and observations on the States Parties' reports. Moreover, as discussed above, complaints of discrimination with respect to economic, social and cultural rights can be lodged with the Human Rights Committee under Article 26 of the ICCPR.

As is the case under Article 26 ICCPR, the prohibited grounds are not exhaustive.³⁹¹ Sexual orientation discrimination is prohibited under Article 2(2), as the Committee underlined in its General Comment on the right to the highest attainable standard of physical and mental health, for example (Article 12).³⁹² Although we could find no reference to marital status discrimination, it is certainly not precluded as a badge of differentiation for the purposes of upholding the Covenant.

Unlike the parallel ICCPR guarantee, Article 2(2) is not directed against discrimination in general but must be linked to at least one of the substantive rights contained in Part III of the Covenant. Sepúlveda observes that the 'Committee's approach is close to that of the European Court [of Human Rights] in the sense that it is sufficient that the subject falls within the general scope of the substantive rights'; a concurrent violation of another right need not be established.³⁹³

The CESCR has made it clear that the non-discrimination principle is a core feature of the Covenant, as it notes in General Comment 9:

It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.³⁹⁴

As to the working definition of discrimination employed by the Committee, Sepúlveda concludes that differences in treatment based on objective and reasonable criteria are permissible.³⁹⁵ Through references in General Comments to the 'purposes' and 'effects' of impugned measures, the CESCR has clarified that Article 2(2) captures direct and indirect discrimination.

³⁹¹ See M. Craven (1995) *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford: Clarendon Press), pp. 153 *et seq.*

³⁹² General Comment 14, UN Doc E/C.12/2000/4 Art 12, 18 (11 August 2000).

³⁹³ M. Sepúlveda (2003) *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen/Oxford/New York: INTERSENTIA), at p. 381.

³⁹⁴ General Comment 9: The domestic application of the Covenant, para. 15.

³⁹⁵ Sepúlveda *op. cit.*, pp. 381–91.

Under Article 10:

The States Parties to the present Covenant recognise that:

(1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

(2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

The CESCR has not defined the family that merits ‘protection and assistance’ for the purposes of Article 10, but does require the State Parties’ reports to include information on measures designed to implement its obligations in this sphere. As with the HRC, the Committee on Economic, Social and Cultural rights largely defers to the domestic position but reserves the ability to criticise overly restrictive or discriminatory laws. It has, for example, consistently underlined the obligation to repeal legislation that discriminates against children born outside marriage.³⁹⁶ In discussing the obligation not to discriminate in relation to the right to adequate housing under Article 11, the CESCR commented that ‘the concept of “family” must be understood in a wide sense’.³⁹⁷

In its concluding observations on Ireland’s last report, issued in June 2002,³⁹⁸ the Committee recommended that the Covenant be incorporated into domestic law, on both a constitutional and legislative plane.³⁹⁹ Irish equality legislation prohibits discrimination on specific grounds in selected contexts; some entire areas of State activity are exempt and differential treatment on the sexual orientation ground is sanctioned in the context of social welfare provision (see generally Chapter 4). Therefore, arguably Article 2(2) has not been fully implemented, despite its established status as an immediately realisable obligation requiring judicial remedies.⁴⁰⁰

3.3.4 Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) entered into force in 1981. It defines discrimination against women as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality

³⁹⁶ See, for example, Concluding Observations Sri Lanka E/1999/22, para. 74; Concluding Observations Japan E/C.12/1/Add.67, para. 14.

³⁹⁷ General Comment 4, para. 6.

³⁹⁸ E/C.12/1/Add.77.

³⁹⁹ *Ibid.*, para. 23.

⁴⁰⁰ General Comment 9: The domestic application of the Covenant, E/C.12/1998/24 (1998), para. 9.

of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁴⁰¹

Reference to any ‘distinction, exclusion or restriction’ that has the ‘effect or purpose’ of negating women’s rights signals that both direct and indirect discrimination is prohibited. The Women’s Committee has confirmed this to be the case; General Recommendation 25, for example, provides that State Parties have an obligation ‘to ensure that there is no direct or indirect discrimination against women’.⁴⁰²

Although the primary object of CEDAW is the elimination of discrimination based on sex/gender, the text of the Convention and associated General Recommendations acknowledge that marital status discrimination may adversely affect women.⁴⁰³ In other words, the intersection of sex/gender and marital status may give rise to violations of the Convention.⁴⁰⁴

Article 16 requires states to ‘take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations’. While the Committee’s reviews of State Parties reports have to date focused on the removal of provisions that directly discriminate against married women in particular, given the continued development of standards under CEDAW it is possible that indirectly discriminatory practices will be subject to critical appraisal in the future. In particular it could be argued that the Irish Government’s failure to provide for maintenance as between *de facto* heterosexual couples⁴⁰⁵ constitutes indirect discrimination on the grounds of gender and marital status (see Chapter 4.3). Given established economic inequality between men and women, such failure can be expected to have a disproportionate adverse impact on women.⁴⁰⁶ Such a construction is supported by General Recommendation 21, which states:

Moreover, generally a *de facto* union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.⁴⁰⁷

The Committee goes on to problematise the absence of redistributive measures for members of *de facto* couples upon relationship breakdown:

⁴⁰¹ Article 1.

⁴⁰² General Recommendation 25, UN Doc. HRI/GEN/1/Rev.7 (12 May 2004), pp. 282–90, para. 7.

⁴⁰³ See Articles 1, 11(2) and 16.

⁴⁰⁴ ‘Intersectionality’ is a concept that seeks to embrace the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. See generally Ontario Human Rights Commission (2001) *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims: Discussion Paper* (Ontario: Ontario Human Rights Commission).

⁴⁰⁵ Given that the Convention is concerned with the elimination of gender-based discrimination, rights as between same-sex partners fall outside its ambit.

⁴⁰⁶ On the respective economic status of men and women, see, for example, Central Statistics Office (2005) *Women and Men in Ireland 2005* (Dublin: Stationery Office).

⁴⁰⁷ General Recommendation 21, Equality in Marriage and Family Relations (Article 16) UN Doc. HRI/GEN/1/Rev.6 (4 February 1994), para. 18.

In many countries, property accumulated during a *de facto* relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.⁴⁰⁸

As outlined in Chapter 4, although Ireland does not adhere to a community property regime during the currency of a marriage, upon divorce or separation family law statutes provide for the redistribution of property as between former spouses and the payment of maintenance.⁴⁰⁹ No such provisions exist with respect to unmarried partners.

The Optional Protocol to CEDAW entered into force on 22 December 2000; to date, few individual complaints have been heard and as a result there is little jurisprudence to draw upon.⁴¹⁰ In a complaint concerning State responses to domestic violence⁴¹¹ the Committee on the Elimination of Discrimination Against Women emphasised that it will scrutinise carefully the adequacy of State measures irrespective of the marital status of the parties. It also indicated that the rights to property and privacy could not be accorded priority over the right to physical and mental integrity of domestic violence victims.⁴¹² The stance adopted by the Committee opens up the possibility that the residence and other restrictions set out in the Domestic Violence Acts 1996–2002 in relation to *de facto* couples only could be deemed contrary to the Convention.⁴¹³

Ireland submitted its combined 2nd and 3rd reports⁴¹⁴ to the monitoring committee in 1999. In 2004 the Government's combined 4th and 5th reports were published⁴¹⁵ and a hearing was held in July 2005.⁴¹⁶ While the Committee's Concluding Observations did not specifically address the position of *de facto* couples, on both occasions concern was expressed at the related narrow and stereotypical view of women presented under Article 41 of the Constitution.

3.3.5 Convention on the Rights of the Child

As a backdrop to this discussion, it is worth noting that the Universal Declaration of Human Rights and Fundamental Freedoms specifically prohibits discrimination as between children born to married and unmarried parents:⁴¹⁷

⁴⁰⁸ *Ibid.*, para. 33.

⁴⁰⁹ See, in particular, Chapter 4.3–4.4.

⁴¹⁰ The Optional Protocol to CEDAW was adopted by GA Res. 54/4, 15 October 1999. It provides for individual complaints of violation to be made to the Committee on the Elimination of Discrimination Against Women and an inquiry procedure.

⁴¹¹ Communication No. 2/2003, *Ms. A.T. v. Hungary* (views adopted on 26 January 2005, thirty-second session).

⁴¹² *Ibid.*, para. 9.3.

⁴¹³ See Chapter 4.8.5.

⁴¹⁴ CEDAW/C/IRL/2-3.

⁴¹⁵ CEDAW/C/IRL/4-5. See Irish Human Rights Commission (2005) *CEDAW Submission* (Dublin: IHRC).

⁴¹⁶ CEDAW/C/IRL/CO/4-5.

⁴¹⁷ Adopted by General Assembly Resolution 217A (III) of 10 December 1948.

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

The Convention on the Rights of the Child does not define family life as such but makes several references to parents, guardians and other relatives, indicating that the concept is to be understood broadly.

Article 2 provides that:

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

As in the case under ICCPR and ICESCR, the reference to 'status' may include marital status. Sexual orientation is a protected ground; for example, the UN Committee on the Rights of the Child has interpreted Article 2 of the Convention as barring disparity between heterosexual and homosexual couples' ages of consent.⁴¹⁸

Article 3(1) establishes a principle of interpretation to the effect that in 'all actions concerning children' the best interests of the child shall be considered a primary consideration. Given the reference to 'all actions', arguably States Parties are bound by the best interests standard even with respect to activities that fall outside the Convention's scope.

There is little material concerning derivative protection for the parents of children born into *de facto* relationships. Article 7, which recognises the child's right, insofar as it is possible, to know and to be cared for by his or her parents, gives rise to certain procedural obligations *vis-à-vis* the ties between natural parents and children. For example, when considering the Irish government's first report in 1998, the Committee raised concerns about a number of issues pertaining to children of unmarried parents.⁴¹⁹ Specifically, the Committee pointed to the lack of appropriate procedures for registering birth fathers and the impact of same on consent for adoption. Both points have since been addressed by way of legislation (see Chapter 4).⁴²⁰

Our review of the Committee's general comments and concluding observations did not yield any recommendations to the effect that States had a positive duty to recognise the relationship between children and social parents. Section 28 of the South African Constitution, which broadly gives domestic effect to the UNCRC within that jurisdiction, is instructive in this regard and may be taken as a model of best practice (see Chapter 5.1).

⁴¹⁸ Concluding Observations of the Committee on the Rights of the Child: (Isle of Man) United Kingdom of Great Britain and Northern Ireland, UN Doc CRC/C/15/Add.134 ¶22 (16 October 2000).

⁴¹⁹ Concluding Observations of the Committee on the Rights of the Child: Ireland, UN Doc CRC/C/15/Add.85 (4 February 1998). Ireland ratified UNCRC in 1992.

⁴²⁰ *Ibid.*, para. 17.

3.3.6 UN Convention Relating to the Status of Refugees⁴²¹

Article 12(2) of the Geneva Convention on the Status of Refugees expressly requires contracting States to respect '[r]ights previously acquired by a refugee and dependent on personal status, more particularly, rights attaching to marriage'.⁴²²

While this formulation would appear at first glance to be confined to marital relations, it leaves open the possibility that other relationships recognised by the law of the refugee's state of origin might also attract such recognition. This depends, however, on the recognition by the State of an analogous right in persons who are not refugees. Thus the fact that a refugee may be a registered partner or recognised cohabitee of a person under the law of his or her home state, does not necessarily mean that the host State would be obliged to recognise such a relationship. The right in question must have been 'one which would have been recognised by the law of that State had he not become a refugee'.

3.3.7 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families⁴²³

Although the Convention has not been ratified by Ireland,⁴²⁴ its terms may be instructive as regards the definition of the 'family' in international law generally.⁴²⁵ Article 1(1) in particular requires that the Convention rights are guaranteed:

[E]xcept as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

This formula is unusual in that it makes express reference to marital status as a prohibited ground for discrimination. The non-exhaustive nature of the Article, moreover, leaves open the possibility that sexual orientation would also be recognised as another status upon which discrimination is prohibited.

Article 4, however, is noticeably more circumspect in its definition of a member of the family, alluding to:

[P]ersons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.

⁴²¹ Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950.

⁴²² Article 12(2) of the UN Convention Relating to the Status of Stateless Persons (1954) makes a similar pledge.

⁴²³ Adopted by the General Assembly Resolution 45/158 of 18 December 1990.

⁴²⁴ Irish Human Rights Commission & NCCRI (2004) *Safeguarding the Rights of Migrant Workers and their Families, A Review of EU and International Standards: Implications for Policy in Ireland* (Dublin: IHRC).

⁴²⁵ The Committee on the Elimination of Discrimination Against Women has called on the Irish Government to ratify the Convention: CEDAW/C/IRL/CO/4-5, para. 45.

While this formulation is arguably wide enough to encompass registered partners (provided that the registered partnership is considered to produce effects ‘equivalent to marriage’), it may not cover *de facto* couples, a result that largely negates the terms of Article 1(1) insofar as it relates to adult relationships. However, it is clear that, insofar as children are concerned, Article 4 makes no distinction between children based on marital status.

Chapter 4: Domestic Law

4.1 Introduction and Context

While recent years have seen some legislative tweaking of the definition of family and allied concepts, Irish law in the main still cleaves largely to an exclusive, prescriptive model centred on the institution of marriage. As noted in Chapter 1, this paradigm increasingly does not represent the experience of many thousands of families in Ireland. Despite these social changes, judicial interpretation has not extended the boundaries of the constitutional understanding of family life. With certain notable exceptions, legislation tends to take its cue from this restrictive definition. In sum, and to put the point at its most basic, two persons living together in an intimate relationship will not be recognised as a ‘family’ for most legal purposes *unless* they are party to a valid and subsisting marriage recognised in civil law. Non-marital cohabitation (however lengthy in duration, however profound or loving the relationship on which it is based) is generally not recognised in law. Thus, for most legal purposes, a cohabiting couple has only marginally more rights and obligations towards each other than flat-mates. The law thereby denies the legal status of family to a significant portion of the population and of the total proportion of family units in the State. These problems are particularly entrenched in the case of same-sex couples, who, in addition to being precluded from marrying, are often excluded from measures applying to cohabiting couples outside of marriage.

This effective non-recognition of the non-marital family contrasts sharply with the position under the European Convention on Human Rights (see Chapter 3.2.3). The Convention recognises the right to a family life not only of marital families but also of *de facto* couples and their children, as well as one-parent families and non-custodial parents and their children. The Convention also bans discrimination in the application of these rights, in particular, on the basis of sexual orientation.

4.2 The Definition of Family: Constitutional and Legal Restrictions

4.2.1 Overview

It is generally accepted that in Ireland, with some notable exceptions, a prescriptive model of family recognition has prevailed. At the heart of Irish family law and policy stand Articles 41 and 42 of the 1937 Constitution.⁴²⁶ These provisions – which represent the basic law of the State on this point – guarantee to the family certain rights and privileges, as well as conferring certain obligations on the members of that family. Although these rights are not absolute,⁴²⁷ they place a particularly strong onus on the State in cases where it wishes to intervene in matters reserved to the family.⁴²⁸

⁴²⁶ See also L. Glennon (2002) ‘“The Family” – A Comparative Analysis of a Contextual Definition’, *Irish Journal of Family Law* 2, p. 17, and M. Staines (1976) ‘The Concept of “Family” under the Irish Constitution’, *Irish Jurist* 11(n.s), p. 223.

⁴²⁷ *Murray v. Ireland* [1985] I.R. 532.

⁴²⁸ In several high-profile cases, attempts on the part of the State to intervene in aspects of family life, and in the rearing of children, have been struck down as unconstitutional: See *McGee v. Attorney General*, [1974] I.R. 284 (access to contraception), *North-Western Health Board v. H.W.* [2001] 3 I.R. 623 (healthcare decisions), *In re Article 26 and the Matrimonial Home Bill, 1993* [1994] 1 I.R. 305 (autonomy in the arrangement of property ownership within the family).

The courts have consistently ruled that the concept of ‘family’, as used in the Constitution, is confined exclusively to a prescribed model: that of the family based on a legally subsisting marriage.⁴²⁹ Article 41.3 of the Constitution contains a pledge on the part of the State ‘to guard with special care the institution of Marriage, *on which the Family is founded*, and to protect it against attack’. From this pledge, the Supreme Court has extrapolated that family units not based on marriage are excluded from the remit of the constitutional protection afforded by these Articles.⁴³⁰ Although the Constitution is said to be an ‘organic’ document, capable of changing with the times,⁴³¹ the Supreme Court has as recently as 1996 confirmed this exclusive definition of family.⁴³²

The language of Article 41.3 is noteworthy. It not so much asserts that the family ought to be based on marriage as *assumes* that this is necessarily the case for all families. This may well have been a fair assumption to make in 1937, but it no longer reflects the diversity of family life almost seventy years on. Although marriage rates remain healthy, there is no denying the underlying growth not only in the number of couples who are delaying marriage but also in the proportion of families living together with no expectation of marriage at all. Either for ideological, financial or legal reasons (as, for instance, with same-sex couples who are not entitled to marry), the phenomenon of the non-marital family has become decidedly more prevalent in Irish society (see Chapter 1.2.1.). As Archbold observes, in the Northern Irish context:

Marriage is no longer the only, or even the preferred life choice for enormous numbers of people...and if our legal system ignores these trends, it risks becoming irrelevant, and worse, providing no legal protection to people who may be in great need of it.⁴³³

4.2.2 Constitutional Protection for Marriage

Articles 41 and 42 effectively establish a constitutionally mandated preference for marriage over other alternative household arrangements. The courts have permitted differential treatment in favour of one-parent families. In *MhicMhathúna v. Attorney General*⁴³⁴ the High Court ruled that certain provisions of the social welfare and tax code did not discriminate against a married couple because they were not similarly situated to an unmarried parent living alone. The State was, Carroll J. concluded, entitled to take the view that a one-parent family required support additional to that accorded to families where both parents cohabited. On appeal the decision was upheld; the Supreme Court emphasised the deference owed by the courts to the

⁴²⁹ See Kelly *op. cit.*, pp. 1839–40.

⁴³⁰ *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, *K.C. v. An Bord Uchtála* [1985] I.R. 275, *K. v. W.* [1990] 2 I.R. 437, *W.O’R. v. E.H.* [1996] I.R. 248. See also *Mokrane v. Minister for Justice, Equality and Law Reform*, unreported, High Court, 28 June 2002, in which Roderick Murphy J. confirmed that an asylum applicant seeking leave to remain in Ireland, in part on the basis of his relationship with his child, could not rely on the terms of Article 41 of the Constitution, as he was not married to the mother of the child.

⁴³¹ See the observations of O’Higgins C.J. in *State (Healy) v. Donoghue* [1976] I.R. 325 and the comments of Walsh J. in *McGee v. Attorney General* [1974] I.R. 284.

⁴³² *W.O’R. v. E.H.* [1996] I.R. 248.

⁴³³ C. Archbold (1999) ‘Divorce: The View from the North’ in G. Shannon (ed.) *The Divorce Act in Practice* (Dublin: Round Hall), at p. 50.

⁴³⁴ [1989] I.R. 504.

legislature under the separation of power doctrine in the domain of distributive justice.⁴³⁵

It is well established, however, that any legislative arrangement which serves to give preferential treatment to *de facto* couples over their married counterparts is generally inconsistent with the Constitution.⁴³⁶ In *Murphy v. Attorney General*,⁴³⁷ for instance, the Supreme Court ruled that an income tax scheme which led, in practice, to dual-income married couples paying more income tax than their unmarried cohabiting counterparts, was unconstitutional. The court reasoned that, given the special position of marriage under the Constitution, a measure which served to treat married couples less favourably than unmarried couples would necessarily fall foul of Article 41.3.1. A similar result arose in *Hyland v. Minister for Social Welfare*,⁴³⁸ in which the Supreme Court declared unconstitutional a social welfare scheme under which married couples received lower payments than similarly positioned unmarried couples living together.⁴³⁹

This does not mean that measures which equate *de facto* couples and married couples will necessarily be unconstitutional. Some legislative provisions do in fact accord like treatment regardless of marital status.⁴⁴⁰ Although this point has not been extensively tested, the Law Reform Commission concludes that, provided such measures do not treat non-marital couples more favourably, they will not be subject to a finding of unconstitutionality.⁴⁴¹ However, the decision in *Ennis v. Butterly*⁴⁴² suggests that some caution is required in equating marriage and *de facto* unions.⁴⁴³ In *Ennis*, Kelly J. ruled that cohabitation contracts entered into between persons who were not married to each other could not be enforced in a court of law. Although this was consistent with common law precedent on the point, Kelly J. relied heavily on the terms of Article 41.3.1:

[G]iven the special place of marriage and the family under the Irish Constitution, it appears to me that the public policy of this State ordains that non-marital cohabitation does not and cannot have the same constitutional status as marriage.⁴⁴⁴

Were such contracts to be enforced, he continued, ‘the pledge on the part of the State, of which this Court is one organ, to guard with special care the institution of marriage would be much diluted. To permit an express cohabitation contract...to be enforced would give it a similar status in law as a marriage contract’,⁴⁴⁵ a position which, the judge concluded, would undermine the constitutional position of marriage. This places legislators in a difficult position. The tenor of this judgment suggests that,

⁴³⁵ [1995] 1 I.R. 484.

⁴³⁶ Kelly *op. cit.*, paras. 7.6.14–27.

⁴³⁷ [1982] I.R. 241.

⁴³⁸ [1989] I.R. 624. See also Law Reform Commission *op. cit.*, paras. 6.11–6.18.

⁴³⁹ See also *Greene v. Minister for Agriculture* [1990] 2 I.R. 17.

⁴⁴⁰ Domestic Violence Act 1996; Civil Liability Amendment Act 1996; Non-Fatal Offences Against the Person Act 1997; Residential Tenancies Act 2004.

⁴⁴¹ *Op. cit.*, paras. 1.12–17.

⁴⁴² [1996] 1 I.R. 426.

⁴⁴³ See generally J. Mee (1997) ‘Public Policy for the New Millennium? [*Ennis v. Butterly*]’, *Dublin University Law Journal* 19, pp. 149–60.

⁴⁴⁴ *Ibid.*, p. 438.

⁴⁴⁵ *Ibid.*, p. 439.

while some limited reform may be possible, too ready an equation between marriage and other alternative family forms may amount to an attack on marriage.⁴⁴⁶

It is certainly the case that Article 41.3.1 permits legislative discrimination in favour of the marital family.⁴⁴⁷ The most notable example of this facility can be found in *O'B. v. S.*,⁴⁴⁸ a case predating the inception of the Status of Children Act 1987. In that case, the plaintiff challenged succession legislation, which (at that time) prevented non-marital children from succeeding to the estate of a deceased intestate parent. In sum, while the marital children of the intestate person were entitled, under the Succession Act 1965, to make a claim in respect of their father's estate, non-marital children were excluded from so doing. Although the Supreme Court agreed that this amounted to unequal treatment, it concluded that such treatment was permitted by Article 41.3.1, as it served to protect the institution of marriage. This conclusion does not mean that such differentiation is constitutionally mandated – merely that, if the legislature chooses to differentiate in favour of the marital family, its actions will be legally valid.⁴⁴⁹

The relatively weak nature of the constitutional equality guarantee has been widely acknowledged.⁴⁵⁰ Article 40.1 provides:

All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral and of social function.

Although the Article has been instrumental in promoting formal equality as between husbands and wives,⁴⁵¹ its impact in other areas has been minimal. The willingness of the courts to put forward hypothetical justifications for inequalities has notably diluted the impact of the guarantee. For instance, in *Norris v. Attorney General*⁴⁵² the Supreme Court declined to rule that measures penalising male homosexual conduct between consenting adults infringed the equality guarantee and the unenumerated right to privacy. A majority of the court reasoned that such conduct was injurious to the health both of individuals and the public and potentially damaging to the institution of marriage,⁴⁵³ a conclusion for which little substantive evidential support

⁴⁴⁶ For this reason absent constitutional amendment [sense?], the Oireachtas may decide to confine any registered partnership scheme that provides rights equivalent to marriage to same-sex couples only.

⁴⁴⁷ See Kelly *op. cit.*, paras. 7.6.14–27.

⁴⁴⁸ [1984] I.R. 316.

⁴⁴⁹ See also the All-Party Oireachtas Committee's (*op. cit.*, p. 124) recommendation concerning inclusion of a guarantee of equality before the law for all children, irrespective of *inter alia* 'birth' in the text of the Constitution.

⁴⁵⁰ See, for example, Constitution Review Group *op. cit.*, pp. 220–43; G. Hogan (1998) 'The Supreme Court and the Equality Clause', *The Bar Review* 4(3), pp. 116–20; S. Mullally (1998) 'Equality Guarantees in Irish Constitutional Law: The Myth of Constitutionalism and the Neutral State' in T. Murphy and P. Twomey (eds.) *Ireland's Evolving Constitution 1937–1997* (Oxford: Hart Publishing), pp. 148–63.

⁴⁵¹ *Tilson v. Attorney General* [1951] I.R. 1, *De Búrca v. Attorney General* [1976] I.R. 38, *State (D.P.P.) v. Walsh and Conneely* [1981] I.R. 412, *T.O'G. v. Attorney General* [1985] I.L.R.M. 61, *W. v. W.* [1993] I.L.R.M. 294, *McKinley v. Minister for Defence* [1992] 2 I.R. 333. See generally O. Doyle (2004) *Constitutional Equality Law* (Dublin: Thomson Round Hall), Chapter 7.

⁴⁵² [1984] I.R. 36.

⁴⁵³ *Ibid.*, at p. 63.

was offered.⁴⁵⁴ Again, the ECHR Act 2003 can be expected to have an impact in cases such as this. In particular the doctrine of proportionality, as employed by the ECtHR, requires that, where differential treatment is pursuing a legitimate aim, such as support for the traditional family, the means employed to advance that aim be proportionate (see Chapter 3.2.3).

Given the principle of subsidiarity and the associated margin of discretion afforded States under international human rights law, it is doubtful that a constitutional amendment aimed at widening the definition of family is prescribed. Although this question has not been explicitly tested, it is evident from the approach adopted by the ECtHR and bodies such as the Human Rights Committee that legislative change designed to comply with human rights standards is adequate (see Chapter 3.2.3–4; 3.3.2). As we argue in Chapter 5.1, such an amendment is, however, desirable for the purposes of affording greater clarity to the status of *de facto* couples.

4.2.3 Legislative Developments

While specific aspects of the law are addressed in detail below, it is worth making some preliminary comments on the overall status of the *de facto* couple under Irish law. In general, the Irish legislature, in dealing with family units, has tended to take its cue from the Constitution, although there are some notable exceptions to this tendency.

With respect to children, legislative reforms, primarily the Status of Children Act 1987, removed several examples of discrimination against children born outside marriage. The Act served to equalise rights in respect of maintenance, succession and interests in property. Divorce and judicial separation legislation also potentially embrace children born outside marriage. The phrase ‘dependent child’ when used in divorce and judicial separation legislation is deemed to include a child born to or adopted by either party alone, provided that the other party has treated the child as a child of the family.⁴⁵⁵ However, as discussed further below, parent–child relationships, specifically those between unmarried fathers and their children, are not accorded equal status under relevant legislation.

Insofar as adult relationships are concerned, reform has proved more muted, and significant legal differences remain between marital and *de facto* couples. However, the boundaries of recognition have been incrementally extended. The Domestic Violence Act 1996 and the Civil Liability (Amendment) Act 1996 conferred the right to seek a barring order and the right to sue for wrongful death, respectively, on heterosexual non-marital couples. The Parental Leave Act 1998 extends the right to avail of *force majeure* leave to *de facto* couples, albeit again only to heterosexual unions.⁴⁵⁶

⁴⁵⁴ See L. Flynn (1998) ‘To Be an Irish Man: Constructions of Masculinity within the Constitution’ in T. Murphy and P. Twomey (eds.) *Ireland’s Evolving Constitution 1937–1997* (Oxford: Hart Publishing), pp. 135–45. The ECtHR found that the criminal provisions in question violated Mr Norris’s right to private life as protected under Article 8 ECHR: *Norris v. Ireland* (1989) 13 E.H.R.R. 186.

⁴⁵⁵ Family Law (Divorce) Act 1996, section 2(1), Family Law Act 1995, section 2(1). See also the Family Home Protection Act 1976, section 1(1). See also the Family Law (Maintenance of Spouses and Children) Act 1976, section 3(1).

⁴⁵⁶ We suggest in section 4.2.5 that this latter provision is contrary to EC law.

For certain specified purposes, the term ‘family’ has been defined in legislation, although again the meaning of the term can vary quite significantly depending on the context. For instance, in the Non-Fatal Offences Against the Person Act 1997 a remarkably expansive definition is adopted, section 1 declaring that, for the purposes of the Act:

‘member of the family’ in relation to a person, means the spouse, a child (including step-child or adopted child), grandchild, parent, grandparent, step-parent, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece of the person *or any person cohabiting or residing with him or her*. [Emphasis added.]

The definition relates in the main to the offence of coercion outlined in section 9 of the Act. This rather expansive definition, however, is relatively exceptional. In general, where the term ‘family’ has received explicit legislative definition, the legislature has tended to confine its remit to persons related in one of three ways: by blood, by marriage or by adoption. This means that, although non-marital children are generally accorded rights equivalent to their marital counterparts, *de facto* couples rarely receive recognition in legislation. The most glaring, and ironic, example of this is the definition of ‘member of the family’ under the Employment Equality Acts 1998–2004, which fails to include as a family member a non-marital cohabiting partner.⁴⁵⁷

4.2.4 Definitional Uncertainties

As yet, no attempt has been made to deal comprehensively with the legal position of the *de facto* couple. The imminent establishment of a governmental working group on partnership rights provides the clearest indication to date that legal change is on the horizon.⁴⁵⁸ Reforms to date have tended to be isolated and piecemeal. As a consequence, there is no consistent position on the parameters of a *de facto* union. This is to some extent understandable. As the Constitution Review Group Report observed, attempts to define the family independently of marital status face an immediate difficulty, in that such unions are diverse and multi-faceted and do not readily lend themselves to easy definition.⁴⁵⁹ Legislation varies considerably regarding the length of relationship required to give rise to legal protection. The Domestic Violence Acts 1996–2002, for instance, stipulate a period amounting to not less than six months in aggregate during the period of nine months immediately prior to the application for a barring order,⁴⁶⁰ though for a safety order the parties must have been living together for six of the previous *twelve* months.⁴⁶¹ The Residential Tenancies Act 2004 also requires a cohabitation period of six months, although in this case the period must be continuous. The Civil Liability (Amendment) Act 1996, by contrast, sets out a continuous cohabitation period of not less than three years, with no provision for a break in the continuity of co-residence.⁴⁶² The Social Welfare Acts

⁴⁵⁷ Employment Equality Act 1998, section 2(1).

⁴⁵⁸ *Irish Times*, 21 December 2005; *Irish Examiner*, 22 March 2006.

⁴⁵⁹ *Op. cit.*, p. 373.

⁴⁶⁰ Domestic Violence Act 1996, section 3(1)(b).

⁴⁶¹ *Ibid.*, section 2(1)(a)(ii).

⁴⁶² Civil Liability (Amendment) Act 1996, section 1(1) amending section 47(1) of the Civil Liability Act 1961.

adopt a much more broad-textured definition, depending on the cumulative examination of a variety of criteria, with no specific length of time being designated.⁴⁶³

The Law Reform Commission proposes a definition centred in part on the parental status of the parties. If a child resides with the parties, the period of cohabitation required should be two years; three years if the parties are childless.⁴⁶⁴ While this suggestion represents a welcome attempt to provide some consistency in this field, the differentiation between parental and non-parental families is not wholly defensible. While the presence of children certainly places additional obligations on the parties individually, it does not necessarily change the substance of the relationship between the adults involved. Given that the presence of children is not a prerequisite to the existence of a marriage,⁴⁶⁵ the principle upon which this distinction is made is unclear.

Another difficulty inherent in the Law Reform Commission's definition is the exclusion of *de facto* couples where one or both of the parties remains validly married to other persons. This restriction may be justified on two grounds: first that it serves to prevent the possible dilution of the rights of already married parties' spouses, and second that it precludes the development of a situation in which one person may be obliged simultaneously to maintain a former *de facto* partner and a spouse. It is certainly fair to conclude that the recognition of an extra-marital union, and an attempt to equate it with an existing marital union, may undermine the position of marriage in an unconstitutional manner. As against this, the law already permits a former spouse to be the subject of multiple demands for maintenance. Provided that a divorced spouse does not remarry, he or she may indefinitely seek maintenance from his or her former spouse, even if the latter has existing maintenance obligations to a new spouse and family.

The uncertainty engendered by such inconsistency reflects in part the fact that there exists no system of recording or granting recognition to non-marital unions. By their very nature, all intimate relationships tend to be insusceptible to definition and depend to a large extent on the self-definition of the parties thereto. As such, difficulties will arise where an attempt is made to define what is, after all, an unregistered arrangement. The Constitution Review Group declined to offer a definition of the family outside of marriage, preferring to leave the task of definition to judges, who would decide the parameters of family life, they suggested, on a case-by-case basis.⁴⁶⁶ While this approach would lend itself to flexibility, making the law sufficiently broad to adapt to new family arrangements that might arise in the unforeseen future, such uncertainty may pose particular difficulties for marginal family units, and those offering legal advice thereto. An 'open' and undefined concept of family would require, in many cases, judicial clarification, which may prove time-consuming and costly for the individuals involved. A wider theoretical difficulty also arises in that the open approach favoured by the Constitution Review Group effectively delegates to the judiciary the ability to make policy in a sensitive area where legislative action might be more constitutionally appropriate.

⁴⁶³ See, for instance, the Social Welfare (Consolidation) Act 1993, section 3(12) and (13).

⁴⁶⁴ *Op. cit.*, paras. 1.01–4.

⁴⁶⁵ See *Baxter v. Baxter* [1948] A.C. 274.

⁴⁶⁶ *Op. cit.*, p. 323.

The history of relationship recognition in Canada and its provinces may prove instructive in this context. A series of cases that successfully challenged discrete legislative provisions ultimately prompted legislatures at both provincial and federal levels to enact omnibus legislation recognising same-sex and opposite-sex partners as being in an equivalent position to married persons in a wide variety of contexts.⁴⁶⁷ The presumptive approach adopted generally required cohabitation in a conjugal relationship for a defined period of time. In the absence of legislative guidance, the task of defining key terms employed in these statutes such as ‘conjugal’ or ‘marriage-like’ fell to courts, tribunal and administrative bodies.⁴⁶⁸ Decisions generated intrusive inquiries as to the existence of a sexual relationship between given parties, lack of clarity as to whether economic dependence was a prerequisite and so on.⁴⁶⁹ Cossman and Ryder conclude that, although such interpretive difficulties can never be eliminated, two legislative strategies might improve the situation. First, legislators could expand opportunities to voluntarily assume rights and obligations by enacting partnership laws. Second, ‘relational definitions should be more carefully tailored to expressly incorporate the precise functional attributes that are relevant to the particular legislative objectives at issue’.⁴⁷⁰ We revisit these questions in Chapter 5.

4.2.5 The Distinction Between Same-Sex and Opposite-Sex Couples

Another difficulty arises in respect of several of the recent reforms favouring *de facto* couples. In the case of each of the following pieces of legislation, a formula of words is used which, on a literal interpretation, serves to confine the benefits arising to *de facto* couples where the partners are of the opposite sex:

- Domestic Violence Act 1996, section 3 (barring orders)
- Civil Liability Amendment Act 1996, section 1 (wrongful death)
- Parental Leave Act 1998, section 13 (*force majeure* leave)
- Residential Tenancies Act 2004, section 39 (succession to a tenancy)

These measures accord certain rights to spouses and additionally to persons living together ‘as husband and wife’. The phrase is a term of art generally understood in law to designate a conjugal relationship not based on marriage but very similar thereto. The juxtaposition of the words ‘husband’ and ‘wife’, however, may be read, in a literal sense, as requiring that the parties respectively be male and female, and that the parties cannot be of the same sex. Mee and Ronayne suggest that the use of this formula does not encompass same-sex couples.⁴⁷¹

Support for this view may be garnered from the House of Lords decision in *Fitzpatrick v. Sterling Housing Association*,⁴⁷² where a similar phrase was interpreted as applying only to opposite-sex couples. The juxtaposition of the words ‘husband’ and ‘wife’, respectively, suggested that the parties should be of opposite gender. ‘A

⁴⁶⁷ See Cossman and Ryder (2002) *op. cit.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*, at p. 314.

⁴⁷¹ *Op. cit.*, pp. 16–17.

⁴⁷² [1999] 3 W.L.R. 1113 (H.L. (E.)).

person can only live with a man as his wife’, Lord Hutton concluded, ‘when that person is a woman’.⁴⁷³ This conclusion accords with the decision of the Court of Appeal in *Harrogate Borough Council v. Simpson*,⁴⁷⁴ where the court rejected the proposition that the defendant could qualify as the spouse of her lesbian partner, the phrase ‘living together as husband and wife’ not being ‘apt to include a homosexual relationship’.⁴⁷⁵ The formula has yet to be tested before an Irish court.

The immediate difficulty with such a conclusion, from a human rights perspective, is that it serves to create a second tier of differentiation in law. On the one hand, Irish law differentiates between persons who are married and those who are not. On the other hand, even where legislation does accord recognition to families not based on marriage, such recognition is reserved to opposite-sex couples and denied to same-sex couples in what may well be substantially similar circumstances. This approach is particularly problematic given that, in general, opposite-sex parties are free to marry, while same-sex couples are not.

In light of the case canvassed in Chapter 3, it is evident that such differentiation potentially contravenes the European Convention on Human Rights. *Da Silva Mouta v. Portugal*⁴⁷⁶ and *Karner v. Austria*⁴⁷⁷ established that Article 14 protects persons treated less favourably solely on the basis of homosexuality in the absence of an objective justification. Given its stance in *Young v. Australia*⁴⁷⁸ in particular, it is also possible that the Human Rights Committee would find these provisions incompatible with Article 26 ICCPR, notwithstanding the deference paid to States concerning the definition of familial relationships (Chapter 3.3.2).

Thus, if the phrase ‘living together as husband and wife’ were to be given a construction exclusive of same-sex couples, such a result may breach Article 14 ECHR. However, it is at least arguable that, on a purposive approach to the phrase used, a less exclusive interpretation may be open. When considered in the light of the object of the legislation – to extend rights formerly reserved to married couples to unmarried couples in like relationships – the phrase in question could be ‘read as referring not to the respective characteristics of the parties to the relationship but rather to the characteristics of the *relationship* itself’.⁴⁷⁹

In the Court of Appeal decision in *Fitzpatrick*, Ward L.J. suggested that a familial nexus should not be defined solely in terms of its structures or form, but rather by reference to the ‘familial functions’ performed by the respective partners for each other. ‘The question’, he observed, ‘is more what a family does than what a family is’.⁴⁸⁰ This functional approach requires that the court look to the substance of the

⁴⁷³ *Ibid.*, at 1140.

⁴⁷⁴ [1986] 2 F.L.R. 91 (1984) 17 H.L.R. 205 (C.A.).

⁴⁷⁵ *Ibid.* (F.L.R.) *per* Ewbank L.J., at p. 95. Watkins L.J. was particularly emphatic on this point, observing that ‘[I]t would be surprising in the extreme to learn that public opinion is such today that it would recognise a homosexual union as being akin to a state of living as husband and wife. The ordinary man and woman, neither in 1975 nor in 1984, would in my opinion not think even remotely of there being a true resemblance between those two very different states of affairs.’ *Ibid.*, at p. 95.

⁴⁷⁶ (1999) 31 E.H.R.R. 47.

⁴⁷⁷ Application No. 40016/98, 24 July 2003.

⁴⁷⁸ Communication No. 941/2000, 6 August 2003.

⁴⁷⁹ F. Ryan (2000) ‘Sexuality, Ideology and the Legal Construction of Family: *Fitzpatrick v. Sterling Housing Association*’, *Irish Journal of Family Law* [2000] 3, at p. 6.

⁴⁸⁰ [1998] Ch. 304, at p. 339.

relationship rather than its outward form, and in particular to the overall purpose and character of the relationship.⁴⁸¹

Such an approach ultimately found favour with the House of Lords in *Ghaidan v. Godin-Mendoza*,⁴⁸² which ruled that the phrase ‘a person living with the original tenant as his or her husband or wife’ should be read as including a couple of the same sex. While this conclusion arguably strains the ordinary meaning of the words, and may not have reflected the true intention of legislators in enacting the relevant section, it did certainly avoid the otherwise inevitable conclusion that the legislation contravened the Convention.

As noted above, the reasoning employed by the UK judiciary cannot be readily transposed into an Irish context (Chapter 3.1.2). In the absence of a domestic precedent on the point and few substantive decisions concerning the interaction between constitutional norms and Convention standards post the ECHR Act 2003, the position of same-sex couples awaits clarification. Exclusion of lesbian and gay partners from the remit of the relevant legislation may infringe Article 14 of the Convention in according less respect to the family life of a person based solely on that person’s sexual orientation (see Chapter 3.2.3). It is difficult to discern any legitimate reason which would necessitate, for instance, the State allowing only opposite-sex *de facto* couples to seek a barring order, or to seek compensation for the wrongful death of a partner. In line with ECtHR jurisprudence, the State cannot rely on broad abstract arguments concerning protection of traditional families but must demonstrate that the differentiation is necessary to advance that aim. However, Irish Superior Court judgments issued prior to the enactment of the ECHR Act 2003 exhibit a high degree of deference towards the legislature in Article 40.1.⁴⁸³ According to case law, the equality guarantee forbids arbitrary, unreasonable or ‘invidious’ discrimination.⁴⁸⁴ Courts have regard to both the terms of the proviso to Article 40.1⁴⁸⁵ and other provisions of the Constitution⁴⁸⁶ in considering whether an impugned measure should be upheld because the classification employed is a reasonable one.

Under the 2003 Act courts are obliged to take judicial notice of relevant ECtHR jurisprudence (Chapter 3.1.2). It remains to be seen whether this development will lead to stricter scrutiny of legislative provisions such as those canvassed above. In particular it is arguable that equal treatment of heterosexual and homosexual *de facto* couples poses no apparent constitutional difficulties; regarding such couples as similarly situated may be distinguished from attempts to approximate unmarried unions with the marital family accorded priority under Articles 41-42 (section 4.2.2).

While litigation may ultimately resolve this issue, arguably a better approach would involve the legislature moving proactively to clarify that the aforementioned

⁴⁸¹ See L. Glennon (2000) ‘Fitzpatrick v. Sterling Housing Association: An Endorsement of the Functional Family?’ *International Journal of Law, Policy and the Family* 14, pp. 226–55.

⁴⁸² [2004] U.K.H.L. 30.

⁴⁸³ See *Casey op. cit.*, pp. 452–4.

⁴⁸⁴ In *de Burca and Anderson v. A. G.* [1976] IR 38, Walsh J. stated, at 68, that: ‘Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids arbitrary discrimination. It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally.’

⁴⁸⁵ See, for example, *State (Nicolaou) v. An Bord Uchtala* [1966] IR 567; *Dillane v. A.G.* [1980] ILRM 167; *People (D.P.P) v. Quilligan and O’Reilly (No.3)* [1993] 2 I.R. 305.

⁴⁸⁶ See, for example, *O’B v. S* [1984] IR 316.

legislative provisions apply equally to same-sex and opposite-sex couples. It could do so by adding a caveat to each measure in question noting that the legislation is intended to apply equally to same-sex and opposite-sex couples. It could, in the alternative, replace the impugned formula with a more gender-neutral statement to the effect that the relevant law shall apply where the parties are adults, whether of the same sex or of the opposite sex, who cohabit in a manner similar to a married couple.

With respect to *force majeure* leave, the position is distinct, as this benefit falls within the ambit of EC law. We noted in Chapter 2 that the Framework Directive prohibits discrimination on the sexual orientation ground in relation to all terms and conditions of employment. Given the broad scope of the Directive it would appear that section 13 of the Irish Parental Leave Act 1998, by apparently confining *force majeure* leave to opposite-sex unmarried partners, contravenes the prohibition on direct discrimination. That is certainly the view taken by the European Group of Experts on Combating Sexual Orientation Discrimination.⁴⁸⁷ Owing to the supremacy of EC law, section 13 must be read so as to include same-sex partners.

Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 amended the principal social welfare statute so that the pre-existing definition of ‘spouse’ or ‘couple’, which encompasses only married and opposite-sex cohabiting couples, now also applies to administrative social welfare schemes. Unlike the legislative provisions canvassed above, the unambiguous language employed means that there is no latitude for reading section 19 in a manner that would be compatible with the ECHR, as courts are now obliged to do under section 2 of the ECHR Act 2003. The amendment was designed to ensure that for the purposes of all social welfare schemes same-sex couples would essentially be treated as single persons. While *statutory* social welfare schemes were immune from challenge under the Equal Status Act 2000 because of the exemption for any measures required by law,⁴⁸⁸ administrative schemes were not so covered. A man who sought and was refused a Free Travel Pass under the non-statutory Free Travel scheme for his cohabiting male partner successfully settled an action taken against the Department of Social and Family Affairs in 2003.⁴⁸⁹ The Department accepted that the impugned decision amounted to unlawful discrimination on the sexual orientation ground in contravention of the Equal Status Act 2000. Section 19 effectively precludes any similar challenge to differentiation based on sexual orientation under the social welfare code.

While the legislative provision falls outside the ambit of the Framework Directive,⁴⁹⁰ it appears to run counter to applicable ECHR jurisprudence by differentiating between individuals solely on the basis of their sexual orientation, without any apparent objective and reasonable justification. Furthermore, while the Government may rely

⁴⁸⁷ European Group of Experts on Combating Sexual Orientation Discrimination (2004) *Combating Sexual Orientation Discrimination in Employment: Legislation in Fifteen EU Member States* (Brussels: European Commission), pp. 621–2. Recital 13 of the Directive implies that the ECJ’s jurisprudence on pay should also apply in this context: ‘This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.’

⁴⁸⁸ Section 14 ESA 2000.

⁴⁸⁹ See Equality Authority press release of 10 March 2004 (<http://www.equality.ie/>).

⁴⁹⁰ Payments made under statutory schemes including social security payments are explicitly excluded: Article 3.1(c).

on the *Petrovic*⁴⁹¹ precedent to claim some latitude with respect to the need to incrementally adjust law and policy in light of social changes, such a ‘breathing space’ may not be applicable in the case of legislation that is enacted with the object of *removing* entitlements (and liabilities) that were already in situ. Section 19 also arguably contravenes Article 26 ICCPR, which requires that the content of legislation adopted by a State party must not be discriminatory (see Chapter 3.3.2).

4.2.6 Freedom of Choice and Access to Marriage

The charge is often levelled that *de facto* couples generally have a choice whether to marry or not. Having decided not to accept the obligations attached to marriage, such persons cannot complain of unequal treatment. As noted in Chapter 3, this type of reasoning resonates through the decisions of international human rights bodies. There is certainly some attraction to the argument that couples who do not marry have chosen not to do so, and should thus be taken not to have accepted legal regulation of their relationship. However, the ‘freedom of choice’ argument is deficient in certain respects. As the UNHRC has recently acknowledged, children may be adversely affected by the ostensibly autonomous decision of their parents (Chapter 3.3.2). We consider the implications of the Committee’s decision for the area of pension provision below (section 4.5.3). Further, there are three distinct categories of adult who do not have the freedom to choose marriage.

Same-sex couples

Lesbian and gay couples are the first and most obvious example, being denied the right to enter into a civilly recognised marriage. Section 2(2) (e) of the Civil Registration Act 2004 explicitly precludes the possibility of marriage between persons of the same sex. Irish case law that preceded this statute endorsed the common law position⁴⁹² to the effect that gender reassignment surgery did not effect a lawful change in gender for marriage purposes.

In *B. v. R.*⁴⁹³ Costello P. observed that insofar as Irish law was concerned: ‘Marriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life.’ Similarly, McKechnie J. in *Foy v. An t-Árd Chláraitheoir (Registrar of Births Marriages and Deaths) & Ors*⁴⁹⁴ confirmed that, as a matter of common law, marriage was confined to persons of the opposite biological sex. The case concerned a claim by a male-to-female transsexual seeking to have what she asserted was a right to have her true psychological gender noted on her birth certificate and other official documents. The Court concluded that, despite her reassignment, the plaintiff remained legally male, relying in the main on biological factors present at birth. Given that this conclusion has since been deemed to be

⁴⁹¹ *Petrovic v. Austria* (2001) 3 E.H.R.R. 14.

⁴⁹² Set out in *Talbot v. Talbot* 111 Sol. J. 213 (1967) and *Corbett v. Corbett* [1971] P. 83. *Corbett* concerned the marriage of the petitioner (a male) and a male-to-female transsexual, the latter having undergone gender reassignment to change her anatomical features from those of a male to those of a female. The High Court concluded that, despite this reassignment, the respondent remained in law a male, the court relying solely on biological indicia present at birth and refusing to recognise either aspects of psychological gender identity or the subsequent reassignment of anatomical gender.

⁴⁹³ [1995] 1 I.L.R.M. 491 (HC) at 495.

⁴⁹⁴ [2002] IEHC 116 (9 July 2002).

contrary to the European Convention on Human Rights,⁴⁹⁵ the Supreme Court declined to hear the resultant appeal. A definitive ruling on the post-ECHR Act 2003 and *Goodwin* situation awaits the outcome of fresh proceedings before the High Court.

In arriving at this conclusion, McKechnie J. referred to Article 12 of the European Convention on Human Rights. Article 12 notably (and exceptionally given the more inclusive use of the word ‘everyone’ in other articles) refers to the right of ‘men and women’ to marry, a gendered construction, which has been interpreted as implying that marriage rights are confined to heterosexuals. He thus concluded that ‘there is no sustainable basis for the applicant’s submission that the existing law, which carries the impugned provision which prohibits the applicant from marrying a party who is of the same biological sex as herself, is a violation of her constitutional right to marry’.⁴⁹⁶

Although the Judge did not deny the existence of a right to marry, he observed, nevertheless, that such a right is not absolute. The right had to be weighed against ‘several other rights including the rights of society’. The State was entitled, in particular, in seeking to uphold the wellbeing of society as a whole, to determine that marriage should be confined to partners of opposite sex.

The predominance of the case law is exclusive in tone: few if any decisions question the proposition that marriage is open to persons of the same sex. Although this conclusion may well be in keeping with conventional social and political understandings of marriage, there is notable lack of evidence or argument supporting the legal conclusion, in particular in *Foy*, precluding same-sex marriage. The proposition that marriage is exclusively a heterosexual union is presented throughout the case law as self-evident, as a conclusion that requires no precedential support or logical reasoning. The courts do not explore in any detail, for instance, the soundness of the various bases upon which same-sex and opposite-sex relationships may be distinguished.

Those that are put forward are not, moreover, always totally convincing. For example, in *Baker v. Nelson*⁴⁹⁷ the Supreme Court of Minnesota cited the unique ability of heterosexuals to procreate as a valid reason for such differentiation. This argument, though feasible in certain respects, remains deficient, given that in Irish law a marriage may be annulled for lack of consummation⁴⁹⁸ but not for the infertility of either party.⁴⁹⁹ Nor may a marriage be annulled on the ground that the parties do not wish to bear children,⁵⁰⁰ although a unilateral decision on the part of one party not to procreate, which is not communicated to the other party prior to the marriage, may result in voidness owing to misrepresentation.⁵⁰¹

⁴⁹⁵ *Goodwin v. United Kingdom* (2002) 35 EHRR 18.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ 191 NW 2d 185 (Minn. 1971).

⁴⁹⁸ See for instance *S. v. S.* [1976-77] I.L.R.M. 156, *A. O’H. v. F.* [1986] I.L.R.M. 489.

⁴⁹⁹ *M.M. (orse. G.) v. P.M.* [1986] I.L.R.M. 515.

⁵⁰⁰ See Lord Jowitt L.C. [1947] 2 All.E.R. 886 at 890. See also *D-e. v. A-g.* (1845) 1 Rob. Eccl. 296, *L. v. L.(D)* (1922) 38 T.L.R. 697 and Lord Stair’s *Institutions* (1832) 1, tit. 4, para. 6. See generally C. Veitch (1976) ‘The Essence of Marriage – A Comment on the Homosexual Challenge’, *Anglo-American Law Review* 5, p. 41.

⁵⁰¹ *Per* Kenny J. in *S. v. S.* [1976-77] I.L.R.M. 156.

Equality-based arguments grounded the recent decisions of the Constitutional Court of South Africa⁵⁰² and Massachusetts Supreme Court⁵⁰³ to remove the ban on same-sex marriage in those jurisdictions. Massachusetts remains the only US state to permit such marriages; at federal level the Defense of Marriage Act⁵⁰⁴ confines the definition of ‘spouse’ and ‘marriage’ to opposite-sex relationships.⁵⁰⁵ In 2004 the Canadian Supreme Court determined that extending marriage to same-sex partners would promote constitutional norms, in particular the equality guarantee of the Canadian Charter of Rights and Freedoms.⁵⁰⁶ The Federal Parliament ultimately legislated for same-sex marriages in 2005.⁵⁰⁷

With respect to lesbian or gay couples, the current position under Irish and ECHR law is that the right to marry does not extend to such partnerships. While the wording of Article 12 ECHR is arguably sufficiently broad to encompass gay and lesbian marriage, such a finding may fall within the States’ margin of appreciation, even in the event that recognition of such partnerships achieves widespread acceptance throughout Europe (Chapter 3.2.4).

Given that the ECHR is concerned with instituting minimum standards, the Irish Government is of course free to remove legal prohibitions on same-sex marriage and/or provide for other forms of relationship recognition. Absent constitutional amendment any change to the provisions of the Civil Registration Act 2004 allowing for same-sex marriage could, however, be deemed unconstitutional upon judicial review. The All-Party Oireachtas Committee on the Constitution alludes to the possibility of the reference to marriage in Article 41 being interpreted so as to include same-sex unions, in which case the common law and legislative definitions would be overridden.⁵⁰⁸ Such a finding is however unlikely, at least for the time being, given existing jurisprudence concerning the constitutional provisions on the family and Article 40.1.

Divorce and Cohabitation

Historically, a very significant factor for non-marital cohabitation was the absence of a facility for divorce. Prior to the enactment of the Fifteenth Amendment of the Constitution, Article 41 proscribed the enactment by the Oireachtas of legislation permitting the dissolution of a valid subsisting marriage, otherwise than on the death of a party to the marriage. Although this did not preclude the recognition of divorces obtained abroad, where one of the parties was domiciled in the state granting the divorce,⁵⁰⁹ for the vast majority of separated persons the right to remarry after separation was not an option. This was arguably a key factor behind the gradual

⁵⁰² *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others*, Case CCT 60/04, 1 December 2005.

⁵⁰³ *Goodridge v. Mass. Department of Public Health*, 440 Mass. 309, 798 NE2d 941, 18 November 2003.

⁵⁰⁴ Public Law 106199, 1 USC Sec. 7. The Act also allows each US state and territory to decline recognition of a same-sex relationship that is treated as a marriage under the law of another jurisdiction.

⁵⁰⁵ On the prospect of recognition of a right to marry for same-sex couples under the US Constitution, see C. A. Ball (2004) ‘The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas’, *Minnesota Law Review* 88, pp. 1184–232.

⁵⁰⁶ *Reference re Same-Sex Marriage* [2004] SCR 698, 2004 SCC 79 (CanLII).

⁵⁰⁷ Bill C-38 (The Civil Marriage Act), which came into force on 20 July 2005.

⁵⁰⁸ *Op. cit.*, p. 123.

⁵⁰⁹ See the Domicile and Recognition of Foreign Divorces Act 1986.

growth in the number of couples cohabiting outside of marriage, with second unions forming in circumstances where one of the parties was unable to contract a further marriage. This arose for instance in *Johnston v. Ireland*,⁵¹⁰ a case involving a cohabiting couple precluded from marrying because of the continued subsistence and indissolubility of a prior marriage. The European Court of Human Rights ruled that the corresponding failure to facilitate the recognition of family ties between the father and his non-marital child (the father being at that time precluded from obtaining guardianship because he was not married to the mother of his child)⁵¹¹ constituted a breach of Article 8 of the ECHR requiring respect for the family and home life of the applicant.

Even with the coming into force in early 1997 of the scheme for the judicial dissolution of marriage, many opposite sex couples may remain, at least for some time, effectively precluded from marrying because of the lengthy waiting period required before a divorce may be granted. The Family Law (Divorce) Act 1996 stipulates (as required by the Constitution) that a marriage may only be dissolved where each of the conditions precedent to divorce are satisfied. In summary, these are:

1. That the parties have lived apart from each other for at least four of the previous five years.
2. That there is no prospect of reconciliation between the parties.
3. That proper provision has been, or will be made, for the support of each of the parties and of any dependent children.⁵¹²

The Constitution permits further conditions to be added. Of particular note are provisions requiring that a divorce may not be obtained unless the solicitor for each of the parties certifies that she has advised her client of the existence of various alternatives to divorce.⁵¹³ This added feature, coupled with the second condition noted above, underlines the strong policy of ‘de-juridification’ underpinning the Act, a policy that views judicial intervention – and, in particular, divorce – as a last resort in situations of family breakdown.

In practice, the second and third requirements noted above do not present particular difficulties. The first requirement, though no fault in nature, may present problems for some couples. Although the living apart ground has been interpreted quite liberally, including, for instance, couples living under the same roof but effectively living separate lives,⁵¹⁴ in the interim four-year period the new union remains largely unprotected in law.

⁵¹⁰ (1987) 9 E.H.R.R. 203.

⁵¹¹ The Status of Children Act 1987 added section 6A of the Guardianship of Infants Act 1964, thus affording the father a right to apply to court to be appointed guardian. As a result of the Children Act 1997, section 2(4) of the 1964 Act now allows the father to be deemed a guardian by agreement with the mother of the child.

⁵¹² See Article 41.3.2, Constitution of Ireland 1937 and Family Law (Divorce) Act 1996, section 5.

⁵¹³ Family Law (Divorce) Act 1996, sections 6 and 7. See also section 8, permitting a judge, by consent, to adjourn proceedings for the purposes of facilitating discussions leading to a possible reconciliation. The content of such discussions is, moreover, privileged.

⁵¹⁴ *M. McA. v. X.McA.* [2000] 2 I.L.R.M. 48. See also *Santos v. Santos* [1972] 2 All E.R. 246: living apart is ‘a state of affairs’ that requires ‘more than that the husband and wife are physically separated, that involves, considering attitudes of mind’. *Pulford v. Pulford* [1923] P. 18: ‘living apart is not the withdrawal from a place but from a state of things’. See *Naylor v. Naylor* [1961] 2 All E.R. 129, *Hopes*

The European Court of Human Rights in *Johnston v. Ireland* addressed this latter point.⁵¹⁵ Although the Court declined to rule that the then existing ban on divorce infringed the Convention, it nevertheless concluded that the failure to facilitate the formalisation of family ties between the parents and children in second unions of persons unable to divorce constituted a breach of Article 8. Irish law now complies with this aspect of the Convention (see section 4.9).

Unilateral opposition to marriage

A marriage may only be contracted in circumstances where *both* parties consent to its celebration. This being the case, the unilateral opposition of, or procrastination by, one party to a *de facto* cohabiting relationship may preclude the marriage of the couple in question. It may well be that the reluctant party chooses to refrain from marriage for very legitimate reasons, although it is also possible that he or she may do so with a view to avoiding the obligations and responsibilities arising from marriage. In the case of relationship breakdown, this may cause particular hardship to a person who, while aspiring to marriage during the course of the relationship, could not do so. The Canadian Supreme Court mentioned such considerations in a 1995 landmark judgment, which established that marital status discrimination was prohibited under the equality guarantee of the Canadian Charter of Rights and Freedoms.⁵¹⁶ International human rights law does not generally intervene in such circumstances, however, regarding decisions to marry as being a matter of mutual consent. However, as suggested in Chapter 3.3.4, the absence of certain protections for opposite-sex *de facto* couples could amount to indirect discrimination under CEDAW (see further Chapter 5.1).

4.3 Rights on Relationship Breakdown: Financial Support

4.3.1 Maintenance Rights: Legislative Provision

Husbands and wives enjoy throughout marriage (i.e. not just on marital breakdown) the right and obligation of mutual maintenance.⁵¹⁷ This means that the parties may be obliged by law to provide a stipulated sum in financial support to a spouse or former spouse with a view to providing for the needs of the recipient. The right survives the dissolution of the marriage, the Family Law (Divorce) Act 1996 permitting a divorced spouse who has not remarried to continue claiming maintenance from his or her former spouse (even if the latter has remarried).⁵¹⁸ A similar right to apply for

v. Hopes [1948] 2 All E.R. 920, *Fuller v. Fuller* [1973] 2 All E.R. 650, *Holmes v. Mitchell* [1991] Simon's Tax Cases 25, *Smith v. Smith* [1939] 4 All E.R. 533, and *Bartram v. Bartram* [1949] 2 All E.R. 270. But *cf. Mouncer v. Mouncer* [1972] 1 All E.R. 289. See also the Judicial Separation Act 1989, section 2(3): 'Spouses shall be treated as living apart from each other unless they are living with each other in the same household'.

⁵¹⁵ (1987) 9 E.H.R.R. 203.

⁵¹⁶ *Miron v. Trudel* [1995] 2 S.C.R. 418, 1995 CanLII 97 (S.C.C.) (25 May 1995). See in particular the judgment of Justice L'Heureux-Dubé, at paras. 91–103. *De facto* and married couples need not be treated in an equivalent manner for all purposes, however: see *Nova Scotia v. Walsh* [2002] S.C.J. No. 84 (QL), 32 R.F.L. (5th) 81. For a discussion of this jurisprudence, see N. Bala (2003) 'Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships', *Queen's Law Journal* 29, pp. 41–102.

⁵¹⁷ Either generally under section 5 of the Family Law (Maintenance of Spouses and Children) Act 1976 or specifically on judicial separation (see section 8 of the Family Law Act 1995) or divorce (section 13 of the Family Law (Divorce) Act 1996).

⁵¹⁸ Section 2(2) of the Act of 1996 defines a spouse as including a person who is a party to a marriage that has been dissolved under the Act.

maintenance arises on judicial separation. Additionally, provision may be made, in an agreement made between the parties, to provide maintenance on an agreed basis, though such agreements may not legally oust the right of a spouse to seek maintenance in a court of law.⁵¹⁹

Non-marital couples, by contrast, do not enjoy any right to apply to a court for financial support on relationship breakdown. The various provisions noted above are confined to persons who are, or have been, married. Although the Family Law (Maintenance) Act 1976 does not define the term ‘spouse’, the context of the Act, and references therein, make it clear that this term is confined to persons who are married to each other. This view is confirmed by references in section 5 of the Act to the desertion of a spouse, desertion being historically a ‘matrimonial offence’. In a similar vein, section 8 refers to ‘the parties to a marriage’ entering into an agreement for the provision of maintenance by ‘one spouse’ to ‘the other spouse’. In the Act, specific provision is made in sections 5A and 8A for the maintenance of children whose parents are not married to each other, which suggests that the other sections of the Act are ring-fenced in their application to families based on marriage alone.

The Act does, however, permit applications for maintenance by or on behalf of a dependent child.⁵²⁰ In such circumstances, maintenance may be sought from either parent, regardless of their marital status. The legislation does not permit an application seeking direct provision in respect of a non-marital partner. Additionally, although legislation permits a parent to seek maintenance from a spouse or former spouse on behalf of a child who, though not a child of the former, was treated as a child of the family, this facility does not apply in the case of a *de facto* partner of the parent.

While international human rights law is addressed to States, the duties imposed often require the implementation of measures as between private parties.⁵²¹ As noted above (Chapter 3.2.5), redistribution of property as between *de facto* partners would appear to fall outside the scope of the European Convention’s substantive human rights guarantees or at least within the State’s margin of appreciation (Chapter 3.2.3). Should the Government ratify Protocol 12 ECHR, that position may well change, however. In particular the failure to treat same-sex couples differently, as is arguably required under the Court’s indirect discrimination jurisprudence, could give rise to a violation of Article 1 of Protocol 1. It might further be argued that the Government’s failure to extend interpersonal financial support obligations to heterosexual unmarried couples constitutes indirect discrimination under CEDAW. As noted previously, the CEDAW Committee has expressed concern about the gendered impact of laws relating to the distribution of property upon the termination of a *de facto* relationship (Chapter 3.3.4).

⁵¹⁹ Family Law (Maintenance of Spouses and Children) Act 1976, section 27.

⁵²⁰ *Ibid.*, section 5A, inserted by the Status of Children Act 1987. The Guardianship of Infants Act 1964, section 11(2)(b), provides a similar facility to seek maintenance on behalf of a child.

⁵²¹ See, for example, A. Clapham (1993) *Human Rights in the Private Sphere* (Oxford: Clarendon) and S. Pattinson and D. Beylevend (2002) ‘Horizontal Applicability and Horizontal Effect’, *Law Quarterly Review* 118, pp. 623–46.

4.3.2 Maintenance Agreements

A married couple may, on the breakdown of the relationship, enter into an agreement providing in whole or in part for the financial support of one spouse by the other. The parties are thus free to determine the amount of maintenance to be paid and the arrangements for payment thereof. Such agreement is typically to be found as a component of a separation agreement, or as part of an agreement made in contemplation of divorce. Provided that an agreement meets the general requirements for the creation of a valid contract, it will be upheld. However, the Family Law (Maintenance of Spouses and Children) Act 1976, section 27, renders invalid any clause in such an agreement purporting to prevent either party from applying for maintenance under the Act.

While there has been some debate on the legal status of agreements entered into *prior* to marriage or to marital breakdown,⁵²² the status of contracts entered into in contemplation of *immediate* separation is well established and was confirmed in *P.O'D v. A.O'D.*,⁵²³ where the Supreme Court held that such an agreement is valid and may be upheld in a court of law.

By contrast, even where a *de facto* couple agrees mutually to maintain each other in cases of relationship breakdown, such a contract will not be enforceable in law. In *Ennis v. Butterly*,⁵²⁴ Mr Justice Kelly of the High Court ruled that a non-marital couple could not rely on an apparent maintenance agreement made between them. To enforce such a contract, he reasoned, would undermine the constitutional preference for marriage. This means that, even where a non-marital partner has made sacrifices in terms of career and social life to support her family, the law provides no redress in cases where her relationship has broken down.

The wider human rights implications of such a stance is not clear, in the absence of any direct jurisprudence on the issue. In line with the ECtHR's case law on property,⁵²⁵ such a contractual interest may give rise to a claim of interference with one's 'possessions', combined with a putative Article 14 violation. An applicant would have to establish that the interest in question was not a mere expectation. Article 8 is also implicated, in that the subject matter concerns one's private and family life. The State could seek to justify the interference as being one that pursues the legitimate aim of supporting the traditional family. Arguably, however, such interference is not proportionate to that aim.

⁵²² *Cohane v. Cohane* [1968] I.R. 176 suggests that agreements entered into in contemplation of future marital breakdown are contrary to public policy, as they tend to encourage infidelity and marital breakdown. See also *Fender v. St. John-Mildmay* [1937] 3 All E.R. 402. But see *McMahon v. McMahon* [1913] 1 I.R. 154. See also *Purser v. Purser* [1913] 1 I.R. 422. See generally S. Conneely (1999) 'Pre-nuptial Agreements: Back to the Future', *Irish Law Times* 17, pp. 9–11; L. Crowley (2002) 'Pre-Nuptial Agreements: Have They Any Place in Irish Family Law?', *Irish Journal of Family Law* 1, p. 3; and G. Shannon (2000) 'Pre-Nuptial Agreements: Hedging Your Bets', *Law Society of Ireland Gazette* 94(3), p. 16.

⁵²³ [1998] 1 I.L.R.M. 543.

⁵²⁴ [1996] 1 I.R. 426.

⁵²⁵ See Coban *op. cit.*, Chapter 6.

4. 4 Rights in Respect of Property: *Inter Vivos*

4.4.1 The Family Home

In respect of a family home shared by a *de facto* couple, the safeguards in the Family Home Protection Act 1976, and other legislation protecting the accommodation rights of spouses, are also denied. Although the Act does not define the term ‘spouse’, it is clear from section 2(1) of the Act that it is intended to apply only to ‘a married couple’. The Family Home Protection Act 1976 acts to invalidate any unilateral disposal by one spouse of an interest in the family home⁵²⁶ without the prior written consent of the other spouse.

By contrast, in the absence of making financial contributions towards its purchase, a non-marital partner will have no claim over the property of her partner should their relationship founder. Thus the home in which she and her children reside could be sold, mortgaged or leased without her knowledge or her consent.

In cases of judicial separation and divorce, the Family Law Act 1995 and Family Law (Divorce) Act 1996 permit a court to grant certain remedies in respect of the family home.⁵²⁷ These redistributive remedies allow the court to grant, for instance, a right of residence to one spouse, or, for instance, to transfer or otherwise adjust ownership in the family home. These remedies apply, however, only in cases of judicial separation and divorce, and as such cannot be availed of in cases of dispute between unmarried partners. As noted above (sections 4.3), the extent to which such issues fall within the State’s margin of appreciation and/or come within the ambit of the ECHR altogether is not clear.

4.4.2 Other Property

The very extensive remedies available for the distribution of property and wealth on divorce and judicial separation are confined to persons who are or were married to each other. Thus, the extensive provisions of the Family Law Acts⁵²⁸ facilitating the redistribution of property rights, pension rights, succession rights and other financial benefits based on the needs and resources of the parties are not available to *de facto* couples who separate.

Equity does, however, provide some relief for partners in a non-marital relationship (along with other non-related persons), where one partner makes a financial contribution towards the purchase of property belonging to the other partner.⁵²⁹ The purchase money resulting trust operates to vest in the contributing partner an equitable interest in the property equivalent to the extent of their contribution. This may operate, in appropriate cases, to vest in a non-marital partner an equitable interest in respect of property to which the other partner has sole legal title.

A trust may arise from both direct contributions and indirect contributions made by the non-marital partner. The classic example of a direct contribution arises in circumstances where a person who does not have legal title assists in the making of

⁵²⁶ For a definition of the term ‘family home’, see Family Home Protection Act 1976, section 2(1).

⁵²⁷ Family Law (Divorce) Act 1996, section 15(1), Family Law Act 1995, section 10(1).

⁵²⁸ Family Law Act 1995, Parts II and III, Family Law (Divorce) Act 1996, Part III.

⁵²⁹ Two notable examples involving non-marital couples are *Power v. Conroy*, unreported, High Court, McWilliam J., 22 February 1980, and *Maher v. Donaghy*, unreported, Circuit Court, McMahon J., 22 February 2000.

mortgage payments.⁵³⁰ Indirect contributions may also give rise to an equitable interest, for instance, where a person makes contributions to the general family expenses, for instance through the payment of gas or electricity bills, or the regular purchase of groceries for the family.⁵³¹

There are, however, certain limitations in the operation of this doctrine. First, a trust will not arise in circumstances where the payments are made *after* the property in question has been fully purchased. Thus, if a property has already been purchased outright, or has previously been paid for in full by the legal title-holder, subsequent contributions by another person will not give rise to an equitable interest.⁵³² Furthermore, the contributions in question will only give rise to an equitable interest where the contributions assist in the purchase of property and not in the *improvement* of property already owned by another person.⁵³³

Finally, and most significantly, the purchase money resulting trust arises only in respect of contributions of a financially quantifiable nature. The Supreme Court in *B.L. v. M.L.*⁵³⁴ rejected the proposition that care and domestic work performed within the home could give rise to an equitable interest, even in the case of a married couple.⁵³⁵ An unmarried person who chooses to remain in the family home to care for the parties' children may do so at the expense of his or her career and thus may not enjoy an independent income. As such, he or she may not be in a position to make financial contributions giving rise to an equitable interest. In the case of relationship breakdown, such a person will thus have acquired no interest in family property and no right to call upon the legal owner thereof for support in accommodating the non-owning former partner. While judicial separation and divorce legislation allow for the redistribution of family property in cases of marital breakdown, safeguarding the interests of economically dependent spouses, no such provision applies in the case of the breakdown of a non-marital relationship.

Again, these measures may give rise to a direct discrimination claim under Article 14 ECHR (read in conjunction with Article 8 and Protocol 1, Article 1). The prospect of indirect discrimination under the terms of ECHR and CEDAW also arises with respect to same-sex and heterosexual partners, respectively.

4.4.3 Sale of Real Property and Creation of Tenancies

The Equal Status Acts 2000–2004 explicitly ban discrimination on the basis *inter alia* of sexual orientation, marital status and family status in relation to the provision of accommodation.⁵³⁶ This includes the provision of leases and tenancies, as well as the creation of mortgages and the outright sale of property. An exemption applies, however, in respect of property where the landlord or owner of the property or a

⁵³⁰ *Conway v. Conway* [1976] I.R. 254.

⁵³¹ *M. v. M.* (1978) 114 I.L.T.R. 46, *K. v. K.* (1978) 114 I.L.T.R. 50, *F.C. v. P.G.* [1982] I.L.R.M. 155.

⁵³² A good example involving an unmarried couple is *McGill v. S.* [1979] I.R. 283. See also *W. v. W.* [1981] I.L.R.M. 202, *N.A.D. v. T.D.* [1985] I.L.R.M. 153, *D. McC. v. M.McC.* [1986] I.L.R.M. 1.

⁵³³ See *W. v. W.* [1981] I.L.R.M. 202.

⁵³⁴ *B.L. v. M.L.* [1992] 2 I.R. 77.

⁵³⁵ See J. Mee (1993) 'Trusts of the Family Home: The Irish Experience' *The Conveyancer and Property Lawyer* [1993], pp. 351–61.

⁵³⁶ Equal Status Act 2000, section 6

member of his or her family also resides in the property in question or where it would interfere with his or her private life.⁵³⁷

The Residential Tenancies Act 2004 also offers certain protections to *de facto* couples, although, in common with other measures, this appears to be confined to opposite-sex couples. Section 39 of the Act stipulates that, while a Part 4 Tenancy (as defined) shall terminate on the death of the tenant, the tenancy will survive the death of the tenant provided that:

- (3)...
- (a) the dwelling, at the time of the death of the tenant concerned, was occupied by –
- (i) a spouse of the tenant,
 - (ii) a person who was not a spouse of the tenant but who cohabited with the tenant as husband and wife in the dwelling for a period of at least 6 months ending on the date of the tenant's death,
 - (iii) a child, stepchild or foster child of the tenant, or a person adopted by the tenant under the Adoption Acts 1952 to 1998, being in each case aged 18 years or more, or
 - (iv) a parent of the tenant, and
- (b) one or more than one of the foregoing persons elects in writing to become a tenant or tenants of the dwelling.

This permits an opposite-sex cohabitee, but not a same-sex partner, to succeed to a tenancy on the death of his or her partner. In light of the ECtHR decision in *Karner*,⁵³⁸ it would appear that the exclusion of same-sex partners is no longer sustainable.

4.5 Rights on the Death of a Partner

4.5.1 Succession by Will

A spouse of a deceased person is entitled as of right, regardless of the terms of any will, to one-third of the total value of the deceased's estate if the couple has children and one half of the total value of the estate if the couple has no children.⁵³⁹ The surviving spouse may, in satisfaction (or part satisfaction) of her legal share, exert a right to appropriate the family home of the spouses and the chattels therein.⁵⁴⁰ In this regard, the term 'spouse' is confined to a person lawfully married to the deceased at the time of death. This may include a separated person, although provision may be made in a separation agreement and on judicial separation for the extinction of the right to succeed.⁵⁴¹ The legislation does not, however, include divorced persons; the parties in question must be legally married at the time of death. Such a party may, however, seek to have provision made for him or her on the death of a former spouse

⁵³⁷ *Ibid.*, section 6(2)(d), as amended by the Equality Act 2004, section 49.

⁵³⁸ See generally A. Cotter and J. Moffatt (eds.) (2005) *Discrimination Law* (London: Cavendish).

⁵³⁹ Succession Act 1965, section 111.

⁵⁴⁰ Succession Act 1965, section 56.

⁵⁴¹ Family Law Act 1995, section 14.

provided that the court is satisfied that proper provision was not made for the survivor during the deceased's lifetime.⁵⁴²

The Succession Act does not include non-marital partners; that is, persons who have never been married to each other. In the latter case, a deceased partner has full right to deal with his or her estate as he or she sees fit. There is no obligation in law to provide for the surviving partner.⁵⁴³

A non-marital partner may, of course, make a will providing for the surviving partner. If, however, the testator was a party to a valid and subsisting marriage, he or she would effectively be obliged to make provision for the surviving spouse at the expense of the surviving non-marital partner, the legal rights of the spouse taking precedence over devises, bequests and shares on intestacy.⁵⁴⁴

4.5.2 Succession on Intestacy

In the case of intestacy, serious difficulties arise for non-marital partners. If a non-marital partner dies having failed to make a will, or has created a will that is deemed to be invalid, the deceased's estate (or the portion that is not dealt with by will) falls to be distributed in accordance with the rules of intestacy set out in Part VI of the Succession Act 1965.

Where a married person dies without making a will, legislation requires that the surviving spouse will be entitled to most if not all of the deceased's property. The Succession Act 1965 entitles the spouse of a such person to two-thirds of his or her estate where they have surviving children, and the whole estate when they have no children.⁵⁴⁵ By contrast, where a non-marital cohabiting partner dies without making a will, her surviving partner is effectively left high and dry.⁵⁴⁶ The latter will not be entitled to any portion of the deceased's estate. In this regard it is worth noting that the non-marital partner is in a position worse than that of the children of the deceased, who, on intestacy, are entitled to equal shares in respect of at least one-third of the deceased's estate (and all of the estate if the deceased has no surviving spouse).

Certain reliefs may be available if property is held by two parties in joint tenancy. Where property is owned by two or more persons in joint tenancy, on the death of one party the survivor is deemed to take the entire property. By contrast, if the property is held subject to a tenancy in common, the proportion of the estate belonging to a deceased owner will pass to her estate.

Another possible facility may be invoked by non-marital partners. If a partner who owns property represents during her lifetime that the property will pass on her death to the surviving partner, this may be sufficient to give rise to an interest in the property based on proprietary estoppel. This is not, however, a reliable means of

⁵⁴² Family Law (Divorce) Act 1996, section 18.

⁵⁴³ Mee and Ronayne *op. cit.*, pp. 25–8.

⁵⁴⁴ Succession Act 1965, section 112.

⁵⁴⁵ Succession Act 1965, section 67. Under section 10(1) of the Ontario Human Rights Code (R.S.O. 1990, C. H.19), marital status is defined as 'being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage'.

⁵⁴⁶ See F. Ryan (2005) 'Sexual Orientation Discrimination' in A. Cotter and J. Moffatt (eds.) *Discrimination Law* (London: Cavendish), Chapter 7, at pp. 108–9.

transferring property and, while useful in some cases, should not be considered as a substitute for the creation of a valid will.

As with maintenance and redistribution of the family home upon relationship breakdown, the question arises here as to whether international human rights standards require inclusion of *de facto* couples within a legal framework that facilitates the recognition and protection of mutual rights and obligations in this context. The *Goodwin* case supplies little guidance on this matter, since it was concerned with the elimination of sex discrimination in relation to *access* to such a legal framework in the form of capacity to marry. It did not address the wider question of whether the substantive rights and duties attached to such recognition should be available to wider sets of people. Jurisprudence that pre-dates *Goodwin* indicates that general legal regulation of the position of cohabitantes falls within the State's margin of appreciation (Chapter 3.2.3). Although succession for the most part falls outside the ambit of Article 1, Protocol 1, case law pertaining to Article 8 is more favourable.⁵⁴⁷ Protocol 12 would appear to bring such questions under the supervisory scope of the Strasbourg Court.

Given its free-standing nature, Article 26 is directly applicable; however, it is doubtful whether the HRC will impose a positive duty on the State to accommodate the needs of *de facto* couples (Chapter 3.3.2). Despite the deference afforded States in this general area, should the Committee's indirect discrimination jurisprudence develop further a positive finding in relation to same-sex couples may issue.

4.5.3 Pension Entitlements

Problems also arise with pensions, most particularly where non-marital partners are denied access to pension funds that are readily extended to widows and widowers in similar situations.⁵⁴⁸ The Pensions Acts 1990–2005 contain an exemption that protects occupational pension schemes which only provide a survivor's pension to married partners.⁵⁴⁹ Although such schemes fall within the remit of the Framework Directive and the exclusion of *de facto* couples raises the prospect of indirect discrimination on the sexual orientation ground because same-sex partners may not marry under Irish law, the differential treatment may be justified. As we noted above (section 2.3.3), recital 22 of the Directive's preamble indicates that benefits provided only to married persons are not meant to be affected by EC law. However, when the provision is read in light of ECHR jurisprudence and the Framework Directive as a whole, it would appear that any blanket immunity for such measures is questionable.⁵⁵⁰ At a minimum, then, we can expect the exemption provided for under the Pensions Acts to be tested in future litigation. A particular candidate for any such case might be the 'spouses and children' pension fund operative in the public sector.

The children and spouses of public servants can draw from the 'spouses and children' fund if the employee dies after retirement. Although unmarried public servants are

⁵⁴⁷ Coban *op. cit.*, Chapter 6.

⁵⁴⁸ See Equality Authority *op. cit.*, pp. 22–3, and Law Reform Commission *op. cit.*, Chapter 7.

⁵⁴⁹ Section 72(3) provides: 'It shall not constitute a breach of the principle of equal pension treatment on the marital status or sexual orientation ground to provide more favourable occupational benefits to a deceased member's widow or widower provided that it does not result in a breach of the said principle on the gender ground.'

⁵⁵⁰ European Group of Experts on Combating Sexual Orientation Discrimination *op. cit.*, p. 34.

required to make payments to this fund, surviving unmarried partners and their children may not benefit.⁵⁵¹ Since marriage is a prerequisite to accessing the fund, same-sex couples may argue that exclusion of their partners and children from the scheme amounts to indirect discrimination on the grounds of sexual orientation. Further, in *Derksen*⁵⁵² the Human Rights Committee signalled that, notwithstanding the wide margin of discretion available to States in the area, it is willing to interrogate measures that adversely affect children (Chapter 3.3.2).⁵⁵³

By contrast, where a public servant dies prior to retirement, a ‘death in service benefit’ is paid to the estate of the deceased. Provided that the unmarried partner is nominated as a beneficiary in the will of the deceased, the former may thus acquire the benefit.

In relation to private companies, pension arrangements vary and depend largely on the discretion of fund trustees, though some funds do confer benefits on the surviving partners of deceased employees.⁵⁵⁴ Under the terms of the Framework Directive, such benefits must be extended to both same- and opposite-sex *de facto* couples on an equal basis (see Chapter 2.3.3). Moreover, the Human Rights Committee determined in *Young v. Australia* that exclusion of same-sex cohabitants from pension schemes which confer benefits on opposite-sex unmarried partners contravenes Article 26 ICCPR (Chapter 3.3.2). Pensions also constitute property for the purposes of Protocol 1, Article 1 ECHR, and so are subject to the Convention’s discrimination prohibition (Chapter 3.2.5).

On divorce and judicial separation, legislation permits the courts to order that a pension be adjusted or split such that one spouse’s pension will, once vested, accrue to the benefit of the other spouse.⁵⁵⁵ No such facility applies in the case of non-marital partners.

Any pension-related benefits acquired by a surviving non-marital partner will be subject both to Capital Acquisitions Tax on the capital value of the pension at the time of the holder’s death, and income tax on any income subsequently derived from the pension. Capital Acquisitions Tax may not be levied in respect of benefits derived by one spouse on the death of another.

Social welfare legislation restricts the survivor’s pension, moreover, to widows and widowers (see section 4.6.2). While ECHR and ICCPR jurisprudence to date permits States to prefer married couples in these contexts, the provisions do disclose indirect discrimination on the grounds of sexual orientation, and so are open to challenge on that basis.

⁵⁵¹ See Commission on Public Service Pensions (2000) *Final Report* (Dublin: Stationery Office), Chapter 20.

⁵⁵² Communication No. 976/2001, 15 June 2004.

⁵⁵³ Decisions of the Human Rights Committee do not, however, enjoy a binding legal status (Chapter 3.3.2). See also *Kavanagh v. Ireland* (Communication No. 1114/02), where the author’s complaint to the effect that the Irish government had failed to provide a remedy for an established breach of ICCPR was deemed inadmissible by the Human Rights Committee.

⁵⁵⁴ Equality Authority *op. cit.*, p. 23.

⁵⁵⁵ Family Law (Divorce) Act 1996, section 17, Family Law Act 1995, section 12. The Family Law Act 1995, section 13, also provides for the preservation of pension entitlements on judicial separation.

4.5.4 Funeral Arrangements

In the circumstance of a partner's death, and in the absence of an express provision in a will, a surviving non-marital partner has no rights.⁵⁵⁶ This situation may be improved, however, if the surviving partner is nominated as 'executor' in the deceased partner's will. This means that the survivor will be entitled to arrange the funeral and generally to administer the deceased's estate in accordance with the wishes expressed in the will. Without a will, however, the unmarried partner has no rights either to succeed to the estate of the deceased or to arrange the funeral. (This may impact harshly on same-sex partners, where the parents of the deceased partner do not approve of the deceased's relationship.)

4.5.5 Right to Sue for Wrongful Death of a Partner

The Civil Liability (Amendment) Act 1996, section 1 (amending section 47 of the Civil Liability Act 1961), extended to a cohabiting partner who has been 'living with the respondent as husband or wife' for at least three continuous years the right to sue for the wrongful death of a partner.⁵⁵⁷ As discussed above, it is likely that the use of the phrase 'living with the respondent as husband or wife' serves to exclude same-sex partners, which may contravene the ECHR (section 4.2.5).

4.6 Financial Support from the State

4.6.1 Taxation

The tax system largely favours married couples over non-marital couples, though less so since the introduction of individualisation in tax assessment of married couples.⁵⁵⁸ Non-marital couples are, for instance, denied access to the income tax reliefs extended to married persons. In particular, it is possible for a person to share unused personal tax credits and other benefits with his or her spouse, thus potentially reducing the couple's total tax liability.⁵⁵⁹ This facility particularly favours spouses both of whom work, where there is a significant difference in the spouses' respective salaries. This facility does not apply in the case of unmarried couples, who are treated at all times as individual taxpayers. In litigation currently before the High Court, a same-sex couple who have previously gone through a ceremony of marriage in Canada are contesting the refusal of the Revenue Commissioners to accord to them the various income tax reliefs extended to married couples.⁵⁶⁰

In addition, a non-marital partner will pay significantly more inheritance tax on donations made to her by a deceased partner than will a spouse or child succeeding on the death of the other spouse or parent, respectively. Married persons are exempt from gift and inheritance tax ('Capital Acquisitions Tax') in respect of transfers between spouses.⁵⁶¹ Non-marital partners, by contrast, enjoy no such exemption, exposing surviving partners to potentially significant CAT bills. Similar spousal

⁵⁵⁶ Equality Authority *op. cit.*, p. 27.

⁵⁵⁷ See *Quinn v. Cashin* [2005] IEHC 214, 21 June 2005 (High Court, O'Donovan J.).

⁵⁵⁸ See Law Reform Commission *op. cit.*, Chapter 8, and H. Walpole (2000) 'Taxation' in G. Shannon (ed.) *Family Law Practitioner* (Dublin: Thomson Round Hall).

⁵⁵⁹ See, for instance, Taxes Consolidation Act 1997, sections 461 and 1015–1027.

⁵⁶⁰ *Gilligan and Zappone v. Revenue Commissioners* (see www.kalcase.org).

⁵⁶¹ See F. Ryan (2005) 'Sexual Orientation Discrimination' in A. Cotter and J. Moffatt (eds.) *Discrimination Law* (London: Cavendish), at p. 111.

exemptions in respect of capital gains tax,⁵⁶² probate tax and stamp duty are not available to non-marital couples. A person may, for instance, sell a property to his or her spouse without incurring liability under capital gains tax legislation. The gain is deemed to be ‘rolled over’, the purchaser being deemed liable to pay the vendor’s gain should the property be sold to a third party.

The Finance Act 2000 provides some limited relief for non-marital partners and others in the case of the inheritance of a home shared by two persons prior to the death of one such party. Section 151 creates an exemption from tax where a property that is the ‘principal private residence’ of cohabiters is bequeathed on death to the surviving partner. There are, however, certain limitations in this regard. The surviving partner must have lived in the dwelling house in question for three years prior to the latter’s death and must not have another house in her possession. An exception applies however, where the dwelling house in question replaces a dwelling house in which the survivor previously resided, provided that the survivor did not hold a beneficial interest in any other dwelling house. This exception applies provided that the survivor has lived cumulatively for at least three of the previous four years in the two houses. Although the surviving partner is required to live in the inherited house for at least six years after the deceased’s death, the Act permits the survivor to sell the house and purchase another, provided again that the survivor has throughout this period only one residence available to her and that the cumulative period of residence in both houses amounts to six of the previous seven years.

Section 151 applies only where the survivor has no other residence available to her. For instance, a *de facto* couple that own a house together and also own a further dwelling (e.g. a holiday home) may thus be denied relief under this section. As noted previously, Contracting States enjoy a wide margin of appreciation in the area of taxation (Chapter 3.2.5). Cases brought to date by *de facto* couples have been unsuccessful and, although *PM v. United Kingdom*⁵⁶³ in particular established that a State’s discretion in this area is not unfettered, the ECtHR was careful to confine the decision to the particular facts in question. Again, same-sex couples may have a greater prospect of success in future case law, since the possibility of marriage is not open to them. Any such development is contingent on the emergence of more robust indirect discrimination jurisprudence.⁵⁶⁴

4.6.2 Social Welfare

Cohabitation with a person of the opposite sex, but not of the same sex, may affect the entitlement of a person to particular social welfare payments. Unlike the bulk of the legislation discussed above (sections 4.23–4.25), the Social Welfare (Consolidation) Act 1993 defines a ‘spouse’ for certain purposes as including ‘a man and woman who are not married to each other but are cohabiting as husband and wife’.⁵⁶⁵ A person living with a person of the opposite sex in a relationship that is akin to marriage will not, for instance, be entitled to the one-parent family allowance. The income of a

⁵⁶² Taxes Consolidation Act 1997, section 1028.

⁵⁶³ Application No. 6638/03, 19 July 2005.

⁵⁶⁴ See, for example, G. Gilbert (2002) *Jurisprudence of the European Court and Commission of Human Rights and Minority Groups Prepared for the Working Group on Minorities of the UN Sub-Commission on the Promotion and Protection of Human Rights*, UN Document E/CN.4/Sub.2/AC.5/2002/WP.2.

⁵⁶⁵ Sections 3 (12) and 3 (13). See also section 24 of the Social Welfare and Pensions Act 2005.

person's opposite-sex cohabiting partner, moreover, may be taken into account in assessing the former person's entitlement to unemployment assistance and other like allowances.

By contrast, several social welfare benefits remain contingent on the marital status of the parties. For example, the Widow's and Widower's Contributory Pensions are confined to persons who were married.⁵⁶⁶ The Widowed Parent Grant is similarly confined.

4.6.2.1 Same-Sex Cohabitants

Drawing on the Social Welfare (Consolidation) Act 1993, section 3, the Department of Social and Family Affairs defines cohabitation as follows:

[T]he relationship between the man and the woman must be shown to be the same as that of a husband and wife. As relationships and domestic and financial arrangements between husbands and wives vary considerably each individual case must be considered on its own particular facts.⁵⁶⁷

Notably, in assessing eligibility for social welfare payments, the Department of Social and Family Affairs does not have regard to same-sex cohabitants living with each other. Thus, in assessing whether two people are cohabiting for the purposes of the one-parent family allowance, regard is only given to opposite-sex partners living together (see also section 4.6.2.2). In light of ECHR considerations, the Law Reform Commission has recommended extending the definition of cohabitation to include same-sex relationships.⁵⁶⁸

As noted above (section 4.2.5), section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 serves to copper-fasten the distinction adopted in practice between same-sex and opposite-sex couples.⁵⁶⁹ Statutory social welfare schemes are immune from challenge under the Equal Status Acts 2000–2004 due to the exemption in respect of differences in treatment required by law.⁵⁷⁰ This result appears to conflict with Article 14 of the European Convention on Human Rights, when read in conjunction with Article 8 thereof, in that it accords a lesser status to the family life of a person based solely on his/her sexual orientation. The provision may also be regarded as a violation of Article 26 ICCPR in light of the decision in *Young v. Australia* (Chapter 3.3.2).

⁵⁶⁶ Eligibility is further contingent on not cohabiting with someone 'as husband or wife'. See *Foley v. Minister for Social Welfare* [1989] I.L.R.M. 169.

⁵⁶⁷ See <http://www.welfare.ie/foi/cohabit.html#general>.

⁵⁶⁸ *Op. cit.*, para. 6.50.

⁵⁶⁹ The non-statutory schemes covered by the provision include:

- (a) the Free Travel Scheme,
- (b) the National Fuel Scheme,
- (c) the Part-Time Job Incentive Scheme,
- (d) the Back to Education Allowance,
- (e) the Back to School Clothing and Footwear Allowance,
- (f) the Back to Work Allowance (Employees),
- (g) the Back to Work Enterprise Allowance,
- (h) the Smokeless Fuels Allowance, and
- (i) the Household Benefits Package.

⁵⁷⁰ Section 14 (a).

4.6.2.2 Further Difficulties with the Definition of Cohabitation

In determining whether two people are cohabiting together, the Department looks to a variety of criteria, including the following:

- Co-residence: are the parties living together?
- The nature of the household relationship:
 - Whether and to what extent finances are shared.
 - Whether and to what extent household duties are shared.
- The stability of the relationship.
- The social aspects of the relationship, including whether the parties socialise together. Are they regarded locally as an established couple?
- The ostensible sexual aspects of the relationship: do the parties have children together? Do they appear to share a bedroom?

Some of these criteria would appear to involve very intimate examination of the shared lives of the parties. The Northern Ireland Human Rights Commission points out that affording parity to lesbian and gay people under a social welfare code ‘may well cause policy dilemmas’.⁵⁷¹ It notes that, ‘whatever the residual sensitivities of investigations into opposite-sex cohabitation, the sensitivities of State investigation into the personal relationship of two women or two men who live together or spend significant periods of time together are highly significant’.⁵⁷² In light of these concerns, the Commission recommends more rigorous approaches towards the confidentiality of private relationships, in line with Article 8 ECHR.⁵⁷³

It may also be suggested that the effective reduction of state support based on the fact that two persons cohabit discourages unmarried persons from cohabiting and may, in practice, deter the formation of supportive *de facto* relationships.⁵⁷⁴ The Department of Social and Family Affairs estimates that between 30 and 40% of recipients of the one-parent family allowance are in fact cohabiting with a person of the opposite sex.⁵⁷⁵ This has led to a proposal to drop the cohabitation rule, reformulating social welfare payments based on the need of the family in question.⁵⁷⁶ Government policy now acknowledges that social welfare measures which have the effect of deterring the formation of supportive relationships (be they marital or non-marital) are counterproductive to the overall aims of the social welfare code.⁵⁷⁷

4.7 State Recognition of Cross-Border Relationships

4.7.1 Refugee Status

The UN Convention Relating to the Status of Refugees 1951 (the ‘Geneva Convention’), as amended by a 1967 protocol, requires all contracting parties to grant asylum to persons meeting the stipulated definition of a refugee. Under the Convention a refugee is defined as any person who:

⁵⁷¹ *Op. cit.*, p. 76.

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*, p. 77.

⁵⁷⁴ See Irish Human Rights Commission (2005) *CEDAW Submission* (Dublin: IHRC), para. 4.5.2.

⁵⁷⁵ Reported by Reid, ‘Cohabiting Welfare Ban on Single Parents to Be Dropped’, *Irish Times*, 29 December 2005, p.1, and Reid, ‘Growing Number of Lone Parents Live in Poverty’, *ibid.*, p. 11.

⁵⁷⁶ Government of Ireland (2006) *Government Discussion Paper: Proposals for Supporting Lone Parents* (Dublin: Stationery Office).

⁵⁷⁷ *Ibid.*, pp. 23–4.

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁵⁷⁸

The Geneva Convention was incorporated into Irish law by the Refugee Act 1996, section 2 of which broadly replicates the definition outlined above. The implementing legislation, however, goes somewhat further than required by international law in defining the phrase ‘membership of a particular social group’ to include *inter alia* having a particular sexual orientation.⁵⁷⁹

Once established as having refugee status, the refugee has an express right under section 18 of the Act to family reunification – that is, to be joined in Ireland by other members of his or her immediate family. For these purposes, however, the category of eligible family members is confined to spouses and dependent children.⁵⁸⁰ Section 18 requires the Minister for Justice, Equality and Law Reform, if satisfied that a person is ‘a member of the family’ of a refugee, to grant the relevant person permission to enter and reside within the State. That person will be entitled to the rights and privileges enjoyed by refugees under section 3 of the Act.

For these purposes, the term ‘member of the family’ is defined as including a ‘spouse’ or minor child of the refugee and, where the refugee is at the relevant date a minor, his or her parents.⁵⁸¹ Although the term ‘spouse’ is not explicitly defined, the section clearly indicates that the term denotes the lawful husband or wife of a person and not a cohabiting partner. The reference to a spouse is preceded by a stipulation ‘in case the refugee is married’ and further requires that the marriage in question ‘is subsisting at the date of the refugee’s application’.

The Minister is also empowered to admit, at his or her discretion, a dependent member of the family of the refugee, defined as including a grandparent, parent, sibling, child, grandchild, ward or guardian of the refugee, provided such persons are dependent on the refugee or are unable, due to a mental or physical disability, to care for themselves. This facility is wholly discretionary and omits, moreover, any reference to non-marital partners.

The provisions of section 12 of the Act permit the Minister to require that priority be given to certain applications, based on a number of considerations, including ‘any family relationships between applicants’,⁵⁸² and where ‘there are special circumstances regarding the welfare of applicants or the welfare of family members of applicants’.⁵⁸³ Although the term ‘family’ is not defined in section 12, it is likely, by analogy with

⁵⁷⁸ UN Convention Relating to the Status of Refugees 1951 (the ‘Geneva Convention’), Article 1(A)(2).

⁵⁷⁹ Refugee Act 1996, section 1(1).

⁵⁸⁰ See generally Irish Human Rights Commission (2005) *Position Paper on Family Reunification* (Dublin: IHRC).

⁵⁸¹ *Ibid.*, section 18(3)(b).

⁵⁸² *Ibid.*, section 12(1)(c).

⁵⁸³ *Ibid.*, section 12(1)(h).

section 18, that the term would be interpreted as confined to persons related by blood, marriage or adoption and would not extend to non-marital partners.

There is, of course, nothing preventing a cohabiting partner of a refugee from being admitted at the discretion of the Minister for Justice, Equality and Law Reform. There is, however, no express legal right to reunification in such cases, nor is there any designated procedure for this purpose. This is particularly problematic in the case of the same-sex partner of a refugee, who is, as noted above, precluded from acquiring the status of spouse in respect of her partner. Although the latter may independently have grounds for refugee status, the Act does not permit her access to the State on the basis of her relationship alone. Case law under the ECHR accords State Parties a high degree of autonomy in the area of immigration. There is no right to family reunification, as such, under the Convention and, although Article 14 is applicable to decisions made in this context, it affords *de facto* couples no apparent protections.⁵⁸⁴

4.7.2 Immigration: EU/EEA Citizens

A national of a Member State of the European Union, the European Economic Area (which embraces the EU, as well as Norway, Liechtenstein and Iceland) or Switzerland is entitled to move freely throughout the EU, to take up employment, provide or access economic services and move capital throughout the EU. Thus, a non-marital partner of a person lawfully resident in Ireland is entitled, provided she is a national of one of the States noted above, to enter and reside in the State. This right arises, however, independently of any consideration of the existence of a *de facto* relationship.

4.7.3 Immigration: Third-Country Nationals

A person who is not an EU, EEA or Swiss national, who wishes to enter and reside in the State, may do so only in compliance with the provisions of the Aliens Act 1935 and the Immigration Acts 1999–2004. Such a person wishing to work within the State may only do so on condition that he or she has first acquired permission from the State.

As a general principle, the non-EU national spouse of a person lawfully resident in Ireland is entitled to enter and reside in the State with his or her spouse.⁵⁸⁵ This right is not absolute and may be curtailed where required, by considerations of public policy, for instance where the person's presence in the State constitutes a threat to the common good⁵⁸⁶ or to public safety generally,⁵⁸⁷ or where the parties are estranged or separated.⁵⁸⁸

In theory, immigration law does not recognise non-marital relationships. In this regard, same-sex and unmarried opposite-sex couples are treated alike, with the obvious exception that opposite-sex couples may, in most cases, opt to marry and avail of various rights as a result of such marriage. To date, the State has failed formally to recognise in legislation relationships between adults outside of marriage,

⁵⁸⁴ *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 E.H.R.R. 471, para. 59.

⁵⁸⁵ This right appears to be limited to cases where the person entitled to reside in Ireland is already resident in, or intends to return to, the State. See *Abdelkifi v. The Minister for Justice* [1984] I.L.R.M. 138.

⁵⁸⁶ *Oshoku v. Ireland* [1987] I.L.R.M. 330.

⁵⁸⁷ *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593.

⁵⁸⁸ *State (Bouzagou) v. Station Sergeant, Fitzgibbon Garda Station* [1986] I.L.R.M. 98.

although there is some evidence that the State, prompted by the imminent coming into force of Directive 2004/58/EC (see Chapter 2), is beginning to consider according recognition to non-marital relationships and allowing foreign national partners of Irish citizens to live and in some cases to work in Ireland on the basis of a non-marital relationship.⁵⁸⁹ As against this, the Department of Justice's recent discussion on immigration and residence in Ireland does not deal with the position of *de facto* couples for family reunification purposes.⁵⁹⁰

It is worth noting that, in determining whether a person should be granted leave to land in the State, section 4(10) of the Immigration Act 2004 requires an immigration officer to have regard to any family relationships of the foreign national with persons in the State. The term 'family relationships' only applies, however, to relationships by 'blood or marriage'. The Act further bans the presence in the State, without permission, of a non-national (not being a national of an EU or other exempted state). For these purposes, the family member of a refugee is exempted, though again it is worth noting that the term 'family member' for the purposes of the Refugee Act does not include a non-marital partner.

Section 3(6) of the Immigration Act 1999 (concerning the deportation of persons who are not or are no longer entitled to reside in the State) would appear, by contrast, to adopt a somewhat wider remit. In considering whether a person ought to be deported, the Minister for Justice, Equality and Law Reform is obliged to have regard, *inter alia*, to the 'family and domestic circumstances of the person' as well as the 'nature of the person's connection with the State'. While neither provision necessarily prevents the deportation of the partner of an EU citizen, these sub-clauses may be wide enough to require the Minister to have regard to a non-marital relationship with a person legally resident in the State.

Thus, as matters stand at the moment, all of the options available to a *de facto* couple seeking immigrant status for the non-EEA partner require that the latter must establish his or her right to stay in Ireland independently of considerations relating to his or her relationship. In other words, the latter is generally treated as a single immigrant. Non-marital partners of EEA citizens may be admitted at the discretion of the Minister for Justice, Equality and Law Reform and permitted to reside in Ireland, either with or without the right to work. There is, however, no express legal right to residence in such cases nor is there any designated procedure for this purpose. Such permission would, moreover, usually be subject to conditions, most notably as to duration and means.

As noted above, Directive 2004/58/EC requires by 30 April 2006 the reform of Member States' immigration laws to include provision for unmarried persons in a durable relationship. Irish law, as presently constituted, makes no provision for such persons. The lack of a mechanism for the recognition of non-marital unions thus risks breaching the terms of the Directive. The fact that same-sex couples in particular are not permitted to marry may also mean that, in the absence of reform, the State may be deemed to have discriminated indirectly on the basis of sexual orientation, which is

⁵⁸⁹ Downes, 'Partnerships to Be Recognised under EU Rule', *Irish Times*, 12 December 2004.

⁵⁹⁰ See Irish Human Rights Commission (2005) *Observations on the Immigration and Residence in Ireland Discussion Document* (Dublin: IHRC), p. 12.

banned under the Directive and also runs counter to the Charter of Fundamental Rights.

4.7.4 Citizenship

Ordinarily, a person who is not a citizen of the State may acquire citizenship by naturalisation if he or she has lawfully resided in the State for a total of five of the previous nine years, including at least one continuous year of residence immediately prior to the application for naturalisation.⁵⁹¹ The decision to naturalise is, however, at the absolute discretion of the Minister for Justice, Equality and Law Reform. In other words, there is no automatic right to be naturalised, even if all relevant conditions are met. The person must be of full age and good character and must, moreover, intend in good faith to continue to reside in the State after naturalisation.

Formerly, it was possible for the spouse of an Irish citizen automatically to acquire citizenship once three years had passed since the date of the marriage. This applied only where the marriage took place prior to 30 November 2002. In such cases, the spouse of an Irish national simply made a declaration accepting Irish citizenship. The marriage had to be subsisting at the time of the declaration, and such declaration had to be made by 30 November 2005 at the latest. Notably, there was no requirement that the spouse reside in Ireland either before or after naturalisation.

Current law no longer affords an automatic right to citizenship on marriage to an Irish citizen. Section 15A of the Irish Nationality and Citizenship Act 1956 empowers the Minister for Justice, Equality and Law Reform to confer citizenship on the non-national spouse of an Irish citizen, provided certain conditions are met. The Minister, however, has 'absolute discretion' and may, thus, decline to confer citizenship. The parties must have been married for at least three years and must, at the time of the application, be living together as husband and wife.⁵⁹² In addition, the non-national spouse must have resided in Ireland for at least one continuous year prior to the application for naturalisation, and at least a further two of the four years preceding that continuous year,⁵⁹³ making a total of three years of the five years immediately preceding the application. The person must be of full age and good character and must, additionally, intend in good faith to continue to reside in the State after naturalisation.

The residence requirements are relaxed in the case of spouses of public servants working abroad. In such cases, any period of time spent outside Ireland in the company of a spouse working in the public service (for instance, as a diplomat), will be deemed for this purpose to constitute residence in Ireland. This exemption, however, only applies where the Irish national spouse is working in the public service, and not in the private sector. This may well constitute a breach of EU law on the free movement of persons in that it potentially penalises private-sector employees who choose to work abroad.

⁵⁹¹ Irish Nationality and Citizenship Act 1956, sections 14, 15 16, 16A-20. The Act speaks of one continuous year of residence immediately prior to the application, and a further four cumulative years out of the eight years prior to that continuous year of residence.

⁵⁹² *Ibid.*, section 15A.

⁵⁹³ Although, under section 15A(2), the Minister has the discretion to waive the conditions relating to the required duration of the marriage, the required residence periods and/or the requirement of an intention to continue residing in Ireland if satisfied that the applicant would suffer serious consequences in respect of his or her bodily integrity or liberty if not granted Irish citizenship.

In all cases, however, the facility for naturalisation of a spouse is available only where the applicant is ‘in a marriage recognised under the laws of the State as subsisting’.⁵⁹⁴ No special facility applies where an Irish citizen is cohabiting with a non-Irish national: insofar as citizenship is concerned, the relationship between the parties is not deemed to be relevant.

Determination of national citizenship falls outside the competence of the EC and does not fall within the material scope of the European Convention on Human Rights; as a result, Article 14 is inapplicable. Such matters may be covered under Protocol 12 to the ECHR, however.⁵⁹⁵

4.8 Health and Personal Safety⁵⁹⁶

4.8.1 Hospital Treatment: Visitation Rights

If a partner goes into hospital for treatment, there is no automatic right of visitation. In practice, however, many hospitals have adopted a policy that permits visitation by a partner. Hospitals are subject to the Equal Status Acts 2000–2004. As such, any discriminatory treatment on grounds of marital status, family status or sexual orientation would be contrary to the Acts. Thus, a hospital that fails to allow access to a patient by his or her non-marital partner, in circumstances where it can be established that a person of different marital status or sexual orientation would not be so treated, may be entitled to damages and other remedies.

4.8.2 Consent to Treatment

Unless a person is mentally incapacitated, she and she alone may make decisions regarding her treatment. A person may not be subject to medical treatment or surgery without that person’s full, free and informed consent.⁵⁹⁷ As a general rule, neither the next of kin nor the spouse of a person may interfere in the decision of a person regarding their own medical treatment.

Despite common perceptions to the contrary, an adult’s next of kin (usually the spouse, or parent or nearest relative of a person) has no automatic right to make decisions on behalf of an incapacitated adult. Medical Council guidelines stress that a doctor may only act in cases where such surgery is considered necessary for the recovery of the patient. While Medical Council guidelines recommend consultation with the next of kin and/or the spouse of a person, no provision is made for consultation with a non-marital partner.⁵⁹⁸ As the guidelines do not derive from a statute or other rule of law, they fall within the scope of the Equal Status Acts 2000–2004 and are open to challenge on that basis. As a public body, the Medical Council is also obliged to carry out its functions in accordance with Convention standards, including the discrimination prohibition under the ECHR Act 2003.

⁵⁹⁴ *Ibid.*, section 15A(1)(d).

⁵⁹⁵ See De Schutter *op. cit.*, p. 24.

⁵⁹⁶ On health, see generally, Law Reform Commission *op. cit.*, paras. 9.02–9.13.

⁵⁹⁷ *Re a Ward of Court (Withdrawal of Medical Treatment)* [1996] 2 I.R. 79.

⁵⁹⁸ See Equality Authority *op. cit.*, p. 27.

4.8.3 The ‘Enduring Power of Attorney’

An exception arises where the partner has acquired an enduring power of attorney under the provisions of the Power of Attorney Act 1996.⁵⁹⁹ The Enduring Power of Attorney is an instrument signed by a donor permitting the attorney to act on the donor’s behalf, in accordance with the terms of the power. This gives the attorney power to make decisions regarding property, finance, business and personal care in respect of the donor. It does not confer the power to make decisions regarding surgery or medical treatment but does allow the attorney to make a decision that might have implications for the healthcare of a person; most notably, whether an incapacitated partner should be allowed to die a natural death.

4.8.4 Access to Medical Records

Under the Data Protection Acts 1988–2003, neither a spouse nor a partner of a patient has the right to access the patient’s medical records without the consent of the patient. The only exception to this would be where the patient has effected an enduring power of attorney in favour of the relevant person.

4.8.5 Domestic Violence

The Domestic Violence Acts 1996–2002 expanded the range of persons who could apply for a remedy, for the first time granting a right to non-marital partners⁶⁰⁰ to apply for a barring order (excluding the respondent from the family home),⁶⁰¹ a safety order (requiring the respondent to desist from undermining the safety or welfare of the applicant)⁶⁰² and a protection order (providing emergency relief pending the determination of proceedings for either of the foregoing).⁶⁰³ The remedies designated by the Acts may be imposed where a court is satisfied that there are reasonable grounds for believing that the safety or welfare⁶⁰⁴ of an applicant or a dependent child so requires.

⁵⁹⁹ See Law Reform Commission *op. cit.*, paras. 9.07–9.09.

⁶⁰⁰ Earlier legislation confined these rights to marital families. The first example of such legislation arose with the enactment of the Family Law (Maintenance of Spouses and Children) Act 1976, section 22 of which permitted the courts, but only at the instance [insistence?] of a spouse, to bar the other spouse from the place at which the former spouse or child resides, where the safety or welfare of the spouse or child so required. The Family Law (Protection of Spouses and Children) Act 1981, while expanding somewhat the aforementioned provision of the 1976 Act, was similarly confined to spouses.

⁶⁰¹ This allows a court to exclude the person from the home of the applicant. If granted, it requires the respondent, if living with the applicant or dependent person, to leave such place and whether he or she is living in that place prohibits the respondent from returning there or ‘entering such place’. A barring order is valid for three years but is renewable. The Act also permits an interim barring order to be sought pending the determination of an application for a full barring order.

⁶⁰² This permits a court to direct the subject of the order ‘not to use or threaten to use violence against, molest or put in fear the applicant or dependent person and shall not watch or beset the place where the applicant or dependent person resides’. The safety order, once granted, remains valid for five years and may be renewed for another five years. It does not require the subject of the order to vacate the family home.

⁶⁰³ This is effectively an emergency order, affording immediate protection pending the determination of an application for a safety or barring order. It may be sought where immediate protection is required, or where the applicant fears retribution in the case of an application for a safety or barring order being made. The protection order has broadly the same effect as a safety order but can be obtained more speedily and without the need to inform the subject of the order in advance.

⁶⁰⁴ Welfare for these purposes includes the physical *and* psychological welfare of the person in question: Section 1(1).

Safety or protection orders

A safety or protection order may be availed of by the spouse, dependent child or cohabiting partner (whether of the same sex or of the opposite sex). It may also be obtained by a parent against a child aged 18 or over.

In relation to cohabiting partners, a close examination of the Act reveals a notable difference in treatment between opposite-sex and same-sex partners. For this purpose, the Acts define an applicant as including a spouse of the respondent, or as a person who, though 'not the spouse of the respondent, has lived with the respondent as husband and wife for at least six months in aggregate during the previous twelve months'.⁶⁰⁵ This would appear, at face value, to be confined to opposite-sex couples. The Act provides, further, that a person may obtain either order against any other person of full age who is residing with the respondent in a relationship the basis of which is not primarily contractual.⁶⁰⁶ This rather awkward phrase feasibly includes a cohabiting same-sex partner. In the case of such persons, however, there is no required minimum period of cohabitation; in deciding whether the parties have the required relationship, the court can look to the time spent together, the absence of profit or payment from the living arrangement and the 'duties performed' by each person for the other.⁶⁰⁷ It would appear that the Acts distinguish between same-sex and opposite-sex couples, first, in expressly providing a facility for the latter, while grouping the former with other miscellaneous relationships, and second by setting for heterosexual couples a minimum period of cohabitation not required of same-sex couples. The Law Reform Committee of the Law Society of Ireland regards the residence requirement for heterosexual *de facto* couples as being anomalous and without justification.⁶⁰⁸

Barring orders

A person⁶⁰⁹ may obtain a barring order in respect of their spouse or child (if aged 18 or over). A cohabiting partner who, though 'not the spouse of the respondent', has 'lived with the respondent as husband or wife' for at least six of the previous nine months may also apply for a barring order. At face value, this latter phrase could be interpreted as excluding same-sex partners. As noted above, in *Karner* the ECtHR established that unequal treatment of same-sex and opposite-sex *de facto* partners could amount to unlawful discrimination unless objectively justified (Chapter 3.2.3). As such, a similar argument could be made in the context of Irish domestic violence legislation, although this has never been tested and the outcome of such a case would be unclear. The provision may contravene Article 14 of the ECHR, particularly given the connection here with an important interest (personal safety) and a ground of discrimination that merits especially weighty reasons by way of justification for any difference in treatment.

Even in the case of unmarried heterosexual partners, a barring order may only be sought where the applicant has at least a 50% beneficial interest in the property. This means that a partner may only obtain a barring order where the applicant has an equal or superior interest in the property, and not where the respondent's interest is greater

⁶⁰⁵ Section 2(1)(a)(ii).

⁶⁰⁶ Section 2(1)(a)(iv).

⁶⁰⁷ Section 2 (1) (b).

⁶⁰⁸ Law Reform Committee of the Law Society of Ireland (1999) *Domestic Violence: The Case for Reform* (Dublin: Law Society of Ireland), p. 16.

⁶⁰⁹ A Health Board may also apply on behalf of a party.

than that of the applicant. This condition does not apply to married couples. This provision may mean that a partner with less than a 50% interest in the property faced with persistent threats to his or her safety or welfare may ultimately be required simply to leave the property with a view to avoiding such threats, should a safety or protection order prove ineffective. The compatibility with the ECHR of such a property threshold test has yet to be probed. It is evident from the CEDAW Committee's jurisprudence to date that the efficacy of State measures in the field of domestic violence, including the level of protection afforded unmarried partners, will be subject to a high level of scrutiny (Chapter 3.3.4).⁶¹⁰

4.9 Duties and Rights in Respect of Children

Turning to the rights of children, the legal distinction between non-marital and marital children was for most purposes abolished by the Status of Children Act 1987. This Act broadly acknowledged that there was no difference in law between children born inside or outside the confines of marriage. It is worth noting, however, that the Constitution still permits discrimination against the non-marital family (even if legislation does not).⁶¹¹ If the legislature, then, were to repeal the 1987 Act, there would be nothing in the Constitution to stop it from doing so.

Although the Act largely eliminated discrimination against non-marital children, the position of the non-marital parent in law is markedly less secure. In particular, significant legal differentiations arise as between the rights and duties respectively of marital and non-marital fathers.⁶¹²

4.9.1 Guardianship of Children

The right of guardianship, in respect of a minor child, confers on the holder the global right and duty to provide for the overall upbringing of that child. Although one may act as guardian without also acting as custodian of the child, *prima facie*, a guardian is entitled, as against all persons who are not guardians, to assert a right to custody of the child. Guardians, moreover, have the power legally to make major decisions concerning the child's upbringing, income and property, though always with the best interests of the child to the forefront.

When born to parents who are married to each other, a child acquires two legal guardians, its father and its mother, these parents holding, in law, co-equal rights of guardianship.⁶¹³ By contrast, where a child is born to persons who are not married to each other, the law initially designates the mother of the child as sole guardian.⁶¹⁴ Although a father may apply to a court to be conferred with guardianship,⁶¹⁵ the

⁶¹⁰ See, in particular, Communication No. 2/2003, *Ms. A.T. v. Hungary* (views adopted on 26 January 2005, thirty-second session).

⁶¹¹ See *O'B. v. S.* [1984] I.R. 316.

⁶¹² See also H. O'Driscoll (1999) 'The Rights of the Unmarried Father', *Irish Journal of Family Law* [1999] 2, p. 18; F. Ryan (2006) 'Recognising Family Diversity: Children, One Parent Families and the Law', *Irish Journal of Family Law* [2006] 1, p. 1; and D. Walshe (2003) 'The Legal Rights of Unmarried Biological Fathers', *Irish Journal of Family Law* [2003] 2, p. 2.

⁶¹³ Guardianship of Infants Act 1964, section 6(1). Section 2(1) of the Act defines a father, for the purpose *inter alia* of section 6(1), to include a male adopter but excluding a father who is not married to the child's mother, unless he has been appointed guardian thereof.

⁶¹⁴ *Ibid.*, section 6(4).

⁶¹⁵ *Ibid.*, section 6A, inserted by the Status of Children Act 1987, section 12, and amended by the Children Act 1997, sections 6 and 12.

conferral of guardianship on a non-marital father is not automatic. In particular, a court may refuse to confer guardianship on the basis that it is not in the child's best interests to do so.⁶¹⁶

Another alternative open to the father arises where the mother of a child, with the consent of the father, makes a statutory declaration⁶¹⁷ to the effect that the father will be deemed a joint and equal guardian with the mother.⁶¹⁸ This option depends, however, on the written consent of the mother, which may not be forthcoming in all cases. As such, the various legislative provisions appear to accord with relevant jurisprudence of the ECtHR (see also Chapter 3.2.3.). In *McMichael*, for example, the Strasbourg Court held that governments were free to differentiate between married and unmarried fathers in relation to the acquisition of automatic guardianship rights. Further, the ECHR does not as of yet require legal recognition of social parents (even though such relationships may amount to family life under Article 8). Arguably, however, failure to provide a legal mechanism for the recognition of such co-parents runs counter to the UN Convention on the Rights of the Child (Chapter 3.3.5).

4.9.2 Custody

Any guardian and both parents of a child may apply under section 11 of the Guardianship of Infants Act 1964 for an order relating, *inter alia*, to the guardianship or custody of a child. This right is expressly deemed to extend to a non-marital father of a child, whether the father is a guardian of the child or not.⁶¹⁹

In determining to whom custody or access will be granted, the courts retain a significant degree of discretion, subject to the overriding requirement that the remedy in question should promote the best interests of the relevant child.⁶²⁰ Decided case law provides some evidence for the proposition that, in determining whether a particular resolution is in the best interests of the child, the courts sometimes have had regard to the lifestyle of each parent. It is thus feasible that a parent would be denied custody because the parent was living with a third person in a non-marital relationship, a situation that some courts regarded as detrimental to the child's moral welfare.

For instance, in *J.J.W. v. B.M.W.*⁶²¹ the Supreme Court refused to award custody to a mother in part on the grounds that she was living with a non-marital partner. The court did agree to grant access to the children in respect of their mother, subject to the condition that the partner would not be present during visits. Other judges have proved less willing to regard custody as a reward for good behaviour,⁶²² though *S. v. S.*⁶²³ suggests that the participation of a parent in a non-marital relationship may be

⁶¹⁶ See *K. v. W.* [1990] 2 I.R. 437 and *W.O'R. v. E.H.* [1996] 2 I.R. 248. In both cases, two seemingly committed and conscientious fathers were nevertheless denied guardianship rights. The courts in each case favoured adoption of the child by its mother and her new husband as being in the children's best interests, thus concluding that it would not be feasible to grant the father a veto over the adoption.

⁶¹⁷ See the Guardianship of Children (Statutory Declarations) Regulations 1998 (S.I. No. 5 of 1998).

⁶¹⁸ Guardianship of Infants Act 1967, section 2(4), as inserted by the Children Act 1997, section 4.

⁶¹⁹ *Ibid.*, section 11(4).

⁶²⁰ *Ibid.*, section 3.

⁶²¹ (1976) 110 I.L.T.R. 45.

⁶²² *E.K. v. M.K.* unreported Supreme Court, 31 July 1974, and *M. O'B. v. P.O'B.*, unreported High Court, Kenny J., 5 January 1971.

⁶²³ [1992] I.L.R.M. 732.

considered by the court as a reflection of the priorities of the parent in respect of the child.

Although the issue has not been extensively tested in Ireland, English and Welsh case law suggests that, until recently, the courts were reluctant to grant custody to parents who were gay or lesbian,⁶²⁴ though this restrictive approach has gradually abated.⁶²⁵ It is clear, however, that in custody cases it is contrary to the European Convention on Human Rights to deny custody or access on the grounds of a person's sexual orientation. In *Da Silva Mouta v. Portugal*,⁶²⁶ the European Court of Human Rights was called upon to consider a decision of a Portuguese court denying custody to the father of a child on the sole basis of his sexual orientation. The Court ruled that such treatment infringed Article 14 of the Convention, as it amounted to direct discrimination on the 'other status' ground of sexual orientation. As previously noted, Irish courts must now take judicial notice of the ECtHR jurisprudence when interpreting or applying any rule of law.

4.9.3 Adoption of Marital and Non-Marital Children

The constitutional preference for marriage can and has in the past been used to justify several arbitrary and unjust distinctions between children based on the marital status of their parents. This state of affairs still pertains, to a significant extent, in relation to the placing of children for adoption. A non-marital child may be adopted by consent of its mother and any other guardian, but the child of married parents may not be approved for adoption in this manner. Because of the restraints created by Article 42 of the Constitution, a marital child may only be adopted where there has been a complete and comprehensive abandonment of the child that is likely to last until the child reaches the age of 18.⁶²⁷ It is extremely difficult in practice to establish that this has occurred. Ironically, this predicament illustrates that the constitutional preference for marriage may in some cases work to the disadvantage of members of the marital family. A child in long-term foster care may find that she cannot hope to attain the long-term stability that adoption may provide simply because her natural parents are married to each other.⁶²⁸

A further differentiation in this regard concerns the right of fathers to veto an adoption. A consent is required from the mother, guardian and any person having 'charge of or control over the child' in question immediately prior to placement.⁶²⁹ Thus, unless a non-marital father has acquired guardianship in respect of a child, he is not entitled to object to the proposed adoption of the child. As a result of the decision of the European Court of Human Rights in *Keegan v. Ireland*,⁶³⁰ the Adoption Act 1998 amended the Principal Act to confer on the father of a child, whether he is a person required to give consent or not, the right to be consulted in respect of the child's adoption.⁶³¹ This right extends also to a person who believes himself to be the

⁶²⁴ See *Re D* [1977] A.C. 602 and *C. v. C.* [1991] 1 F.L.R. 223.

⁶²⁵ See *Re. T.*, 1997 Scots Law Times 724 (adoption granted to man living with male partner) and *Re W.* [1998] Fam. 58. See also Northern Ireland Human Rights Commission *op. cit.*, Chapter 3.5.

⁶²⁶ (1999) 31 E.H.R.R. 47.

⁶²⁷ Adoption Act 1988.

⁶²⁸ Department of Health and Children (2005), *Adoption Legislation: 2003 Consultation and Proposals for Change* (Dublin: Stationery Office), Chapter 7.

⁶²⁹ Adoption Act 1952, section 14(1).

⁶³⁰ (1994) 18 E.H.R.R. 342.

⁶³¹ Adoption Act 1952, section 16(1)(d), as amended by section 5 of the Adoption Act 1998.

father of a child. By putting in place such procedural safeguards, Irish law in this regard now appears to comply with Articles 6 and 8 of the ECHR.

4.9.4 Adoption and Foster Care by *De Facto* Couples

While there is nothing in Irish law preventing an unmarried partner from adopting a child on his or her own, it is not possible jointly to adopt a child unless the adopters are married to each other.⁶³² In theory it is possible for an unmarried person to adopt a child, though, where the person is not a relative of the child, an adoption will only be effected where the Adoption Board is satisfied that, in the particular circumstances of the case, it is desirable to do so.⁶³³ As a public body the Adoption Board is obliged under section 3 of the ECHR Act 2003 to perform its function in a manner that is compatible with the Convention. However, direct discrimination against a gay/lesbian prospective adoptive parent may fall within the State's margin of appreciation (Chapter 3.2.2–3).

There is no legal restriction on *de facto* couples fostering a child together. The overriding consideration in such cases is whether the foster care arrangement is in the best interests of the child.⁶³⁴

4.9.5 Parental and Maternity Leave

Both marital and non-marital parents can avail of parental and maternity leave (see also sections 4.9.3–4). However, the implicit definition of 'parent' set out in section 6 of the Parental Leave Act 1998 is potentially problematic in relation to the entitlements of social parents, in that it refers to 'an employee who is the natural or adoptive parent of a child'. In this regard the proposal to define a 'parent', under section 2 of the Parental Leave (Amendment) Bill 2004, as including an employee acting in *loco parentis* is a welcome development from the perspective of certain *de facto* couples.

4.9.6 Rights and Duties of Social Parents

A person who lives with a non-marital partner and a person who is the child of the latter only has few rights in respect of the child, and few duties towards that child. Unless the partner is also a parent of the child, he or she is not obliged to pay maintenance in respect of the child. (A spouse or former spouse, by contrast, may be obliged to maintain a child treated as a child of his or her family, even if the spouse is not a parent of the child.) The non-marital partner who is not also a parent of that child is not entitled to seek custody, or to acquire guardianship over the child, although the parent of the child may, by means of a will, transfer guardianship to the partner on the former's death.⁶³⁵ He or she may not jointly adopt the child with his or her partner unless the parties first marry. While the partner is included in the range of persons entitled to seek parental leave in respect of a child's illness⁶³⁶ and to seek

⁶³² Sections 10(1)(a) and 10(3) of the Adoption Act 1991 stipulate that a child may not be adopted by more than one person unless those persons 'are a married couple who are living together'.

⁶³³ Adoption Act 1991, section 10(2).

⁶³⁴ Department of Health and Children, *op. cit.*

⁶³⁵ Guardianship of Infants Act 1964, section 7.

⁶³⁶ Parental Leave Act 1998, section 13.

access to the child in case of relationship breakdown,⁶³⁷ both facilities only apply where the partner has been *in loco parentis* in respect of the child. As noted above, the ECHR does not currently mandate the extension of parental rights to social parents.

4.10 Employment

Although the rights and duties of employment generally concern the individual employee, rather than her family, the marital and family status of an employee may come to the fore in certain contexts.

4.10.1 Employment Equality Overview

The Employment Equality Acts 1998–2004 offer some limited protections in the field of employment to persons who are unmarried.⁶³⁸ The Acts generally ban discrimination on the specified grounds in the context of employment in both the public and private sector, and in particular in the recruitment, remuneration, training and promotion of employees and generally in the setting of the conditions of employment. The nine specified grounds include marital status and family status.⁶³⁹ Marital status for these purposes is defined as being ‘single, married, separated, divorced or widowed’. This effectively means that it is not possible to treat a person more or less favourably in the employment context on the grounds that the person is or is not married.⁶⁴⁰ Nevertheless, it is at least arguable that, on a narrow reading, this definition falls short insofar as it concerns *de facto* couples. Carolan observes that by reference to this definition:

[M]arital status discrimination occurs only if a person is discriminated against because she is single, married, separated, divorced or widowed. Discrimination against someone based on cohabitation does not constitute marital status discrimination, because such a person is not being discriminated against by reason of being single, married, separated, divorced or widowed.⁶⁴¹

In other words, although the Act prevents a person from suffering discrimination on account of being unmarried, it does not appear expressly to prevent discrimination on the grounds that a person is cohabiting with another person outside of marriage.

This interpretation appears to be borne out in the Seanad debates on this point. In response to a proposed amendment designed specifically to prohibit discrimination on the grounds of cohabitation, the then Minister for Justice held firm. In refusing to extend the definition of marital status to include non-marital cohabiting partners, the Minister observed:

⁶³⁷ Guardianship of Infants Act 1964, section 11B.

⁶³⁸ See generally A. Cotter and J. Moffatt (eds.) (2004) *Discrimination Law* (Oxford: OUP/Law Society of Ireland).

⁶³⁹ See generally Power *op. cit.*

⁶⁴⁰ It is also potentially illegal to draw attention to a person’s marital status in an interview or to enquire of a spouse’s attitudes to the work involved. In *Coombe Lying-In Hospital v. Tuite* EE 17/1985, a married woman was canvassed on her husband’s views on her decision to take a course, and whether a housewife could run a home and study at the same time. This was determined to constitute a breach of the 1977 Act. See also *ACOT v. Hall*, EE 1/1987, *National Building Agency v. Kinsella* EE 8/1985 and *McDonald v. Clonmel Healthcare* (DEC-E2000-12).

⁶⁴¹ B. Carolan (2001) ‘Rights of Sexual Minorities in Ireland and Europe: Rhetoric versus Reality’, *Dickinson Journal of International Law* 19, p. 387, at p. 399.

[T]his legislation seeks to ensure equality in employment and to eliminate prejudice and discrimination. It does not seek to change the marital status of individuals or provide for different types of marital status.⁶⁴²

Although the content of parliamentary debates is not considered to be conclusive as regards the likely interpretation of the relevant legislation, the content of the Minister's response does appear to bear out Carolan's observation that the statutes may not prevent an employer from dismissing or otherwise discriminating against an employee on the basis that he or she is cohabiting outside of marriage.

As against this, the decision in *Eagle Star Co. v. A Worker*⁶⁴³ suggests that the marital status ground may be read more expansively, that case having determined that the extension of a discount to employees and their spouses, but not unmarried cohabitants of a partner, was contrary to the 1977 Employment Equality Act. Power suggests, however, that under the 1998 Act such differential treatment would in fact be exempted, as preferential treatment for spouses is expressly permitted under the later enactment.⁶⁴⁴ Same-sex partners might, however, be able to argue that unequal treatment due to cohabitation outside of marriage constitutes unlawful sexual orientation discrimination. The ECtHR decision in *Karner* suggests that being in a same-sex relationship is an aspect of sexual orientation discrimination. In light of these ambiguities, legislative clarification may be a preferable course of action. The definition of marital status could, for example, be amended to include 'persons living in a conjugal relationship'.⁶⁴⁵

The term 'family status', in this context, is similarly restricted. As defined in the legislation, the phrase is largely understood to denote a parental relationship and does not extend to relationships between adults. For the purposes of the Acts, the term means:

responsibility:

(a) as a parent or as a person *in loco parentis* in relation to a person who has not attained the age of 18 years or

(b) as a parent or the resident primary care giver in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis.

Although this definition would appear to be wide enough to cover the relationship between a person and his/her partner's child, it does not apply to the relationship between adult non-marital partners.

4.10.2 Employment Equality Exemptions

In several other important respects the Acts appear to be deficient in their protection of cohabitants. In particular, a number of exemptions apply in this context, the most significant of which applies to organisations of a religious nature. Section 37 of the 1998 Act allows medical, educational and religious organisations which are run in

⁶⁴² Minister John O'Donoghue, 154 *Seanad Debates*, Col. 379 (18 February 1998).

⁶⁴³ [1998] E.L.R. 306.

⁶⁴⁴ *Op. cit.*

⁶⁴⁵ Note, however, the interpretive difficulties inherent in such a phrase: Cossman and Ryder *op. cit.*

accordance with the rules of a particular religious denomination to discriminate with a view to protecting their religious ethos.⁶⁴⁶ This means that a hospital or school run in accordance with the principles of a particular faith may lawfully discriminate against employees who cohabit outside of marriage, though only if the ethos of the organisation mandates such discrimination. The burden lies on the relevant organisation to establish that the action involved is reasonably necessary in order to prevent the undermining of its religious ethos. In other words, the action taken by the employer must be proportionate; that is, no more than is necessary to protect its ethos.

This clause poses particular difficulties for people who are in same-sex relationships, effectively forcing such persons either to avoid seeking employment with certain religious employers or to take up such employment in conditions where they are forced to conceal their sexuality. As the Equality Authority observes, ‘the inclusion of this clause has reinforced fear of discrimination against workers in religious-run institutions...and makes it even more difficult for such workers to be open about their sexuality’.⁶⁴⁷

The clause may also impact, however, on opposite-sex couples cohabiting outside of marriage. This is ably demonstrated by the case of *Flynn v. Power*.⁶⁴⁸ In that case, the plaintiff had been employed as a teacher at a girls’ secondary school run by a Roman Catholic religious order. The plaintiff, having formed a relationship with a married man, had become pregnant. Shortly after the birth of the child she was dismissed from employment, the respondents citing the circumstances of the pregnancy as grounds for dismissal. In rejecting her claim of unfair dismissal, the High Court relied heavily upon the religious ethos of the school in justification of the respondents’ actions. Noting that the school was a religious establishment, Costello J. held that the respondents were entitled to conclude, on the evidence, that the plaintiff’s actions in openly conducting a non-marital relationship, as well as the fact of her pregnancy, had the potential to undermine the school’s ethos. The school had been established, the Court observed, with a view to fostering certain values and norms of behaviour in the students who attended the school, efforts which the court concluded might potentially be undermined were the plaintiff to continue working there. The court appears to have placed some considerable emphasis on the fact that the plaintiff had not made any effort to conceal her situation. Although this case predated the implementation of the Act of 1998, it seems likely that the inclusion of section 37 would yield a similar result were the case heard today.

Although the exemption reflects in part Article 4(2) of the Framework Directive, it would appear that that measure is more tightly drawn than section 37(1). Article 4(2) permits discrimination on the religious belief ground where necessary to maintain religious ethos, but it does not permit discrimination on other grounds. This may mean that an interpretation of Article 4(2) may not permit discrimination where it serves, indirectly, to disadvantage persons on the ground of sexual orientation, another ground referred to in the Framework Directive.⁶⁴⁹ Additionally Article 4(2) applies

⁶⁴⁶ See F. Ryan (2005) ‘Sexual Orientation Discrimination’ in Cotter and McDermott (eds.) *Discrimination Law* (Cavendish/Law Society), Chapter 7, at pp. 108–9.

⁶⁴⁷ *Op. cit.*, p. 60.

⁶⁴⁸ [1985] I.R. 648.

⁶⁴⁹ See M. Bell (2003) ‘Equality Dialogues: Comparing the Framework Directive with the Regulation of Sexual Orientation Discrimination in Ireland’ in C. Costello and E. Barry (eds.) *Equality in*

only in respect of forms of employment where, ‘by reason of the nature of these activities or of the context in which they are carried out, a person’s religious belief constitutes a genuine, legitimate and justified occupational requirement’. This would appear to narrow considerably the scope of the employment to which section 37(1) applies. As such, Bell advises that:

The Irish Courts should, at the very least, interpret section 37(1) in light of the Directive’s provisions. Ultimately, legislative revision of section 37(1) is necessary and desirable.⁶⁵⁰

Another problematic exemption applies to workplace practices that favour the family members of employees. Employers are entitled to grant the family members of employees certain benefits on account of their relationship.⁶⁵¹ Benefits may also be bestowed in respect of an event related to members of the employee’s family or any description of those members. This might include, for instance, marriage (from which same-sex couples are excluded) or the birth of a child. Ironically (given that this is a measure seeking to promote equality) the Act of 1998 defines ‘member of the family’ for this purpose as a person related to the employee by blood, marriage or adoption, thus excluding non-marital partners.⁶⁵²

Although there is no definition of ‘spouse’ in the legislation, in Irish law it is generally understood that the term refers to a person who is a party to a valid and subsisting marriage recognised by the State. This being the case, the definition of family offered in the Acts definitively excludes unrelated persons living together outside of marriage. Given that partners of the same sex cannot marry, the provision of benefits is at least open to question as unlawful indirect sexual orientation discrimination, as discussed above.

4.10.3 Maternity and Paternity Arrangements

Although there is no express reference to marital status in the relevant legislation, maternity leave is available to all women during and after pregnancy.⁶⁵³ A woman may not be denied maternity leave on the basis that she is unmarried or living with a non-marital partner.

Section 6(1) of the Paternal Leave Act 1998 (granting the right to 14 working weeks’ paternal leave in respect of young children) applies to ‘natural or adoptive parent[s]’, a construction that includes marital and non-marital parents. Given the use of the term ‘natural’ in section 6, there is some ambiguity as to whether the statute covers social parents. As noted above, the Parental Leave (Amendment) Bill 2004 envisages

Diversity: The New Equality Directive (Dublin: Irish Centre for European Law), at pp. 336–9, and Power *op. cit.*, p. 325.

⁶⁵⁰ *Ibid.*, p. 337.

⁶⁵¹ Section 34, EEA.

⁶⁵² Section 2(1) of the Act defines ‘member of the family’ in relation to any person as:

(a) that person’s spouse,
(b) a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant of that person or that person’s spouse.

⁶⁵³ Maternity (Protection of Employees) Act 1981, sections 3 and 8, as amended by the Maternity (Protection of Employees) Act 2004, section 2.

extending the category of eligible employees to those acting *in loco parentis* with respect to a child.

4.10.4. Force Majeure Leave

The Parental Leave Act 1998 grants the right to *force majeure* leave in respect of an emergency related to a spouse or opposite sex partner, but not, it seems, a same-sex partner. Section 13 of the Act entitles employees to paid leave not exceeding three days in any one year, or five days over 36 consecutive months where, for urgent family reasons, owing to an injury to or the illness of a specified person, the immediate presence of the employee at the place where the person is, whether at his or her home or elsewhere, is indispensable.

The Act lists the following as persons in respect of whom *force majeure* may be taken:

- (a) a person of whom the employee is the parent or adoptive parent,
- (b) the spouse of the employee or a person with whom the employee is living as husband or wife,
- (c) a person to whom the employee is *in loco parentis*,
- (d) a brother or sister of the employee,
- (e) a parent or grandparent of the employee and
- (f) persons of such other (if any) class or classes as may be prescribed.

The reference in section 13(2)(c) appears to be wide enough to cover a person cohabiting with a person who is the parent of a child born as a result of an earlier relationship. Section 13(2)(b), however, in referring to persons living together ‘as husband or wife’ would appear to exclude same-sex couples, a situation that probably infringes Article 14 of the ECHR and does not comply with the Framework Directive (see section 4.2.5). While it is arguable that *force majeure* leave does not fall within the ambit of Article 8 ECHR, the Strasbourg Court in *Petrovic* has determined that parental leave is covered, since such measures are aimed at supporting family life (see also below on the EC law position).⁶⁵⁴ A similar construction would in all likelihood apply to leave that may be taken in the case of medical emergencies relating to a family member. Under the Parental Leave (Amendment) Bill 2004, currently before the Dáil, the Equality Authority is to be empowered to draw up codes of practice in relation to the practical operation of parental leave and *force majeure* leave entitlements.⁶⁵⁵ These codes will be admissible as evidence in any proceedings taken under the relevant legislation and can be expected to embody relevant ECHR standards.

4.10.5 Obligations on Elected Officials and Other Public Servants: Ethics in Public Office

The Ethics in Public Office Act 1995 places certain obligations of disclosure on all members of each House of the Oireachtas, as well as designated office holders and other persons holding a designated position in a public body. The legislation generally requires disclosure of the interests of the person in question and his or her spouse or child, but not of a non-marital partner.

⁶⁵⁴ *Petrovic v. Austria* (2001) 3 E.H.R.R. 14.

⁶⁵⁵ Section 10.

4.11 Consumer Rights: Provision of Goods and Services

The Equal Status Acts 2000–2004 ban discrimination on nine specified bases in relation to the provision of goods and services. The grounds of discrimination covered include sex, marital status, family status and sexual orientation. These grounds share the same definitions as accorded by the Employment Equality Acts 1998–2004 and thus much of the discussion noted above in 4.9.1 applies equally in this context.

The Acts ban discrimination in the disposal of goods and the provision of services to the public generally or to a section of the public.⁶⁵⁶ For this purpose, the term ‘service’ is defined quite widely and includes:⁶⁵⁷

- access to and the use of any place
- facilities for banking, insurance, grants, loans, credit and financing
- facilities for entertainment, recreation or refreshment, or for cultural activities
- facilities for transport and travel
- a service or facility provided by a club
- a professional or trade service

Provision of Accommodation

Section 6 of the Act specifically bans discrimination in the context of the disposal of any interest in land or the provision of accommodation. It is also illegal to discriminate in the context of the provision of a lease or tenancy. It would thus be illegal to deny a lease to a person on the grounds that she is not married. Here again, however, as is the case with discrimination in the context of employment, section 6 may be read as allowing a lessor to discriminate against a *de facto* couple on the basis that they are cohabiting. The exact parameters of the ‘marital status’ ground should become clear in future case law.

Section 6 also affords a notable exemption in favour of local authorities providing subsidised accommodation, permitting such authorities to discriminate on the basis of family size, family status and marital status. ECtHR jurisprudence accords a wide margin of appreciation to States in this field. The Equality Tribunal has confirmed that a local authority is entitled to prefer certain applicants for housing provided that decisions are based on objective and reasonable criteria.⁶⁵⁸

Education

Section 7 of the Act extends its remit to the provision of education, including pre-school, primary, secondary and third-level education, whether provided by a public or a private body. All such ‘educational establishments’ are prohibited from discriminating on any of the nine grounds in relation to the admission or terms of admission of a student, the access of a student to courses and other facilities, any other term or condition of participation in such establishment and the expulsion of the student. Although this would appear to prevent discrimination on the basis of marital status and family status in the education sector generally, section 7(3) of the Act poses an important exception that may in practice impact disproportionately on non-marital

⁶⁵⁶ Equal Status Act 2000, section 5(1).

⁶⁵⁷ *Ibid.*, section 2(1).

⁶⁵⁸ *Jones v. Dun Laoghaire Rathdown County Council*, DEC-S2004-081.

couples and their children. That subsection permits a school run in accordance with the rules of a particular faith to discriminate against students not of that faith, with a view to upholding its religious ethos. The provision does not expressly permit discrimination on the basis of marital status, family status and sexual orientation. However, it is arguable that this exemption opens up the possibility that a school might exclude or otherwise disadvantage the child of a non-marital or same-sex couple on the basis that the parents are in breach of a particular aspect of the religious rules that the school purports to promote.

Exemptions

The Act contains a number of exemptions that may permit discrimination on the grounds of marital status, family status and sexual orientation. In particular, section 16 of the Act of 2000 expressly permits the imposition or maintenance of a 'reasonable preferential fee, charge or rate' in respect of goods and services offered *inter alia* to persons with their children and married couples. This measure clearly permits service providers to offer special deals to married persons that are not available to *de facto* couples. This may also indirectly serve to permit discrimination on the basis of sexual orientation (same-sex couples not being permitted to marry). Section 5(2)(1) may also permit preferential treatment for newly married couples (such as the provision of bridal suites and honeymoon deals) on the basis that such differences in treatment apply to goods of services 'which can reasonably be regarded as suitable only to the needs of certain persons'.⁶⁵⁹ Compatibility with the Framework Directive does not arise, as goods and services are not covered with respect to sexual orientation; likewise this area falls outside the material scope of the ECHR but would come within Protocol 12.⁶⁶⁰ Although the ICCPR is applicable, it is highly unlikely that these matters would be scrutinised under Article 26.

Section 5(2)(d) of the Act also permits differences in relation to annuities, pensions, insurance policies and other matters related to the assessment of risk, where such differential treatment is effected by reference to actuarial or statistical data upon which it is reasonable to rely or other relevant underwriting or commercial factors. This exemption has given rise to a practice of life assurance companies in particular setting higher premia for, or otherwise refusing to insure, gay and bisexual men and their partners on the basis of a statistically higher risk of STD contraction.⁶⁶¹

The most significant exemption, however, arises under section 14, which effectively exempts from the remit of the Act any conduct expressly permitted by any enactment or order of court, or that is required under any act done or measure adopted by the European Union, or the institutions or communities thereof, or under any international convention. The provisions referring to EC law simply reflect the supremacy of this source of law, and the reference to international law is arguably defensible on the

⁶⁵⁹ See also section 5(2)(h), permitting differential treatment of 'a category of persons in respect of services that are provided for the principal purpose of promoting, for a *bona fide* purpose and in a *bona fide* manner, the special interests of persons in that category to the extent that the differences in treatment are reasonably necessary to promote those special interests'. It is arguable, however, that the requirement that the difference in treatment is reasonably necessary to promote the special interests may limit the remit of the section to the provision of necessary, as opposed to discretionary (or luxury), goods or services.

⁶⁶⁰ See De Schutter *op. cit.*, p. 24.

⁶⁶¹ See F. Ryan (2005) 'Sexual Orientation Discrimination' in Cotter and McDermott (eds.) *Discrimination Law* (Cavendish/Law Society), at p. 111.

basis that such measures are binding on the State. The exemption in favour of ‘any enactment’, however, permits a very extensive undermining of the Act by the actions of the State itself. Section 14 thus excludes the application of the Act where discrimination is permitted under a statute. For instance, the Department of Social and Family Affairs is permitted by section 19 of the Social Welfare (Miscellaneous Provision) Act 2004 to discriminate between same-sex and opposite-sex couples in the operation of certain social welfare schemes (see section 4.6.2). The sweeping nature of this exemption would not appear to conform to Article 26 ICCPR and Article 2(2) ICESCR, which impose a duty on States not to discriminate in the fields of economic, social and cultural rights.

4.12 Family Privacy and Autonomy

4.12.1 General Right to Privacy

All persons enjoy, under the Constitution, a general right of privacy,⁶⁶² albeit one that is subject to limitations.⁶⁶³ In addition, however, the Family under Article 41 of the Constitution enjoys a particular right to privacy. According to the Supreme Court in *McGee v. Attorney General*,⁶⁶⁴ the family enjoys a right of autonomy; that is, a privilege from State interference in its operation. As noted above, however, the ‘family’ envisaged by Articles 41 and 42 of the Constitution is restricted to that based on marriage. As such, the constitutional right of autonomy accorded to the family applies only to the family based on marriage and cannot be invoked (at least on constitutional grounds) by the members of a non-marital unit.

Although the courts have also developed a general right to privacy, it is subject to limitations. In *Norris v. Attorney General*⁶⁶⁵ the plaintiff, a gay man, sought to rely on the right to privacy with a view to striking down legislation criminalising same-sex sexual activity between males, even where such activity occurred between consenting adults in private. A majority of the Supreme Court declined to strike down the legislation, ruling that the State was entitled, with a view to upholding the common good, to make incursions upon the right of privacy. This view ultimately was rejected by the European Court of Human Rights in *Norris v. Ireland*,⁶⁶⁶ the latter Court ruling that there had in fact been a breach of Article 8 of the Convention, guaranteeing, *inter alia*, respect for one’s private life.

4.12.2 Autonomy in Matters of Education, Reproduction and Healthcare

Article 42 of the Constitution accords to parents various rights and obligations in respect of the upbringing of their children. These include the primary right and duty in respect of the education of children. Article 42 thus reserves to parents the right to determine where a child will attend school, and in particular whether the child should be home-schooled or educated in a private school of their choosing or in a school designated by the State. Although the State may lay down minimum standards in respect of such schooling, it may not interfere in parental choice in this regard. Similar restrictions apply in respect of reproductive choice, the State generally being precluded from interfering with the decision of a married couple regarding family

⁶⁶² *Kennedy v. Ireland* [1987] I.R. 587, *In Re a Ward of Court (Withdrawal of Medical Treatment)* [1996] 2 I.R. 79.

⁶⁶³ See *Norris v. Attorney General* [1984] I.R. 36, *Kearney v. Minister for Justice* [1986] I.R. 116.

⁶⁶⁴ [1974] I.R. 284. See also *Murray v. Ireland* [1985] I.R. 532, *North-Western Health Board v. H.W.* [2001] 3 I.R. 623, *In re Article 26 and the Matrimonial Home Bill, 1993* [1994] 1 I.R. 305.

⁶⁶⁵ [1984] I.R. 36.

⁶⁶⁶ (1989) 13 E.H.R.R. 186.

planning and the number of children they choose to bear.⁶⁶⁷ The State is also precluded from requiring parents, against their will, to subject a child to surgery or other medical intervention.⁶⁶⁸

Although none of these privileges is absolute,⁶⁶⁹ they create important safeguards for families. It is clear, however, that to the extent that such privileges are based on Articles 41–42 of the Constitution, they are reserved to families based on marriage alone. As such, the extent to which similar rights apply to non-marital families is unclear.⁶⁷⁰ Under the terms of the ECHR, once family life is established for the purposes of Article 8, any difference in treatment between married couples and other family forms must be justified on reasonable and objective grounds.

4.12.3 Marital Privilege

At common law, communications between a husband and wife are privileged. This means that a husband generally cannot be obliged to reveal, in court or otherwise, the subject of conversations with his wife, and vice versa. Moreover, a person generally cannot be compelled by law to give evidence against his or her spouse. The Criminal Evidence Act 1992, section 21, nevertheless renders the spouse of an accused person competent to give evidence during the trial of the accused (either for the prosecution or defence), although the accused's spouse may only be *forced* to give evidence in limited cases. Section 22 of the Act allows the State to compel a person to give evidence where:

- (a) the crime is a violent crime against the spouse, the child of the spouse or of the accused, or any person who was at the material time under the age of 17 years,
- (b) the crime is a sexual crime, as defined, including rape, sexual assault and aggravated sexual assault.

The spouse of the accused may in all cases be compelled to give evidence at the instance of the accused, subject to the caveat that, if both spouses are jointly accused of a crime, they cannot be compelled to give evidence against each other.

Non-marital partners do not, by contrast, enjoy any privilege in respect of an accused partner. Such matters are likely to fall within the State Parties' margin of appreciation,⁶⁷¹ given the thrust of Convention case law concerning Article 6.⁶⁷²

4.12.4 Application of the *In Camera* Rule

Family law proceedings are generally subject to the *in camera* rule, a principle requiring that family law cases proceed in private and subject to requirements of

⁶⁶⁷ *McGee v. Attorney General* [1974] I.R. 284.

⁶⁶⁸ *North-Western Health Board v. H.W.* [2001] 3 I.R. 623.

⁶⁶⁹ The right to access family planning does not, for instance, create a right to abortion.

⁶⁷⁰ See C. O'Mahony (2003) 'Extra-Marital Families and Education Rights Under the Constitution', *Irish Journal of Family Law* [2003] 3, p. 21.

⁶⁷¹ It is worth noting that the ECHR permits, but does not prescribe, the introduction of an actionable privacy right between private parties: *Tammer v. Estonia* (2003) 37 E.H.R.R. 857.

⁶⁷² See K. Reid (2004) *A Practitioner's Guide to the European Convention on Human Rights* (London: Sweet & Maxwell), pp. 57 *et seq.*

confidentiality.⁶⁷³ While this rule has been relaxed in certain respects by section 40 of the Civil Liability Act 2004, the *in camera* requirement broadly serves to exclude from family law proceedings any person not directly involved in the proceedings. It further prevents any person from revealing the identity of the parties concerned.⁶⁷⁴ While the *in camera* rule applies in all cases involving spouses, and in all disputes concerning the guardianship, custody and access to children, it does not apply to disputes between non-marital partners. The proceedings in *Ennis v. Butterly*⁶⁷⁵ are a case in point, the identity of the (non-marital) parties being the subject of public knowledge, a phenomenon that would not apply to cases involving married persons. The absence of protections for *de facto* couples at least raises the prospect of a challenge employing Article 8 in combination with Article 14. ECtHR jurisprudence concerning family law proceedings has to date concerned the legitimacy of holding such hearings in private;⁶⁷⁶ the converse has not yet been substantively examined.

⁶⁷³ See section 45(1)(b) of the Courts (Supplemental Provisions) Act 1961, section 38 of the Family Law Act 1995 and section 14 of the Matrimonial Causes and Marriage Law (Amendment) Act 1870 (33 & 34 Vict. c.110) as amended by the Civil Liability Act 2004, section 40.

⁶⁷⁴ Thus family law cases involving married persons are reported with the names abbreviated to list only the first letter of the first name and surname of each party.

⁶⁷⁵ [1996] 1 I.R. 426.

⁶⁷⁶ *B. and P. v. United Kingdom* (2002) 34 E.H.R.R. 529, 24 April 2001. See also *Guisset v. France* (2002) 34 E.H.R.R. 47.

Chapter 5: Conclusions and Recommendations

Law sets the parameters to what is considered ‘normal’, for example marriage, sexual relations, the way we care for our children...We cannot ‘opt out’ of these legal parameters by adopting unconventional lifestyles or by avoiding heterosexuality. The law still has something to say about our domestic lives and intimate relations, and we cannot assert its irrelevance by ignoring it.⁶⁷⁷

5.1 The Case for Recognition of De Facto Couples

Normative arguments for legal recognition of a greater diversity of family arrangements have been advanced in Ireland and comparable jurisdictions.⁶⁷⁸ Reforms enacted in several European States, and other countries such as Canada, New Zealand and South Africa, go beyond the floor of rights set out under international law. While change at European level has largely been introduced via the political process, the judiciary in Canada and South Africa has also played an instrumental role in delivering protection for *de facto* couples.⁶⁷⁹ Successful litigation outcomes in these latter jurisdictions demonstrate the potential of substantive constitutional equality guarantees, a position that does not prevail under the Irish Constitution (see Chapter 4.2).⁶⁸⁰

The South African experience also illustrates the potential derivative impact of children’s rights on the position of *de facto* partners. Section 28 of the South African Constitution broadly gives domestic effect to the UNCRC within that jurisdiction, while section 9(3) expressly prohibits discrimination on the basis of sexual orientation and marital status.⁶⁸¹ *Du Toit*⁶⁸² concerned partners in a long-term lesbian relationship

⁶⁷⁷ J. Brophy and C. Smart (1985) *Women-in-Law: Explorations of Law, Family and Sexuality* (London: Routledge), at p. 1.

⁶⁷⁸ See, for example, Alberta Law Reform Institute (1989) *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (Report No. 53) (Edmonton: ALRI); Alberta Law Reform Institute (2002) *Recognition of Rights and Obligations in Same Sex Relationships* (Research Paper No. 21) (Edmonton: ALRI); Equality Authority *op. cit.*; Law Commission of Canada (2001) *Beyond Conjugal: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada); Law Commission of New Zealand (1999) *Recognizing Same-Sex Relationships* (Wellington: Law Commission); NESF *op. cit.*

⁶⁷⁹ See Bala *op. cit.*; D. G. Casswell (2001) ‘Moving Toward Same-Sex Marriage’, *Canadian Bar Review* 80, pp. 810–22; J. Cock (2002) ‘Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution’, *Women’s Studies International Forum* 26, pp. 35–45; Cossman and Ryder *op. cit.*; P. De Vos (2004) ‘Same-Sex Sexual Desire and the Re-Imagining of the South African Family’, *South African Journal of Human Rights* 20, pp. 179–206; B. Porter (1998) ‘Beyond Andrews: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*’, *Constitutional Forum* 9(3), pp. 71–82; 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), pp. 505–26.

⁶⁸⁰ See generally Doyle *op. cit.*

⁶⁸¹ The equality guarantee provides:

‘9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

who sought unsuccessfully to adopt two children as a couple. Legislative provisions confined joint adoption to married partners and the applicants claimed that the impugned statutes discriminated against them on the basis of their sexual orientation and marital status. It was further argued that the provisions undermined the constitutional principle that the best interests of the child are of paramount importance in all matters concerning the child. The High Court and the Constitutional Court, on appeal, ruled in their favour and ordered that certain words be ‘read in’ to allow same-sex life partners jointly to adopt children where they are otherwise found to be suitable parents. In 2003, the Constitutional Court held that when a same-sex couple has a child through donor insemination, both are automatically the legal parents of the child.⁶⁸³

Unlike the relatively ‘young’ Constitutions of Canada and South Africa, *Bunreacht na hÉireann* pre-dates the major international human rights instruments. In general Irish law privileges marriage by according a bundle of rights and duties to married families, while neglecting to provide a comprehensive legal framework with respect to other relationships (Chapter 4). For those who are currently excluded from marriage – same-sex couples in particular – the case for reform is more pressing still.

The juxtaposition of Irish law with international human rights standards reveals quite significant gaps in terms of human rights protection on both the constitutional and legislative front (Chapter 4). However, given the principle of subsidiarity and the associated margin of discretion afforded States under international human rights law, it is doubtful that a constitutional amendment aimed at widening the definition of family is prescribed. Although this question has not been explicitly tested, it is evident from the approach adopted by the ECtHR and bodies such as the Human Rights Committee that legislative change designed to comply with human rights standards is adequate (see Chapter 3.2.3–4; 3.3.2). For this reason the outline reform proposals presented in this Chapter focus on legislative action. A constitutional referendum is nevertheless appealing from a pragmatic and normative point of view: A guarantee of respect for private and family life extending beyond marital relationships would anchor any attempts to legislate in the area of relationship recognition. Further, as a minority of the All-Party Committee notes, change is preferable to ensure that the Constitution is ‘not out of step with Article 8 of the European Convention on Human Rights’.⁶⁸⁴

Relevant international law does not require that marital and *de facto* couples be treated in the same manner for all purposes, yet jurisprudence concerning marital status, sexual orientation and gender discrimination is increasingly shaping the contours of State regulation of families. Domestic legislative reforms effected in favour of *de facto* couples have often applied only to opposite-sex couples, potentially

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

⁶⁸² *Du Toit and Another v. Minister of Welfare and Population Development and Others*, CCT 40/01, 2001 (12) BCLR 1225 (T); 2002 (10) BCLR 1006 (CC).

⁶⁸³ *J. & B. v. Director General of Home Affairs, Minister of Home Affairs, & President of the Republic of South Africa*, CCT 46/02.

⁶⁸⁴ *Op.cit.*, p. 128.

contravening contemporary jurisprudence of the European Court of Human Rights. Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 supplies a patent example of differential treatment on the grounds of sexual orientation, which arguably infringes both Article 14 ECHR and Article 26 ICCPR. *Force majeure* leave falls within the ambit of the EC Framework Directive and so should be made available to employees that need to care for their same-sex partners. Several other miscellaneous statutory provisions stand in need of amendment (Chapter 4).

At a more general level, failure to accord *de facto* couples rights equivalent to those enjoyed by married couples implicates indirect discrimination on the basis of sexual orientation. Because same-sex partners are not entitled to marry each other, such couples are denied access to a variety of rights, privileges and duties that may in fact be accessed by heterosexual couples. ECJ decisions in this area are not currently favourable to such a reading, but, given the ongoing development of ECHR standards and the advent of an explicit prohibition of sexual orientation discrimination under the EU Charter, this stance could arguably change (Chapter 2). As of yet this area is largely untried under international human rights law (Chapter 3).

Continuing the current approach of effecting reform on an incremental basis, with individual areas of the law being reviewed on a piecemeal basis, is an avenue that is open to the government. International standards do not prescribe removal of the ban on same-sex marriage, or the enactment of a relationship registration scheme (Chapter 3).⁶⁸⁵ Maintaining the current overarching framework, while amending the discrete legislative provisions that do not comply with international law, has several drawbacks. First, an incremental approach to change arguably gives rise to inefficiencies: the State would, it is suggested, make better use of resources by dealing with the issues involving non-marital couples globally rather than on a particularised basis. The second difficulty is that such an approach risks creating inconsistency in the treatment of *de facto* couples, who may find themselves meeting the definition of ‘cohabitee’ (or allied concepts) for certain specified purposes but not others. Current legislative divergences on this point are a testament to this likelihood (Chapter 4.2.4). Finally, as will be evident from Chapters 2 and 3, international standards are in a state of flux; the general direction of ECHR and ICCPR jurisprudence in particular is towards more robust protection for *de facto* couples, especially same-sex partners. Failure to instantiate a fundamental change to the legal framework governing relationships may therefore generate adverse litigation outcomes and consequent needs for continual, *ad hoc* realignment between domestic and international laws. As against this, piecemeal advances may enable the government to ‘pilot’ reforms concerning *de facto* couples in distinct areas, potentially flagging unforeseen problems, such as interpretive ambiguities.

From an international human rights vantage point, it is desirable that the State should provide some formal level of protection and recognition to same-sex couples, if not to *de facto* couples generally. The United Kingdom’s Civil Partnership Act 2004 is instructive in this regard. The Act creates an opt-in registration scheme extending certain rights and responsibilities to couples of the same sex who register their relationships.⁶⁸⁶ In a report preceding the enactment of the Act the UK Government

⁶⁸⁵ See, however, comments below concerning the Belfast Agreement 1998.

⁶⁸⁶ The legislation affords couples that register their relationship in compliance with the Act a status that is almost wholly equivalent to that of married persons. The process of dissolution for such

explained its rationale for introducing this measure, and in particular for excluding opposite-sex couples from its remit.⁶⁸⁷ While recognising that unmarried opposite-sex couples and same-sex couples encounter similar legal difficulties, the Government argues that:

This difference in treatment is justified because it would remedy an inequality that already exists between opposite-sex and same-sex couples. Civil partnership registration would provide same-sex couples with a way of gaining a formal legal status for their relationships – which they cannot currently do...The [UK] Government believes that opposite-sex couples do not have the same need for a civil partnership registration scheme. Opposite-sex couples already have the opportunity of obtaining legal (and socially recognised) status for their relationship by entering into a marriage, whether religious or civil. Some couples choose not to marry, and that is entirely a decision for them.⁶⁸⁸

This conclusion presupposes that opposite-sex couples in a like position in fact always enjoy the option to marry. In fact (as noted in Chapter 4.2.6) there are various factors that may preclude an opposite-sex couple from marrying. Even in cases where such couples are permitted to marry, the protection of vulnerable parties may require the recognition of certain aspects of the relationship. An omission to address the position of such individuals could, for instance, give rise to a finding of indirect discrimination under CEDAW. Because women undertake disproportionate amounts of care work and are hence more likely to be disadvantaged in financial terms,⁶⁸⁹ the ostensibly neutral failure to provide for redistribution of assets and maintenance on relationship breakdown is possibly open to challenge. There is some doubt as to whether such matters fall within the ambit of Article 8 or Protocol 1, Article 1 ECHR (Chapter 3.2.5).

In considering the post civil partnership position in the UK, Wong identifies a potential line of argument for opposite-sex cohabiters.⁶⁹⁰ Because legislative protection of family relationships has been extended beyond marriage, employing the 'promotion of the traditional family' or 'promotion of marriage' justification for unequal treatment becomes more strained. However, having reviewed relevant ECHR and Canadian jurisprudence she concludes that arguments grounded in Article 14 are unlikely to succeed, primarily because the freedom of choice argument continues to be highly influential. Same-sex *de facto* partners are likely to be compared with their registered counterparts, while the probable comparators for opposite-sex couples are married partners.⁶⁹¹ While these arguments are inevitably speculative, they do accord with the weight of relevant jurisprudence under ECHR and ICCPR.

partnerships is virtually identical to the UK model for dissolution of a marriage, with minor modifications.

⁶⁸⁷ Department of Trade and Industry (2003) *Civil Partnership: A Framework for the Recognition of Same-Sex Couples* (London: DTI, Women and Equality Unit).

⁶⁸⁸ *Ibid.*, p. 18.

⁶⁸⁹ Central Statistics Office (2005) *op. cit.*

⁶⁹⁰ *Op. cit.*, pp. 274–7.

⁶⁹¹ *Ibid.*

5.2 Civil Partnership and the ‘Good Friday’ Agreement

Introduction of the UK civil partnership scheme brings to the fore the provisions of Part 6 of the ‘Good Friday’ Agreement.⁶⁹² Under ‘Human Rights’, Clause 9, the Irish government commits itself as a matter of international law to ‘take steps to further strengthen the protection of human rights in its jurisdiction’. It further promises to ‘bring forward measures to strengthen and underpin the constitutional protection of human rights’.

In making this commitment, the Government makes express reference to the European Convention on Human Rights and other international legal instruments, noting that the State would draw on these instruments as a source for the enhancement of human rights protection. Most notably, the Government commits itself to provide ‘at least an equivalent level of protection of human rights as will pertain in Northern Ireland’.

Northern Ireland has, since December 2005, offered a facility of civil partnership for same-sex couples. This being the case, it is arguable that the unavailability of similar protection in this State constitutes a failure to comply with the terms of the Good Friday Agreement.

The Equality Authority and the Equality Commission for Northern Ireland have jointly published research into the equivalence of equality-centred human rights standards in Northern Ireland and in the Republic of Ireland respectively.⁶⁹³ Ó Cinnéide observes that, despite the bi-lateral commitment, significant disparities remain in respect of the equality laws of the two jurisdictions. In particular, the report highlights marked differences in the treatment of lesbian, gay, bisexual and transgendered persons. Most obviously, inception in the UK of the Gender Recognition Act 2004 (providing a mechanism for the recognition of gender reassignment) and the Civil Partnership Act 2004 stands in sharp contrast to the absence of similar legislation in the Republic. The application of this legislation in Northern Ireland and the lack of corresponding protection in the Republic represent, the report concludes, ‘a lack of equivalence’, contrary to the Agreement. The report also notes the extension to same-sex couples in the UK, in *Ghaidan v. Godin-Mendoza*,⁶⁹⁴ of rights formerly reserved to opposite-sex couples, a move not yet matched in Ireland.

Ó Cinnéide concludes that ‘[i]t would make little sense for every measure introduced in Northern Ireland...to require an equivalent response in Ireland’ and that the equivalence requirement was intended to protect fundamental rights only.⁶⁹⁵ It is not necessary, in other words, that Irish equality legislation replicate exactly the laws of Northern Ireland or vice versa. However, the report argues that the UK legislation in question was designed to provide redress in respect of unequal treatment and thus to remedy a deficiency in the application of human rights standards as developed by the ECtHR. Ó Cinnéide maintains that:

⁶⁹² *Agreement Reached in the Multi-Party Negotiations* (Cm 3883, 1998); 37 I.L.M. 751 (1998).

⁶⁹³ 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* (Dublin/Belfast: Equality Authority & Equality Commission for Northern Ireland).

⁶⁹⁴ [2004] UKHL 30.

⁶⁹⁵ *Op. cit.*, p. 49.

Therefore Ireland is not alone obliged under the European Convention on Human Rights to take similar steps, it is also obliged under the equivalence requirement to introduce measures to ensure an equivalence of rights as introduced in Northern Ireland.⁶⁹⁶

As such, the report contends that change is required in the Republic broadly matching that found in Northern Ireland. Although the detail of legislation brought forward in the South need not necessarily be identical, Ó Cinnéide concludes that:

[T]he legislative recognition of the right to equality of treatment...in Northern Ireland for transsexual people and lesbian and gay couples does appear to largely come within the scope of the equivalence requirement. In any case, Ireland is also bound by the *Goodwin* and *Karner* decisions, and it would in all likelihood be bad policy to introduce a watered-down version of the UK partnership legislation that will inevitably have to be adjusted as the Strasbourg jurisprudence rapidly evolves in this area.⁶⁹⁷

5.3 Recognition Models⁶⁹⁸

This section outlines three basic models of relationship recognition that may be employed to address the legal status of *de facto* couples. It should be noted that the schemes are not mutually exclusive; in fact, many jurisdictions provide for variants of all three. Of the options canvassed, registration-based statutes generally focus exclusively on conjugal partnerships, while the presumptive and nomination models may also embrace wider forms of interpersonal relationships.

5.3.1 'Opt-in' Registration-Based Schemes

One model of reform takes as its basis the model of marriage itself, modified or extended in limited form to other couples not previously married or entitled to marry.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Ibid.*

⁶⁹⁸ This section relies on a range of sources, including the website of ILGA-Europe (<http://www.ilga-europe.org/>) and that of the International Gay and Lesbian Resource Centre (<http://www.iglhrc.org/>); B. Cossman and B. Ryder (2000) *The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation* (Ottawa: Law Commission of Canada); B. Cossman and B. Ryder (2001) 'What Is Marriage-Like Like? The Irrelevance of Conjugal Partnership', *Canadian Journal of Family Law* 18, pp. 269–326; R. Graycar and J. Millbank (2000) 'The Bride Wore Pink...to the Property (Relationships) Amendment Legislation Act 1999: Relationships Law Reform in New South Wales', *Canadian Journal of Family Law* [2000], pp. 227–77; K. Lahey (2001) *The Impact of Relationship Recognition on Lesbian Women in Canada: Still Separate but Only Somewhat Equivalent* (Ottawa: Status of Women in Canada); N. La Violette (2001) *Registered Partnerships: A Model for Relationship Recognition* (Ottawa: Law Commission of Canada); N. La Violette (2002) 'Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada', *Canadian Journal of Family Law* 19, pp. 115–71; Law Commission of Canada (2001) *Beyond Conjugal Partnership: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada); K. Waaldijk (2004) 'Others May Follow: The Introduction of Marriage, Quasi-Marriage and Semi-Marriage for Same-Sex Couples in European Countries', *New England Law Review* 38, pp. 569–90; K. Waaldijk (2004) *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners* (Paris: Institut National d'Etudes Démographiques); 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, pp. 505–26.

The basis for recognition here typically is the formal registration and/or solemnisation of the relationship in a form prescribed by the State. This may take the form of a contractual agreement or of signing a register agreeing to the conferral of certain specified rights and duties.

Such measures have usually arisen in the context of reforms aimed at promoting equality between same-sex and opposite-sex partners. For instance, in 1989 Denmark became the first State in the world to allow same-sex partners to register their relationship. On such registration the partners acquire most of the rights, privileges and duties of marriage, including the right to adopt jointly. In fact virtually all legal differences between marriage and registered partnerships have been eliminated in Denmark, as well as in the Netherlands, Sweden, Finland and the United Kingdom. For example, Swedish registered partnership legislation was amended during 2003, introducing equal rights for same-sex couples and opposite-sex couples with respect to all forms of adoption and custody rights.

Other States have followed Denmark's lead in modified form, introducing various forms of 'civil union' or registered partnership with varying degrees of entitlement flowing from such registration. While these unions do not necessarily confer all of the rights and duties of marriage, they do evidence a growing recognition of the existence of non-marital partnerships and of same-sex relationships in particular. Included amongst such States are France, Germany, Portugal, Slovenia, Andorra, Croatia, the Czech Republic and Switzerland. The pattern in the United States is more chequered, with several States enacting partnership recognition laws, while others have sought to block any such eventuality through state constitutional amendments. The Netherlands, Belgium and Spain, as well as Canada and the US state of Massachusetts, have gone one step further, now permitting full marriage for all persons, whether of the same sex or of different sex.

Ireland finds itself part of an ever-decreasing minority of EU States that do not permit some form of union conferring rights and obligations on *de facto* couples. At the time of writing, of the 25 EU Member States:

- three permit same-sex marriage on the same basis as applies to opposite-sex couples and
- thirteen provide registration schemes recognising non-marital unions.

Moreover, several States recognise cohabiting *de facto* couples under presumptive schemes, in many cases in conjunction with registration or marriage.

'Opt-in' systems of registration present several advantages. For the individuals involved, the benefits arising are clear, though it is worth observing that obligations as well as rights flow from such registered partnerships. In this regard the 'opt-in' facility furthers decisional autonomy and secures to couples the freedom to decide whether or not to accept the conferral of mutual rights and obligations. The United Kingdom Government defended its preference for registered partnerships, observing that:

[S]ome people deliberately choose not to make formal commitments to each other, and/or to limit their liabilities in respect of each other. An opt-in system

would support individual choices, and would not impose responsibilities on those who do not want them.⁶⁹⁹

Additionally, although registered partnerships or civil unions may not be confined to same-sex couples they can afford lesbian and gay partners a means of publicly affirming their commitment where marriage is precluded.⁷⁰⁰ As against this, fear of homophobic reactions may generate reluctance on the part of such couples to register.

For the State, the key benefit is that of administrative simplicity; it can easily determine the nature of the relationship between particular persons who are registered or who have solemnised civil unions. The State is not required, as in countries where non-formalised relationships have been recognised, to scrutinise the length or nature of the relationship or the practical arrangements between the parties in order to determine whether the relationship should be recognised or not as having legal effects. It may simply consult a register. An opt-in scheme thus provides legal certainty, as it is possible to determine who has opted in and who has not, and to determine when the legal relationship begins and ends.

From a more philosophical perspective, the opt-in model promotes an approach that looks to the form that relationships take rather than the substance of such relationships, one that values formal recognition and the fulfilment of procedural prerequisites over the substantive reality of a person's family life. Such a model implies that state approval is a prerequisite to forming a valid family and may simply compound the unequal treatment experienced by unregistered and non-marital families. The adoption of a registration scheme thus harbours the potential for the creation of a three-tier system of state recognition in place of a two-tier system. Concerns such as these prompted the Gay and Lesbian Rights Lobby of New South Wales to campaign for the enactment of a presumptive scheme in place of a registered partnership law during the mid-1990s.⁷⁰¹

5.3.2 Presumptive Schemes

In its consultation paper on the *Rights and Duties of Cohabitees* the Law Reform Commission discussed the merits of a relatively extensive presumptive scheme.⁷⁰² Under presumptive schemes certain rights and duties automatically accrue to the relevant parties, generally once they have been cohabiting for a defined period. Ireland's social welfare code applies a presumptive approach with respect to eligibility for certain welfare payments (Chapter 4.6.2). A key feature of such a scheme is that it adopts a 'functional approach', one that looks not to the form that a family takes but rather to the functions that members perform for each other.⁷⁰³ The judicial arm of the House of Lords embraced this approach in *Fitzpatrick v. Sterling*

⁶⁹⁹ Department of Trade and Industry *op. cit.*, p. 13.

⁷⁰⁰ L. Becker (1995) 'Recognition of Domestic Partnerships by Governmental Entities and Private Employers', *National Journal of Sexual Orientation Law* 1(1), p. 90.

⁷⁰¹ See R. Graycar and J. Millbank (2000) 'The Bride Wore Pink...to the Property (Relationships) Amendment Legislation Act 1999: Relationships Law Reform in New South Wales', *Canadian Journal of Family Law* [2000], pp. 227–77.

⁷⁰² The Commission did not consider the registration option, on the basis that such a scheme would entail major policy changes and so merit a distinct research report: *op. cit.*, para. 1.03.

⁷⁰³ See Glennon (2002) *op. cit.* and Ryan (2000) *op. cit.*

*Housing Association*⁷⁰⁴ in ruling that a same-sex couple in a long-term relationship constituted a ‘family’ for the purposes of UK housing law.⁷⁰⁵

The main advantage of a presumptive approach lies in the protection it offers to vulnerable parties who are unable to marry or register their relationship. Such protection is offered regardless of the agreement of the parties and as such minimises the risk of one party suffering detriment with no prospect of legal redress. This also represents a difficulty with the presumptive scheme, in that personal decisions of parties will be overridden in favour of a prescribed set of rights and obligations. Many couples may not even be aware of the accrual of duties and entitlements.

An additional problem is that the model presupposes the creation of a formula for the identification of couples covered by the scheme. Developing such a formula is not any easy task.⁷⁰⁶ As noted above (Chapter 4.2.4), where Irish law has taken on the task of defining relationships outside of marriage, a variety of rather disparate definitions have arisen. The period of cohabitation required, in particular, varies depending on the legislation involved. Other States have enacted omnibus laws designed to set a uniform period of cohabitation and other qualifying criteria across a range of substantive areas. The legislative packets introduced vary widely from jurisdiction to jurisdiction; a basic distinction exists, however, between models that centre on conjugal relationships, leaving other interpersonal connections that may be similar in substance largely untouched, and those that adopt a more purposive approach by focusing on key substantive features of the nexus involved irrespective of conjugality.⁷⁰⁷

Over the course of three decades Canada has increasingly recognised *de facto* relationships through ascription for many legal purposes. Based on a period of cohabitation, many, but not all, of the rights and duties of marriage have been extended to unmarried couples.⁷⁰⁸ Considerable ambiguities arose as to how the terms ‘conjugal’ or ‘marriage-like’ should be construed, and in particular whether the presence of a sexual relationship or other factors such as financial interdependence were determinate.⁷⁰⁹ A growing number of Canadian provinces have supplemented the federal-level presumptive scheme with opt-in registration laws.

It may, perhaps justifiably, be said that, once the State abandons marriage as the hallmark of a legal family, the task of defining the family becomes perhaps unduly complex. The Constitution Review Group noted this very problem in its remarks on the reform of Articles 41 and 42 of the Constitution.⁷¹⁰ This stance arguably underlines the benefits of a registration statute and the advantages of certainty and clarity arising from such a scheme. However, an inherent problem with using registration as the *sole* means of ameliorating the position of *de facto* couples is that it neglects the position of people that are not party to a formalised relationship. Such a

⁷⁰⁴ [1999] 3 W.L.R. 1113. See also the New York case of *Braschi v. Stahl Associates Co.* (1989) 544 N.Y.S. 2d. 784.

⁷⁰⁵ For a discussion of the judgment, see Glennon (2002) *op. cit.* and Ryan (2002) *op. cit.*

⁷⁰⁶ See Cossman and Ryder *op. cit.*

⁷⁰⁷ See generally Law Commission of Canada, *op. cit.*

⁷⁰⁸ See K. Lahey (2001) *The Impact of Relationship Recognition on Lesbian Women in Canada: Still Separate but Only Somewhat Equivalent* (Ottawa: Status of Women in Canada).

⁷⁰⁹ Cossman and Ryder *op. cit.*

⁷¹⁰ *Op. cit.*, pp. 321–3.

stance may cause particular hardship for an economically dependent member of a couple and for persons who cannot register their relationship since it is not conjugal in nature.⁷¹¹ Registration may usefully be complemented, therefore, by a presumptive scheme which need not, and in the opinion of the Law Commission of Canada⁷¹² ought not, to pivot on conjugal or sexual partnerships. The presumptive scheme adopted in the Australian state of New South Wales recognises *de facto* couples in the same way as married partners for a wide range of legal purposes. In addition, persons who are not sexual partners but are in defined ‘domestic relationships’ have a more limited range of rights and obligations under a less extensive set of state laws than those applicable to their conjugal counterparts.⁷¹³ The Irish Finance Act, section 151, reflects in part this approach, extending to persons living together for three years or more a ‘principal private residence relief’ designed to reduce capital acquisitions tax liability. This measure is not confined to conjugal partners or related persons but extends to any two persons sharing a property that is bequeathed.

5.3.3 Nomination

A third possible alternative is that of nomination. This presupposes that all persons, whether married or unmarried, have relationships with others that are important to their personal wellbeing. These relationships may be sexually intimate in nature but often are not. Discussion around recognition of non-marital units has, however, tended to focus on relationships that look like marriage, in particular in the sense that they are based on sexual attraction and the possibility or appearance of exclusive intimate relations. In other words, even in extending rights to *de facto* couples, the State’s concept of family seems still to be based around romantic and sexual notions of love and commitment rather than encompassing all dependency or care-based relationships.⁷¹⁴

The ‘nomination’ model presupposes that all persons would be able, regardless of whether they are married, in a *de facto* relationship or ‘single’, to name a person in law who would be entitled to various rights largely in respect of the nominator’s estate and wealth. It differs from the registration model outlined above and the assumption of liabilities and rights through the ordinary law of contract in that the decision to nominate is a unilateral one. In the context of succession, the model could be used to complement the existing overarching principle of freedom of testation. The nominee might, for instance, be extended the right to succeed on the death of the nominator without paying Capital Acquisition Tax (i.e. as if the parties were spouses). The nominee might be entitled to next-of-kin rights in cases where the nominator is unable to make crucial medical decisions.⁷¹⁵ Where the law would stand if a person wished to nominate someone other than his/her spouse or long-term partner is one question arising from this model. Another is whether the parties must cohabit.

Arguably this method has fiscal limitations and may, moreover, depending on the type of right involved, be subject to various abuses at the hands of less scrupulous

⁷¹¹ See Graycar and Millbank *op. cit.*

⁷¹² *Op. cit.*

⁷¹³ See generally Graycar and Millbank *op. cit.*

⁷¹⁴ For a critique of this approach, see M. Fineman (1995) *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge) and (2003) *The Autonomy Myth: A Theory of Dependency* (New York: The New Press).

⁷¹⁵ See Chapter 4.8.3 on the Enduring Power of Attorney.

family members.⁷¹⁶ Nevertheless it has certain benefits, in particular that nominators can choose persons to receive certain benefits even when they are not in a sexual relationship. As a matter of principle it also endorses the view that the State should broadly endorse interpersonal relationships involving support and commitment and should not be concerned solely with the sexual lives of adults. As noted above, however, a presumptive scheme may also be tailored to take account of a variety of interdependent relationships.

5.4 General

Enactment of a statutory duty to equality proof legislation, perhaps along the lines of that adopted under the Government of Wales Act 1998,⁷¹⁷ would go some way to ensuring that Ireland complies with its obligations under Article 14 ECHR and Article 26 ICCPR. The latter explicitly obliges States to afford all persons ‘equal protection of the law’ and, according to the Human Rights Committee, ‘when legislation is adopted by a State party...its content should not be discriminatory’.⁷¹⁸ Both the ECHR Act 2003 and the Equal Status Acts 2000–2004 contain certain exemptions for any discriminatory treatment required by the terms of a statute or other law. These provisions create a significant gap in the application of anti-discrimination protections, since many public bodies exercise their functions in accordance with the terms of such legislation. Introduction of a mandatory equality proofing mechanism within the parliamentary process would secure an enhanced level of compliance with international human rights standards.

⁷¹⁶ See Lahey *op. cit.*, p. 81.

⁷¹⁷ See P. Chaney (2002) ‘New and Unexplored Possibilities – The Welsh Legislature’s Statutory Duty to Promote Equality of Opportunity’, *Equal Opportunities International* 21(1), pp. 19–42, and F. Mackay and K. Bilton (2001) *Equality Proofing Procedures in Drafting Legislation: International Comparisons* (Scottish Executive Central Research Unit).

⁷¹⁸ General Comment 18, *op. cit.*, para. 12.

Appendix 1: Relationship Recognition in European Union Jurisdictions

	Marriage	Registration Scheme	Comments
Austria	Opposite-sex only	No	Cohabitants of same sex and opposite sex recognised in law since 2003
Belgium	Same-sex and opposite-sex	Yes – same-sex and opposite-sex	Cohabitants of same sex and opposite sex recognised in law since 1998
Cyprus	Opposite-sex only	No	No formal recognition for cohabitantes
Czech Republic	Opposite-sex only	Yes – as of June 2006 for same-sex couples only	Registered partnership bill passed by Parliament on 15 March 2006
Denmark	Opposite-sex only	1989 – yes, for same-sex couples only	
Estonia	Opposite-sex only	No	No formal recognition for cohabitantes
Finland	Opposite-sex only	2001 – yes, for same-sex couples only	
France	Opposite-sex only	1999 – yes, same-sex and opposite-sex	Cohabitants of same sex and opposite sex recognised in law for limited purposes
Germany	Opposite-sex only	2000 – yes, for same-sex couples only	
Greece	Opposite-sex only	No	No formal recognition for cohabitantes
Hungary	Opposite-sex only	No	Cohabitants of same sex and opposite sex recognised in law since 1996
Ireland	Opposite-sex only	No	No formal recognition for cohabitantes
Italy	Opposite-sex only	2004 – yes, same-sex and opposite-sex in some regions	No formal recognition for cohabitantes
Latvia	Opposite-sex only	No	No formal recognition for cohabitantes
Lithuania	Opposite-sex only	No	No formal recognition for cohabitantes
Luxembourg	Opposite-sex only	2004 – yes, same-sex and opposite-sex	
Malta	Opposite-sex only	No	No formal recognition for cohabitantes
Netherlands	Same-sex and opposite-sex	1998 – yes, same-sex and	

		opposite-sex	
Poland	Opposite-sex only	No	No formal recognition for cohabittees
Portugal	Opposite-sex only	2001 – yes, same-sex and opposite-sex	
Slovakia	Opposite-sex only	No	
Slovenia	Opposite-sex only	2005 – yes, for same-sex couples only	No formal recognition for cohabittees
Spain	Same-sex and opposite-sex	In some regions	
Sweden	Opposite-sex only	1994 – yes, for same-sex couples only	
United Kingdom	Opposite-sex only	2005 – yes, for same-sex couples only	

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