



**ICCL Submission to the Minister for  
Justice, Equality and Law Reform on the  
Scheme of the Civil Partnership Bill 2008**

August 2008

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## **About the Irish Council for Civil Liberties (ICCL)**

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

Founded in 1976 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included campaigns resulting in the establishment of an independent Garda Síochána Ombudsman Commission, the legalisation of the right to divorce, more effective protection of children's rights, the decriminalisation of homosexuality and introduction of enhanced equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

### **What we do**

- Advocate for positive changes in the area of human rights;
- Monitor Government policy and legislation to make sure that it complies with international standards;
- Conduct original research and publish reports on issues as diverse as equal rights for all families, the right to privacy, police reform and judicial accountability;
- Run campaigns to raise public and political awareness of human rights, justice and equality issues;
- Work closely with other key stakeholders in the human rights, justice and equality sectors.

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## 1. Introduction

1.1 The Irish Council for Civil Liberties (ICCL) welcomes the publication of the Scheme of the Civil Partnership Bill 2008<sup>1</sup> which was introduced in line with a commitment in the Programme for Government. The ICCL also appreciates the opportunity provided by the Minister for Justice, Equality and Law Reform<sup>2</sup> to comment on its provisions.<sup>3</sup>

1.2 The ICCL has long since campaigned for equal treatment for same-sex couples as well as other non-traditional families and considers the publication of the Scheme to be a welcome step on the path to achieving full equality for all family forms. In this respect, the ICCL refers to the 2006 report *Equality for all Families* which details the organisation's vision and policy aims for the achievement of equal recognition of all family forms.<sup>4</sup> Two core values underpin the ICCL's policy on *Equality For All Families*: equality and personal autonomy. Realisation of these values entails respect for diverse family forms, freedom of conscience and belief, personal privacy and the inherent dignity of all individuals.

1.3 These human rights are protected under the Irish Constitution<sup>5</sup> and the European Convention on Human Rights (ECHR)<sup>6</sup> and are supported by the International Covenant on Civil and Political Rights (ICCPR).<sup>7</sup> Indeed, the monitoring body for the ICCPR, the UN Human Rights Committee, recently commented on the proposed Scheme (see *infra* at p. 24). The ICCL also refers to the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*.<sup>8</sup> These principles comprise a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity.<sup>9</sup>

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<sup>1</sup> Hereinafter referred to as the 'Scheme of the Bill'.

<sup>2</sup> Hereinafter referred to as the 'Minister'.

<sup>3</sup> *Programme for Government 2007 – 2012*, at p. 87.

<sup>4</sup> Available on the ICCL website at: [www.iccl.ie](http://www.iccl.ie)

<sup>5</sup> Under Article 40.1 and Article 40.3.1.

<sup>6</sup> Under Articles 8, 14 and Protocol 12.

<sup>7</sup> Under Articles 17, 24 and 26.

<sup>8</sup> Available at <http://www.yogyakartaprinciples.org/index.php?item=24>.

<sup>9</sup> A distinguished group of human rights experts drafted and developed these principles and they were unanimously adopted by leading experts from 25 countries in November 2006. The project was spearheaded by the International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organisations.

1.4 Though broadly welcoming of the proposals in the Scheme, the ICCL believes that full equality for same-sex couples will only be achieved with full access to marriage. The secular purpose of marriage is to provide a framework that enables people to express their commitment to one another, receive public recognition and support and voluntarily assume a range of legal rights and duties. Confining access to opposite-sex couples denies same-sex couples those legal rights and social norms; and reinforces the social exclusion experienced by gay and lesbian people.

1.5 In 2006, the former Minister established a Working Group to examine the status of domestic partnerships (Colley Group). The Group formed a similar view to the ICCL that equality for same-sex couples will only be secured where the option of civil marriage is available to them. The *Options Paper Presented by the Working Group on Domestic Partnership* (Colley Report) to the Minister in November 2006 states that:

The introduction of civil marriage for same-sex couples would achieve *equality of status* with opposite-sex couples and such recognition would underpin a wider equality for gay and lesbian people [emphasis added].<sup>10</sup>

1.6 The Colley Report was clear that “full civil partnership falls *short of full equality* for same-sex couples [emphasis added] [...]”.<sup>11</sup> The Report also refers to five jurisdictions (Netherlands,<sup>12</sup> Belgium, Canada,<sup>13</sup> Spain, and Massachusetts USA) which have extended the right to marry to same-sex couples “conferring all, or virtually all, the rights and responsibilities of marriage” (since the Report was published South Africa<sup>14</sup> and the US State of California have also recognised civil marriage for same-sex couples).<sup>15</sup> Furthermore, in 2006, the High Court of Justice in Israel recognised same-sex marriages performed in other countries.<sup>16</sup>

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<sup>10</sup> Department of Justice, Equality and Law Reform, (November 2006) *Options Paper Presented by the Working Group on Domestic Partnership* to the Tánaiste and Minister for Justice, Equality and Law Reform, Mr Michael McDowell T.D, at p. 50, para 7.20.

<sup>11</sup> *Ibid*, at p. 51, para 7.23.

<sup>12</sup> Marriage Act, 2001.

<sup>13</sup> Civil Marriage Act, 2005.

<sup>14</sup> Civil Union Act, 2006.

<sup>15</sup> *Ibid*, at p. 48, para 7.06.

<sup>16</sup> Marriage Equality Position Paper by Dr Jane Pillinger, *Making the case for Marriage Equality in Ireland*. See [www.marriagequality.ie](http://www.marriagequality.ie).

1.7 Full civil partnership, according to the Colley Report, “entails the State introducing a civil registration scheme, which extends the full range of rights and duties of marriage to same-sex couples who choose to register their partnership”.<sup>17</sup> This statement concurs with the declaration in the *Yogyakarta Principles* that States should:

Take all necessary legislative, administrative or other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners.<sup>18</sup>

1.8 However, the ICCL believes that the Scheme of the Bill does not provide for full civil partnership as is outlined in the Colley Report. The Scheme of the Bill is silent on crucial issues such as taxation and social welfare (however, it is understood that these matters may be dealt with in separate legislation). Furthermore, it fails to recognise same-sex couples as parents and does not consider same-sex couples and their children to comprise a family unit. However, the Colley Report recommended that the legal consequences for extending marriage should extend to all elements of marriage and family law.<sup>19</sup>

1.9 In this respect, the ICCL is concerned about the absence of any reference to “family”, “family home” and particularly, “dependent members of the family”.<sup>20</sup> Consequently, the Scheme does not provide equivalency of rights as those afforded to married couples and their children. As a result of these gaps in child and family protection within the Scheme, the rights of the most vulnerable people affected by the new civil partnership regime – children – have been ignored.

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<sup>17</sup> *Ibid*, at p. 51, para 7.21.

<sup>18</sup> Principle 12 (f). See *supra* note 6.

<sup>19</sup> *Ibid*, at p. 51, para 7.22.

<sup>20</sup> At pp. 11-14.

1.10 Moreover, the Scheme does not provide full protection for civil partners in relation to the registration of the partnership;<sup>21</sup> the status of the partnership with respect to the law of nullity<sup>22</sup> or its dissolution.<sup>23</sup> In the section 7 of this submission, the proposals regarding a regulatory scheme for cohabitants are considered.<sup>24</sup>

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<sup>21</sup> At p. 8.

<sup>22</sup> At p. 9.

<sup>23</sup> At p. 10.

<sup>24</sup> At p. 21.

## 2. Procedural Requirements for Registration

### Notification of civil partnership registrations

2.1 The provisions within Head 8 largely conform to the provisions concerning marriage notifications set out in sections 46 and 47 of the Civil Registration Act, 2004 (“CRA 2004”). However, there is one noticeable omission from the civil partnership regime. Section 47 of the CRA 2004 allows a judge of the Circuit Family Court or the High Court to grant an exemption to people who wish to get married from the requirement to notify the Registrar of their intention to marry three months previously. This clause provides a safety net to those committed couples who intend to marry but circumstances dictate that they cannot wait for the three month notification period to pass e.g. if one of the parties is terminally ill. No such provision is made available for civil partners.

**The ICCL recommends that Head 8 should be amended or a new Head should be inserted to exempt civil partnerships from the notification requirements in Head 8, subject to judicial approval, as provided for in section 47 of the CRA 2004.**

### Prohibited Degrees of Relationship

2.2 Head 23 inserts Schedule 3 which sets out consanguinity limits between civil partners; however, there is no reference to prohibition on the grounds of affinity, unlike marriage as set out in the Marriage (Prohibited Degrees of Relationship) Acts, 1907 and 1921. **The ICCL recommends that there should be no difference in consanguinity rules between married couples and civil partnerships. However, the ICCL is also of the view that this area of law requires substantial reform taking account of Laffoy J’s judgment in *Maura O’Shea and Michael O’Shea v Ireland & AG*<sup>25</sup> and the European Court of Human Rights in *B. and L. v UK*.<sup>26</sup>**

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<sup>25</sup> Unreported, High Court, judgment delivered by Ms Justice Laffoy 10<sup>th</sup> November 2008.

In this case, the court ruled that legislation preventing a wife from marrying her former husband’s brother constituted an unjustified restriction on her right to marry and could not be justified as being necessary in support of the constitutional protection of the family and the institution of marriage.

<sup>26</sup> Application No. 36536/02, judgment of 13 September 2005. In this case, the European Court of Human Rights found a violation of Article 12 on the right to marry in the traditional domestic bar on marriage of parents-in-law with children-in-law.

### 3. Nullity and Dissolution Proceedings

#### Nullity

3.1 Under Head 49, the court may grant a decree of nullity where it is satisfied that either or both parties were:

- under age
- party to a valid marriage
- party to another civil partnership (not dissolved and entitled to be recognised in this jurisdiction)
- unable to give informed consent, as attested by a medical practitioner

Or:

- the parties were within the forbidden degrees of relationship
- they were of opposite sexes

By contrast, the law regarding nullity of marriage is much broader. A marriage can be declared void on grounds of lack of formalities, lack of capacity and lack of consent. Lack of capacity appears to be the only ground which is comprehensively provided for in Head 49. Moreover, although Head 49 sets out the requirement for informed consent, it fails to mention the other aspects of valid consent which apply to those entering marriage. In this respect, the ICCL refers to the *Yogyakarta Principles* which call on states to ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners.<sup>27</sup>

While common law rules on nullity of contracts would apply in this instance, **the ICCL calls on the Minister to ensure certainty in law and provide civil partners with same avenue of protection under the laws of nullity as those currently granted to married people. The ICCL also recognises that the law on nullity requires substantial reform and recommends it should be codified and updated accordingly.**

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<sup>27</sup> Principle 12 (f). See *supra* note 6.

## Dissolution

3.2 Head 57 sets out the requirements for the grant of dissolution and its provisions in this Head differ quite considerably from those set out in respect of divorce in section 5 of the Family Law (Divorce) Act, 1996. In particular, section 5(1)(b) explicitly states that there must be “no reasonable prospective of reconciliation between the spouses” and the court must be satisfied that proper provision is made for dependent members of the family as well as the spouses.

3.3 The ICCL has concerns that aspects to Head 57 indicate that the government considers civil partnership as an institution of lesser importance. In particular, the ICCL questions why the requirement to consider whether there is no reasonable prospect of reconciliation between the civil partners is not placed on a judge deciding a grant of dissolution? Why are the public policy considerations behind the inclusion of this provision in the Family Law (Divorce) Act, 1996 not applicable in respect of the legal framework governing commitment by same-sex couples? Moreover, Head 134 of the Scheme which refers to cohabitants, places an onus on solicitors acting for cohabitants to discuss and advise on reconciliation prior to instituting proceedings under the Scheme of the Bill. Regarding part (iii) above, the diligent removal of rights of and responsibilities to “dependant members of the family” will be discussed in Section 6 of the submission.

**The ICCL recommends that the following provisions on dissolution should be introduced for civil partnerships: (1) there must be no reasonable prospective of reconciliation between the civil partners and (2) that the court must be satisfied that proper provision is made for dependent members of the family, as well as for civil partners.**

## 4. Family

4.1 The term “family” has been studiously avoided in the Scheme of the Bill. This suggests an ideology influencing the policy of the Scheme which seeks to restrict the rights of same-sex couples to an entitlement to create legal relationships with each other only and form a unit between themselves only. What is clear from the terminology and provisions of the Scheme is that *families which are centred on civil partners* should continue to be excluded from legal recognition, rights and responsibilities.

4.2 A prime example of this is Chapter 4 of Part 3 of the Scheme which deals with the protection of the home of civil partners. This Chapter introduces provisions around the protection of the home of civil partners which are largely analogous to the protections afforded to married couples under the Family Home Protection Act, 1976. However, unlike other Heads within the Bill (e.g. amendment to the Succession Act, 1965 and the Domestic Violence Act, 1996), this chapter does not introduce such protections for civil partners by amendment of the Family Home Protection Act, 1976. Rather it creates identical legislative provisions which apply to civil partners. It is possible that this route was chosen for the protection of rights in the home so that civil partners and their children would not be recognised as a family in the proposed legislation. Similarly, Chapter 3 of Part 6 of the Scheme transposes maintenance provisions from the Family Law (Maintenance of Spouses and Children) Act, 1976, as amended. The 1976 act deals with the maintenance of spouses and children; however, the Scheme looks only to address the maintenance of civil partners.

4.3 The ICCL considers that the non-recognition of civil partners and their children as a family unit falls short of the standards required under human rights law and principles. Principle 12 of the *Yogyakarta Principles* declares that “everyone has the right to found a family, regardless of sexual orientation or gender identity”. It points out that families exist in diverse forms and that no family should be subjected to discrimination on the basis of sexual orientation of any of its members.<sup>28</sup>

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<sup>28</sup> See *supra*, note 6.

Under this provision, States should ensure that:

Laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration.<sup>29</sup>

4.4 Although not yet legally binding, Article 7 of the EU Charter of Fundamental Rights<sup>30</sup> provides that “everyone has the right to respect for his or her private and family life, home and communications”. Article 9 states that “the right to marry and found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”. The explanatory memorandum to the Charter notes “this article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex”. Further, Article 21 prohibits any discrimination based on any ground including gender/sex and sexual orientation. It follows, therefore, where same-sex couples are permitted to form, what is in essence a family unit, they should not be denied their right to found a family. Following on from the signing of the Charter, the European Court of Human Rights referred directly to Article 9, in the case of *Goodwin v. United Kingdom*,<sup>31</sup> noting that:

There have been major social changes in the institution of marriage since the adoption of the Convention [...] Article 9 of the Charter of Fundamental Rights departs, no doubt deliberately, from the wording of Article 12 [of the ECHR] in removing the reference to men and women.

4.5 While the constitutional family is based on marriage (generally regarded as confined to opposite-sex couples), the ECHR which was given further effect into Irish law under the European Convention on Human Rights Act, 2003, recognises diverse family forms.

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<sup>29</sup> Principle 12(b).

<sup>30</sup> See [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm).

<sup>31</sup> *Goodwin v. United Kingdom* (2002) 35 EHRR 447.

4.6 The concept of “family” within the ECHR jurisprudence is not rigid but flexible in seeking to recognise the diversity of close and caring relationships.<sup>32</sup> For example, the European Court has held that *de facto* family ties can arise where parties are living together outside of marriage.<sup>33</sup> According to the Court, “family” is not confined solely to marriage-based relationships and “may encompass other *de facto* ‘family’ ties where the parties are living together outside of marriage”.<sup>34</sup> A number of factors must be taken into account when deciding whether a relationship can be considered as forming family life which includes: whether the couple live together; the length of their relationship; and whether they have had children together or by any other means.<sup>35</sup> In 2003, the European Court found in favour of the applicant who has been in a long-term same-sex relationship but was denied tenancy succession rights after his partner died.<sup>36</sup> The judgment emphasised that any difference in treatment based on sexual orientation requires particularly serious reasons by way of justification. The Court also observed that:

A growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view was supported by recommendations and legislation of European institutions.<sup>37</sup>

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<sup>32</sup> *Marckx v Belgium* (1979-80) 2 EHRR 330; *Keegan v Ireland* (1994) 18 EHRR 33; *Lebbink v Netherlands* (2005) 40 EHRR 18; *K & T v Finland* (2003) 36 EHRR 18.

<sup>33</sup> *Johnston and others v. Ireland* (1987) 9 EHRR 203, para. 25.

<sup>34</sup> *Keegan v. Ireland* [1994] 18 EHRR 342, at para. 360; See also *Kroon and others v. The Netherlands* [1995] 19 EHRR 263, at para. 30.

<sup>35</sup> *X, Y and Z v. UK* [1997] 24 EHRR 143, at para. 36.

<sup>36</sup> *Karner v. Austria* (2003) 38 EHRR 24.

<sup>37</sup> *Karner v. Austria, op cit*, at para. 36.

4.7 The jurisprudence of the European Court of Human Rights was applied in the Irish High Court case of *J. McD v. P.L. and B.M.*<sup>38</sup> Mr Justice Hedigan sought guidance from the ECHR due to the silence in Irish constitutional law on the question of homosexual *de facto* families.<sup>39</sup> The Court held that a lesbian couple living together in a “long term committed relationship of mutual support” should be considered a *de facto* family unit. Moreover, the Court found that “where a child is born into such a family unit and is cared for and nurtured therein, then the child itself is part of the *de facto* family unit.”<sup>40</sup> In reaching a decision on guardianship rights, the Court had to factor in the rights of the lesbian couple and their child as a *de facto* family unit under Article 8 of the ECHR.

4.8 Under the 2003 Act, Irish courts are obliged to interpret Irish law in accordance with the ECHR. The Strasbourg Court has recognised the existence of *de facto* family units outside of marriage and relationships between same-sex couples. Absent constitutional guidance to the contrary, the High Court has accepted that same-sex couples and their children comprise *de facto* family units. The ICCL considers that the Scheme of the Bill, as it presently stands does not comply with the current statement of Irish law; removing as it does most if not all references to “family” within provisions of the Bill that are analogous to those dealing with spouses. Furthermore, the ICCL is of the view that certain of the provisions within the Scheme are not compliant with Articles, 7, 9 and 21 of the Charter of Fundamental Rights (which will more than likely become part of Irish law) and do not meet the standards required under international law as set out in the *Yogyakarta Principles*.

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<sup>38</sup> *J. McD v. P.L. and B.M.*, unreported, High Court, judgment delivered by Mr Justice Hedigan 16<sup>th</sup> April 2008.

<sup>39</sup> See pp. 40-42. Mr Justice Hedigan noted that the heterosexual *de facto* family has been established by the Supreme Court despite an absence of explicit recognition in the Constitution. “The silence of the Constitution on the matter did not preclude the Supreme Court from accepting the existence of same. It seems clear therefore that the silence of the Constitution in relation to same sex *de facto* families does not necessarily preclude this Court from coming to the conclusion that such units also should be recognised as existing and as having certain rights and duties” (at p. 41).

<sup>40</sup> *Ibid*, at p. 47.

4.9 The Scheme demonstrates a lack of recognition for same-sex couples and their children as a family unit, focusing instead on the creation of a new legal unit exclusively between the civil partners themselves.

**Consequently, the ICCL recommends that the Scheme of the Bill be amended to include reference to and recognition of same-sex couple families as is required under Irish, European and international law. In particular, the ICCL recommends that express reference should be included in the Bill to families, where applicable, in line with similar legislation dealing with families based on marriage.**

## 5. Children

5.1 Intricately connected to the notion of family and by far the most serious shortfall within the Scheme of the Bill is the lack of recognition or protection afforded to children. In essence the most vulnerable people have been omitted from the reach of the new legal framework. Within family law legislation, there is myriad reference to the “dependant member of the family” (and children) as a rightful interest to be protected in respect of family proceedings. Although the provisions of various family law enactments have been conscientiously transposed into the Scheme of the Bill, references to the “dependant member of the family” have been omitted. Throughout the Scheme, there is “scant regard for any children who may reside [with the civil partners]”.<sup>41</sup>

5.2 As mentioned previously, the court is not obliged to consider proper provision for the dependent members of the family at the time of dissolution, unlike divorce proceedings (section 5(1)(c) of the Family Law (Divorce) Act, 1996). In respect of the general maintenance arrangements under the Scheme (Heads 96 – 103) and upon dissolution of a civil partnership (Heads 62 – 68), there is no requirement on the court to take a dependent child of the family into account. The only significant reference to a child or children is in Head 70 (l) where it is stated that the court must have regard to the rights of other persons, including any child to whom either of the civil partners have an obligation to support.

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<sup>41</sup> Ryan, Fergus (18 July 2008), *Benchmarking Civil Partnership: Comparing Civil Partnership with Marriage and Considering the Place of Children*, paper delivered as part of ICCL event on the *Civil Partnership Bill Scheme: Legal Consequences and Human Rights Implications*, at p. 9.

5.3 The non-recognition of children with the Scheme of the Bill ignores the existence of the children of same-sex couples.<sup>42</sup> It has been pointed out in a recent paper on the Scheme of the Bill that this “is regrettable and is undoubtedly going to lead to problems. Many civil partners have children. They either have these from a previous marriage or relationship, or they have, as a couple, decided to have a family”.<sup>43</sup> Moreover, this omission fails to uphold and protect the rights of children in line with domestic and international human rights law. Privacy and the family are protected against unlawful interference by Article 17 of the ICCPR. This Treaty further protects the rights of children under Article 24 which states that:

Every child shall have without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

5.4 The government-established Colley Group identified the welfare of children as a key principle to inform its work. The Report notes that:

The principle of welfare of children acknowledges that both domestic law and international instruments, including the UN convention on the Rights of the Child, require that the child’s welfare is the *paramount consideration* in all decisions taken concerning the child [emphasis added].

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<sup>42</sup> The Colley Report found that “there is some evidence that a significant number of lesbian and gay people are having and raising children”. The Report also identifies the range of different family formations.

<sup>43</sup> Walls, Muriel (18 July 2008), *Dissolution*, paper delivered as part of ICCL event on the *Civil Partnership Bill Scheme: Legal Consequences and Human Rights Implications*, part 4.

5.5 Regarding the UN Convention on the Rights of the Child (CRC), Article 2(2) states 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.<sup>44</sup>

Discrimination on the grounds of sexual orientation or gender identity of the child's parent or guardian is therefore incompatible with the CRC. In discussing the role of the family, the Committee on the Rights of the Child, has noted that it is "hard to argue for a single notion of the family"; however, any questions with regard to the family's role in a child's life seem to "place the essential value of the principle of non-discrimination in the forefront of the general discussion".<sup>45</sup> Furthermore, Article 16 of the CRC provides that children have the right to protection against "arbitrary or unlawful interference with his or her privacy, family or correspondence".

5.6 The principle of the "best interests of the child" is central to the framework of the CRC and all acts of government or public policy relating to children should have that principle at its core. The same principle provides the backbone for Article 24 of the EU Charter of Fundamental Rights which sets out the rights of children. The notion of the best interests of the child in respect of same-sex parenting has generally been considered in terms of adoption proceedings. The South African Constitutional Court has held that denying same-sex couples the opportunity of joint adoption was, in itself, contrary to the best interests of the child, as it "deprives children of the possibility of a loving and stable family life".<sup>46</sup> The Ontario Court of Justice has described as "ludicrous" the suggestion that it might not be in the best interests of the child "to be raised by loving, caring and committed parents, who might happen to be lesbian or gay".<sup>47</sup>

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<sup>44</sup> UN Convention on the Rights of the Child, Article 2 (2), available at

<http://www2.ohchr.org/english/law/crc.htm#part1>.

<sup>45</sup> Committee on the Rights of the Child, *Role of the Family in the Promotion of the Rights of the Child*, CRC/C/24, 7th Session, 10 October 1994.

<sup>46</sup> *Du Toit & De Vos v Minister for Welfare and Population Development*, Case CCT 10/01, judgment of 10 September 2002.

<sup>47</sup> *Re. K* (1995) 23 Ontario Reports (3d) 679, at para. 101-5, quoted in Hodson, Loveday for ILGA Europe, (2007) *Different Families, Same Rights? Lesbian, Gay, Bisexual and Transgender Families under International Human Rights Law*, available at [www.ilga-europe.org](http://www.ilga-europe.org).

- 5.7 As mentioned in the previous section, the children of same-sex couples enjoy rights under Irish law as members of a *de facto* family unit which has been recognised by the High Court. It is arguable, therefore, that the difference in treatment between children in a particular *de facto* family unit and those of the married family unit could be considered discriminatory under Article 40.1 of the Constitution and Article 14, together with Article 8, of the ECHR.
- 5.8 It is worth noting the preamble to the CRC which recognises that “the child [...] should grow up in a family environment, in an atmosphere of happiness, love and understanding”. In ratifying the Treaty, the Irish Government has signed up to its terms and should provide the strongest possible constitutional and legislative mechanisms to vindicate those rights.
- 5.9 With the progress of technological and medical advancements, it is likely that the numbers of children raised by same-sex couples will grow rather than diminish. Indeed, the law must encourage and facilitate the development of a relationship between a child and both of his/her parents where applicable and other individuals acting in a parental role. Irrespective of whether non-marital relationships are defined by a registered partnership or through cohabitation, the ICCL recommends the following common changes to the current law and practice:

**Guardianship:** Where a partner in a relationship is a non-biological parent and is caring for and residing with a child, this relationship needs to be given legal recognition. The State ought to pay particular attention to civil partnered, cohabiting couples and reconstituted families and should review the guardianship model to take account of non-biological parents. This would enable a child to maintain a relationship with his or her non-biological parent upon the dissolution of the adults’ relationship or if a biological parent dies.

**Adoption:** Civil-partnered and unmarried opposite-sex and same-sex couples should be permitted to adopt jointly – the determining factor being the best interests of the child – assessing each potential couple individually – irrespective of sexual orientation or marital status. In particular, this would facilitate couples where there are children from a former relationship. Moreover, permitting civil partnered and unmarried couples to adopt would ensure that a child has two legally recognised parents.

## 6. Tax and Social Welfare

6.1 Reform of both these areas is essential to ensure that the most vulnerable individuals who are in committed same-sex relationships are protected. For example, same-sex couples are denied income tax reliefs extended to marital couples and will pay significantly more inheritance tax on any donation made by her/his partner. Regarding social welfare entitlements, which are part of a system designed to assist the most vulnerable in society, same-sex couples are denied access to Widow's and Widower's Contributory Pensions and the Widowed Parent Grant.

6.2 While the Scheme is silent on these matters, it is understood that they will be dealt with in the annual Finance and Social Welfare Bills. Such a move would be in keeping with the European Parliament's 2006 Resolution on Homophobia in Europe, which calls on Member States to enact laws which "end discrimination faced by same-sex partners in the areas of inheritance, property arrangements, tenancies, pensions, *tax, social security* etc [emphasis added]".<sup>48</sup>

6.3 The ICCL is keen to hear what the Government intends to do regarding tax and social welfare entitlements; particularly, in light of the General Comments of the United Nations Human Rights Committee which reported on Ireland's performance under the ICCPR just a few weeks ago.<sup>49</sup> The Committee expressed its concerns "that no provisions regarding taxation and social welfare are proposed at present [in the Scheme of the Bill]" and it called on the Irish Government to ensure that its legislation is not discriminatory of non-traditional forms of partnership, including taxation and welfare benefits.<sup>50</sup>

**The ICCL recommends that full parity of rights and entitlements be afforded to same-sex couples in the tax and social welfare codes.**

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<sup>48</sup> European Parliament, *Resolution on Homophobia in Europe*, adopted on 18 January 2006 (P6\_TA (2006) 0018).

<sup>49</sup> Concluding Observations of the UN Human Rights Committee on Ireland, Ninety-Third Session, Geneva, 7 - 25 July 2008. For further information on Ireland's report under the ICCPR see [www.rightsmonitor.org](http://www.rightsmonitor.org).

<sup>50</sup> *Op cit*, at para 8.

## 7. Cohabitation

- 7.1 The ICCL welcomes the proposals in the Scheme of the Bill which will introduce measures to regulate the affairs of qualified cohabitants. In its Report, *Equality for All Families*, the ICCL called for a presumptive scheme for unmarried cohabiting couples that chose not to enter marriage or a registered partnership, similar to that set out by the Law Reform Commission in its 2006 Report, *Rights and Duties of Cohabitees*.<sup>51</sup> For the most part, the provisions in Part 7 of the Scheme mirror the recommendations of the Law Reform Commission.
- 7.2 The framework for cohabitants allows those in a stable and committed relationship of interdependence, whether of same or opposite sex to assume and be granted legal rights and responsibilities. Particularly, it offers protection for the vulnerable in cohabiting relationships.
- 7.3 There are two models available to cohabiting couples. The redress scheme applies to all cohabiting couples who are determined “qualified cohabitants” under Head 123. The redress system could be considered a sort of “safety net for the most vulnerable people who have lived with their partner in a supportive or dependent relationship and who are financially vulnerable when that relationship ends”.<sup>52</sup>
- 7.4 Under the proposed scheme, the courts will be able to make a range of orders to provide redress for the cohabitant who is left economically disadvantaged on separation. However, in this regard the ICCL calls for guidance on how the courts will weigh up the various factors before making an order. Such flexible assistance could avoid arbitrariness between awards.

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<sup>51</sup> LRC 82-2006, available at <http://www.lawreform.ie>.

<sup>52</sup> Walls, Muriel (18 July 2008) *Provision for Qualified Cohabitants*, paper delivered as part of ICCL event on the *Civil Partnership Bill Scheme: Legal Consequences and Human Rights Implications*.

7.5 Head 124 (6) allows couples to opt out of the redress scheme, if they so wish and to regulate their relationship through a written agreement. Agreements between cohabitants or the contract model, as it is referred to by the Law Reform Commission, protects the freedom of autonomy of cohabitants who wish to regulate their own relationships. Head 124 declares the validity of such agreements at the outset for the avoidance of any doubt. For such agreements to be valid, each party must have obtained independent legal advice or if not, to have waived the right to such advice. The court retains the power to make orders in respect of the custody, access or maintenance of children. The court can also set aside the agreement where its enforcement would cause serious injustice.

7.6 The ICCL welcomes the recognition of these agreements as it will allow those who do not wish to marry or be civilly partnered to regulate their financial affairs accordingly. The presumptive scheme will also protect the more vulnerable or economically dependent partner.

7.7 In its Report, the Law Reform Commission recommended that gift and inheritance tax as well as stamp duty should be adjusted; however, these provisions are not contained in the Scheme.<sup>53</sup> **The ICCL calls on the Government to make provision for a reduction in gift/inheritance tax and stamp duty for cohabitants in the next Finance Bill.**

7.8 The Department of Social and Family Affairs conducts joint household income means test of unmarried opposite-sex cohabiting couples when one partner applies for Unemployment Assistance. **The ICCL recommends that if unmarried cohabiting couples are treated in this way, they must be entitled to Widow's or Widower's (Contributory) Pension or the Widowed Parents Bereavement Grant. Again, there should be no distinction in treatment between opposite-sex and same-sex couples. This change should be reflected in the next Social Welfare Bill.**

7.9 In addition, married couples are expressly excluded from the definition of cohabitant but it does seem to cover couples who are civilly partnered. Does this mean that a same-sex couple can be a party to a civil partnership and a cohabitation agreement simultaneously? This could lead to serious legal ambiguity; therefore, **in the interests of clarity and parity of esteem, the ICCL recommends that civil partners be excluded from the proposed cohabitation regime.**

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<sup>53</sup> LRC 82 – 2006, at para. 8.15 and 8.16.

## 8. Concluding Comments

8.1 The recognition of same-sex couples under law is a measure of the achievement of equality in our society. As a Report by the Equality Authority observed:

The 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 partnerships.<sup>54</sup>

The same Report goes to say to:

The vulnerability experienced by all couples during times of death or serious illness of a partner, the anxieties involved in child rearing and child custody are all exacerbated for same-sex couples.<sup>55</sup>

8.2 Reference has been made in this submission to other jurisdictions in Europe and abroad where same-sex marriage and/or civil partnership has been introduced. Such developments are keen indicators of the attitudinal and social norms of our neighbours in Europe and further afield. We are in a unique position to develop our equality regime for same-sex couples with the hindsight of mistakes and omissions of other countries.

8.3 Since December 2005, same-sex couples in Northern Ireland can civilly register their unions under the UK Civil Partnership Act 2004. Under clause 9 of the Good Friday (Belfast) Agreement 1998, the Irish Government committed itself as a matter of international law to “take steps to further strengthen the protection of human rights in its jurisdiction”. In doing so, the Government also made a commitment to the ECHR, other international legal instruments and the provision of “at least and equivalent level of protection of human rights as will pertain in Northern Ireland”.<sup>56</sup> Consequently, the ICCL calls on the Minister to introduce a system of civil partnership which contains the same rights and protections as those afforded under the 2004 Act. In this respect, the ICCL specifically refers to the position of children (and their families) under the 2004 Act at sections 199 to 203, where financial provision for children is set out and which grants to civil partners, *inter alia*, guardianship rights and adoption rights.

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<sup>54</sup> Equality Authority, (2002) *Implementing Equality for Lesbians, Gays and Bisexuals*, Dublin: Equality Authority, at p. 32.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Walsh, J. and Ryan, F., (March 2006) *The Rights of De Facto Couples*, a research report commissioned by the Irish Human Rights Commission, at p. 132.

- 8.4 The ICCL is hugely supportive of the Minister in progressing this draft legislation. We are greatly encouraged by the steps which have been taken to extend legal rights and entitlements to same-sex couples. However, the ICCL is anxious to ensure that tax and social welfare issues be dealt with comprehensively in upcoming legislation. Furthermore, we are concerned about the lack of recognition given to the families and children of same-sex couples. We believe that many children will continue to be deprived of legal rights in respect of a non-biological or non-adoptive parent. Public policy has an important role to play in shaping social norms and, for children of same-sex couples, the message emanating from the current Scheme of the Bill is that their family does not exist in the eyes of the State. Indeed, as discussed *supra*, such a viewpoint is at variance with current High Court opinion on *de facto* families.
- 8.5 The ICCL believes that any reform of the laws in relation to recognition of same-sex couples should be informed primarily by the principle of equality. Notwithstanding the ICCL's view that marriage is the only route through which full equality will be achieved, we consider that much can be done in the proposed Civil Partnership regime to provide full recognition, rights and responsibilities for same-sex couples. The ICCL looks forward to working with the Minister in achieving this.