

ENHANCING THE RIGHTS OF LESBIAN, GAY AND  
BISEXUAL PEOPLE IN NORTHERN IRELAND



NORTHERN  
I R E L A N D  
HUMAN  
RIGHTS  
COMMISSION

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## FOREWORD

This report is the product of four months of research conducted for the Northern Ireland Human Rights Commission by researchers at the University of Ulster with the assistance of two practising barristers. It was commissioned because the Human Rights Commission identified the rights of lesbian, gay and bisexual people as one of the priority areas for work in its first three years of existence. The researchers also looked at the rights of transgendered people and this part of their work will be published by the Commission later in 2001.

The primary aim of the research was to evaluate relevant law, policy and practice in Northern Ireland against the standards established under international human rights law. This is in line with the Commission's overall Mission Statement, which indicates that we will measure law, policy and practice against internationally accepted rules and principles for the protection of human rights and seek to ensure that those rules and principles are promoted, adopted and applied throughout Northern Ireland.

The Commission feels that the researchers performed their task admirably and is pleased to be able to put the outcome of their work into the public domain. We very much hope that their findings and recommendations will be given close attention by law and policy-makers both in Belfast and in London.

As requested, the researchers also made several recommendations addressed to the Commission itself concerning the actions it should take to promote and protect the human rights of lesbian, gay and bisexual people. These are reproduced in Appendix Four. Over the next few months the Commission will be considering whether and how it can implement these recommendations.

This report can be made available in alternative formats on request. It is also accessible on the Commission's website: [www.nihrc.org](http://www.nihrc.org).

**Brice Dickson**  
**Chief Commissioner**

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# **1 Executive Summary**

## **1.1 Introduction**

This report provides an audit of the laws, policies and practice affecting lesbian, gay and bisexual people in Northern Ireland, with reference to European Union equality law, international human rights law, best practice and international developments. The report addresses the merits/demerits of law, policy and practice across the following areas: education and young people; family law; partnership; employment; immigration; access to, and standards of, health care; welfare law, and criminal law. The report concludes with a programme of action for the Northern Ireland Human Rights Commission with reference to the Commission's statutory duties to advise on laws, policy and practice; investigate and assist in cases; conduct educational activities and conduct research. It also includes recommendations to the Commission on the scope for protecting rights in a Bill of Rights for Northern Ireland.

## **1.2 Main Findings**

- Laws, policies and practice in Northern Ireland discriminate extensively against lesbian, gay and bisexual people.
- This discrimination has significant adverse impact on the emotional, physical, social and economic rights, entitlements, needs and interests of lesbian, gay and bisexual people.
- This discrimination pervades most areas of law, policy and practice, including: criminal law, employment, education, health care, housing, immigration, and the taxation and social security systems. Such discrimination is embedded in the nature and effect of laws regarding the family and partnerships, which deny carers and dependents rights in, for example, succession and inheritance.
- The extent of discrimination tends to be hidden because of an absence of research and a fear of “outing” and further discrimination among many lesbian, gay or bisexual people. This is associated with a lower rate of accessing legal services and other remedies among lesbian, gay or bisexual people.
- Lesbian, gay and bisexual people face more burdensome requirements than others in accessing those rights and entitlements that are nominally theirs across a range of laws, for instance in having to make a will instead of relying on intestacy.
- While public authorities are statutorily required to promote equality of opportunity in their policies and services for lesbian, gay and bisexual people, many public authorities show little evidence of policies or practices that affect lesbian, gay and bisexual people.

- Organisations representing lesbian, gay and bisexual people seek an end to discrimination and desire equality under the law.
- International human rights instruments provide protection of the rights of lesbian, gay and bisexual persons.

### **1.3 Recommendations**

- We recommend that the United Kingdom government and the Assembly repeal and/or amend any law that discriminates against gay, bisexual and lesbian people.
- We recommend that the UK government and the Assembly enact law that recognises same-sex partnerships through registration.
- We recommend that the UK government and the Assembly repeal the law on sexual offences regarding consensual sexual activity between gay, lesbian and bisexual persons and that all persons irrespective of sexual orientation be placed on the same basis throughout the UK as regards criminal activity.
- We recommend that the UK government and the Assembly make discrimination on the grounds of sexual orientation an automatically “unfair” reason for the purpose of unfair dismissal law.
- We recommend that the Assembly sets-up a Task Force on gay, lesbian and bisexual issues to address the wide range of social and economic issues faced by lesbian, gay and bisexual people and to consider inter-agency responses.
- We recommend that the Assembly supports the establishment of a dedicated gay, lesbian and bisexual legal advice service in Northern Ireland.
- We recommend that the UK government signs the European Convention on Human Rights and Biomedicine to strengthen the rights of lesbian, gay and bisexual patients in the UK.
- We recommend that the UK government ratifies as a matter of urgency the Revised European Social Charter.
- We recommend that further research is needed in specific areas such as social work, housing, adoption, child care, higher and further education, access to legal services and vindication of rights and entitlements.
- We recommend that such research should be carried out in conjunction with appropriate lesbian, gay and bisexual organisations.

- We recommend further research into the scope for developing a system of registered partnerships in Northern Ireland both to extend the rights of common law partners to same-sex partners but also to extend the rights of married partners to all potentially registered partners whether straight or lesbian, gay and bisexual people.

## **1.4 Introduction and Background**

### **1.4.1 Aim**

The aim of this report is to provide an audit of the laws, policies and practices affecting lesbian, gay and bisexual people in Northern Ireland.

The audit provides, specifically, the following:

1. List of all current relevant laws, policies and practices;
2. Succinct review of the merits and demerits and defects in current law, policy and practice in this area;
3. Recommendations to government for the amendment or repeal of discrimination legislation, policies and practices; and
4. A programme of action to be undertaken by the Northern Ireland Human Rights Commission in order to enhance the protection of rights for lesbians, gay and bisexual people in Northern Ireland.

### **1.4.2 Background**

The report is largely based on research conducted for the Northern Ireland Human Rights Commission by researchers commissioned in October 2000.

### **1.4.3 Structure of the Report**

The report begins with a short Executive Summary, which summarises the main findings and recommendations.

Each chapter addresses particular aspects of life, namely: education and young people; family law; partnership; employment; immigration; access to, and standards of, health care; welfare law and criminal law. Each of these “aspects” will be assessed according, as appropriate, to international human rights law, European Union equality law, (sections 75 and 76 of the Northern Ireland Act 1998), best practice internationally and any recent developments.

The audit also examines the matter of enforceability, with reference to the standards and mechanisms for monitoring, enforcing and reviewing law, policy and practice in this

field. It includes assessment of issues of equity and fairness with reference to statutory and policy requirements.

The audit concludes with a proposal for a programme of action:

1. Making recommendations to Government for amendment of existing law, policy and practice and for introducing new law, policy and practice (section 69(1) and (3) of the Northern Ireland Act 1998);
2. Assisting individual cases or taking cases to court in the Commission's own name (section 69(5) of the Northern Ireland Act 1998);
3. Conducting investigations (section 69(3) of the Northern Ireland Act 1998);
4. Conducting further research (section 69(6)(a) of the Northern Ireland Act 1998);
5. Conducting educational activities (section 69(6)(b) of the Northern Ireland Act 1998); and
6. The scope for protecting such rights in a Bill of Rights for Northern Ireland (section 69(7) of the Northern Ireland Act 1998).

#### 1.4.4 Promoting Equality: Northern Ireland Act 1998

The Belfast (Good Friday) Agreement of 1998 promised that the British government would create a

“statutory duty on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and **sexual orientation**.” (emphasis added)

This aspect of the Agreement was enshrined in section 75 of the Northern Ireland Act 1998 as follows:

"75. -

A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity-

between persons of different religious belief, political opinion, racial group, age, marital status or **sexual orientation** ..."<sup>1</sup>

Schedule 9 to the Act establishes a procedure for the enforcement of this duty.<sup>2</sup> In brief, public authorities are each required to produce an Equality Scheme stating how they propose to fulfil the duty. Equality Schemes must state how the public authority will assess compliance with duties and consultation; assess and consult on likely impact of policies; monitor adverse impact of policies; publish results of assessments; train staff; and ensure and assess public access to information and to services provided by the

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<sup>1</sup> Emphasis supplied.

<sup>2</sup> The Act also requires public authorities to have regard in carrying out their functions to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

authority.<sup>3</sup> Public authorities are required to test their Equality Schemes through “Equality impact assessments”, which involve in-depth examination of a policy for equality implications, the consideration of measures which might mitigate any adverse impact, and alternative policies which might better achieve the promotion of equality of opportunity. The process of examination of all policies is termed “screening”, from which the public authority must prioritise issues for impact assessment.

The Act establishes an Equality Commission to keep under review the effectiveness of the duties under section 75; offer advice to public authorities and others in connection with those duties as well as other functions. Public authorities are required to submit their schemes to the Equality Commission and before doing so to consult with representatives of persons likely to be affected by the scheme. At the time of writing, almost all public authorities had produced their draft Equality Schemes. Some had been approved by the Equality Commission.

Section 75 imposes a far-reaching statutory duty to promote equality of opportunity for gay, lesbian and bisexual people. This research took the opportunity to check compliance by a wide range of public authorities in the earliest stages of their section 75 duties.

#### **1.4.5 The Single Equality Bill**

The Office of First Minister Deputy First Minister have commenced consultation on the Single Equality Bill which will be brought forward in 2002. This document is aimed at the harmonisation of the existing anti-discrimination legislation<sup>4</sup> and broadening the scope of the protection to include new categories such as sexual orientation.

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<sup>3</sup> Schedule 9, para. 4, Northern Ireland Act 1998.

<sup>4</sup> Sex Discrimination (Northern Ireland) Order 1976, Equal Pay Act (Northern Ireland) 1970, Disability Discrimination Act 1995, Race Relations (Northern Ireland) Order 1997, Fair Employment and Treatment (Northern Ireland) Order 1998.

## 2 Education and Young People

A wide range of laws affect young people generally in Northern Ireland, with a narrower range of laws in relation to their education. No law specifically addresses gay, lesbian and bisexual young people. Nonetheless, the nature and effect of the law that does exist has significant implications for those young people. As many of the laws regarding children also provide rights, powers and responsibilities for parents, any discrimination against gay, lesbian and bisexual parents is a matter of concern for both the parents and their children. These laws have human rights implications and there are areas where the law, policy and practice can be improved to enhance the human rights protections of those young people and their parents.

This section is organised into two broad components, the first addressing young people and the law generally, the second addressing education and young people in particular.

### 2.1 Young People

Lesbian, gay, bisexual young people and parents or carers may be particularly affected by laws in relation to care and juvenile justice.

The UK has ratified the United Nations Convention on the Rights of the Child and must ensure therefore that all laws within the UK comply with the Convention.<sup>5</sup>

#### 2.1.1 Young People in Care

The principal legislation affecting young people in care and leaving care in Northern Ireland is the Children (Northern Ireland) Order 1995. Under the Order those with “parental responsibility” have a number of entitlements in relation to their children, for example the child’s reasonable contact with his or her parents.<sup>6</sup> “Parental responsibility” is defined in relation to existing law, which severely restricts gay, lesbian, bisexual people from parenting. While the Order does allow a person who does not have parental responsibility for a child but who has care of the child (which may include gay, lesbian or bisexual people) to do what is reasonable to safeguard or promote the child’s welfare, this does not extend to them the same rights extended to parents. Under Article 8 of the Order, other carers may apply to the court for a residence order, for “settling the arrangements to be made as to the person with whom the child is to live”. It remains possible that provisions, which deny such people from exercising parental powers in respect of their children, are in breach of Article 8 of the European Convention on Human Rights (right to family life) in conjunction with Article 14 (prohibition on discrimination)<sup>7</sup> (see section on family law).

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<sup>5</sup> This is discussed further, below pp. 12-13.

<sup>6</sup> Art. 53(1).

<sup>7</sup> For discussion of cases, see Kilkelly, U. *The Child and the European Convention on Human Rights*. (1999) Aldershot: Ashgate.

## **2.1.2 Young People in the Juvenile Justice System**

The principal legislation in relation to young people and juvenile justice is the Criminal Justice (Children)(Northern Ireland) Order 1998. The Order comprises a number of provisions that would allow a gay, lesbian or bisexual carer to claim the same status as a parent from a heterosexual partnership. Thus, Article 10 provides that when a child is in police detention a person responsible for his or her welfare (which includes a parent, guardian or other person for the time being assuming responsibility for his welfare) shall be informed. This approach equalises the status of parent and carer in a way that the aforementioned provisions of the Children (Northern Ireland) Order 1995 do not. We recommend that all gay, lesbian and bisexual parents [and carers] be able to exercise the same rights and powers as parents from conventional heterosexual relationships. This should extend to lesbian and gay co-parents.

Notwithstanding the more inclusive concept of welfare guardian in the 1998 Order, Statutory Rules made pursuant to the Order reinforce the concept of heterosexual parent. For example, under the Magistrate's Courts Criminal Justice (Children) Rules (Northern Ireland) 1999, any written reports of probation officers, Truists or medical practitioners before a court should be disclosed to parents or guardians.

While there may be some allowance for gay, lesbian or bisexual parents in these laws, the law generally imposes barriers to the exercise of rights and entitlements. In reality, many lesbian, gay, bisexual "parents" are not in fact biological parents. Nor are they parents by virtue of a parental rights agreement or through registration. A non-biological and/or non-married father (in a heterosexual relationship) of a child may gain some parental rights by default when he and his partner register the child as if the child were his child. As such, a man may gain parental rights through a default mechanism. Because two "fathers" or two "mothers" cannot be registered on a birth certificate of a child (nor jointly adopt a child) as they are unable to marry their partners, lesbian, gay or bisexual people who are not the biological parent are excluded from having joint parental rights, unless a specific agreement is made. Even then, such an agreement only exists when the parties co-exist. If one dies, or the couple separate, the non-biological parent is excluded completely from the parenting role.<sup>8</sup>

## **2.1.3 International Human Rights Law**

The United Nations Convention on the Rights of the Child lays down a number of articles that are relevant to lesbian, gay and bisexual young people.

Article 2 provides that children<sup>9</sup> shall not be discriminated against and shall have equal access to protection. While sexual orientation is not specified as one of the grounds in the Convention, it is likely that this would be interpreted into the Convention by a tribunal.

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<sup>8</sup> The implications of this position are explored throughout the relevant areas of law further in this report and examined particularly in the sections on family law and partnership.

<sup>9</sup> Art. 1 provides that a 'child' means every person below the age of 18 years, unless under the law applicable to the child, majority is attained earlier.

Article 2 also provides that States shall take appropriate measures to ensure that a child is protected against discrimination on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members. This provision underlines the State's responsibility to ensure that children are protected from bullying that targets the sexual orientation of his or her parent/s, legal guardians or family members. It has been established by the European Court of Human Rights that States have a general duty to protect children from abuse.<sup>10</sup>

Article 3 requires States to ensure that institutions, services and facilities responsible for the care or protection of children conform to standards established by competent authorities. Lesbian, gay or bisexual young people, whose rights regarding safety and health are violated to this extent by institutions, perhaps through sexual abuse, could claim an infringement of this article. Vindication of such protection is strengthened by Article 19, which provides that States shall take appropriate measures to protect the child from violence, abuse, neglect or negligent treatment, maltreatment or exploitation, and Article 33 which provides that States shall protect children from all forms of sexual exploitation and sexual abuse.

The United Nations Convention on the Rights of the Child also provides rights in relation to young people experiencing the juvenile justice system. Article 40 provides that States shall recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the child's sense of dignity and worth. Paragraph 4 of that article provides that juvenile justice dispositions, including care and probation, are available "in a manner appropriate to their well-being". Such dispositions should therefore respect the sexual orientation of young people.

The Convention requires that States submit to the Committee on the Rights of the Child reports on measures they have adopted which give effect to the rights in the Convention and on the progress made on enjoyment of those rights.<sup>11</sup>

## **2.2 Education**

### **2.2.1 Domestic Law<sup>12</sup>**

The law on education in Northern Ireland is influenced from a number of sources; policy developments at Westminster, the UK's international obligations, the churches, media, public opinion and broader political developments.

As with young people, the law on education affects young peoples' direct educational needs and the involvement of lesbian, gay and bisexual parents. The latter aspect is

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<sup>10</sup> *Stubbings v UK* 1996 23 *European Human Rights Report* 213.

<sup>11</sup> Art. 44. Every five years after the UK's first report.

<sup>12</sup> Much of this section draws from the comprehensive examination of education law, policy and practice in Northern Ireland in Lundy, L. *Education: Law, Policy and Practice in Northern Ireland*. (2000) Belfast: SLS Legal Publications (NI), The Queen's University of Belfast.

particularly important because much of the recent educational developments in the UK have sought to increase the say of parents in the schooling of their children.

Three principal organisations have statutory responsibility for education in Northern Ireland: the Department of Education, Education and Library Boards and the Catholic Council for Maintained Schools. The Department of Education is required to “secure the effective execution by Boards and other bodies on whom powers are conferred or duties imposed under the Education Order of the Department’s policy in relation to provision of the Education services.”<sup>13</sup> The five Education and Library Boards are required; “...to contribute towards spiritual, moral, mental and physical development of the community by securing that efficient education is available to meet the needs of its area.”<sup>14</sup> They are responsible among other things for curriculum advice and support, and the administration of curriculum and exclusion appeals. The Catholic Council for Maintained Schools is responsible for the management of all Catholic primary and secondary schools, including the employment of teachers.<sup>15</sup> Below this tripartite level of administration over education, Boards of Governors have a wide range of responsibilities over schools. These include admissions, discipline, attendance and the curriculum. Lundy (2000) observes that “...with few exceptions, Boards of Governors in Northern Ireland have a significant proportion of their membership drawn from the local clergy or from those whom they have chosen to represent them. It is largely through these guaranteed positions on the management committees of individual schools that the churches have been able to exercise a significant influence on the development of the education system and indeed the legal provisions which govern it”.<sup>16</sup>

The influence of the churches over education in Northern Ireland is significant. Of the four types of State-funded schools (controlled, voluntary maintained, voluntary grammar and grant-maintained) only controlled schools are precluded from having a particular religious denominational ethos. In practice, they are attended mainly by Protestant children. Voluntary maintained and voluntary grammar schools may have denominational status, and are in large part controlled by the Catholic Church. The only State-funded schools oriented towards non-denominational admissions are grant-aided integrated schools. There are just over twenty independent schools in Northern Ireland, which do not receive State funding and are subject to less educational regulation. The role of churches in schools is therefore significant across education. Given the resistance of the churches in Northern Ireland to treat sexual orientation in a healthy, respectful and positive way it is unlikely that this important aspect of education for young people will be addressed voluntarily by school boards.

Areas where gay, lesbian or bisexual people are affected by the law on education also arise in relation to a wide range of parental rights and duties. These comprise rights to election to boards of governors, attendance at annual parents meetings,<sup>17</sup> receipt of

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<sup>13</sup> Art. 3(1)(b), Education and Libraries (Northern Ireland) Order 1986.

<sup>14</sup> Art. 5, Education and Libraries (Northern Ireland) Order 1986.

<sup>15</sup> Education Reform (Northern Ireland) Order 1989.

<sup>16</sup> Lundy, above, p. 66.

<sup>17</sup> Education Reform (Northern Ireland) Order 1989, Art. 126.

school annual reports,<sup>18</sup> admissions,<sup>19</sup> provision of information on individual pupil's achievement<sup>20</sup> and records,<sup>21</sup> and challenge of school discipline.<sup>22</sup> Meeting the definition of parent may be more difficult for gay, lesbian or bisexual carers (see sections on "family" and "partnership"). For instance, a Board of Governors must contain an elected parent representative who must be a parent of a child attending the school and must be elected by parents of pupils attending the school.<sup>23</sup> A "parent" includes a guardian and every person who has actual custody of the child. This requirement makes it difficult for gay, lesbian or bisexual carers to access this right. In practice, it is also highly unlikely given the religious ethos of most schools that a gay, lesbian or bisexual person could be elected to a Board.

As a result of these provisions lesbian, gay or bisexual "parents", who are not recognised as parents by current mechanisms, are excluded from receiving important information from schools in respect of their child (including reports, nursing or dental records) and are precluded from participating in the governance of schools.

### **2.2.1.1 Sex and Sexuality Education**

While there is no formal legal requirement that schools provide education in sex and sexuality, the Education Reform (Northern Ireland) Order 1989 requires schools' curricula to prepare pupils for the "responsibilities and experiences of adult life".<sup>24</sup> It is argued that failure to provide some form of sex education may breach this requirement.<sup>25</sup>

### **2.2.1.2 Special Educational Needs**

Children with special educational needs are covered by a Code of Practice made pursuant to the Education (Northern Ireland) Order 1996. Schools must have regard to the Code. The Code reinforces the concept of the heterosexual family in defining contact with "parents". Gay, lesbian or bisexual carers may therefore be excluded from some of the important consultative processes that the school must engage in on behalf of the child. This includes, for example, the responsibility of each school's special needs co-ordinator to establish the nature of support from "parents" at home. It also comprises the rights of parents to be involved in the assessment of the child's special educational needs. As part of this process may involve referral to the Special Educational Needs Tribunal, it is arguable that the exclusion of gay, lesbian or bisexual carers from the quasi-judicial

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<sup>18</sup> Education Reform (Northern Ireland) Order 1989, Art. 125.

<sup>19</sup> Education and Libraries (Northern Ireland) Order 1986, Art. 44 (children shall be educated according to the wishes of their parents). Education Reform (Northern Ireland) Order 1989. Education (Northern Ireland) Order 1997 (regarding appeals by parents).

<sup>20</sup> Education Reform (Northern Ireland) Order 1989, and Education (Individual Pupil's Achievements)(Information) Regulations (Northern Ireland) 1998, reg. 5(2).

<sup>21</sup> Education (Individual Pupil's Achievements)(Information) Regulations (Northern Ireland) 1998, reg. 7.

<sup>22</sup> Education (Northern Ireland) Order 1998, Art. 3(2)(b), Schools (Expulsion of Pupils)(Appeal Tribunals) Regulations (Northern Ireland) 1994, as amended, Expulsion of Pupils)(Amendment) Regulations (Northern Ireland) 1995, Schools (Suspension and Expulsion of Pupils)(Amendment) Regulations (Northern Ireland) 1998.

<sup>23</sup> Education Reform (Northern Ireland) Order 1989.

<sup>24</sup> Art. 4.

<sup>25</sup> Lundy, *supra*, p. 140.

process afforded to parents violates Article 6 (right to a fair trial) of the European Convention on Human Rights in conjunction with Article 8 and Article 14.<sup>26</sup>

## 2.2.2 Policy and Practice

The Department of Education does not make any explicit mention of gay, lesbian or bisexual issues in its legal or policy documents.<sup>27</sup> The Department is a public authority for the purpose of section 75 of the Northern Ireland Act 1998. Its draft Equality Scheme follows the general format of Equality Schemes across public authorities. As part of its review for the purpose of the equality consultation process the Department identified one aspect of legislation or policy that may directly impact on lesbian, gay and bisexual people. This is a provision in the Teachers Superannuation Regulations (Northern Ireland) 1998 which does not include those who may be nominated as beneficiaries under the scheme — same-sex or unmarried persons.<sup>28</sup> This provision may be in breach of the Department's requirement to promote equality of opportunity under the Act for persons on the ground of their sexual orientation. The draft does not state that consultation was conducted with any representative lesbian, gay or bisexual groups. The Equality Commission has since approved the Department's Equality Scheme.

The Department of Education provides guidance to schools on the provision of sex education.<sup>29</sup> The guidance states that sex education should be an important element in the curriculum of all schools and recommends that it “should be taught in a sensitive manner which is in harmony with the ethos of the school or college and in conformity with the moral and religious principles held by parents and school management authorities.”<sup>30</sup> The Department was preparing new guidelines at the time of this research. Research shows that many schools do not address the sex educational needs of gay, lesbian and bisexual young people. In a 1996 survey, only 50% of secondary schools, 65% of grammar schools and 15% of primary schools had a sex education policy with homosexuality covered in 59% of those secondary schools.<sup>31</sup> Save the Children and the Children's Law Centre in Belfast found in their research in 1998 that sex education in schools did not provide young people with enough information to make informed choices.<sup>32</sup> It would appear, therefore, that schools are not meeting their legislative requirement or guidance from the Department of Education that sex education, including reference to gay, lesbian and bisexual sexuality, should be an important part of the curriculum of all schools. Indeed, the reported practice of two Boards in dealing with sex education and

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<sup>26</sup> Cf *TP & KM v UK*, application No. 28945/95, May 10, 2001.

<sup>27</sup> Personal communication from the Department of Education, 20 December 2000.

<sup>28</sup> Reg. E23.

<sup>29</sup> DENI Circular 1987/45.

<sup>30</sup> *Ibid* para. 2.

<sup>31</sup> Health Promotion Agency for Northern Ireland *Sex Education in Northern Ireland, Views from Parents and Schools*. (1996) Belfast: Health Promotion Agency for Northern Ireland.

<sup>32</sup> Geraghty, T. *Getting it Right? The State of Children's Rights in Northern Ireland at the end of the 20<sup>th</sup> Century*. (1999) Belfast: Save the Children and Children's Law Centre.

homophobic bullying reactively suggests an unwillingness to take an effective programmatic approach.<sup>33</sup>

It is arguable that the failure of schools to provide sufficient and positive education in sexuality contributes to the high level of homophobic bullying in schools. In any event, anti-bullying policies which address specifically homophobic bullying are also necessary. The Department's child protection document refers to homophobic bullying, by stating that verbal bullying may take the form of homophobic name-calling.<sup>34</sup> There is no further reference to bullying on the basis of sexual orientation or perceived sexual orientation in the document.

There is no comprehensive research on the nature and scale of homophobic bullying in Northern Ireland. In 1999, Foyle Friend reported the results of a survey of 31 young respondents in Derry, Donegal and Tyrone who identified as gay, lesbian or bisexual.<sup>35</sup> One respondent reported having attempted suicide, two spent time in a psychiatric hospital and eleven felt that their schoolwork had been adversely affected. In Ireland, which bears some cultural similarities with Northern Ireland, a survey by the Combat Poverty Agency in 1995 found that 57% of respondents had experienced a range of problems at school due to homophobia, including isolation, depression, poor self-esteem, harassment and bullying.<sup>36</sup> A survey in Britain by Stonewall in 1996 of 4,000 people showed that

- 48% of respondents under the age of 18 had experienced violence
- 61% had been harassed
- 90% had been called names because of their sexuality
- 24% of all respondents under the age of 18 had been attacked by fellow students,
- 44% had been harassed by fellow students
- 79% had been called names by fellow students
- 50% of the violent attacks had involved fellow students
- 40% of violent attacks took place in school.<sup>37</sup>

Research shows that gay, lesbian and bisexual youth experience alienation, fear and violence at school more than heterosexual pupils as a result of bullying, which leads to increased adverse social, emotional and physical consequences,<sup>38</sup> probably contributing to higher rates of suicide.<sup>39</sup>

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<sup>33</sup> Torney, K. (2000) 'Pupils who are gay' *Belfast Telegraph* 22 February 2000.

<sup>34</sup> DENI *Pastoral Care in Schools: Child Protection*. (1999) Bangor.

<sup>35</sup> Foyle Friend *The Experiences of Lesbian, Gay and Bisexual People in the Northwest of Ireland*. (1999) Derry: Foyle Friend.

<sup>36</sup> Combat Poverty Agency *Poverty: Lesbians and Gay Men; The Economic and Social Effects of Discrimination*. (1995) Dublin: Gay and Lesbian Network and Nexus Research Cooperative.

<sup>37</sup> Mason, A. & Palmer A. *Queer Bashing*. (1996) London: Stonewall. (<http://www.stonewall.org.uk>)

<sup>38</sup> Elliott, M. & Kilpatrick, J. *How to Stop Bullying: A KIDSCAPE Guide to Training*. (1994) London: KIDSCAPE.

<sup>39</sup> Trenchard & Warren *Something to Tell You: The Experiences and Needs of Young Lesbians and Gay Men in London*. (1984) London: London Gay Teenage Group. 19% of gay, lesbian and bisexual pupils attempted suicide. Rivers (1996); 40% of gay, lesbian and bisexual pupils attempted suicide.

This research was not equipped to investigate further the policies and practices within the education system, including those of the education and library boards, Council of Catholic Maintained Schools and Boards of Governors. Such research would be necessary to fully examine the human rights implications of compliance.

A range of lesbian, gay and bisexual organisations responded to the section on education in our questionnaires. The Rainbow Project sought inclusion of lesbian, gay and bisexual issues in the school curriculum. Lesbian Line advised that there was a lack of positive relationship and sexuality education in schools, with no recognition of the lives of lesbian, gay or bisexual people. They recommended that there should be provision for positive role models in teaching staff, curriculum development and anti-homophobic bullying policies. They also noted the link between education and the employment practices of schools in Northern Ireland whereby the wide range of schools associated with religious groups may preclude or inhibit such education. Lesbian Line recommends that there should be no exemption on religious grounds for schools in their sex education duties.

### **2.2.3 International Human Rights Law**

The broadest right to education in international human rights law lies in Article 26(1) of the United Nations Universal Declaration of Human Rights, which states: “Everyone has the right to education.” The United Nations Convention on the Rights of the Child provides that States “recognise” the right of the child to education.<sup>40</sup> By Article 29 of the Convention, States agree that the education of the child shall be directed to the development of the child’s personality, mental and physical abilities. Thus, the Convention supports the development of a child’s sexuality and sexual health; essential aspects of their personalities and abilities.<sup>41</sup> Article 13 provides that every child has the right to freedom of expression and that this right shall include freedom to seek, receive and impart information. It is axiomatic that rights, which seek to promote education, should protect young people’s rights to expression and information about sexual orientation. The United Nations Convention on the Rights of the Child is limited in so far as its enforcement mechanisms do not allow an aggrieved individual to lodge a complaint against their government. Instead, the Convention is enforced through the United Nations Committee on the Rights of the Child, to which States are required to report.

Article 1 of the First Protocol of the European Convention on Human Rights states that “[no] person shall be denied the right to education.” This weaker articulation of a right to education has been interpreted by the European Court of Human Rights to include a right to an effective education.<sup>42</sup> The Court stressed that this did not require States to “establish at their own expense, or to subsidise, education of any particular type or level.”

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<sup>40</sup> Art. 28.

<sup>41</sup> Cf. International Gay and Lesbian Human Rights Commission *Written Out: How Sexuality is Used to Attack Women’s Organizing*. (2000) <http://www.iglhrc.org/publications/books/WrittenOut/>.

<sup>42</sup> *The Belgian Linguistic Case* (1968) 1 *European Human Rights Review* 252.

## 2.2.4 Best Practice: International

We note that the Scottish Parliament has abolished section 28 of the Local Government Act 1988.<sup>43</sup>

A number of jurisdictions provide extensive education in relationships, sexuality and sex education from which Northern Ireland could learn. In Ireland, the Department of Education and Science has provided a programme “Relationships and Sexuality” which specifically addresses sexual orientation. Since 2000, the Department has also provided the “Exploring Masculinities” programme for young male students. The programme addresses the diversity of masculinity within schools, including issues around sexual orientation. Significantly, the Department sees the programme as complementing new law in Ireland, which makes it illegal to discriminate on the grounds of gender, sexual orientation and other categories of people.<sup>44</sup>

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<sup>43</sup> Ethical Standards in Public Life etc. (Scotland) Act 2000, s.34.

<sup>44</sup> Equal Status Act 2000.

## 3 Family Law

### 3.1 Family

#### 3.1.1 Definition of Family

What constitutes “family” may appear to be a straightforward concept but in recent years the traditional perception of “family” has been reconsidered, extended and others might say eroded.

In the UK, since the mid 1800s family life always existed within marriage and does not cease upon separation/divorce of the parents. The central relationships of family life are those of husband/wife and parent/child. This position is increasingly anachronistic due to increased cohabitation and the emergence of atypical family units.<sup>45</sup>

It follows from the change in societal values and liberation of sexual mores that “family” requires to be redefined to ensure rights are protected between individuals without discrimination. Bates opines; “the diversity of modern personal relationships is a challenge to such fundamental concepts in family law as “family” and “parent”.”<sup>46</sup>

The recent decision by the House of Lords in *Fitzpatrick v Sterling Housing Association Ltd*<sup>47</sup> “illustrates that the rights of same-sex couples and other home sharers is an important issue for contemporary family law.”<sup>48</sup> Glennon argues that: “once it is accepted that a man and woman living together in a stable relationship are capable of being members of a family there is no rational basis to exclude same-sex couples whose relationship embodies the same characteristics.”<sup>49</sup> It is this functional approach to the concept of family which enables society to transcend discriminatory assumptions based on sexual orientation.<sup>50</sup>

*Fitzpatrick* shows that “family” is a flexible adjective describing the functional relationships which exist between individuals and away from the patriarchal and heteronormative concept of family arising through marriage.<sup>51</sup>

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<sup>45</sup> Archbold in a recent lecture on ‘Human Rights & Family Law’ classifies homosexuals (gays, lesbians and bisexuals) and transsexuals as atypical families. 17 October 2000.

<sup>46</sup> Bates, P. D. *ALL ER Annual Review* 1999 at p. 255, Family Law.

<sup>47</sup> [1999] 2 FLR 1027, [1999] 4 All ER 705.

<sup>48</sup> Per Glennon, L. ‘Fitzpatrick v Sterling Housing Association – an endorsement of the functional family?’ *International Journal of Law, Policy & the Family* 14 (2000), 226-255 at p. 226.

<sup>49</sup> *Ibid* at p. 233.

<sup>50</sup> *Ibid* at p. 245.

<sup>51</sup> See chapter on ‘Partnerships.’

### 3.1.2 European Convention on Human Rights

Article 8 of the European Convention on Human Rights refers to the notion of “family life.” There is no definition of “family life” in the European Convention on Human Rights, however the jurisprudence of the European Court of Human Rights, attempting to give the term its modern meaning, has interpreted it widely.

*X, Y & Z v UK* held that in determining whether a relationship can amount to “family life” numerous factors may be relevant; “including whether a couple live together, the length of their relationship and whether they have demonstrated commitment to each other by having children or by any other means.”<sup>52</sup> In this case a transsexual man, his female partner and child constituted “family life” under Article 8, however the European Court of Human Rights has excluded a stable same-sex relationship as being within the remit of “family life.” The status of same-sex relationships is evolving and under review in Europe.<sup>53</sup>

## 3.2 Marriage

### 3.2.1 Domestic Law

In *Hyde v Hyde*<sup>54</sup> Lord Penzance defined “marriage” as; “the voluntary union (for life)<sup>55</sup> of one man and one woman to the exclusion of all others.” This common law definition subsists today and quite clearly excludes lesbian, gay and bisexual people from entering a marital relationship with persons of the same-sex. The common law proposition is enshrined in the Matrimonial Causes (Northern Ireland) Order 1978, Article 13(1)(e) of which provides that a marriage shall be void<sup>56</sup> if the parties are not respectively male and female.

The House of Lords in *Fitzpatrick* held that for the purposes of the Rent Act 1977 a gay partner could be a member of a person’s “family”, and so succeed to the tenancy in question, but was not equated with a “spouse”, the terms “husband” and “wife” being held to be gender specific. It is our contention that although this dictum is to be welcomed it does not promote equality.

The International Lesbian and Gay Association has said of the UK that it has the most repressive legal situation of any country in Western Europe other than Cyprus.<sup>57</sup> This view is also reiterated by Stonewall.<sup>58</sup>

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<sup>52</sup> (1997) 24 *EHRR* 143.

<sup>53</sup> Butterworths Family Law Service, *The Human Rights Act 1998*, A Special Bulletin for Family Lawyers, 1999 at paragraph 5.25 p. 30.

<sup>54</sup> [1861-73] All ER 175 (1866).

<sup>55</sup> The ‘for life’ aspect of the definition is now derogated by virtue of readily available petitions and judicial separation.

<sup>56</sup> The word void indicates that the marriage is deemed never to have taken place at all.

<sup>57</sup> At page 1 of ILGAS world Legal survey at <http://www.ilga.org> 1999.

In response to the questionnaire distributed to relevant organisations, Lesbian Line<sup>59</sup> comments that Northern Irish law is vague in relation to lesbian couples. Cara-Friend<sup>60</sup> wish to see full equality for all lesbian and bisexual couples and they endorse the registration of partnerships. The Rainbow Project<sup>61</sup> would like to see equalisation of all laws including the granting of rights such as marriage.

### 3.2.2 European Convention on Human Rights

The scope of Article 12 which deals with the right to marry was considered in the case of *Rees v UK*. It was held, "...the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex. The wording of Article 12 makes it clear that it is mainly concerned to protect marriage as the basis of the family."<sup>62</sup> It does not give a transsexual person a right to marry under his/her new gender or homosexuals to marry one another.

### 3.2.3 International Perspectives

Globally, lesbian, gay and bisexual partnerships are becoming recognised in law and increasingly there is equality of treatment between same-sex couples and married couples.<sup>63</sup> In many European countries, Australia and in some States in the United States legislation has been enacted putting same-sex couples on a par with heterosexual couples.<sup>64</sup>

Some countries have taken steps to equalise or diminish inequality of lesbian, gay or bisexual people;<sup>65</sup> the Law Reform Advisory Committee for Northern Ireland in considering changes to marriage said "we are ...not concerned with issues such as the questions of ...formalised same-sex relationships."<sup>66</sup>

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<sup>58</sup> Another organisation promoting Gay and Lesbian equality, which states that gay and lesbian partnerships are not recognised in public policy and by virtue of this fact, there is discrimination in that many rights which heterosexual couples take for granted are denied to lesbian and gay men. Stonewall document, "Does British law recognise same-sex partnerships?" (This issue will be dealt with in more depth in the chapter on Partnership).

<sup>59</sup> Lesbian Line is a telephone and befriending service for lesbian and bisexual women.

<sup>60</sup> A voluntary organisation providing information and befriending service for lesbian, gay and bisexual persons.

<sup>61</sup> A volunteer lead organisation working to improve the emotional, physical and mental health of gay and bisexual men living in, working in or visiting Northern Ireland.

<sup>62</sup> (1986) 9 *European Human Rights Review* 49.

<sup>63</sup> See chapter on Partnerships, and Danish Registration of Partnerships Law 1989 as referred by Wintemute, R. in "Lesbian and Gay Inequality" (2000) *European Convention on Human Rights Law Review* 621.

<sup>64</sup> Stonewall.org.uk "Are Same-Sex Partnerships Recognised In Other Countries?"

<sup>65</sup> See Chapter on Partnership.

<sup>66</sup> Law Reform Advisory Committee for Northern Ireland.

### 3.3 Breakdown of Relationships

#### 3.3.1 Domestic Law

The law in Northern Ireland exclusively applies to married couples; it follows that lesbian, gay or bisexual people, like heterosexual cohabitants remain unprotected and vulnerable when their relationships breakdown. Horowitz states: “[t]he ancillary relief code is not available to help pick up and rearrange the pieces and the available legal remedies do not easily answer to the task of creating a fair adjustment to meet new needs.”<sup>67</sup> He continues “ in a changing social climate, gay and lesbian couples also claim their right to have a fair and comprehensible system of resolving their shared finances on separation.”<sup>68</sup>

A court may order on a petition for divorce, nullity or judicial separation, one party to pay to the other maintenance pending suit; and on granting a decree of divorce, nullity or judicial separation order periodical payments, lump sum payments and/or property adjustment.<sup>69</sup>

A party to a marriage may apply to the court to order that the other party to the marriage make periodical payments and/or a lump sum.<sup>70</sup>

Lesbian, gay or bisexual couples may only be regulated and protected on the basis of contractual principles by drafting “cohabitation contracts”<sup>71</sup>, or equitable principles and maxims<sup>72</sup>, or equitable estoppel.<sup>73</sup> Horowitz states, “equitable doctrines are ill adapted to meet modern social conditions.”<sup>74</sup>

In England, the Law Commission has this issue under review since May 1994 and proposals in 1995 sought consultation on a code for cohabitants. In Northern Ireland this issue has not come under such review.

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<sup>67</sup> Horowitz, “A code for cohabitants-fairness at last” (1995) *Family Law* 963.

<sup>68</sup> *Ibid.* at p. 963.

<sup>69</sup> Articles 24, 25 and 26 of the Matrimonial Causes (NI) Order 1978 as amended by Article 5 of the Matrimonial and Family Proceedings (NI) Order 1989.

<sup>70</sup> Article 4 of the Domestic Proceedings (NI) Order 1980.

<sup>71</sup> Specifically addressing what is to happen should the relationship breakdown.

<sup>72</sup> Whereby a party must establish a constructive trust: a beneficial interest in a property is demonstrated by a direct financial contribution.

<sup>73</sup> That they spend money or acted to their detriment; they believed that they owned an interest in the property by spending money or that thereby an interest would be secured or that the other party encouraged the belief that they have an interest. This stems from common law jurisprudence in *Lloyd's Bank PLC v Rossett & Another* (1990) 2 *FLR* 155 and *Hammond v Mitchell* (1991) 1 *WLR* 1127.

<sup>74</sup> Horowitz above, at p. 693.

### 3.3.2 European Convention on Human Rights

Article 1 of the First Protocol to the European Convention on Human Rights guarantees in substance the right to peaceful enjoyment of property and the right not to be deprived of possessions. It is directly relevant to ancillary relief and distribution of assets. Surprisingly there are no reported European Convention on Human Rights cases, which deal with distribution of assets in breakdown of relationships. The provisions of the Welfare Reform and Pension (Northern Ireland) Order 1999 may provide the catalyst for a case to be referred by a disgruntled worker whose pension has been earmarked or split.<sup>75</sup>

It could be argued that the difference in treatment between married couples and cohabitants (whether heterosexual or homosexual) is discriminatory under Article 14 in conjunction with Article 1.

### 3.4 Domestic Violence

#### 3.4.1 Domestic Law

In Northern Ireland the introduction of the Family Homes and Domestic Violence (Northern Ireland) Order 1998<sup>76</sup> considerably improved the range of civil remedies available to those experiencing violence within the home as well extending significantly the range of people who will come under the protection of the civil law.<sup>77</sup>

There are essentially three Orders available:

1. Matrimonial Home Rights<sup>78</sup>
2. Occupation Orders<sup>79</sup>
3. Non Molestation Orders.<sup>80</sup>

Article 3 provides the range of potential applicants. Lesbian, gay or bisexual people do not fall within the definition of “cohabitantes”<sup>81</sup> but same-sex couples may be “associated persons.”<sup>82</sup> It follows that lesbian, gay or bisexual people can be protected from domestic violence if they satisfy the court that they live or have lived in the same household, and

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<sup>75</sup> Article 18.

<sup>76</sup> Hereinafter referred to as the 1998 Order.

<sup>77</sup> For an interesting insight into the equivalent law in England see the Article by Ada Kewley: “Pragmatism before Principle: The Limitations of Civil Law Remedies for the victims of Domestic Violence.” (1996)18 (1) *Journal of Social Welfare & Family Law* 1-10.

<sup>78</sup> Article 4. Only available to married spouses.

<sup>79</sup> Article 11.

<sup>80</sup> Article 20.

<sup>81</sup> Article 3 (1)(a).<sup>81</sup> “ A man and a woman who are living together as husband and wife.”

<sup>82</sup> Article 3(3) if: “ they live or have lived in the same household, otherwise than merely by reason of one of them being the others employee, tenant, lodger or boarder.”

that are living in the same household was an additional relationship above that of employee, tenant, lodger or boarder.

Lesbian, gay or bisexual people may apply for an Occupation Order<sup>83</sup> if they can establish a beneficial estate or a contractual or statutory right to occupy a dwelling house and the dwelling house is or has been the home of the applicant and of another associated person.

A court can grant a Non-Molestation Order<sup>84</sup> on the application by a person associated with the proposed respondent.<sup>85</sup> This includes lesbian, gay or bisexual people.

### 3.4.2 European Convention on Human Rights

It would appear that the 1998 Order might be the subject of challenge under the European Convention on Human Rights.

Article 8 of the European Convention on Human Rights guarantees the right to respect for the home, which includes the right to occupy; not be expelled or evicted from and peaceful enjoyment of the home.<sup>86</sup> Thus a person against whom Matrimonial Home Rights or an Occupation Order is made could challenge the Order on the basis that their rights and entitlement in the property have not been respected under Article 8 in conjunction with Article 1 of the First Protocol.<sup>87</sup>

It could be argued in relation to lesbian, gay or bisexual people that their right to respect for family life in light of *Fitzpatrick*, is being infringed by having to satisfy the court that they are not a lodger, tenant, employee or boarder; rather than satisfying the court of the fact of being a cohabiting couple. A challenge could also be made under Article 14.

## 3.5 Children

The Children (Northern Ireland) Order 1995<sup>88</sup> is the relevant statutory authority for the rights of parents and interested parties in respect of children. It deals with private and public law applications. The relevant Orders available to lesbian, gay or bisexual people, include: Parental Responsibility Order and Article 8 Orders: Contact, Prohibited Steps, Residence and Specific Issue.

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<sup>83</sup> As defined in Article 11(3).

<sup>84</sup> As defined in Article 20(1)(a).

<sup>85</sup> Article 20(2)(a).

<sup>86</sup> See *Wiggins v UK* (1978) 13 DR 40 & *Arondele v UK* (1982) 26 DR 5.

<sup>87</sup> Note also *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 36 at paragraphs 63 & 69.

<sup>88</sup> Hereinafter referred to as The 1995 Order.

### 3.5.1 Parental Responsibility<sup>89</sup>

Lesbian and bisexual women who are the mother of a child are automatically vested with parental responsibility.

A father may acquire parental responsibility:

1. By applying to the court for a Parental Responsibility Order.<sup>90</sup>
2. By entering into a parental responsibility agreement with the mother.<sup>91</sup>
3. By marrying the mother.
4. By being granted a Residence Order as the court must also grant a Parental Responsibility Order.<sup>92</sup>
5. By being appointed as the child's guardian.<sup>93</sup>

A party who wishes to have responsibility for a child must have parental responsibility.

The International Gay and Lesbian Association<sup>94</sup> states: "Lesbians and gay men who have children in a heterosexual relationship can and do still face discrimination if there is a dispute with their former partner or spouse over arrangements for their children."

It would appear to be the situation that lesbian, gay or bisexual people are treated equally in that if they are not the mother or father of the child they must, in the same way as any other applicant for parental responsibility, enter agreement with the mother, or apply for a Residence Order or Contact Order where it is perceived that lesbian, gay or bisexual people are under a more onerous obligation to prove themselves.

### 3.5.2 Residence Order<sup>95</sup>

The Order automatically confers parental responsibility for the duration of the Order.

There are 3 avenues open within the 1995 Order for lesbian, gay or bisexual people who are not the biological father or mother of a child to obtain a Residence Order and thereby acquire parental responsibility over the child:

1. An Order may be made in favour of a person with whom the child has been residing for a period of 3 years.<sup>96</sup>

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<sup>89</sup> Parental Responsibility is defined in Article 6(1): All the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

<sup>90</sup> Article 7(1)(a).

<sup>91</sup> Article 7(1)(b).

<sup>92</sup> Article 12(1).

<sup>93</sup> Article 160.

<sup>94</sup> International Gay & Lesbian Association, World Legal Survey (2000).

<sup>95</sup> An Order settling the arrangements to be made as to the person with whom the child is to live: Article 8(1). It can be made in favour of 2 or more persons who do not themselves live together: Article 11(4).

<sup>96</sup> Article 10(5)(b).

2. Where they have obtained the consent of all other persons who have been vested with parental responsibility.<sup>97</sup>
3. Failing that they may apply to the court for leave to apply.<sup>98</sup> In granting leave the court will, amongst other considerations, have regard to any risk there may be of the proposed application disrupting the child's life to the extent that he or she would be harmed by it.<sup>99</sup>

Stonewall considers that whereas courts have been more progressive, an unspoken burden exists for lesbian mothers and gay fathers to prove to the court that the child will not grow up in what is perceived as a risky environment.<sup>100</sup>

UK jurisprudence is reaching the position where the fact of an atypical same-sex relationship does not of itself present a ground of refusing the child's right to contact and residence.

In *C v C (a minor)(Custody Appeal)*<sup>101</sup> the Court of Appeal considered "a lesbian relationship was an unusual background in which to bring up a child."<sup>102</sup> Glidewell LJ continued, "I regard it as axiomatic that the ideal environment for the upbringing of a child is the home of loving, caring, and sensible parents: her father and her mother. When there is a breakdown the Court's task is to choose the alternative which is closest to the ideal."<sup>103</sup> Despite this suggestion that same-sex relationships are not ideal; it was held that the child should stay with her mother; the fact that the mother was a lesbian did not of itself render her unfit to have care and control of the child.<sup>104</sup>

In *B v B (Minors)(Custody, Care and Control)*<sup>105</sup> Judge Callman said, in a case involving a lesbian couple and a child, "the particular issue is whether the proclivities of the mother and the partner with whom she lives are such as to make it undesirable in M's (the child) interests that he should be brought up in that home." He went on to hold that lesbianism could not constitute a total and inevitable embargo preventing the courts in every case from saying that the child should not live in such a house.

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<sup>97</sup> Article 10(5)(c)(iii).

<sup>98</sup> Article 10(9).

<sup>99</sup> Article 10(9)(c).

<sup>100</sup> See, <http://stonewall.org.uk>; in relation to treatment of lesbians and gays in custody cases. Also, Rights of Women in Lesbian Custody Group (1986) *Lesbian Mother's Legal Handbook*. London: The Women's Press.

<sup>101</sup> 1991 1 FLR 223, Court of Appeal.

<sup>102</sup> *Ibid* at Page 223 at G.

<sup>103</sup> *Ibid* at Page 228 at F & G.

<sup>104</sup> Balcombe LJ at p. 233 at E.

<sup>105</sup> 1991 1 FLR 402.

In determining any Order in relation to a child it must always be remembered that the paramount consideration is the welfare of the child.<sup>106</sup>

One of the difficulties faced by lesbian, gay or bisexual people is the extent to which a partner in a same-sex relationship has rights over the child of their partner.

In *Re C (a minor)(Residence Order; lesbian co-parents)*<sup>107</sup> a lesbian couple entered into an arrangement that one partner would have a child with a man who did not want to be involved with the child. On birth the other partner applied to the court for a Residence Order to obtain parental responsibility. Douglas Brown J made a joint Residence Order in favour of both women.

In *G v F (Shared residence: Parental Responsibility)* a child conceived by artificial insemination was born to a woman in a lesbian relationship, which subsequently broke down. Bracewell J, in granting leave to allow an application for a shared Residence Order, opined that the fact that the couple were “in a lesbian relationship was a background circumstance and was no basis for discriminating against the applicant.”<sup>108</sup>

It would appear that lesbian, gay or bisexual people have rights in respect of children but they are not treated equally with married couples. It has to be remembered that a child has a right to see his/her parent and the question of that parent’s sexual orientation or social identity should be irrelevant.

### **3.5.3 Human Rights Act 1998**

The introduction of the Human Rights Act 1998 has the potential to allow lesbian, gay or bisexual people equal treatment in relation to children.

Wyld argues that the paramouncy principle, “does not sit comfortably with rights of parents and other family members for respect for their private and family life.”<sup>109</sup> European Court of Human Rights cases suggest that, “equal weight should be given to the right of each family member, including the child, to respect for his/her family and private life. If these rights conflict the court will have to consider whether interference is justified.”<sup>110</sup> In *Johansen v Norway*<sup>111</sup> the court determined: “when assessing whether a fair balance has been struck, particular importance attaches to the best interests of the child which, depending on their nature and seriousness, may override those of a parent.”

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<sup>106</sup> Article 3(1) of The Children (NI) Order 1995; note also the checklist of considerations the court may take into account under Article 3(3)(a) to (g).

<sup>107</sup> 1994 Family Law 468.

<sup>108</sup> Family Court Reporter [1998] 3 FCR at p. 2.

<sup>109</sup> Per Nicola Wyld in a recent Article “The Human Rights Act and the Law Relating to Children,” Legal Action, September 2000 at p. 17.

<sup>110</sup> Article 8(2).Ibid at p. 18. In relation to Article 8(2) this refers to a public authority that may only interfere with the rights of individuals “in accordance with the law and where it is necessary for the protection of the rights and freedoms of others.”

<sup>111</sup> 1996 (23) EHRR 33.

Under the Human Rights Act the courts will have to apply the 1995 Order in a way that avoids discrimination contrary to Article 8 and 14 of European Convention on Human Rights.

In *Salgueiro v Portugal*<sup>112</sup> a clear message was distilled that sexual orientation cannot be treated as a negative factor in deciding with whom a child is to reside or to have contact.

The difficulty with the application of European Convention on Human Rights is that there is almost no positive Strasbourg case law.<sup>113</sup> In relation to lesbian and gay couples as parents the Commission held that despite an evolution of attitudes to homosexuality Article 8 did not import a positive obligation on a State to grant parental rights to a woman living with the mother of a child.<sup>114</sup>

Even if the European Court of Human Rights case law has not, so far, been positive towards lesbians, gay or bisexual people, this does not mean that there is no scope for government to apply the Convention's rights in a way that would be positive towards lesbian, gay or bisexual couples. On the contrary, Robert Wintemute argues firstly that Strasbourg case law is not binding and secondly that "UK courts are free to interpret the Convention rights in Schedule 1 to the Human Rights Act more generously than Strasbourg, in light of social conditions in early 21<sup>st</sup> Century Britain."<sup>115</sup> The UK courts have shown a willingness to go beyond Strasbourg jurisprudence as in *Re C* and *Fitzpatrick*.

### 3.5.4 Adoption

#### 3.5.4.1 Domestic Law

Article 9 of the Adoption (Northern Ireland) Order 1987 provides that in placing a child for adoption the child's welfare is the most important consideration and all circumstances must be considered.<sup>116</sup> A successful Adoption Order automatically confers parental responsibility upon the adopter(s).

This declaration of the welfare principle is reinforced by statutory criteria of those that are eligible to adopt. Essentially there are two types of potential adopters: a married couple and a single person.

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<sup>112</sup> 21<sup>st</sup> December 1999 available at <http://www.EuropeanConventiononHumanRights.coe.int/hudoc>.

<sup>113</sup> This view is also expressly by Robert Wintemute in "Lesbian & Gay Inequality" 2000 EHRLR 603 at p. 620.

<sup>114</sup> *Kerkhoven v Netherlands* No. 15666/89 (1993) unreported.

<sup>115</sup> Wintemute: Lesbian & Gay Equality 2000 EHRLR 603 at pp. 620-621.

<sup>116</sup> Full consideration being given to the need to be satisfied that the adoption, or adoption by a particular person(s), will be in the best interests of the child; and the need to safeguard and promote the welfare of the child throughout his childhood; and the importance of providing the child with a stable and harmonious home; and so far as is practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.

The adoption agency has their own set of suitability criteria, which can include quality of relationships and lifestyle of the adopter(s).

There is no bar to lesbian, gay or bisexual people or those in a relationship from making an application to adopt. In *Re W (Adoption: Homosexual Adopter)*<sup>117</sup> a local authority applied to free a child for adoption by a lesbian in a stable long-term relationship. The child's mother opposed this application on the basis that it was contrary to public policy to make an adoption order in favour of a party in a homosexual relationship.<sup>118</sup> Singer J determined that there was nothing to prevent him granting the application in favour of a single homosexual applicant. Public policy considerations formed the basis of the decision to allow the child to be freed. The decision in *Re W* was submitted to be "at odds with the policy currently underlying current adoption legislation. The policy is that whenever a couple adopt, that couple should be married, and to dodge this restriction by permitting one of a couple (whether heterosexual, homosexual or asexual) to adopt singly is contrary to the intentions of Parliament."<sup>119</sup> They must circumvent this arbitrary and inappropriate discrimination by one partner making a single person's adoption application and then by applying for a joint residence order for them both. In reference to the former Moran comments that, "in practice...very few applications are granted. Of those which are successful, only the one applicant has any legal rights and responsibilities towards the child."<sup>120</sup>

In a Scottish case *T, Petitioner*,<sup>121</sup> a case involving similar facts Lord Hope opined: "Issues relating to sexual orientation, lifestyle, race, religion or other characteristics of the parties involved had of course to be taken into account as part of the circumstances. But they could not be allowed to prevail over what was in the best interests of the child."<sup>122</sup> The cases mentioned are "concerned with how far traditional legal perceptions of "normal" families may be stretched in modern society."<sup>123</sup>

The introduction of the Human Rights Act 1998 provides another fundamental basis for the review of legislation. Section 3(1) provides that primary and subordinate legislation *must* be read and given effect in a way, which is compatible with the European Convention on Human Rights.

Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way, which is incompatible with the European Convention on Human Rights. Given the interrelationship of rights in the European Convention on Human Rights in

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<sup>117</sup> [1997] 2 F.L.R 406.

<sup>118</sup> Bainham, A. "Gay Survivors & Lesbian Parents: Sexual Orientation in Family Law." (1998) *Cambridge Law Journal* 43.

<sup>119</sup> *Ibid* at p. 44.

<sup>120</sup> Moran, N. 'Policies affecting same-sex partners in the UK, the Netherlands and Ireland', paper given at the 'Sexual Orientation, Transgender and Law' seminar at the University of Ulster, December 1, 2000, p. 6.

<sup>121</sup> 1997 S.L.T. 724.

<sup>122</sup> Times Law Reports 20 August 1996 at p. 3.

<sup>123</sup> Bainham, A., above at p. 45.

cases involving lesbian, gay or bisexual people it may be the case that decisions or policies of public authorities will be the subject of challenge.

Several of our respondents (Lesbian Line, Cara-Friend and the Rainbow Project) all lobby for equal adoption rights. In Northern Ireland adoption is currently under review.

#### **3.5.4.2 European Convention on Human Rights**

Articles 8 and 14 are extremely relevant in relation to the inequality of treatment presently afforded to lesbian, gay and bisexual and unmarried heterosexual couples in the area of adoption. “It is also quite illogical to allow one of a couple to adopt while preventing both from adopting together.”<sup>124</sup>

#### **3.5.5 Policy and Practice**

A range of governmental departments and statutory organisations has responsibility for formulating policy in relation to family law in Northern Ireland.

The Department of Health, Social Services and Public Safety (DHSSPS) has statutory duties in respect of children. The DHSSPS must administer a system of administration, regulation and inspection of adoption agencies.<sup>125</sup> The Equality Commission has approved the Equality Scheme of the DHSSPS.

The Guardian Ad Litem Agency *must* always be involved in adoption cases to secure and protect the best interests of the child. The Guardian Ad Litem’s duty is to carry out an exhaustive investigation into all the circumstances of a proposed adoption and to bring before the court any factor bearing on the welfare of the child.

The General Register Office is involved in administering the register of births, deaths and marriages.

The Office of Law Reform has a role in identifying areas of family law, which need updating, or alteration. This function had now been passed to the Office of the First Minister and Deputy First Minister which has responsibility for equality and human rights.<sup>126</sup>

#### **3.5.6 European Union Law**

While Waaldijk and Clapham wrote of the position in 1993, that “all community law documents that refer to lesbian and/or gay men are without exception non-binding recommendations, resolutions and reports...lesbian and gay men are not mentioned in

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<sup>124</sup> Ibid at p. 44.

<sup>125</sup> Part II of The Adoption (NI) Order 1987.

<sup>126</sup> A copy of the Equality Scheme for The Office of the First & Deputy First Minister can be accessed at [www.ofmdfmi.gov.uk](http://www.ofmdfmi.gov.uk).

one single binding norm of the Community. Regulations and Directives dealing with family law have to be interpreted to find out if and to what extent they would be applied to lesbian and gay men under the jurisprudence of the Court of Justice.”<sup>127</sup>

The reference to sexual orientation in Article 13 of the Treaty of Amsterdam and the Charter for Social Rights will have significant impact on European Union recommendations, resolutions and decisions. (For further discussion, see the section on Partnership within this report.)

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<sup>127</sup> Waaldijk & Clapham, *Homosexuality: A European Community issue* at pp. 380-381.

## 4 Partnership<sup>128</sup>

### 4.1 Domestic Law

There is no provision in Northern Irish (or English) law, which explicitly recognises same-sex partnerships *per se*. There may be specific examples of such recognition, for example in housing law in response to *Fitzpatrick v Sterling Housing Association*<sup>129</sup> and there may be opportunities to exploit this ruling in other areas where the term “family” is used. Same-sex partners can, of course, enter into private contractual arrangements. These are self-evidently enforceable as not being contrary to public policy. So also, in some situations, a person may designate any other person to benefit from a particular arrangement, for an example in relation to an insurance policy or an occupational pension schemes or may establish a trust with a same-sex partner as beneficiary.

While such private law arrangements may be satisfactory in some situations, they are more burdensome for same-sex partners in other situations, for example, having to make a will instead of relying on intestacy laws. In another range of situations, either private parties refuse to allow recognition of same-sex partnerships, or more particularly, a statutory (or common law) regime does not recognise same-sex partnerships and so the discrimination against same-sex partnerships shifts from one of “added burden” to one of “exclusion from rights”.

Northern Irish law does not make provision for any form of registered partnerships in order to allow same-sex partners to gain some of the benefits which accrue to the partners in an opposite sex partnership in both private and statutory schemes. A separate issue from recognition of same-sex partnerships is the availability of some form of same-sex marriage ceremony and consequent implications for the legal status of the partners. This is a deeply contentious issue within the lesbian, gay and bisexual community, whereas recognition of “registered partnerships” is supported by a great majority of lesbian, gay or bisexual people.<sup>130</sup>

#### 4.1.1 A Note on Succession<sup>131</sup>

There is a range of issues in relation to succession in which same-sex partners are at a serious disadvantage.

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<sup>128</sup> We are indebted to Nicola Moran for her contribution in this area, particularly her paper, ‘Partnership Laws and Policies in Europe,’ presented at the ‘Sexual Orientation, Transgender and the Law’ seminar, University of Ulster, 1 December 2000, and background document for preparation of this section.

<sup>129</sup> [1999] 4 All ER 705, [1999] 3 WLR 1113 (HL).

<sup>130</sup> Stonewall, ‘Partnership’, <http://www/stonewall.org.uk>

<sup>131</sup> See generally, Wylie, J, *Irish Land Law* (3rd ed), Dublin: Butterworths, 1997, pp. 845-863.

#### **4.1.1.1 Freedom of disposition**

Even where one same-sex partner does make a will, there are no equivalent limitations of her/his freedom of disposition as would apply to a married or cohabiting person. Under the Inheritance (Provision for Family and Dependents)(Northern Ireland) Order 1979,<sup>132</sup> a range of parties can apply for a court order on the basis that a will fails to make reasonable financial provision for her/him. These parties include the wife or husband of the deceased, a former wife or husband who has not remarried, a child of the deceased and any person (other than a child) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage. To this list was added cohabitants by way of the Succession (Northern Ireland) Order 1996, but these are defined as “a person who, during the whole of the period of two years ending immediately before the deceased’s death, was living in the same household as the deceased and as the deceased’s husband or wife.”<sup>133</sup>

It must also be noted that the 1979 Order does provide an additional “catch all” category, which might be of significance for same-sex partners, namely “any other person who immediately before the deceased’s death was being maintained wholly or partly by the deceased, i.e., where the deceased, otherwise than for full consideration, was making a substantial contribution in money or money’s worth towards that person’s reasonable needs.”<sup>134</sup> There can be no doubt that this provision may be of value to same-sex partners who are not adequately provided for in her/his partner’s will. However its limitations are apparent from the fact that it was considered necessary to recognise explicitly cohabitation relationships in the Succession Order. It is also the case that the Order makes more extensive provision for husbands and wives in that an order may include such provisions “as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance.”<sup>135</sup> Hence to develop further a point identified above, there is a range of issues upon which either same-sex partnerships could be recognised to the extent that cohabitants “living as husband and wife” are recognised or a system of registered partnerships could actually deal with evidential problems surrounding any relationship outside marriage. There is another range of issues where married persons are treated differently to opposite-sex cohabitants. Nonetheless, the opening out of debate about comparability between same-sex partnerships and opposite-sex partnerships, of necessity, brings into play further scrutiny of distinctions between married persons and any partners in other relationships.

#### **4.1.1.2 Intestacy**

It is in relation to the rules of intestacy that same-sex partners suffer significant detriments. Where no will is made by a same-sex partner, the Administration of Estates Act (Northern Ireland) 1955, as amended by the Succession (Northern Ireland) Order 1996, distributes her/his estate according to well-established rules. If the deceased has a spouse and/or children, the estate will be distributed amongst them. It is significant that,

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<sup>132</sup> Largely based on the English statute of the same title.

<sup>133</sup> Wylie, at p. 846.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

although the 1996 Order did recognise the rights of cohabitants in relation to disposition of a will, it did not alter the distribution rules in relation to intestacy. Hence, if there is no spouse and children, which is more likely than not in a same-sex partnership, the deceased's estate is distributed amongst her/his sisters and brothers and their children and, in default, other issue such as aunts and uncles etc. If there is no next-of-kin, the estate reverts to the Crown as *bona vacantia*. Wylie states that "[i]t appears that the Treasury frequently made *ex gratia* provisions out of such estates in favour of persons having a claim based on natural kinship or as dependants of the deceased, or who were able to show that the intestate left a document indicative of an intention to benefit them by will."<sup>136</sup> It may be that a same-sex partner could benefit from this benevolence but it is an unsatisfactory basis upon which either same-sex partners or opposite-sex cohabitants could gain some entitlement to a partner's estate. Of course, if any of the earlier categories exist, for example sisters or brothers, aunts or uncles, this possibility of *ex gratia* payments is neutralised.

#### 4.1.2 A Note on Taxation<sup>137</sup>

Partnership rights have a significant impact on taxation issues. Under the Finance Act 1999, the married couple's allowance has been abolished, allowing each person to be taxed in an independent fashion. The focus of taxation policy has shifted to the introduction to children's tax credit, to take effect for tax years 2001-02. This is supported by a system of working family tax credits introduced by the Tax Credits Act 1999. While it is open to argument that a system of married couple allowance was a form of direct discrimination against same-sex partnerships, it is more difficult to argue that children's tax credit is discriminatory. Certainly, same-sex partnerships are much less likely to have children but it is easy to justify "children friendly" policies on grounds of public policy. It may be that same-sex partnerships are at a slight disadvantage in claiming children's tax credit. The credit is available to married couples, unmarried couples living together as man and wife and lone parents. Hence it would seem to cover situations in which a same-sex partner is the parent. There may be situations in which a same-sex partnership could still be at a disadvantage, for example, if the non-parent in the partnership wanted to make the claim. Hence, the power to elect which member of the partnership should enjoy the credit only applies to married couples and a couple living together as husband and wife.<sup>138</sup>

There are numerous other situations in the taxation system in which spouses can plan their taxation arrangements; for example, an income-bearing asset put in joint names can be taxed at 50:50, unless a declaration of proportionate ownership is made, even if the asset is primarily owned by one party.<sup>139</sup> So also, within the Capital Gains Tax system, transfers can be made between spouses but also between cohabitants.<sup>140</sup> As in other areas

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<sup>136</sup> Wylie, at 861-2.

<sup>137</sup> See generally, Whitehouse, C, Revenue Law, Principles and Practice, 18<sup>th</sup> ed, London: Butterworths Tolley, 2000, chap 42, 'Taxation of the family'.

<sup>138</sup> Whitehouse, at 898.

<sup>139</sup> Op cit, at 900.

<sup>140</sup> Taxation of Chargeable Gains Act 1992, ss 17, 18; op cit, at 902-3.

of policy, there are taxation matters where there is preference for married couples over other couples, whether opposite- or same-sex partnerships and other areas of policy in which opposite-sex cohabitants are treated on a par with married couples. It is primarily in relation to this latter category that the most obvious discrimination against same-sex partnerships occurs in the taxation system, although the advent of a system of registered partnerships once again raises issues over the rationale behind distinctions in the first category.

### **4.1.3 Sections 75 and 76 of the Northern Ireland Act 1998**

The development of the statutory equality duty may have a profound impact upon the practical rights of same-sex partnerships in Northern Ireland. Although the duty does not require a change in policy in any given area, it does require, in appropriate cases, a re-appraisal of public authority policies through equality impact assessment. In fact, even the process of screening policies in order to establish which ones are subject to impact assessment may throw up issues which have not been previously contemplated by a public authority. There are many partnership issues which might be reconsidered in this context. For example, a hospital trust may wish to reconsider its policies towards supply of information and visiting rights of same-sex partners. This would not necessarily involve some official recognition of a partnership. It might be sufficient for recognition of a “special friend” in certain situations, a scenario which could be utilised by a same-sex partner to gain information and access rights which might otherwise be restricted to “family”. So also a local authority might have to reconsider the availability of “family” tickets at a public facility such as a leisure centre. In this context, the attractiveness of a system of “registered partnerships” becomes apparent. Instead of having to develop some form of investigation of the relationship, it might be sufficient for the same-sex partners to produce a certificate of registration establishing the legal nature of their relationship.

## **4.2 Policy**

The policy underlying the “traditional” approach is that recognition of same-sex partnerships can be perceived as undermining “traditional family values” by granting benefits enjoyed by married couples to those who are not married and indeed are in relationships which the State, while not obstructing, is wary of approving. There is also an underlying issue of scarce resources. If a pension scheme has finite resources, the granting of survivors' benefits to same-sex partners can disrupt the stability of the scheme. This may well be unlikely in practice but what may appear superficially to be a “moral” stance may turn out to be a more pragmatic policy stance, based on the proposition, “we are not opposed to you but we cannot afford to include you in the pre-determined benefits in this scheme or arrangement”.

Alternatively, public policy could take a stance that stable same-sex partnerships are as worthy of recognition and support as opposite-sex partnerships. Any registered partnership arrangement might require evidence of some stability in the relationship.

This occurs, for example, in recognition of same-sex partnerships for immigration purposes. It is not clear why same-sex partnerships should require evidence of stability when opposite-sex partners can be married without such evidence. It may be that churches require such evidence for religious services but there is no such requirement in civil ceremonies. It may be that in immigration law the process works in reverse, in that marriages are accepted subject to investigation into “sham marriages”. However, although any shift in public policy on registered partnerships might be welcomed, it would be necessary to establish a justification for differing criteria applicable to same-sex and opposite-sex partnerships. As stated on a number of occasions in this report, there are areas of policy where there is preference for married couples over other couples, whether opposite- or same-sex partnerships, and other areas of policy in which opposite-sex cohabitants are treated on *a par* with married couples. It is primarily in relation to this latter category that the most obvious discrimination against same-sex partnerships occurs and it is these examples of discrimination which are more difficult to justify.

### 4.3 Practice

There are examples which can be picked up from other reports of specific recognition of same-sex partnerships. For example, in relation to State schemes, in response to the *Admiral Duncan* bombing, the rules on criminal injury compensation are to be altered in England and Wales to allow compensation to be granted to a same-sex partner on the occasion of her/his partner's death.<sup>141</sup> Indeed, in response to the extensive litigation in *Grant v South West Trains* (see below), South West Trains has now extended the coverage of its free travel facilities to include same-sex partnerships.

The House of Lords ruling in *Fitzpatrick v Sterling Housing Association*<sup>142</sup> is a specific example of a change in statutory provision being achieved through a re-interpretation of existing law. In *Fitzpatrick*, the applicant argued both that he was the “spouse” of his deceased partner and also that he was a member of his “family”. By a majority of 3:2, the House accepted that F could be a member of the deceased tenant's “family” so long as they had been in a “long-term loving relationship”. On the basis of the particular statutory wording, which indicated that “spouse” was an “opposite-sex” concept, the House rejected the argument that F could be his partner's “spouse”. Although specific to housing law, *Fitzpatrick* may have more general application. The more recent case of *McCollum*,<sup>143</sup> in relation to European Union immigration law in the UK, indicates that each statutory regime has to be considered within its own context. Here, the applicant sought to argue that his Brazilian partner was a “member of his family” for the purposes of Article 10.2 of Regulation 1612/68/EEC (on free movement of workers). The basis of the decision is not clear from the available report. However, it is most unlikely that the High Court would fail to follow *Fitzpatrick* on the question of what is a “member of a family”. The applicant here, supported by the Stonewall Immigration Group, sought to

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<sup>141</sup> 'Straw raises crime victims' cash sums', *The Guardian*, 20 February 2001.

<sup>142</sup> [1999] 4 All ER 705, [1999] 3 WLR 1113 (HL).

<sup>143</sup> *McCollum v Secretary of State for Home Affairs*, not yet reported, judgment of 24 January 2001. See Davies, M, 'Gay Immigration Couple Lose 'Family' Ruling', [www.gay.com/immigration/5](http://www.gay.com/immigration/5).

exploit a rather obscure provision in Article 10 of the 1968 Regulation which requires Member States to “facilitate” the entry into the State of a member of a worker's family who does not come within the immediate inner circle defined in Article 10.1 of the Regulation. This question of “facilitation” has not been addressed by the European Court of Justice in the 33 years of the Regulation's existence. It may well be that the English Court of Appeal may wish to refer the point to the European Court of Justice.<sup>144</sup>

#### 4.4 International Human Rights Law

There is no recognition of same-sex partnership rights in international human rights law. In fact, to the extent that it is an international agreement, the Belfast Agreement is the first such agreement to mention sexual orientation (European Union law is not being treated as international law for this purpose.) There are indications that bodies interpreting such instruments may be prepared to include aspects of sexual orientation in their interpretation, for example the UN Human Rights Committee in *Toonen*<sup>145</sup> and the European Court of Human Rights in *Lustig-Prean*.<sup>146</sup> The former case involved a re-interpretation of “sex” to include “sexual orientation”, the latter an exploitation of the right to a private life in Article 8 of the European Convention on Human Rights. In relation to partnership rights, such re-interpretations may have some validity but there are limitations. In *Grant v South West Trains*<sup>147</sup> (for further treatment, see below), the European Court of Justice rejected a *sex* equality argument that if G's partner had been male, the partner would have received the relevant benefit, in that case free travel facilities, but because she was female, she did not enjoy them. In *MacDonald*,<sup>148</sup> the Court of Session (Inner House, External Division) refused by a vote of two to one, to interpret the Sex Discrimination Act 1975 as prohibiting dismissal of a gay man from the Royal Army Force. So also, an arrangement which is restricted to “common law marriages” or more explicitly, as in *Grant*, to “common law relationships between persons of the opposite sex”, will also transgress international sex equality principles, where applicable.

The privacy argument successfully employed in *Lustig-Prean* may be of less utility in relation to partnership rights. The essence of the applicants' cases was that the investigation into their sexual orientation was an invasion of their private life. However, the indication by the Court that dismissal on grounds of sexual orientation could also

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<sup>144</sup> Davies, *ibid*, as Vice-Chair of the Stonewall Immigration Group, indicates that an appeal in McCollum is being considered.

<sup>145</sup> *Toonen v Australian Communication* [1994] 1-3 IHRR 97, HR Committee.

<sup>146</sup> *Lustig-Prean and Beckett v UK*, judgment of 25 September 1999; *Smith and Grady v UK* [1999] IRLR 734.

<sup>147</sup> Case C-249/96 *Grant v South West Trains* [1998] ECR I-621.

<sup>148</sup> *MacDonald v Ministry of Defence* [2000] IRLR 748 (EAT/S). However, in the 'Welfare' section of this report, this equation of 'sex' and 'sexual orientation' by the Scottish EAT is doubted. In Application no. 33290/96, *Salgueiro da Silva Mouta v Portugal*, judgment of 21/12/1999, the European Court of Human Rights did conclude that 'sexual orientation' was covered by Article 14 European Convention on Human Rights but on the basis of 'other status' within the Article rather than on the basis of 'sex'.

infringe Article 8 would seem to indicate that the right to private life can be infringed in any case based on sexual orientation. It would be a strange result if the dismissal of (or infliction of another detriment on) a lesbian, gay or bisexual person who was not open about her/his sexual orientation did contravene Article 8 but the dismissal of a person who was open about her/his sexual orientation did not. Nonetheless, it is at least arguable that, in seeking some formal recognition of partnership rights, an individual is transgressing the divide between private and public lives, in that s/he is actively seeking the State's recognition of her/his relationship rather than simply seeking protection from intrusions into her/his private life. On the other hand, there is nothing more private than a personal relationship with another person and from that perspective it may be that a right to private life can encompass State recognition of it.

Of course, Article 8 also protects “family life”. However, the European Commission on Human Rights, during its existence, refused to accept same-sex relationships as a basis for a claim under that aspect of Article 8.<sup>149</sup> So also the European Court of Human Rights has refused to accept that a same-sex partnership can enjoy the right to marry under Article 12 of the European Convention on Human Rights.<sup>150</sup> The fact that a prestigious national court such as the House of Lords has concluded that stable same-sex relationships can be included within the concept of “family” strengthens an argument that the European Court of Human Rights might be persuaded to reconsider this point. However, such a redefinition does raise directly the concerns in some quarters about “threats to family values” while other forms of redefinition and re-interpretation may, on the European Convention on Human Rights level, trigger less resistance.

## 4.5 European Union Equality Law

The inclusion of Article 13 EC in the Treaty of Rome, since its amendment by the Treaty of Amsterdam, provides a “Treaty base” to allow for European Union legislation to combat discrimination on grounds of sexual orientation. Paradoxically, there has been relatively little progress within the European Court of Justice in relation to the rights of lesbian, gay or bisexual persons. It was precisely an “equality of detriment” argument which the European Court of Justice accepted in *Grant*, namely that South West Trains would refuse free travel facilities to a male partner of a male employee just as much as it was refusing free travel for the female partner of a female employee. Interestingly, a “gays in the military” case,<sup>151</sup> as with *Lustig-Prean*, was before the European Court of Justice after *Grant* but was withdrawn by the referring judge, Lightman J, on the basis that it was unarguable after *Grant*. However, in terms of strategic litigation, the success of the “gays in the military” case before the European Court of Human Rights indicates that a case in which a respondent can be perceived to have behaved in an outrageous fashion may create a climate in which benevolent interpretation of legal principles is

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<sup>149</sup> *X v UK* (1983) 32 D & R 220, *S v UK* (1986) 47 D & R 274 and *Kerkhoven v The Netherlands* App No 15666/89, judgment of 19 May 1992, unreported.

<sup>150</sup> *Rees v UK* (1986) 9 EHRR 56, para 49 and *Cossey v UK* (1990) 13 EHRR 622, para 43.

<sup>151</sup> *R v Secretary of State for Defence, ex parte Perkins* [1997] IRLR 297; *R v Secretary of State for Defence, ex parte Perkins (No 2)* [1998] IRLR 508.

facilitated. It might be speculated that if the military case had come before *Grant* in the Court's lists, the outcome *might* not have been the same. Nonetheless, *Grant* was clearly a partnership case while the military cases concerned apparently gross invasions of privacy.

So also another partnership case, *D v Council of the European Union*,<sup>152</sup> failed before the Court — in this case the Court of First Instance. In *D*, the Court rejected a claim to a housing allowance made by a Swedish employee of the Council who was in a registered partnership recognised in Sweden. The Court of First Instance rejected a series of arguments based on the meaning of “family” and “married” in the Council's Staff Regulations. It also rejected arguments based on the European Convention on Human Rights, European Union sex equality law and a general principle of non-discrimination on grounds of sexual orientation.<sup>153</sup>

Nonetheless, the possibilities of utilising European Union equality law are expanding. Based on Art 13 EC, the Council has enacted the Framework Directive on Equal Treatment in Employment and Occupation.<sup>154</sup> Of course, this Directive, to be implemented by the Member States by 2003,<sup>155</sup> is in itself no use to *D*. However, it would appear that the Framework Directive on Equal Treatment in Employment and Occupation would provide significant protection for those in same-sex partnerships in relation to their *employment* rights and benefits. This encompasses questions of “pay”, to include occupational pension benefits.<sup>156</sup> However, payments made under statutory schemes, including social security payments, are explicitly excluded.<sup>157</sup>

Despite intimations to the contrary in *D*, it would appear that the restriction of a benefit to married partners would be indirect discrimination on grounds of sexual orientation. Indeed, applying the European Court of Justice's reasoning in *Dekker*,<sup>158</sup> in which it was held that discrimination against a pregnant person had to be sex discrimination because only women could be pregnant, it is possible to argue that restricting benefits to married persons must be a form of direct discrimination because lesbian, gay or bisexual people, by law, cannot be married. So also any detriment suffered by a person because s/he is in a same-sex relationship seems, by definition, to be direct discrimination on grounds of sexual orientation because, only lesbian, gay and bisexual people can be in same-sex relationships. While direct discrimination cases are subject to very limited, but novel,

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<sup>152</sup> Case T-264/97 *D v Council of the European Union*, judgment of 28 January 1999.

<sup>153</sup> Scappucci, G, 'Court of First Instance Refuses to Recognise Swedish 'Registered Partnership' Rights and Duties' (2000) 6 European Public Law 355. In Case C-122/99P and C-125/99P, *D and Sweden v Council of the European Union*, Advocate-General Mischo, Opinion of 22 February 2001, not yet reported, concluded, on appeal from the CFI's decision, that none of the arguments advanced by D or Sweden altered the validity of the CFI's decision.

<sup>154</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p 16).

<sup>155</sup> There is a longer implementation period of 6 years until 2006 in relation to age and disability discrimination.

<sup>156</sup> Article 3.1(c).

<sup>157</sup> Article 3.3.

<sup>158</sup> Case C-177/88 *Dekker* [1990] ECR I-3941.

exceptions in the Framework Directive,<sup>159</sup> indirect discrimination cases are subject to a relatively light “objective justification” test, namely that “that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.<sup>160</sup> While it might be permissible for the State to take up a policy stance in relation “family values”, it is difficult to see how an employer could claim that giving preference to married over same-sex relationships could be based on a “legitimate aim”.

A further development, which will carry the coverage of European Union equality law outside the parameters of employment law, is the European Union Charter of Fundamental Rights. Article 21.1 of the Charter effectively repeats the provisions of Article 13 EC but in this case, establishing the fundamental nature of the principle of non-discrimination on grounds of sexual orientation. Although the Charter has been categorised as a “political statement”, it will have legal effect in that the European Court of Justice (and Court of First Instance) must be expected to treat the Charter as a code of “general principles of law”. These principles have no freestanding substance to them but they are interpretative principles which the Court can invoke in any European Union law case.<sup>161</sup> Hence, even where the “legitimate aim” test is applied in relation to indirect discrimination cases under the Framework Directive on Equal Treatment in Employment and Occupation, it cannot be a “legitimate aim” to undermine a fundamental right in the Charter. More generally, the general principle of non-discrimination can be invoked to assist the Court (and national courts in European Union cases) to interpret pre-existing legislation. As can be seen in *D v Council*, if a Court is determined to interpret a provision in a particular way, it may not necessarily be deflected by the invocation of a general principle. But where genuine ambiguity, or judicial will, exists, general principles articulating fundamental rights can be very useful to bring about an outcome in accordance with non-discrimination principles.

## 4.6 Best Practice: International

### 4.6.1 The Legal Recognition of Same-Sex Partnerships in Europe<sup>162</sup>

In Western Europe, Belgium, Denmark, Sweden, the Netherlands and France have adopted some form of legal recognition of same-sex partnerships. The most comprehensive are those of the Nordic countries, all of which have similar provisions.

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<sup>159</sup> Article 2.5 states:- “This Directive shall be without prejudice to measures laid down by law which, in a democratic society, are necessary for public security, for maintenance of public order and the prevention of criminal offences, for health protection and for the protection of the rights and freedoms of others.” This provision is closely based on provisions in the European Convention on Human Rights but have not previously been articulated in EU equality law.

<sup>160</sup> Article 2.2(b).

<sup>161</sup> Fitzpatrick, B, 'European Union Law and the Council of Europe Conventions', in Costello, C (ed), *Fundamental Social Rights – Current European & International Protection*, Dublin: Irish Centre for European Law, 2001 (forthcoming).

<sup>162</sup> ILGA-Europe, *Recognition of Gay & Lesbian Partnerships in Europe*, <http://www.steff.suite.dk/partner.htm>.

For example, in Denmark, registered partnerships are different from marriage in that adoption of foreign children is not possible, artificial insemination is not possible for a lesbian registered couple and there is no possibility of church wedding, but church blessings are possible. In the Netherlands currently, the Registered Partnership Act 1998 granted registering same-sex and opposite-sex couples many of the rights and duties associated with marriage. The country now permits civil marriages for same-sex partnerships.

France has recently introduced a form of registered partnership, the Pact of Civil Solidarity (PACS) which is available for both opposite- and same-sex partnerships. Any two adults, regardless of their sex, can enter into a PACS, provided they are not close relatives and neither of them is married, nor already bound by a PACS. They make a joint submission of a written notification to the local Court. The persons bound by a PACS owe each other "mutual and material help" and are "jointly responsible for debts incurred by either of them in the course of everyday life". The PACS is terminated when either partner gets married or dies, or when either of them so decides. When the partners decide to terminate the PACS, they must inform the local Court, which is competent to rule on any aspect about which they disagree. The partners bound by a PACS may submit a joint income tax declaration in the year following the third anniversary of registering it, and thereafter. A tax-free allowance of 375 000 francs (approx. £ 37,500) applies to the total value of the estate of either partner bound by a PACS, and tax is payable at 40% on the subsequent 100 000 francs (approx. £10,000), and at 50% thereafter. No time limit is applicable to this provision, but the same rates apply to gifts only after two years have elapsed from the date the PACS was registered. If either partner dies, the other may continue living under the existing lease in the accommodation they both occupied. Any heritable property acquired by the partners while bound by a PACS is deemed to be owned jointly. Either partner bound by a PACS is entitled to claim the benefits available to a dependent of the other, so long as (s)he is not entitled to claim such benefits on any other basis.

In Germany, same-sex partners can marry at register offices; allowing them to adopt the name of their spouse and be recognised as next in kin in inheritance law. There are also examples of regional laws on registered partnerships in Spain. The regions of Catalonia and Aragon have also introduced partnership recognition, but covering just those aspects of family law determined in Spain at the regional level. In Belgium legislation has been enacted creating a new institution, "statutory cohabitation", which gives very limited rights, mainly around the termination of a partnership. Within States applying to enter the European Union, Hungary extended the legal framework which exists for unmarried heterosexual couples to cover same-sex couples in 1996 following a ruling by the Constitutional Court that exclusion of same-sex couples was unconstitutional.

#### **4.6.2 Recent Developments**

As noted above, there has been a substantial increase in recognition of same-sex partnerships across Western Europe over the past 10 years. This has started primarily in

the Nordic countries and The Netherlands. Significant advances have been made in France with a form of registered partnership. Germany and the Netherlands now recognise same-sex marriages. The Dutch position is about to develop further with the first recognition in Western Europe of same-sex marriages.

## 5 Employment Law

### 5.1 Domestic Law

Sexual orientation is not mentioned specifically in Northern Ireland's employment legislation. No protection *per se* is given in this legislation, nor is it covered specifically as a protected ground in any of the current anti-discrimination statutes.

Sexual orientation is referred to specifically in section 75 of the Northern Ireland Act 1998, which requires public authorities to have due regard to the need to promote equality of opportunity (see *infra*).

Given the lack of specific legal protection in the employment field it is not surprising that a variety of other legal avenues have been pursued to attempt to secure a degree of employment protection for lesbian, gay or bisexual people. These have included the use of unfair dismissal law. This has proved to be largely ineffectual, as employers have been allowed to argue successfully that they have "some other substantial reason for dismissal" and have been held to have acted reasonably in all the circumstances as co-workers or customers might object.<sup>163</sup> Unfair dismissal legislation is also clearly limited in scope in that it can offer no protection against discrimination in recruitment, in relation to the opportunities afforded for training, for development or for promotion, or against other forms of victimisation or harassment which fall short of dismissal.

Another avenue has been to argue that sexual orientation discrimination is a form of sex discrimination. This met with no success at the European Court of Justice in the case of *Grant v South West Trains*.<sup>164</sup> There are conflicting domestic decisions on whether sexual orientation is within the definition of "sex" under domestic law. These cases raise also the question whether the implementation of the Human Rights Act 1998 has had an impact upon this question. These cases will be discussed, below.

Another avenue that may be open is to argue that an employer must not discriminate on grounds of sexual orientation because this is not permitted in an equal opportunities policy promulgated by the organisation. Such arguments (again discussed, below) been given added weight by the decision of the House of Lords in *Taylor v Secretary of State for Scotland*<sup>165</sup> that such a policy may, in an appropriate case, acquire contractual status.

It has also been argued that health and safety law may have a role to play following the decision of the European Court of Justice in *UK v Council of the European Union*.<sup>166</sup> The Court adopted a wide definition of "health" to include the protection of "mental and social well-being" as well as physical health. It may thus be possible to invoke health and safety law mechanisms to recover for stress brought on by harassment or similar conduct.

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<sup>163</sup> Relevant cases are examined in section 6 below.

<sup>164</sup> Case C-249/96 [1998] IRLR 206 discussed below.

<sup>165</sup> [2000] IRLR 502.

<sup>166</sup> Case C-84/94 [1997] IRLR 30.

A further avenue might be to use the Protection Against Harassment Act 1997. Section 1 of the Act prohibits a “course of conduct which (a) amounts to harassment of the other...” Section 3 provides for the award of damages in a civil action for financial loss and also for anxiety.

As noted previously, given the absence of specific legislation to protect against employment discrimination on grounds of sexual orientation, many legal avenues have been explored with a view to finding a means to secure a degree of protection. As noted, a number of these, such as the use of unfair dismissal legislation, have proved unfruitful, and they will not be examined further. This section will focus on those areas which show most promise of protection, until the Employment Framework Directive is implemented.

### **5.1.1 Does "Sex" Include "Sexual Orientation" Under Domestic Law?**

In the section on European Law (5.5.) we will detail the decision of the European Court of Justice in *Grant*, that sexual orientation discrimination is not encompassed by unlawful sex discrimination under the terms of European Law. The question whether domestic sex discrimination legislation is wider than European Law, in the sense that it can include sexual orientation discrimination, has been tested in the domestic courts on a number of occasions

In *Smith v Gardner Merchant Ltd.*<sup>167</sup> a gay man was harassed by fellow employees. The Court of Appeal (following *Grant*) ruled that this would only be discrimination on grounds of sex if a lesbian would not have been harassed in the same fashion. Where an employer permits the harassment of homosexuals of both sexes, that is discrimination on grounds of sexual orientation, but not unlawful sex discrimination under the domestic statute.

The same approach was adopted in *Pearce v Governing Body of Mayfield Secondary School*<sup>168</sup> where a lesbian teacher was driven out of her job by a campaign of homophobic abuse from her pupils. The EAT ruled that this did not amount to sex discrimination, even though the abuse was gender specific. In order for there to be sex discrimination a comparison with a person of the opposite sex was required, and, because the applicant was a lesbian, that required a finding that a gay man would have been treated more favourably.

However, in November 2000, the EAT, sitting in Scotland, held that discrimination on grounds of sexual orientation is discrimination on the grounds of sex for the purposes of the Sex Discrimination Act. In *MacDonald v Ministry of Defence*<sup>169</sup> the applicant was dismissed from the armed forces, following his declaration that he was homosexual. He complained that he had been unlawfully discriminated against on grounds of sex, and that the vetting procedures to which he had been subjected amounted to unlawful sexual

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<sup>167</sup> [1998] IRLR 510, CA.

<sup>168</sup> [2000] IRLR 548.

<sup>169</sup> [2000] IRLR 748.

harassment. The EAT upheld his claim, ruling that the word "sex" in the legislation is ambiguous and could be interpreted to include "on grounds of sexual orientation" as well as meaning "gender". The EAT justified its departure from previous authority on this point<sup>170</sup> by referring to the cases decided by the European Court of Human Rights.<sup>171</sup> Particular reliance was placed upon *Salgueiro da Silva Mouta v Portugal*.<sup>172</sup> However, the EAT seems to have glossed over the actual finding in *Salgueiro*. The EAT states<sup>173</sup> that the European Convention on Human Rights ruled "that sexual orientation is contrary to its own anti-discriminatory provision, namely, Article 14 of the Convention which uses amongst others the word "sex" in relation to discriminatory acts that can be successfully complained against." The EAT went on to say that *Salgueiro* is authority for the proposition that the word "sex" should be interpreted as including "sexual orientation". As noted above<sup>174</sup> the case does not say this. On the contrary it suggests that sexual orientation discrimination is a separate ground within Article 14, coming within the ambit of the phrase "any such ground as". This is not in any way to detract from the logic of the argument that the appropriate comparator (if such is necessary) for a gay man should be a heterosexual woman.

The decision of the EAT in *MacDonald* was reversed by a majority of the Court of Session in June 2001 on the grounds that "sex" in the Sex Discrimination Act 1975 did not include sexual orientation.<sup>175</sup>

### 5.1.2 The Contractual Status of Equal Opportunities Policies

As noted in the introductory section, the House of Lords has ruled, in *Taylor v Secretary of State for Scotland*<sup>176</sup> that an equal opportunities policy, negotiated with trade union representatives, and then notified to employees by means of a circular, formed part of the individual contract of employment. This was the case, even where the policy was of an aspirational character. This case paves the way for employees to enforce rights not to be discriminated against which are conferred as a matter of contract as opposed to legislation. *Taylor* itself concerned the right not to be discriminated against on grounds of age, but the principle would equally apply to discrimination on grounds of sexual orientation. The means that actions for breach of contract and for constructive dismissal may now follow where an equal opportunities policy prohibits discrimination on such grounds. This may prove particularly significant in Northern Ireland when coupled with

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<sup>170</sup> Including Court of Appeal authority in *Smith v Gardner Merchant*.

<sup>171</sup> *MacDonald* was decided after the coming into force of the Human Rights Act, though the actions complained of took place prior to that. The EAT was unable to decide whether the Human Rights Act applies only to discriminatory acts committed after the operative date (2 October 2000) or whether it also applies to proceedings pending in relation to discriminatory acts before that date (at para 16).

<sup>172</sup> Noted above.

<sup>173</sup> At para 12.

<sup>174</sup> See note 111 and following.

<sup>175</sup> *Secretary of State for Defence v. MacDonald* [2001] IRLR 431 CS. [Also available at the following URL [www.scotcourts.gov.uk/opinions/XA172\\_00.html](http://www.scotcourts.gov.uk/opinions/XA172_00.html)]

<sup>176</sup> [2000] IRLR 502.

the "section 75 duty" on public bodies.<sup>177</sup> It is likely that many public sector authorities covered by the section 75 duty will review their equal opportunities policies to take account of their new statutory obligations in respect of sexual orientation. Following the decision of the House of Lords in *Malik v BCCI SA (in liquidation)*<sup>178</sup> "stigma damages" in respect of injury to the reputation and damage to future employment prospects are now available in a breach of contract action. This makes such an action a more attractive and potentially worthwhile proposition than previously.

### 5.1.3 Section 75 of the Northern Ireland Act 1998

Sexual orientation is referred to specifically in this section as follows:

"75. -

A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity-

between persons of different religious belief, political opinion, racial group, age, marital status or **sexual orientation**;<sup>179</sup> ....."

Although not strictly an employment law issue "functions" would clearly include employment and personnel functions. Schedule 9 of the Act details the procedures for enforcement of the statutory duty. Public authorities are required to produce and submit an Equality Scheme to the Equality Commission. This scheme should state how they will fulfil the duties outlined in Section 75. Authorities must consult widely with relevant organisations when preparing their draft Equality Schemes. The Equality Scheme will be audited by the Commission and either approved or referred to the Secretary of State for further action. Authorities must also consult relevant organisations<sup>180</sup> when formulating new policies or before submitting proposals for legislation; when assessing the impact of existing policies, programmes and services on equality of opportunity; when setting priorities for impact assessments and when reviewing their Equality Schemes. A number of lesbian, gay and bisexual groups are already being consulted in relation to the section 75 duty.<sup>181</sup>

### 5.1.4 The Privacy of Tribunal Complainants

A recent case worthy of note is *Chief Constable of West Yorkshire Police v A*.<sup>182</sup> In this case a transsexual employee sought a restricted reporting order barring her identification,

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<sup>177</sup> Discussed in the next para.

<sup>178</sup> [1997] ICR 606 HL.

<sup>179</sup> Emphasis supplied.

<sup>180</sup> Under paras. 4 and 5.

<sup>181</sup> See for example the Equality Scheme of the Department of Higher and further Education, Training and employment June 2000, Volume 1, where six LGBT groups listed as organisations to be consulted. The list is not exhaustive and additional organisations may be added (p.35).

<sup>182</sup> [2000] IRLR 465.

in connection with her successful claim of discrimination in recruitment. It was uncontested that the disclosure of the identity of applicants in such cases would deter them from making application to a tribunal. However, there was no allegation of a "sexual offence" or of "sexual misconduct" as required by the rules on reporting restrictions laid down by the Employment Tribunals Act and the Rules of Procedure. Nonetheless the Employment Appeal Tribunal ruled that it had an inherent jurisdiction under Article 6 of the Equal Treatment Directive to make a restricted reporting order, even though such an order could not be made under domestic legislation. The Community Law principle of effectiveness required that the applicant should not be subjected to procedural rules which rendered virtually impossible or excessively difficult the exercise of rights conferred by Community Law.

In summary it can thus be seen that due to the absence of specific legal protection for the employment rights of lesbian, gay and bisexual people, considerable ingenuity has been applied to try to secure protection through a variety of employment (and other) rights. The most important of these will be further discussed in later parts of this section. It is clear that the most significant development in employment rights terms is the European Union Employment Framework Directive<sup>183</sup> which will prohibit (*inter alia*) discrimination in employment on grounds of sexual orientation. These provisions of the Directive must be implemented in the Member States by 2 December 2003.

## 5.2 Policy

Prior to the promulgation of the Framework Directive in December 2000, the policy of successive British governments had been to resist calls for legislation prohibiting discrimination on grounds of sexual orientation. In Great Britain, the government had been working with the Equal Opportunities Commission to prepare a voluntary Code of Practice.<sup>184</sup> While this represented a welcome recognition of the problem it will be an inadequate response to the Framework Directive and legislation will have to be put in place by the due date.

The government has also been forced to shift policy in relation to the employment of homosexuals in the armed forces. The ban on such employment was lifted with immediate effect on 12 January 2000. This followed the ruling of the European Court of Human Rights in the case of four ex-service personnel who had each been discharged from the armed forces on grounds of their homosexuality<sup>185</sup>. Between 1989 and 1998 over 600 people were discharged from the armed forces on grounds of homosexuality. Making the announcement in the House of Commons the Defence Secretary, Geoff Hoon, said that the existing policy was not legally sustainable. Drawing on the experience of other countries, particularly Australia, the government has introduced a

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<sup>183</sup> Council Directive 2000/78/EC ("the framework directive").

<sup>184</sup> See 91 Equal Opportunities Review May/June 2000, at p. 13 "Backing for TUC Gay Rights Campaign."

<sup>185</sup> Applications 33985/96 and 33986/96 *Smith and Grady v UK* [1999] IRLR 734; Applications 32417/96 and 32377/96. *Beckett v UK*, judgment of 25 September 1999.

code of conduct governing personal relationships in the armed forces<sup>186</sup> under which sexual orientation is “essentially a private matter for the individual”. The code applies to all personnel regardless of gender or sexual orientation. In determining whether there should be any intervention in the personal lives of personnel, the following test is to be applied: “Have the actions or the behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the service.”<sup>187</sup> The Government is currently negotiating compensation with ex-service personnel.

In Northern Ireland the inclusion of sexual orientation in section 75 of the Northern Ireland Act 1998 means that a policy of equality of opportunity should be applied towards lesbians and gay men by the public sector. The Act does not extend to private sector organisations.

### 5.3 Practice

There is a considerable body of evidence that lesbian, gay or bisexual people suffer employment discrimination and harassment in the workplace. A series of surveys and reports from a wide variety of organisations conducted throughout the 1990s consistently reveal the existence of significant levels of discrimination and harassment of employees on grounds of their sexual orientation. Many equal opportunities policies fail to ban explicitly such conduct, or to include sexual orientation discrimination in any catalogue of unacceptable grounds.

An independent study carried out by the Social and Community Planning and Research Group (1996)<sup>188</sup> investigated the nature and extent of discrimination against gay men and lesbians in the UK. Based on questionnaires and interviews with a random sample of gay, lesbian, bisexual and heterosexual employees, the study concluded that the problem was serious and widespread. Among its principal findings were that: 4% of gay and lesbian employees have lost their jobs because of their sexuality; 8% have been refused promotion; 21% have been harassed at work; and 64% have concealed their sexuality from colleagues at work. The study also confirmed that homophobic attitudes are culturally ingrained in parts of British society.

A report published by the TUC in 2000<sup>189</sup> contains case studies of workers who have suffered discrimination on grounds of their sexual orientation. The TUC launched a campaign in May 1999 (together with Stonewall and the Labour Campaign for Lesbian and Gay Rights) to convince the government of the need to introduce legislation. At the end of March 2000 a poll was commissioned by the TUC. BRMB asked a weighted sample of 964 people to agree or disagree with a number of statements about the

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<sup>186</sup> Reprinted at 90 Equal Opportunities Review 2000, p.44.

<sup>187</sup> The Code has been welcomed by Stonewall, *ibid*.

<sup>188</sup> “Attitudes to Gay People at Work” Social and Community Planning and Research Group (1996) discussed by Welch, J. in “The Invisible Minority”, *People Management*, 26 September, 1996, at p.31

<sup>189</sup> “Straight Up! Why the law should protect Lesbian and Gay Workers” TUC (2000) cited in 91 *Equal Opportunities Review* 13.

treatment of homosexual people at work. Three quarters of those questioned thought it was wrong for employers to dismiss or discriminate against lesbian or gay workers.

The Annual Report of LAGER<sup>190</sup> for 1997/8 recorded a total of 153 new employment cases opened over the relevant period. Over 40% of these cases concerned workers who had been dismissed, made redundant or forced to leave their employment for a reason connected with their sexuality.

In 1992, the Labour Research Department carried out a survey of 362 respondents. Nearly a quarter reported personal experience of harassment or victimisation of lesbian and gay workers.<sup>191</sup>

A survey by Stonewall in 1993 of nearly 2,000 lesbians, gay men and bisexuals at work reported that 15% of respondents had had at least one experience of discrimination at work, while a further 21% suspected that they had, and 8% had been dismissed because of their sexuality. Almost half (48%) considered that they had been harassed because of their sexuality. A high proportion concealed their sexuality at work – only 11% of respondents said that they had never concealed their sexuality at work. Private sector organisations were less likely to refer to sexual orientation discrimination in their equal opportunities policies than public sector organisations.

A number of the responses to the interview questions for this research project indicate concern within Northern Ireland that employment rights should be strengthened. Belfast Pride Committee maintained that “Employment rights for lesbian, gay and bisexual personnel should be guaranteed” and expressed the hope that the Bill of Rights in Northern Ireland “could be the first legal document specifically offering protection against discrimination on the basis of sexual orientation”. Queer Space called for “relevant changes to law in equality of...employment rights. No one should be exempt from equality laws including private businesses, churches and schools.” The Rainbow Project wished for the equalisation of all employment laws and “[f]ull and equal employment rights to protect lesbian, gay and bisexual people at work”.

## 5.4 International Human Rights Law

It has already been noted in this section<sup>192</sup> that four ex-service personnel were successful in an action for violation of their human rights in the European Court of Human Rights in September 1999. In *Smith & Grady v UK*<sup>193</sup> the Court declared that the UK government’s investigation and discharge of the service personnel on grounds of their sexual orientation

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<sup>190</sup> Lesbian and Gay Employment Rights.

<sup>191</sup> “Out at Work; Lesbian and Gay Workers’ Rights” Labour Research Department (1992).

<sup>192</sup> *supra* note 197.

<sup>193</sup> *Ibid.*

was a violation of their right to respect for private life under Article 8 of the European Convention on Human Rights<sup>194</sup>. Article 8(1) states:

“Everyone has the right to respect for his private and family life, his home and his correspondence”

The Court went on to hold that the applicants had no effective remedy under domestic law, in violation of Article 13 of the Convention. The Court expressly declined to rule on whether there had been a breach of Article 14, which states:

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

The grounds prohibited by Article 14 are very wide and those specified in the text are only examples. Sexual orientation has been held to be within the ambit of the Article.<sup>195</sup> Further, the Convention is said to be a “living instrument” reflecting changing social standards.<sup>196</sup> The categories of discrimination which may be invoked are not fixed or closed. The weakness of Article 14 lies in the fact that it is not a freestanding Convention right. The protection afforded by Article 14 arises only in the context of another Convention right. It has been described as a “parasitic provision.”<sup>197</sup>

Following the case of *Salgueiro da Silva Mouta v Portugal*<sup>198</sup> there can be no doubt that sexual orientation discrimination is protected by Article 14. This was a child custody case in which the European Court of Human Rights found for the first time that a distinction based on sexual orientation contravenes the principle of non-discrimination in Article 14. The Court observed:

“that, by annulling the decision of the Family Court of Lisbon, and consequently conferring parental authority on the mother to the detriment of the father, the Lisbon Court of Appeal introduced a new element, the fact that the petitioner was homosexual and lived with another man.

In the light of this, the Court can only conclude that there was a difference in treatment between the petitioner and M’s mother, based on the sexual orientation of the petitioner, which without doubt falls within Article 14 of the

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<sup>194</sup> The European Court of Human Rights had already considered a number of cases (from different countries) in which homosexual men had successfully complained about the denial of their right to privacy under Article 8. For a discussion of these see Sanders, D. “Constructing Gay and Lesbian Rights” (1994) *Canadian Journal of Law and Society* at 99, 103. See also Pieter van Dijk, “The Treatment of Homosexuals under the European Convention on Human Rights” in *Homosexuality: A European Community Issue*, 26 *International Studies in Human Rights* 179 (1993).

<sup>195</sup> See *Sutherland v UK* (1997) 24 *EHRR* CD 22.

<sup>196</sup> *Tyrer v UK* (1978) 2 *EHRR* 1.

<sup>197</sup> Harris, D. O’Boyle, M. and Warbrick, C. *Law of the European Convention on Human Rights*, Butterworths (1995).

<sup>198</sup> 33290/96, 21 December, 1999 European Convention on Human Rights.

Convention. This list set out in that paragraph is indicative and not exhaustive in character, as shown in the phrase “any ground such as.”

...the Lisbon Court of Appeal operated a distinction dictated by considerations based on the sexual orientation of the petitioner, which are not to be tolerated under the Convention. The Court does not find that there is a reasonable relationship of proportionality between the methods employed and the aim envisaged; it follows that there has been a breach of Article 8 combined with Article 14.”<sup>199</sup>

It is important to note that this judgment is **not** authority for the proposition that the Convention equates sexual orientation with sex discrimination. Indeed it seems on the contrary to indicate that sexual orientation is a separate and distinct ground coming within the ambit of the phrase “any ground such as.” This has relevance for domestic law because it means that those discriminated against on grounds of sexual orientation by a public sector employer will be able to rely on *Salgueiro da Silva Mouta* under the Human Rights Act. However, this will not improve the position of those discriminated against by private employers.<sup>200</sup>

Protocol 12 of the Convention opened for signature in November 2000. This states:

“(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 para. 1.”

Once in force, this will introduce a free-standing guarantee against unjustified discrimination. It extends the protection of Article 14 to “any right set forth by law” and forbids discrimination by any public authority on those grounds. As we have just seen, the catalogue of prohibited grounds extends to sexual orientation, although this is not given specific mention.<sup>201</sup> At present the UK government is opposed to ratification of Protocol 12.<sup>202</sup>

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<sup>199</sup> At the time of writing, European Convention on Human Rights decision available only in French. Quotation from English translation cited in 94 *Equal Opportunities Review*, 41 at p.42.

<sup>200</sup> See the discussion of *MacDonald v Ministry of Defence* [2000] IRLR 748 below.

<sup>201</sup> *Salgueiro da Silva Mouta v Portugal* 1999.

<sup>202</sup> According to “The Impact of the Human Rights Act on Equality and Discrimination Law”(2001) 95 *Equal Opportunities Review* 21 at p.23.

## 5.5 European Union Equality Law

In the absence of domestic legislation specifically outlawing employment discrimination on grounds of sexual orientation, those seeking protection have turned their eyes towards Europe. They have met with mixed fortunes.

In the case of *P v S and Cornwall County Council*<sup>203</sup> the European Court of Justice held that discrimination on grounds of a gender re-assignment contravenes the *European Community Equal Treatment Directive*. The Court took the view that “the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex”. It applies to discrimination arising from gender reassignment because:

“Such discrimination is based essentially if not exclusively, on the sex of the person concerned....To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”

The Court compared the treatment meted out to a post-operative transsexual woman with the treatment of a man who had not undergone a sex-change operation (rather than with a woman who had become a man, as it could have chosen to do). This purposive construction of the Equal Treatment Directive was felt to have clear implications for challenges to employment discrimination against gay men and lesbians.

However, this optimism was to prove misplaced. In the case of *Grant v South West Trains*<sup>204</sup> Lisa Grant claimed equal pay under Article 119 of the Treaty of Rome, arguing that travel concessions for the partners of employees amounted to “pay”. She was refused free travel for her lesbian partner. Her claim was based first on direct discrimination – if she had been a man with a female partner, then she would have received free travel. However, because she was a woman with a female partner, she did not. Her second argument was that “sex” should be interpreted to include sexual orientation, being wider than simply the biological state. However, the European Court of Justice took the view that the correct comparator for a lesbian woman was a gay man (*contra P v S and Cornwall County Council*) and that Community law was not sufficiently advanced (at this time) to bring gay relationships within its sex equality principles.<sup>205</sup> The decision was viewed as a major setback to the gay rights lobbies within the Member States.

The most significant development for protection against employment discrimination under European Union law arises as a result of Council Directive 2000/78/EC. This Directive (hereafter referred to as the Employment Framework Directive) establishes a

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<sup>203</sup> Case C-13/94 [1996] IRLR 347.

<sup>204</sup> Case C-249/96 [1998] IRLR 206.

<sup>205</sup> It is worth noting that one of the charges brought in the Lisa Grant’s case concerned the failure of SWT to uphold its own equal opportunities policy and Grant’s contract of employment. However, SWT claimed that they were under no obligation to treat homosexuals and heterosexuals equally, which undermines the effectiveness of the equal opportunities policy and stresses the need for anti-discrimination legislation. (We are grateful to Nicola Moran for this point.).

general framework for equal treatment in employment and occupation and specifically includes sexual orientation amongst its grounds of unlawful discrimination.<sup>206</sup> It requires the Member States to implement legislation prohibiting such discrimination by December 2003.<sup>207</sup> Both direct and indirect discrimination must be prohibited. Indirect discrimination will be capable of objective justification;<sup>208</sup> direct discrimination will not, save in the particular circumstances outlined in the Directive itself.<sup>209</sup> No definition of “sexual orientation” is supplied. Strictly speaking an “orientation” is a state of mind or a tendency, as opposed to actual behaviour. Will employers be allowed to draw a distinction between homosexual orientation and homosexual behaviour? Difficult issues may arise on the matter of the expression of sexuality in the workplace.

The main areas where the Directive is likely to have an effect are benefit packages and protection against harassment. The exclusion of an employee from the right to a benefit because their partner is of the same-sex (the scenario for Lisa Grant) will be directly discriminatory on grounds of sexual orientation and unlawful. The exclusion of employees because they are not legally married will be indirectly discriminatory against lesbians and gay men. The employer will have to establish an objective justification for such a policy, something which is likely to be difficult in practice.

Many of the surveys referred to *supra* indicated that harassment on grounds of sexual orientation is a serious and widespread problem. Under the Employment Framework Directive a homosexual man will be able to compare his treatment with that of a heterosexual man. The Directive contains express provisions governing harassment on all the specified grounds.<sup>210</sup> Harassment is to be deemed a form of discrimination within the meaning of the Directive:

“when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

The conjunctive wording of this formulation requires a complainant to prove not only that the harassment violated their dignity, but also that it affected their environment in at least one of the ways described. This seems to be a more stringent requirement than currently exists under domestic race and sex discrimination law, where only proof of detrimental treatment is required.

Some concern has been expressed in relation to how widely the exceptions in Articles 4 and 15(2) of the Directive will be construed. The fear is that these articles, either separately or together, might be used to enable employers to continue to discriminate on grounds of sexual orientation. Article 4(1) permits a difference in treatment on any of the grounds referred to in Article 1, where a particular characteristic constitutes "a genuine

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<sup>206</sup> Article 1.

<sup>207</sup> Article 18 - the actual date for implementation is 2 December 2003.

<sup>208</sup> Article 2.

<sup>209</sup> For examples see articles 4 and 6 of the Directive.

<sup>210</sup> Article 2(3).

and determining occupational requirement." Article 4(2) provides an exception for churches and other organisations whose ethos is based on religion or belief (such as perhaps schools or care homes supported by churches) where "a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos". "Religion or belief" is not defined. It would seem that "belief" is intended to be limited to something akin to religious belief. This might cover someone with a general belief in a God, or an atheist or humanist. However, the second limb of Article 4(2) makes it clear that the rights of a religious organisation to preserve its ethos cannot be used as justification for denying other rights established by the Directive (or national law). Thus, the fact that a fundamentalist religious group regards homosexuality as sinful will not allow it to discriminate in employment against someone on grounds of their sexual orientation.

Article 15(2) states that the "provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation". Again, there is concern that "religion or belief" might be argued to encompass discrimination against lesbian, gay or bisexual people. This would not appear to be within the spirit of the Directive.

## 5.6 Best Practice: International

Wintemute,<sup>211</sup> in his introductory chapter, lists many of the countries which have banned discrimination on ground of sexual orientation. This has become a global phenomenon. The countries include New Zealand (in its Bill of Rights Act, 1990) six of the eight Australian States and territories, a number of Brazilian States, a number of German Lander, South Africa (in the equality provision of its national constitution of 1993) Israel (1992) Colombia, Japan and others. Within the USA, ten States specifically bar discrimination on grounds of sexual orientation and approximately 126 localities have enacted anti-discrimination ordinances.<sup>212</sup> In Canada, in addition to constitutional protection under the Canadian Human Rights Act, the vast majority of Canadian provinces and territories have legislation prohibiting discrimination on grounds of sexual orientation.<sup>213</sup>

Without doubt the best way of tackling the widespread and serious problem of employment discrimination against lesbians and gay men is to enact specific legislative protection. This should make discrimination in all fields - recruitment, appointment, terms and conditions of employment, access to vocational training and personal development, access to fringe benefits, redundancy selection and dismissal - unlawful. Harassment on grounds of sexual orientation should also specifically be made a form of unlawful discrimination. There should be protection against direct and indirect

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<sup>211</sup> Wintemute, R. (1997) 'Sexual Orientation and Human Rights' Oxford, Clarendon Press.

<sup>212</sup> See Cohen, R. O'Byrne, S. and Maxwell, P. "Employment Discrimination based on Sexual Orientation: the American, Canadian, and UK Responses" (1999) 17 *Law and Inequality: A Journal of Theory and Practice* 1 at p. 20.

<sup>213</sup> *Ibid.*

discrimination and against victimisation. Sexual orientation discrimination should be made an automatically unfair reason for dismissal.

## **5.7 Recent Developments**

This section has included recent developments throughout. The one which is worthy of highlighting is of course the European Employment Framework Directive. This measure above any other will do most to improve the situation for lesbian, gay or bisexual people in the context of employment rights, along the lines suggested above. Such legislation should be introduced as quickly as possible, without waiting for the deadline of 2 December, 2003.

The Office of First Minister Deputy First Minister have commenced consultation on the Single Equality Bill which will be brought forward in 2002. This document is aimed at the harmonisation of the existing anti-discrimination legislation<sup>214</sup> and broadening the scope of the protection to include new categories such as sexual orientation.

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<sup>214</sup> Sex Discrimination (Northern Ireland) Order 1976, Equal Pay Act (Northern Ireland) 1970, Disability Discrimination Act 1995, Race Relations (Northern Ireland) Order 1997, Fair Employment and Treatment (Northern Ireland) Order 1998.

## 6 Immigration and Asylum

The law on immigration and asylum in Northern Ireland is governed by UK-wide laws. There are a number of laws that have direct impact on lesbian, gay and bisexual people, which also have the effect of discriminating on the grounds of sexual orientation and entail human rights considerations.

### 6.1 Immigration

#### 6.1.1 “The Unmarried Partners Rule”

The Government introduced in October 1997 the Unmarried Partners Concession, allowing non-European Union citizens to live in the UK with their partners if the relationship had subsisted for four years. This period was reduced to two years in June 1999. The “Concession” was amended to the status of an Immigration Rule (a statutory instrument) in October 2000.<sup>215</sup> The rule allows an overseas national to enter or remain in the UK as the unmarried partner of a person living here if three main requirements are met:

- (a) there must be in existence a relationship akin to marriage which has subsisted for *two years* or more;
- (b) any previous or similar relationship by either partner must have permanently broken down and the couple must intend to live together permanently; and
- (c) the couple must be able to accommodate and maintain the foreign partner without claiming any public funds.

The Rule also applies to non-British citizens who have “settled status” in the UK; partners of non-European Union citizens from European Union countries that are for the time being living in the UK; and, partners of non-European Union citizens who are coming to the UK for a temporary purpose, which could lead to settlement.

The requirement of two-years continuous cohabitation under the Rule does not apply to married couples seeking to remain in the UK. This discrimination may contravene Article 14 of the European Convention on Human Rights in conjunction with Article 8<sup>216</sup> and Article 12 (“the right to marry”) in conjunction with Article 14.<sup>217</sup> It is also arguable that discriminatory treatment in the immigration context amounts to degrading or inhuman treatment contrary to Article 3 of the European Convention on Human Rights. The European Court of Human Rights has held that racial discrimination against non-British applicants constituted an interference with their human dignity which amounted to

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<sup>215</sup> Rule 295D-0.

<sup>216</sup> Several cases, following, decided under the European Convention on Human Rights in the 1980s and 1990 may need to be re-assessed in light of recent developments recognising same-sex relationships across Europe; *B v UK* (no. 16106/90) (1990), 64 DR 278, *C and LM v UK* (no. 14753/89) (9 Oct. 1989), unpublished, *WJ and DP v UK* (no. 12513/86) (1986), 11 EHRR 49, *X v UK* (No. 9369/81) (1983), 32 DR 220, 5 EHRR 601 (1983).

<sup>217</sup> *Wintemute* (1995) 129.

“degrading treatment”.<sup>218</sup> The argument in relation to Article 8 in conjunction with Article 14 may be particularly strong if the effect of the Rule entails the removal of a person from the UK, thus causing a separation where there are real obstacles to the couple continuing their relationship elsewhere.<sup>219</sup> The deportation of a gay, lesbian or bisexual person to a country where sexual relations (or perceived sexual relations) between persons of the same-sex are subject to particularly harsh punishment (such as the death sentence in Iran) might violate Article 3 or 8 of the European Convention on Human Rights.<sup>220</sup> Given the heteronormative culture that prevails in most cultures, the requirement of two years continuous cohabitation for lesbian, gay and bisexual people places them at a disadvantage when compared to heterosexual couples. If Northern Ireland is to fully respect rights based on sexual orientation and gender identity, immigration law should be amended to acknowledge the reality in which lesbian, gay and bisexual people live.

### 6.1.2 “Family Visitor”

Recent Immigration Regulations allowing a “member of family” and “family visitor” to apply for a visa to visit a family member includes married partners (including same-sex couples) where the couple have been living together for two of the preceding three years.<sup>221</sup> While a refusal may be appealed, the regulations do not allow a person to visit their partner in order to build up the two years so that they can make an application. The regulation may be subject to similar human rights challenges applicable to the Unmarried Partners Rule, above.

## 6.2 Asylum

The Asylum and Immigration Appeals Act 1993 provides that a person who has limited leave to enter the UK may appeal to a special adjudicator against a refusal to vary leave on the ground that it would be contrary to the Geneva Convention relating to the Status of Refugees 1951. One of the grounds on which refugee status may be claimed is where a person has a well-founded fear of being persecuted for reasons of “membership of a particular group”.<sup>222</sup> In 1999, a majority of the House of Lords applied this to two Pakistani women who had been forced to leave their homes by their husbands, were at risk of being falsely accused of adultery and subject to criminal proceedings for sexual immorality, punishable by flogging or stoning to death.<sup>223</sup> The Law Lords decided that the women formed a part of a social group if they lived in a society which discriminated

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<sup>218</sup> *East African Asians v UK* (1973) 3 EHRR 76.

<sup>219</sup> Stonewall Immigration Group (2000), <http://www.stonewall-immigration.org.uk>.

<sup>220</sup> Wintemute, R. ‘Lesbian and Gay Inequality 2000: The Potential of the Human Rights Act 1998 and the Need for an Equality Act 2002’ (2000) 6 *European Human Rights Law Review* 118, citing in support *Soering v UK* (1989), Ser. A, No. 161.

<sup>221</sup> SI2000/2446 and 2244.

<sup>222</sup> Geneva, 28 July 1951; TS 39 (1954); Cmd 9171.

<sup>223</sup> *Islam (AP) v. Secretary of States for the Home Department, Regina v. Immigration appeal tribunal and Another Ex Parte Shah (AP)* conjoined Appeal, 25 March 1999, unpublished.

against them on the grounds of sex. Four of the five Law Lords stated that gay men and lesbians could also form a social group. In the past, Immigration Appeals Tribunals have refused asylum where the applicant is persecuted because of his/her sexual orientation. The Law Lords statements are nonetheless *obiter dicta* and the law remains unsatisfactorily unclear as to whether an applicant will succeed in a sexual orientation case.

### 6.3 Policy and Practice

A lawyer working on immigration cases for a law centre in Northern Ireland states that there was no evidence of discrimination by the Home Office in processing the few cases which involved same-sex partners. Given that these Rules and regulations have only recently been introduced, longitudinal monitoring of the practical effect of the law is indicated.

All the lesbian, gay and bisexual organisations contacted in this research broadly supported equality for same-sex partners. Two organisations that commented specifically on immigration called for full equality and equal treatment of same-sex partnerships in this area.<sup>224</sup>

### 6.4 Best Practice and International Developments

In The Netherlands, same-sex couples with a foreign partner are entitled to obtain a partner-dependant residence permit, requiring only that the partners must have been living together for a prolonged period (normally at least six months) in suitable housing, and that the Dutch partner guarantees the costs of living of the foreign partner.<sup>225</sup> In Australia, citizens and permanent residents of Australia and eligible New Zealand Citizens are allowed to have their partners live with them in Australia. They can apply either from overseas or from within Australia. In the Partner Classes of visa the Interdependency subclasses are available for same-sex partners and provided the correct information is given, and all the criteria are met, partners can gain permanent residence. It is necessary to prove that "for the period of 12 months immediately preceding the date of application" the applicant had a "mutual commitment to a shared life"; "the relationship between [the applicants] was genuine and continuing and [they] had been living together; or not living separately and apart on a permanent basis".<sup>226</sup> The time periods required in The Netherlands and Australia are much shorter than in the UK. They are arguably more humane and sensitive to the circumstances in which relationships develop and should be introduced, therefore, in the UK.

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<sup>224</sup> Stonewall, Lesbian Line.

<sup>225</sup> Waaldijk, K. 'The Legal Position in the Member States'. In Waaldijk, K. & Clapham, A. (eds) (1993) *Homosexuality: A European Community Issue: Essays on Lesbian and Gay Rights in European Law and Policy*. Dordrecht: Martinus Nijhoff Publishers.

<sup>226</sup> GLITF (NSW) (The Gay and Lesbian Immigration Task Force); <http://www.glitf.org.au/>. Similar legislation applies to same-sex couples in New Zealand and Canada.

In South Africa, the Constitutional Court found unanimously in 1999 that immigration law limiting immigration permits to “spouses”, thereby excluding same-sex relationships, was discriminatory on the grounds of sexual orientation contrary to section 9 of the Constitution.<sup>227</sup> While the principle of non-discrimination seems clear, the reasoning of the Court provides a salutary reminder of the importance of extending equal protection to same-sex couples. Ackermann J stated that exclusion of same-sex couples gave the message “that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.”<sup>228</sup>

We recommend that the UK government takes a similarly progressive view towards same-sex couples in Northern Ireland and that same-sex partners be treated equally to heterosexual couples.

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<sup>227</sup> ‘The state may not discriminate directly or indirectly against anyone on one or more grounds, including...sexual orientation...’, Constitution of the Republic of South Africa, s. 9(3).

<sup>228</sup> *National Coalition for Gay and Lesbian Equality v Minister for Home Affairs*, Case CCT 10/99, 2 Dec. 1999, para. 54.

## 7 Criminal Law

The criminal law particularly affects gay and bisexual men in relation to sexual offences. There is no legislation addressing lesbians specifically. Gay, bisexual and lesbian people may be more likely than heterosexuals to experience discrimination in the application of the law on obscene publications.

### 7.1 Domestic Law

The criminal law seeks to protect individuals from certain harms. The State provides an institutional structure through the police, the courts and other agencies to administer this objective. Research shows that gay, bisexual and lesbian people are subject to high levels of anti-social behaviour, abuse and assault due to their sexual orientation. According to a survey by Stonewall (1996), 39% of gay and lesbian respondents in Northern Ireland stated that they had been violently attacked.<sup>229</sup> Two-thirds said they had been verbally abused, while a third had been harassed. While there is no comprehensive data of homophobic abuse and violence in Northern Ireland, research in Ireland, with which some similarities may be made, show that 41% of gay, lesbian and bisexual respondents reported that they had been threatened with violence because they were assumed to be gay or lesbian.<sup>230</sup> 25% had been punched, beaten, hit or kicked because they were assumed to be gay.

#### 7.1.1 Sexual Offences

There are a range of sexual offences in legislation and common law that can be committed by individuals irrespective of their sexual orientation. Historically, the law has criminalised a range of “homosexual” acts and applied a more severe punishment to these offences than would be applied in comparable offences between persons of the opposite sex.

##### 7.1.1.1 “Homosexual Acts”

The Sexual Offences (Amendment) Act 2000 decriminalised “homosexual acts in private” between consenting males who have attained the age of 17 years in Northern Ireland.<sup>231</sup> The comparable age in England and Wales is 16 years. “Homosexual acts” are defined as “buggery<sup>232</sup> with another man, an act of gross indecency<sup>233</sup> with another man

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<sup>229</sup> Lester (1996).

<sup>230</sup> Combat Poverty Agency (1995).

<sup>231</sup> Sexual Offences (Amendment) Act 2000, s. 2(4), amending the Homosexual Offences (Northern Ireland) Order 1982, art. 3(1).

<sup>232</sup> Defined as anal intercourse, see Stannard (1984), 108.

<sup>233</sup> Courts have not further defined ‘gross indecency’. According to evidence before the Wolfenden Committee; ‘...the offence usually takes one of three forms: either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence may take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations.’

or the act of being a party to the commission by a man of such an act”.<sup>234</sup> Therefore, consensual sexual activities such as anal sex, fellatio and mutual masturbation between consenting males under the age of 17 remain criminal offences. The law defines “private” narrowly. An act will not be regarded as done in private when two or more persons take part or are present, or when two or more people take part in an act in a lavatory to which the public have access. Therefore, even the presence of another person will render many sexual activities between consenting men unlawful. There is no comparable offence in relation to vaginal intercourse between persons of the opposite sex. The discriminatory nature of the privacy requirement was acknowledged by the Criminal Law Revision Committee (1980, para. 134). This provision is likely to infringe Article 8 and Article 14 of the European Convention on Human Rights following the decision in *Lustig-Prean and Beckett v U.K.* (1999).<sup>235</sup> Russell<sup>236</sup> points out that the equivalent provision in England and Wales in relation to public lavatories “also appears discriminatory in that an act of vaginal or anal intercourse involving a man or a woman is not an offence in itself simply because it takes place in a public lavatory. Such an act would be charged under the common law offence of outraging public decency and no offence would be committed unless at least two people either witnessed the act or were able to do so.”

#### 7.1.1.2 “Buggery”

The law’s predilection for criminalising anal sex between men<sup>237</sup> is evident in the scope of offences regarding buggery in the Offences Against the Person Act 1861, as amended. Section 61 of the Act continued the offence of buggery, introducing a maximum sentence of life imprisonment. The Act also outlawed attempts to commit buggery and “any indecent assault” upon a man.<sup>238</sup> It would now appear that where there is buggery with a male between the age of 16 and 17 years old without consent that the maximum sentence is 10 years imprisonment, and with consent is two years. If the accused is over 21 years and the other man is aged between 16 and 17 years, buggery with consent is liable to five years imprisonment.<sup>239</sup>

Northern Ireland has no equivalent to section 142 of the Criminal Justice and Public Order Act 1994, which incorporated non-consensual anal intercourse into the definition of rape and decriminalised heterosexual buggery in England and Wales. The Northern Ireland Office intends to replicate these provisions through an Order in Council.<sup>240</sup> While this change would remove an important element of discrimination, as Russell<sup>241</sup> points

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<sup>234</sup> The Homosexual Offences (Northern Ireland) Order 1982, art. 2(1).

<sup>235</sup> European Court of Human Rights, application numbers 31417/96 and 32377/96.

<sup>236</sup> (1999, 207).

<sup>237</sup> Moran (1996). Though it should be added that it also remains an offence for a man to commit buggery with a woman, Offences Against the Person Act 1861, s.61.

<sup>238</sup> The maximum sentence is 10 years imprisonment.

<sup>239</sup> Homosexual Offences (Northern Ireland) Order 1982, art. 6, as amended by the Sexual Offences (Amendment) Act 2000.

<sup>240</sup> Personal communication, 22 November 2000.

<sup>241</sup> Russell, E. F. ‘Literature review of research into homosexual offences: A report commissioned by the Research, Development and Statistics Directorate of the Home Office for the Review of Sexual Offences’.

out in relation to the position in England and Wales, “there is some evidence to suggest that male rape victims may be reluctant to report the offence either out of fear among homosexual men encountering anti-homosexual bias, or among heterosexual men a fear of being perceived as gay.”

### 7.1.1.3 “Gross indecency between males”

A statutory provision that has historically been used in an oppressive way against gay men when cruising or cottaging is section 11 of the Criminal Law Amendment Act 1885. The section makes it an offence, liable to two years imprisonment, for a man to “commit, be party to commission, procuring or attempting to procure” an act of “gross indecency” with another man. As this is an offence that can only be committed by men it is a clear discrimination against men on the basis of their sexual orientation. Moreover, as Russell<sup>242</sup> points out, the law on procuring “lacks clarity and also has a discriminatory effect in that it is not an offence for a woman to procure the commission of an act of gross indecency between men.” A similarly oppressive provision is the offence of “persistently soliciting or importuning in a public place for immoral purposes” under the Vagrancy Act 1898.<sup>243</sup>

Although that Act was originally intended to address male procurement of female prostitutes, it came to be used almost exclusively against gay men. The law has not to date been used to prosecute men for soliciting women in public. Given that “immoral purpose” includes lawful gay activity, the law discriminates against gay men. Moreover, Russell<sup>244</sup> observes that the equivalent law in England and Wales “has become an all-embracing means of controlling homosexual behaviour some of which, if conducted between males and females might be seen as no more than casual “chatting-up”. This in itself is discriminatory, but it is also possible to demonstrate that this discrimination may have been increased by the way in which the courts have applied the statute. As Stannard states:

“Juries and magistrates may have different views on the immorality or otherwise of homosexual activity so the application of the law may be uneven and unjust. If a judge misdirects a jury that homosexual activity is immoral, the conviction may well be upheld [under section 2(1) of the Criminal Appeal Act 1968]; and if magistrates decide that it is not, they may be held to have decided against the weight of the evidence and directed to convict. Clearly the matter ought to be resolved as a matter of law, one way or the other.”<sup>245</sup>

Arguably, the application of so inchoate and arbitrary a test as “immoral purposes” offends against the right to a fair trial in Article 6 of the European Convention on Human

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(1999) In Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences*, Appendix D4, 195-229.

<sup>242</sup> Russell, above, at p. 217.

<sup>243</sup> Section 1(1)(b).

<sup>244</sup> Russell, above at 220.

<sup>245</sup> Stannard, J.E. *Recent Developments in Criminal Law*. (1988) Belfast: SLS Legal Publications (NI), The Queen’s University of Belfast, 114-15.

Rights. It should also be pointed out that the maximum sentence for gross indecency committed by a man over the age of 21 on a male between 16 and 17 years is five years in Northern Ireland, whereas the equivalent sentence in England and Wales is two years. This distinction is discriminatory and likely to be held to be in violation of Articles 6 (fair trial), 8, and 14 of the European Convention on Human Rights.<sup>246</sup>

#### **7.1.1.4 “Procuring others to commit homosexual acts”**

It is an offence for a man to procure another man to commit buggery with a third man.<sup>247</sup> This could cover situations where a publisher of a gay contact magazine advertises “personals”. There is no similar provision in relation to sexual relations between persons of the opposite sex. This provision may violate Articles 8 and 10 of the European Convention on Human Rights.

#### **7.1.1.5 “Living off the earnings of a male prostitute”**

Article 8 of the Homosexual Offences (Northern Ireland) Order 1982 lays down a sentence of imprisonment up to seven years on indictment for the offence of a man or woman living off the earnings of prostitution of another man. The punishment for an equivalent offence of a man living off the earnings of a female is two years.<sup>248</sup> The differing sentences may have a discriminatory effect between gay men and straight men.

#### **7.1.1.6 “Indecent assault on a male”**

Section 62 of the Offences Against the Person Act 1861 makes it an offence for anyone to commit an “indecent assault on a male person”. Section 47 of the Act lays down the offence of assault occasioning actual bodily harm. In 1993, the House of Lords in *R v Brown*,<sup>249</sup> rejected by a majority of three-to-two an appeal by a group of men engaged in homosexual sado-masochistic (SM) behaviour in private, that such behaviour was lawful. Sexual acts that involve any kind of physical injury are prohibited, since the consent of the victim is no defence to a charge of assault causing actual bodily harm. According to Moran,<sup>250</sup> “*R v Brown* may work in general to re-criminalise sexual relations between men as it works to name sado-masochism as unlawful violence and to equate homosexuality to sado-masochism.” Any application of the law in similar circumstances may be in breach of international human rights. According to Stychin<sup>251</sup> the language of the court effectively pathologised gay male sexuality. To this extent also the law discriminates against gay men. It is further argued that due to the tendency of the police to target gay men, this group will be disproportionately affected by the law.<sup>252</sup> The decision of the House of Lords was upheld on appeal to the European Court of Human Rights. The Court acknowledged that the applicants’ right of privacy was violated under Article 8 but that the prohibition was “necessary in a democratic society” on the grounds

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<sup>246</sup> *Dudgeon v UK* (1981) 4 EHRR 149.

<sup>247</sup> The Homosexual Offences (Northern Ireland) Order 1982, art. 7(1). ‘To “procure” means ‘to produce by endeavour.’ Stannard above, at 85.

<sup>248</sup> Vagrancy Act 1898, s. 1(1)(a), amending the Vagrancy Act 1824.

<sup>249</sup> [1993] 2 All ER 75.

<sup>250</sup> Moran, L.J. *The Homosexual(ity) of Law*. (1996) London: Routledge, 190.

<sup>251</sup> Stychin, C. *Law’s Desire: Sexuality and the Limits of Justice*. (1995) London: Routledge.

<sup>252</sup> Power, H. ‘Entrapment and Gay Rights’, (1993) 143 *New Law Journal* 47-49.

of protecting health and morals. This suggests that a future court with a more liberal view on consensual sexual activities involving some degree of harm could decide differently.

### **7.1.2 Conspiracy to Corrupt Public Morals and Conspiracy to Outrage Decency**

The common law offence of conspiracy to corrupt public morals has been used to convict publishers of magazines that contained a number of contact ads, by men for men.<sup>253</sup> While we have not had the resources to determine whether this law is applied more oppressively against gay men in Northern Ireland there is some evidence in England that the police traditionally took such an approach under obscene publications legislation.<sup>254</sup> To this extent, any such approach in Northern Ireland could be in violation of Articles 8, 10 (freedom of expression), and 14 of the European Convention on Human Rights.

### **7.1.3 Obscene Publications**

In Northern Ireland, “books, papers, writings, prints, pictures, drawings or other representations” which are “obscene” are subject to search and seizure.<sup>255</sup> The importation of “indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings or any other indecent or obscene articles” is prohibited.<sup>256</sup> It has been suggested that laws on obscenity are enforced disproportionately against gay or lesbian erotica or pornography.<sup>257</sup> Interference with gay or lesbian erotica or pornography may infringe Articles 8, 9 (freedom of thought), or 10 (freedom of expression) of the European Convention on Human Rights.

## **7.2 Human Rights Summary**

The criminal law on sexual offences appears to discriminate against gay (and bisexual) men on a number of grounds. Legislation and common law treats sexual relations between men differently to sexual relations between men and women. This discrimination appears to violate Articles 6, 8 and 14 of the European Convention on Human Rights.<sup>258</sup> The law also merely decriminalises “homosexual activities” between men. The law does not treat sexual relations between those of the opposite sex in this way. Thus for gay men, their rights are, in a sense, negative rights; allowing a freedom against a history of oppression. This structuring of law retains the taint of discriminatory

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<sup>253</sup> *Kneller v DPP* [1973] AC 435.

<sup>254</sup> Robertson, G. *Obscenity: An Account of Censorship Laws and their Enforcement in England and Wales*. (1987) London: Weidenfeld and Nicolson.

<sup>255</sup> 20 & 21 Vict., c. 83.

<sup>256</sup> Customs Laws Consolidation Act, 39 & 40 Vict, c. 36.

<sup>257</sup> Robertson, G. *op. cit.*

<sup>258</sup> *Dudgeon v UK* (1981) 4 EHRR 149, *Norris v Ireland* (1988) 13 EHRR 186, *Modinos v Cyprus* (1993) 16 EHRR 485, *Lustig-Prean & Beckett v UK* (1999) Application numbers 31417/96 and 32377/96, *Smith & Grady v UK* (1999) Application numbers 33985/96 and 33986/96.

law against gay men. The Commission may wish to consider, therefore, supporting a provision that places same-sex relations on a genuine level with opposite sex relations.

We recommend also that the “provocation” defence to prosecution for murder on the basis of homophobic fear be statutorily abolished as having no place in a tolerant society.

The different “age of consent” in Northern Ireland for “homosexual acts” (17 years) as compared with the rest of the UK (16 years) is arguably in violation of Article 8 of the European Convention on Human Rights, though this has not been adjudicated by the European Court of Human Rights. The increasing mobility of young people between Northern Ireland and the rest of the UK and the increasing influence on youth culture through modern media and information technology makes this difference insupportable. Although States have a margin of appreciation in fixing the age above which homosexual relations are no longer subject to criminal law,<sup>259</sup> the margin is narrow because the interference impinges on a most intimate aspect of affected individuals’ private lives.<sup>260</sup> The criminalisation of “homosexual activities” by 16 year-old men in Northern Ireland may differentially impact on health promotion and HIV prevention strategies on this group compared to young men in Britain. This is contrary to the spirit of the International Guidelines on HIV/AIDS and Human Rights 1997.<sup>261</sup>

### 7.3 Policy and Practice

A range of governmental departments and statutory organisations have responsibility for formulating policy in relation to criminal law in Northern Ireland.

The Northern Ireland Office intends to publish a similar consultation paper for Northern Ireland to that produced by the Home Office (2000) on reform of sexual offences in England and Wales.<sup>262</sup> The Director of Public Prosecutions (DPP) states that its policy in relation to prosecutions is to reach its decision on prosecution under legislation<sup>263</sup> only where there is “sufficient evidence available to afford a reasonable prospect of obtaining a conviction, and, prosecution is required in the public interest.” The Director advises that such decisions are “taken independently, fairly and impartially, having regard to the evidence available, and wholly in accordance with established principles of law and practice”, with each case “considered on its own facts and circumstances”.<sup>264</sup> The limited resources available for this research did not allow a rigorous analysis of the prosecution practices or patterns of the DPP in relation to sexual offences in Northern Ireland. Such research would be necessary to determine independently whether or not in practice the DPP meets its policy objectives.

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<sup>259</sup> No. 5935/72 *X v Germany*, Dec. 30.10.75, 19 Yearbook (1976).

<sup>260</sup> No. 25186/94 *Sutherland v UK*, Comm Rep. 1.7.97, 24 EHRR CD 22.

<sup>261</sup> International Guidelines on HIV/AIDS and Human Rights (1997), United Nations Commissioner for Human Rights 1997/33, U.N. Doc. E/CN.4/1997/150 (1997).

<sup>262</sup> Personal communication, 22 November 2000.

<sup>263</sup> Prosecution of Offences (Northern Ireland) Order 1972, art. 5(1)(a).

<sup>264</sup> Personal communication, 22 November 2000.

The Royal Ulster Constabulary (RUC) has introduced a number of programmes to address sexual orientation in its recruitment, training and operations. Its training programme, “Building the Professional”, is administered collaboratively between police sergeant trainers and minority community groups, including representatives from the Northern Ireland Gay Rights Association. As a result of a Force Order in July 2000, the RUC introduced a Hate Crimes officer and ordained that the Force should reconsider its policies and practices in relation to the policing of cruising and cottaging. One gay activist respondent stated that the RUC has “consciously been making efforts to keep abreast of police thinking” in the area of sexual orientation and that they have “not been as bad as some police forces” in the UK. One of our respondent organisations confirmed that there “has been considerable improvement in the attitudes of the police to lesbians, gay and bisexual people — at least of the Community Relations section.”<sup>265</sup> The organisation added that this “needs to extend throughout the entire force.” However, it should be pointed out that when we initially phoned the Community Affairs branch of the RUC, which is responsible for heading such initiatives, requesting information, the reply by the person answering the phone indicated a degree of ignorance and insensitivity to these groups.<sup>266</sup> The Children’s Law Centre in Belfast reported from its research in 1998 that “young gay people have been “outed” to neighbours and employers by the police”, which resulted in these young people feeling unsafe and leaving Northern Ireland.<sup>267</sup>

The European Court of Human Rights has yet to adjudicate such a difference in the age of consent within a State and confirm the opinion of the European Commission on Human Rights in *Sutherland*.<sup>268</sup> It is open to the Northern Ireland Human Rights Commission to test this issue before the courts.

The Police Authority for Northern Ireland, which is statutorily required to “secure for the Northern Ireland community the provision of an acceptable, effective and efficient police service which is accountable to that community”,<sup>269</sup> does not currently have any policy documentation in relation to lesbian, gay or bisexual people. However, it states that it “is certainly something which [it] would be doing soon, and... would hope that it will be something which the new Policing Board will take on board.”<sup>270</sup> The Authority states that it has carried out extensive consultation on policing issues, which has included consultation with gay/lesbian and other minority groups. The Authority is a public authority for the purpose of the Northern Ireland Act and is thereby obliged to produce an Equality Scheme. Though it was invited to supply any policies on or affecting lesbians, gay and bisexual people in Northern Ireland, it did not supply an Equality Scheme. This suggests oversight on the Authority’s part in relation to its duty towards those groups.

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<sup>265</sup> Cara-Friend, January 2001.

<sup>266</sup> The receptionist replied ‘[x] deals with all that sort of stuff, ethnic minorities’ followed by what appeared to be a nervous laughter. Note of conversation, 20 November 2000.

<sup>267</sup> Geraghty, T. *Getting it Right? The State of Children’s Rights in Northern Ireland at the end of the 20<sup>th</sup> Century*. (1999) Belfast: Save the Children and Children’s Law Centre, p. 48.

<sup>268</sup> Above, note 262.

<sup>269</sup> Police Act (Northern Ireland) 1998,

<sup>270</sup> Personal communication, 8 January 2001.

The Police Ombudsman which officially came into being on 6 November 2000 to investigate independently complaints against the police in Northern Ireland was, at the time of research, still developing its organisational policies and practices. It plans to produce an Equality Scheme pursuant to section 75 of the Northern Ireland Act.

The Northern Ireland Court Service failed to reply to two requests for policies within the research period. The Northern Ireland Prisons Service has no specific policies in relation to lesbians, gay and bisexual people. However, in relation to prisoners, it states that one of its objectives is “to treat prisoners as individuals”, that anti-bullying policies are in place within prisons, and that prisoners who feel vulnerable for reasons that may include sexual orientation may apply to the Governor to be accommodated in designated accommodation.<sup>271</sup> The Service is a public authority for the purpose of the Northern Ireland Act and is thereby obliged to produce an Equality Scheme. Though it was invited to supply any policies on or affecting lesbians, gay and bisexual people in Northern Ireland, it did not supply an Equality Scheme. This oversight and its neutral approach to issues of sensitivity to such groups suggest that the Service may not meet the needs of these groups. The need for research on the practices affecting lesbian, gay and bisexual people in the prison service here is indicated.

It is claimed that in practice same-sex offences are treated much more seriously than equivalent offences between persons of the opposite sex:

“...for consensual heterosexual intercourse with girls between 13 and 16 the tariff is a fine or a conditional discharge or imprisonment up to 1 year for older offenders. In practice, the male partner is usually given a caution or, if prosecuted at all, no more than a fine. For consensual sexual activity by a man with a boy of corresponding age, however, the tariff, which in this instance the courts tend to follow, is 3-5 years imprisonment.”<sup>272</sup>

The Probation Board for Northern Ireland does not have any specific policy in relation to lesbian, gay and bisexual clients, though its equal opportunities policy refers to sexual orientation. The Board intends as a public authority “to review” this policy pursuant to section 75 of the Northern Ireland Act 1988. The Board states that it treats all its clients “on the same basis” and that it does not carry out monitoring in respect of sexual orientation. It adds that “we are not aware of any [relevant] issues concerning our clientele”. It may be noted that the previous Chief Probation Officer stated that sexual orientation was a “non-issue” in its work.<sup>273</sup> While this neutral policy can disadvantage lesbian, gay and bisexual people, the Board adds that its position will have to be addressed pursuant to its compliance with the Northern Ireland Act 1998.

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<sup>271</sup> Personal communication, 22 November 2000.

<sup>272</sup> West, D. J. and Woelke, A. (1997) *Socio-legal Control of Homosexuality*. New York: Plenum Press.

<sup>273</sup> Feenan, D. *Community Safety: Partnerships and Local Government* (2000) (Research Report No. 13). Belfast: Criminal Justice Review Group, The Stationery Office, 62.

Victim Support NI, which also has a role in addressing the effects of criminal offending, does not monitor referrals in relation to sexual orientation. However, anecdotal evidence from the organisation suggests that of the groups within our research, volunteers would by-and-large come across gay men. The organisation adds that “most often these men are targeted because they are gay and as a consequence suffer both physical and psychological distress.”<sup>274</sup>

The Department of Health, Social Services and Public Safety could potentially have an impact on offences against lesbian, gay and bisexual people through its public safety branch. The issue of public safety for lesbian, gay and bisexual people is one that is emerging as a policy issue requiring partnership approaches and joined-up government.<sup>275</sup> Appropriate action by the Department may address the high rates of personal violence inflicted on people on the basis of their sexual orientation or gender identity.

The limited resources available for this research did not allow a rigorous analysis of the policing patterns of the RUC in relation to sexual offences in Northern Ireland. A detailed study of these patterns in relation to stop and search, cautioning, arrest and prosecution and dropping of charges would better allow a judgement as to whether or not the law is applied in a discriminatory way against gay men.

#### **7.4 Best Practice: International**

A number of jurisdictions have introduced gay and lesbian relations officers. The Garda Síochána in Dublin has one gay and lesbian relations officer. Similarly the Greater Manchester Police has a gay and lesbian relations officer in the city’s “village” area. The Greater Manchester Police has also produced a policy for dealing with lesbian, gay and bisexual people which is recognised as being at the forefront of policing in this area within the UK. The document is much more extensive than that used by the RUC and could form a useful model for extending the RUC’s sensitivity in this area.

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<sup>274</sup> Personal communication, 10 January 2001.

<sup>275</sup> Corteen, K., Moran, L., Skeggs, B. & Tyrer, P. *Citizens’ Inquiry Reports: Lancaster and Manchester 2000*. (2000) The Violence, Sexuality and Space Research Project: <http://les1.man.ac.uk/sociology/vssrp>.

## 8 Access to, and Standards of, Health Care

Consultation for this research with lesbian, gay or bisexual organisations showed a range of issues of concern regarding access to, and standards of, health care. Some of these require legislative intervention and protection of human rights. However, most concern issues of policy and practice (though, as shown in this section, policy and practice are amenable to legislative and judicial intervention). All are concerned first with equality of treatment for gay, lesbian or bisexual people. Many also wish to see specific responses to the needs of lesbian, gay or bisexual people.

Many of these concerns correspond with the issues identified by the Coalition on Sexual Orientation in its consultation among the lesbian, gay and bisexual communities.<sup>276</sup>

### 8.1 Domestic Law

The law in Northern Ireland in relation to access to and standards of health care broadly follows that in the rest of the UK. There is no law in Northern Ireland that specifically addresses gay, lesbian or bisexual people in relation to access to and standards of health care. However, a number of laws affect lesbian, gay and bisexual people in particular ways which raise problems in relation to access and standards of health care. The extent of regulation in access to health care and standards of health care is substantial. It encompasses particular areas of health care such as medicine, pharmacy, dentistry and ophthalmology. It covers broad service provision such as community care, mental health services and social work. It comprises regulation of standards through a variety of mechanisms such as the Health Service Ombudsman, the Central Services Agency, the General Medical Council, the Social Services Inspectorate, the Mental Health Commission and the National Institute for Clinical Excellence. The resources available to this research did not make it possible to examine the full range of regulation of health care and standards. Instead, the research focuses on areas that have raised specific concerns in our consultation with lesbian, gay and bisexual people and representative organisations.

The broad statutory duty on the Department of Health, Social Services and Public Safety<sup>277</sup> in relation to access to care is:

- to provide or secure the provision of integrated health services designed to promote the physical and mental health of the people through prevention, diagnosis and treatment of illness,
- to provide or secure the provision of personal social services designed to promote the social welfare of the people.<sup>278</sup>

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<sup>276</sup> Coalition on Sexual Orientation (2001). These are set out in Appendix three.

<sup>277</sup> Established under the Departments (Northern Ireland) Order 1999.

<sup>278</sup> Health and Personal Social Services (Northern Ireland) Order 1972, art. 4.

The Department supports programmes of health promotion and education to encourage the community to adopt activities, behaviours and attitudes which will lead to better health and well-being. This incorporates supporting the Health Promotion Agency in Northern Ireland.

A number of miscellaneous laws in relation to health care and medicine may have implications for standards of care for gay, lesbian or bisexual people. Many of these involve visitation and proxy rights for partners of patients. These will not be covered exhaustively as the problem arising across the legislation is generic in nature. For instance, the Mental Health (Northern Ireland) Order 1986 provides that where a patient is detained under Part of the Order the responsible Board shall take steps as are practicable to ensure that the “nearest relative” is furnished with a written statement of his/her rights and powers under the Order. “Nearest relative” comprises spouse, child, parent, brother or sister, grandparent, grandchild, uncle or aunt, nephew or niece.<sup>279</sup> This precludes gay, lesbian or bisexual partners from exercising this important protective function. It also inhibits gay, bisexual or lesbian carers from acting in a parental capacity in respect of their children.

Similarly, under the Access to Health Records (Northern Ireland) Order 1993, access to health records is allowed where the patient is a child to “a person having parental responsibility” for the patient.<sup>280</sup> “Parental responsibility” for the purpose of the Order creates the same problem for lesbian, gay or bisexual people as discussed in the section 3.1 of this report on Family.

## 8.2 International Human Rights Law

There is no international human rights law that is directly relevant to the health needs of gay, lesbian or bisexual people. Indeed, international human rights instruments provide little protection for health needs generally, in contrast with the more progressive interpretation of provisions within domestic human rights charters.<sup>281</sup> Courts have taken a narrow view of claim rights to particular health care.<sup>282</sup> Under the European Convention on Human Rights, for example, courts are more likely to intervene against impugned medical intervention where there has been a breach of Article 2 (right to life), Article 3 (torture or degrading treatment) or Article 5 (right to security of the person). The European Convention on Human Rights and Biomedicine enshrines rights in relation to a range of matters, including consent to treatment, privacy and organ transplantation. Many of these rights are already protected by common law and legislation in the UK. Nonetheless, the consolidation of patients’ rights would be achieved if the UK

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<sup>279</sup> Mental Health (Northern Ireland) Order 1986, art. 32(1).

<sup>280</sup> Access to Health Records (Northern Ireland) Order 1993, art. 5(1)(c).

<sup>281</sup> Eg. Canadian Charter of Rights and Freedoms.

<sup>282</sup> Kennedy, I. & Grubb, A. *Medical Law*, (2000) 3<sup>rd</sup> ed. London: Butterworths.

Government signed the Convention. European Union law does not appear to afford specific rights that would directly assist lesbian, gay or bisexual people.<sup>283</sup>

### 8.3 Policy and Practice

The Department of Health, Social Services and Public Safety has primary responsibility for health policy in Northern Ireland. The Department has a wide range of policies in relation to a number of areas, including primary care, reproduction and community care. The Department has no specific policy in relation to gay, lesbian or bisexual people. It has not been possible within the resources available to this research to examine closely the 157 policies produced by the Department. As a public authority, the Department is required by section 75 of the Northern Ireland Act 1998 to promote equality of opportunity and its Equality Scheme has been approved by the Equality Commission. The scheme is based on consultation with a wide range of representative lesbian, gay and bisexual organisations. At the time of writing, the Department had also contracted an independent researcher to provide the Department with a literature review in respect of the grounds covered by the section 75 duty. Significantly, a search on its website using the words “gay”, “lesbian”, “homosexual” did not yield any references. A similar search on the website of the Department of Health (for England and Wales) yielded 69, 30 and 39 results respectively.

The research selected one of the health and social services board areas, the Eastern Health and Social Services Board — the largest in Northern Ireland, for examination of policies and practices. The Board area comprises a governing Board, a Health and Social Services Council and eight Health and Social Services Trusts.<sup>284</sup> The Board, Council and Trusts did not have any policies addressing specifically the health care needs of gay, bisexual or lesbian people. The Board, the Council and four Boards supplied Equality Schemes. One Board, while replying with a general response did not refer to its statutory obligation to provide an Equality Scheme. Three of the respondents supplying Equality Schemes listed organisations representing a range of specific gay and lesbian interests (including the Coalition on Sexual Orientation). Telephone conversations with a number of Trusts revealed that some saw no particular need for policies addressing gay, lesbian or bisexual people — an alarming response in view of their obligation under section 75 of the Northern Ireland Act to promote equality of opportunity through screening, impact assessments and needs-specific policies. In the view of one director of human resources at a leading hospital, sexual orientation “doesn’t raise an issue” within the hospital.<sup>285</sup> A second respondent responsible for that Trust’s Equality Scheme stated that “treatment policies respond to need, immaterial of sexuality,”<sup>286</sup> despite the fact that the Board

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<sup>283</sup> Dommers, J. ‘An Introduction to European Union Health Law’, (1997) 4(1) *European Journal of Health Law* 19-41.

<sup>284</sup> Belfast City HSS Trust, Down Lisburn HSS Trust, Green Park HSS Trust, Mater Hospital HSS Trust, North and West Belfast HSS Trust, The Royal Group of Hospitals & Dental Hospitals HSS Trust, South & East Belfast HSS Trust, and The Ulster Community and Hospitals Trust.

<sup>285</sup> Personal communication, 21 December 2000.

<sup>286</sup> Personal communication, 5 January 2001

identifies sexual health and AIDS as a priority area within its latest Strategic Plan.<sup>287</sup> The response of another Trust suggests misunderstanding regarding the identification of needs between gay and lesbian people. This respondent stated that “[a] major contribution was made by the Lesbian Line in respect of gay [sic] members of society accessing the services [at the Trust].”

The lack of policies specific to gay, bisexual and lesbian people is a matter serious concern. Numerous studies show that gay, bisexual and lesbian people have specific health needs and that failure to address these needs has significant implications for morbidity and mortality.<sup>288</sup>

It was not possible given the resources available to this research to critically examine all policies within health and social services. The extent of policies is wide. For instance, The Ulster Community and Hospitals Trust alone has 87 medical policies and 113 departmental/local policies.

A number of respondents to the research identified further specific issues to those identified by the Coalition on Sexual Orientation. These include the need for recognition of same-sex partners as “next-of-kin” in health care. Currently, lesbian, gay and bisexual partners may be excluded from access to, and care of, partners because they do not meet the definition of “next of kin”. While they may be able to draw up a living will, this involves time and money and does not challenge the official non-existence of same-sex partners as next of kin. This position should be changed by legislation. In Scotland, the Adults with Incapacity (Scotland) Act 2000 provides that in any intervention in the affairs of an adult person account shall be taken of the views of, among others, “the primary carer” and “any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult”.<sup>289</sup> Registration of partnerships would allow such a right.

### **8.3.1 HIV and AIDS**

Gay men have historically experienced high levels of HIV and AIDS status, although the rate of HIV infection has increased among heterosexuals.<sup>290</sup> Nonetheless, health promotion, counselling and treatment require interventions that are sensitive and responsive to gay, lesbian or bisexual needs. In Northern Ireland, testing and treatment for HIV and AIDS is provided through the Genito-Urinary Clinic at the Royal Victoria Hospital Belfast. Counselling is provided through general practice and also through a

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<sup>287</sup> Eastern Health and Social Services Board, Commissioning Intentions for Health and Social Services for the Period 2001/2002 to 2003/2004.

<sup>288</sup> ‘Health Concerns of the GLBT Community’, <http://www.glbthealth.org/intro3.html>; O’Hanlon, J. ‘Homophobia as a Health Hazard’, <http://ohanlon.com/phobiahzd.htm>; VOICES Focus Group Research Series, <http://www.glbthealth.org/>.

<sup>289</sup> Section 1.

<sup>290</sup> Aler, MW. ‘ABC of AIDS: Development of the epidemic’ (2001) 322 *British Medical Journal* 1226-1229.

range of voluntary organisations<sup>291</sup> and private practices. The Voluntary AIDS Forum coordinates HIV and AIDS work. It includes the Rainbow Project, which works to improve the emotional, physical and mental health of gay and bisexual men living in, working in or visiting Northern Ireland.

The Health Promotion Agency, which is responsible for promotion of health did not provide any policies in relation to gay, bisexual or lesbian people despite some of its functions involving promotion of sexual health. The Eastern Health and Social Services Board or area Trusts did not produce any guidelines on HIV prevention budgets for gay men. Given that a survey of English health authorities showed that only 20% of their HIV prevention budgets is spent on gay men,<sup>292</sup> Board policies may be challengeable by judicial review. Evidence of discrimination in funding of HIV prevention programmes on the grounds of sexual orientation would also infringe section 75 obligations under the Northern Ireland Act 1998.

The Blood Transfusion Service's ban on men who have engaged in anal sex from donating blood is one of several categories of exclusion from blood donation. While the exclusions do not name gay men specifically, the ban disproportionately affects gay men. Because there is no equivalent ban on heterosexual women or men who engage in anal sex with women, this exclusion is discriminatory. The ban has been approved on epidemiological grounds by the Terrence Higgins Trust, a UK-wide organisation providing support and advice on HIV and AIDS. While it may be difficult to invoke a human right relevant to donation of blood, the discrimination probably contravenes the Blood Transfusion Service's obligation under section 75 of the Northern Ireland Act 1998 to promote equality of opportunity.

### **8.3.2 Access to Reproductive Services**

The Human Fertilisation and Embryology Act 1990 provides that licences will not be granted to institutions to allow certain *in vitro* fertilisation procedures (IVF) "unless account has been taken of the welfare of any child who may be born as a result of the treatment [provided to a woman] (including the need of that child for a father), and of any other child who may be affected by the birth." This provision clearly discriminates against lesbians (and gay or bisexual men). Whether it offends against Article 8 in conjunction with Article 14 of the European Convention on Human Rights remains a matter to be tested in the courts.

### **8.3.3 Mental Health**

The high levels of mental health problems and suicide reported by gay men is a major health issue which is only recently being addressed by health and social services in Northern Ireland.<sup>293</sup> Studies show that young gay men are between 6 and 30 times more

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<sup>291</sup> Support Group for Gay Men, Voluntary AIDS Forum.

<sup>292</sup> National AIDS Trust (1999).

<sup>293</sup> Ryder 'Ulster to tackle record male suicide rate' The Sunday Times 4 February 2001.

likely to attempt suicide than their heterosexual counterparts.<sup>294</sup> Policies should be monitored closely, as failure to address high levels of attempted suicide and suicide among young gay men may be in breach of the Department of Health's obligation under section 75 of the Northern Ireland Act 1998. The data also underlines the importance of appropriate and effective education and anti-homophobic bullying policies in schools, which optimally requires inter-agency co-operation.

Research in the UK shows that mental health services may actually undermine the mental health of gay and lesbian users of mental health services. In a survey by MIND in 1997, half of the respondents were told they would have fewer problems if they tried to alter their sexuality.<sup>295</sup> The pathologising of gay, lesbian and bisexual people, which remains widespread within health care, may breach Article 5 in relation to involuntary psychiatric admission (right to security of the person) and/or Article 3 (torture, inhuman or degrading treatment) of the European Convention on Human Rights, whether or not tied to Article 14 of the Convention.

## 8.4 Best Practice: International

There appear to be no compelling reasons to prevent lesbians from accessing *in vitro* fertilisation,<sup>296</sup> and several jurisdictions permit such access. In Canada, the Law Reform Commission stated that "with regard to artificial insemination, protection for the traditional family should not be incorporated into the legislation at the expense of the right to equality."<sup>297</sup> In Denmark, the Danish Council of Ethics recommended that in the context of Denmark allowing lesbian couples the possibility of marital status, "lesbian couples ought to have the possibility of artificial fertilisation...[and]...there ought to be no differential treatment of single women who live together."<sup>298</sup> In Belgium, artificial insemination is available to lesbians in five clinics.<sup>299</sup> In two Canadian provinces access to IVF is available to lesbian partners.<sup>300</sup>

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<sup>294</sup> Growing Up as a Gay Young Person in Ireland – So What's the Story? (reporting research conducted by Ross White at Queen's University Belfast and the University of Ulster in conjunction with the Rainbow Project; and 'Carers are ignoring gay teens' Irish News 5 June 1998.

<sup>295</sup> Bartlett, P. & Sandland, R. *Mental Health Law: Policy and Practice*. (2000) London: Blackstone Press, 45.

<sup>296</sup> Glover, J. *Fertility and the Family: The Glover Report on Reproductive Technologies to the European Commission*. (1989) London: Fourth Estate.

<sup>297</sup> Canadian Law Reform Commission *Medically Assisted Conception*. Working Paper (1992) No. 65. Ottawa.

<sup>298</sup> Danish Council of Ethics *Assisted Reproduction — A Report. 8<sup>th</sup> annual Report*. (1995) Copenhagen: Danish Council of Ethics.

<sup>299</sup> Lee, R.G. & Morgan, D. *Human Fertilisation and Embryology: Regulating the Reproductive Revolution*. (2001) London: Blackstone Press.

<sup>300</sup> Lee and Morgan above.

## 9 Welfare

### 9.1 Domestic Law<sup>301</sup>

The welfare system provides a dilemma in relation to the rights of lesbian, gay and bisexual people. As in other areas of law, the existence of a partnership plays a significant role. Therefore, a range of non-contributory benefits is available to a claimant or her/his partner, for example, Income Support.<sup>302</sup> A wide range of 'customers' may claim Income Support for her/himself but also for her/his partner, defined as being a husband, wife or "someone the customer lives with as their husband or wife."<sup>303</sup> However, non-contributory benefits are inevitably means-tested on the basis of the income and capital of the claimant and her/his spouse but also a cohabiting partner. While provision for cohabitation can be seen in other areas of law, it is up to the cohabiting partners to assert the cohabitation in order to gain certain benefits. However, it is an essential element of a means-tested welfare system that the State must investigate the means of the claimant, including, where the means of a cohabitee is to be included, whether there is a relationship between the claimant and the alleged cohabitee.

The cohabitation rules in relation to means-tested benefits are the same as in other areas of law, namely for partners "living as husband and wife". The Law Centre (Northern Ireland) Information Pack states: "[I]esbian and gay partners do not count as a couple. If a dispute arises as to whether two people are living together as husband and wife, then case law suggests the whole relationship should be looked at and a number of particular factors considered. These include whether two people live in the same household, the financial arrangements, whether there is a sexual relationship, whether there are any children of the relationship and how the two people appear in public."<sup>304</sup> This, in turn, raises issues of confidentiality as the State is effectively investigating the private lives of its citizens.

Hence the resources of a same-sex partner are not taken into account in determining the means of the claimant. On the other hand, only opposite-sex partners are not entitled to make claims for non-contributory benefits on the basis of the circumstances of her/his partner. Same-sex partners are not treated as "partners" for the purposes of welfare entitlements.

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<sup>301</sup> See generally Law Centre (NI), Information Pack, Belfast: Law Centre (NI), 2000. It has not been possible in the course of this project to examine the entire scope of the welfare system in order to identify a range of issues affecting lesbian, gay and bisexual people. Only one major issue is identified and discussed, namely, the non-availability of non-contributory benefits to same-sex partners and the reciprocal non-applicability of cohabitation rules to the means-testing of such benefits.

<sup>302</sup> Income Support is covered by Articles 122-126, 130-133 of the Social Security Contributions and Benefits (NI) Act 1992. Further Regulations are contained in the Income Support (General) Regulations (NI) 1987 as amended, and the Income Support (General) (Jobseeker's Allowance Consequential Amendments) Regulations (NI) 1996.

<sup>303</sup> Law Centre Information Pack, Section A.1, 4. See also Social Security Agency web site:

<http://www.ssani.gov.uk/assets/nigbi/5a58b13.htm>

<sup>304</sup> *Ibid.*

Other welfare benefits are entirely personal to the claimant, for example, Attendance Allowance and Constant Attendance Allowance are claimed by the person who requires the attendance. Invalid Care Allowance is paid to any person who is caring for a person receiving Attendance Allowance for at least 35 hours a week. So, also are contributory benefits dependent upon the contribution record of a particular person and which are invariably personal to that person. However, although they are generally not means-tested, Jobseeker's Allowance, which has replaced Unemployment Benefit since 1996, is means-tested after six months of benefit.

## **9.2 Sections 75 and 76 of the Northern Ireland Act 1998**

The Department for Social Development is subject to the statutory equality duty. It is clear that public authorities must conduct impact assessments of their policies, even if they are subject to statutory regimes. In this context, inequalities between same-sex partnerships and married and opposite-sex cohabiting partnerships would be open to scrutiny. Such distinctions would not have to be altered as a result of equality impact assessments. Nonetheless, the public authority is still required to consider alternative policies and mitigation of existing policies. In this climate, even given the statutory basis for these distinctions, it would still be necessary for the public authority to consider whether these distinctions satisfy the statutory duty. Hence, the controversial question of whether parity between same-sex partnerships and opposite-sex cohabiting partnerships ought to be addressed by public authorities in Northern Ireland involved in the implementation of the welfare system. In this context, the viability of these distinctions will have to be addressed, together with alternative policies and the mitigation of existing policies. It may well be that the rationale for such distinctions is difficult to justify, even though, as already intimated, serious issues of the privacy of personal relationships are inevitably raised by such a reappraisal.

## **9.3 Policy**

It is clear that no attempt has yet been made to take same-sex relationships into account in the delivery of the welfare system. Given that the welfare system includes opposite-sex partnerships in means-testing calculations, it would be inequitable not to include such opposite-sex partnerships within the scope of entitlements to many non-contributory benefits. In other parts of this report, constant reference is made to the inequality both between the rights of married couples and non-married couples (whether opposite-sex or same-sex partnerships) and between opposite-sex cohabitantes and same-sex partnerships. There is no doubt that a move towards recognition of same-sex partnerships in welfare provision is a natural consequence of a re-examination of both of these sets of comparisons in other areas of law and policy. However, as intimated above, an extension of entitlement to non-contributory benefits to same-sex partners, in similar circumstances to those in which there is entitlement for cohabitantes "living as husband and wife" raises

the inevitable corollary that same-sex partnerships should be investigated for the purposes of means-testing.

Even if the legislation was amended to allow for such an approach, two of the criteria may well cause policy dilemmas. First, an investigation into whether there is a sexual relationship between two lesbian or two gay people raises issues under the Human Rights Act, most obviously in relation to Article 8 of the European Convention on Human Rights (the right to private life). It would not be difficult to construct an argument that a claimant for a benefit should not be concealing financial support which s/he is receiving from a partner and that there is no reason why the State should be providing non-contributory benefits to a person who is in a same-sex relationship with a person who has sufficient means to provide for the claimant. Nonetheless, 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. A second consideration is the applicability of the criterion "how the two people appear in public". While this factor would operate in favour of a same-sex partnership from the point of view of means-testing, it would act against them in terms of a claim for a benefit on behalf of a same-sex partner.

There is therefore a strong feeling amongst some lesbian, bisexual or gay people that a push for recognition of same-sex partnerships in welfare provision should be strictly on the basis of registered partnerships rather than State investigation into relationships between those who choose to live together. Such a stance is difficult to maintain in the context of a wider demand for parity between stable same-sex partnerships and cohabiting opposite-sex partnerships. There is, however, a residual concern that a valid demand for such parity may benefit reasonably affluent same-sex partners in situations concerning their rights in succession and taxation but that a rigorous approach towards same-sex partnerships in means-testing investigations may seriously disadvantage the most deprived members of the lesbian, gay or bisexual community.

These dilemmas are not easily reconciled on policy grounds. It is difficult to avoid the conclusion that a demand for parity between opposite-sex cohabitantes and same-sex partners must include the welfare benefits system. Given a State policy of rigorous investigations into the relationships of those who "live as husband and wife", it is inevitable that same-sex partnerships would be subject to similar scrutiny. Nevertheless, it may be that the extension of entitlement of same-sex partners to non-contributory welfare benefits would precipitate a review of the permissibility of intensive scrutiny of personal relationships. Although a claimant can choose whether to apply for a benefit, the nature of non-contributory benefits are such that they provide subsistence protection against poverty. Therefore an application for a subsistence benefit which triggers an investigation into the sexual orientation of the claimant is potentially a serious invasion of that person's private life, leading to a possible breach of the Human Rights Act. On balance, it is understandable that no attempt appears to have been made to open up issues of same-sex partnerships within the welfare system, given the reciprocity between rights to claim and the dangers of means-tested driven investigations. Nonetheless, it is

impossible to precipitate a drive for parity between same-sex partnerships and opposite-sex cohabitants without extending that approach to the welfare system. The answer may be to apply much more rigorous approaches towards the confidentiality of private relationships in the light of Article 8 of the European Convention on Human Rights rather than deny same-sex partners parity with cohabitants within the welfare system. All respondent organisations in this research, which answered questionnaire sections on welfare, called for full equality with heterosexual couples<sup>305</sup> and an end to discrimination in housing and benefits.<sup>306</sup>

## 9.4 Practice

Given the statutory nature of welfare schemes, and given the lack of discretion in most areas of the welfare system as presently constituted, further research would be required on the practices regarding the welfare system.

## 9.5 International Human Rights Law

We are not aware of international rights provision specifically linking welfare rights and sexual orientation. It may well be that the United Nations Committee on Economic, Social and Cultural Rights would be prepared to interpret the UN Covenant on Economic, Social and Cultural Rights to include protection against non-discrimination on grounds of sexual orientation. Certainly, it is open to argument that provisions of the European Social Charter (ratified by the UK) and the Revised European Social Charter (signed but not yet ratified by the UK)<sup>307</sup> in relation to welfare provision must be interpreted in the light of non-discrimination principles. In relation to the European Social Charter, the preamble to the Charter refers to non-discrimination principles in the following terms: "Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin". The European Committee on Social Rights has interpreted this preambular declaration primarily in relation to Article 1 of the European Social Charter concerning the right to work.<sup>308</sup> However, there is no reason why the preamble to the Charter should not apply to other provisions of the Charter, such as Article 12 (the right to social security), Article 13 (the right to social and medical assistance) or Article 14 (the right to benefit from social welfare services).

The difficulty with any attempted exploitation of the non-discrimination clause in the Preamble to the European Social Charter is that it refers to "sex" but not "other status". In

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<sup>305</sup> Lesbian Line, Rainbow Project, Cara-Friend.

<sup>306</sup> Butterfly Club.

<sup>307</sup> The Revised European Social Charter was ratified by the Republic of Ireland on 4 November 2000.

<sup>308</sup> Samuel, L, *Fundamental Social Rights Case Law of the European Social Charter*, Strasbourg: Council of Europe Publishing, 1997, 20-34.

*Salgueiro da Silva Mouta v Portugal*,<sup>309</sup> the European Court of Human Rights interpreted Article 14<sup>310</sup> of the European Convention on Human Rights to include “sexual orientation”. In paragraph 29 of its judgment, the Court makes the intriguing statement: “The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M’s mother which was based on the applicant’s sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention.” However, it fails to identify the basis upon which Article 14 is contravened. The headnote to the judgment indicates that *da Silva Mouta* is an “other status” case, although the Scottish EAT in *MacDonald v Ministry of Defence*<sup>311</sup> appears to have interpreted it as a “sex” equality case. Although not without ambiguity, it is more likely that the Court was treating *da Silva Mouta* as an “other status” case, as more extensive reasoning might have been anticipated if the more complicated equation of “sex” with “sexual orientation” had been made by the Court. It is open to argument that the Charter should be treated in similar fashion. The European Committee on Social Rights might be prepared to take a highly purposive approach to the recital in the Preamble. After all, Article 14 of the Convention does refer to “other status” and it would not be impossible to imply “other status” into the Preamble to the European Social Charter also. Nonetheless, it is expecting much of the European Committee on Social Rights to do so and then to extend this non-discrimination provision into the welfare provisions of the Revised European Social Charter, where previously it has only been the right to work in Article 1.2 which has been subject to such scrutiny.

It should be mentioned that the position under the Revised European Social Charter is stronger. Here, Article E explicitly imposes a non-discrimination principle upon the operation of the. The terminology in Article E is the same as in Article 14 of the European Convention on Human Rights and so it can be anticipated that the European Committee on Social Rights would be happy to follow the interpretation of the European Court of Human Rights in *da Silva Mouta* when it comes to interpret Article E. Indeed, given the express articulation of “other status” in Article E, the case for a purposive approach to what is a recital to the Preamble of the European Social Charter can be seen to be strengthened. Hence, although international standards on welfare law are much weaker in relation to welfare law than labour law, the seeds of a regime in international social law which recognises discrimination on grounds of sexual orientation status can be identified.

## 9.6 European Union Equality Law

European Union equality law as yet has little to say on equality irrespective of sexual orientation in relation to welfare law. The Framework Directive on Equal Treatment in

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<sup>309</sup> *Salgueiro da Silva Mouta v Portugal*, Application No. 33290/96, judgment of 21 November 1999.

<sup>310</sup> Article 14 European Convention on Human Rights states “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>311</sup> *MacDonald v Ministry of Defence* [2000] IRLR 748 (EAT/S).

Employment and Occupation explicitly excludes social security provision from its scope.<sup>312</sup> Nonetheless, the inclusion of sexual orientation in the non-discrimination clause in the European Union Charter of Fundamental Rights<sup>313</sup> may bring about a reconsideration of existing interpretations of Community legislation. In this context, it is not impossible that the European Court of Justice might reconsider its interpretation of “sex” within European Union sex equality law to include sexual orientation. If that did occur, the implications for welfare provision of the Directive of Equal Treatment in Social Security 1979 would be significant but not profound. The 1979 Directive is almost exclusively concerned with contributory benefits. As this survey has indicated, the lack of parity between same-sex partnerships and opposite-sex cohabiting partnerships is primarily in relation to non-contributory benefits. However, some contributory benefits, such as Jobseeker’s Allowance, are subject to means testing criteria after a period of entitlement. In the medium term, the European Commission is planning to propose an extension of the Framework Directive on Equal Treatment in Employment and Occupation into welfare provision within the next 3 years.<sup>314</sup> If the Framework Directive on Equal Treatment in Employment and Occupation was to be extended to govern welfare provision (a somewhat problematic scenario), significant issues of inequality between same-sex partnerships and opposite-sex cohabiting partnerships would be raised.

## **9.7 Best Practice: International**

It has not been possible to establish international best practice in this area. It might be presumed that those states which recognise same-sex partnerships will bestow welfare entitlements upon such partnerships in the same manner as enjoyed by opposite-sex partnerships. It is not known how other states deal with confidentiality and privacy issues in relation to means-tested welfare benefits.

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<sup>312</sup> Article 3.3 of the Directive states “This Directive does not cover payments of any kind made by state schemes or similar, including state social security or social protection schemes.” The Directive is discussed at length in the section of this report on “Enforcement”.

<sup>313</sup> Article 21.1 of the Charter states “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.”

<sup>314</sup> ‘New social policy agenda’, 319 EIRR 14 (Aug 2000).

## 10 Enforcement: The Framework Directive on Equal Treatment and Enforcement of Sexual Orientation Equality Rights

On 27 November 2000 the European Union adopted the Framework Directive on Equal Treatment in Employment and Occupation.<sup>315</sup> The Directive prohibits discrimination in employment and occupation on the grounds of religion or belief, disability, age or sexual orientation.

### 10.1 Background and Context

The European Union has an established history of regulation of discrimination on the grounds of nationality and sex. Article 12 of the Treaty prohibits discrimination on the grounds of nationality in the exercise of Community law rights and Article 141 (formerly Article 119) of the Treaty incorporates the principle of equal pay between men and women in employment. Secondary legislation has extended the principle of equal pay and equal treatment between men and women in employment.<sup>316</sup>

The absence of a legal basis in the Treaty to authorise the adoption of anti-discrimination measures beyond the sphere of sex and nationality stifled political progress on lesbian, gay and bisexual equality rights. In *P v S & Cornwall County Council*,<sup>317</sup> however, the Court held that discrimination on the grounds of gender reassignment fell within the scope of the Equal Treatment Directive. Two years later, in *Grant v South West Trains*,<sup>318</sup> the Court declined to extend the scope of the Equal Treatment Directive to embrace discrimination on the grounds of sexual orientation.

Article 13 of the Treaty of Amsterdam provided the European Union with the legal basis to bring forward measures to challenge discrimination within the sphere of the Treaty across a broad range of grounds. Article 13 provides:

“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.”

In November 1999 the European Commission published a number of proposals for measures to combat discrimination based on Article 13EC:

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<sup>315</sup> Directive 2000/78/EC, OJ L 303, 02/12/2000

<sup>316</sup> Equal Pay Directive 75/117/EC, OJ 1976 L45/19 and Equal Treatment Directive 76/207/EC OJ 1976 L39/40 respectively.

<sup>317</sup> Case C-13/94 [1996] ECR I-2143

<sup>318</sup> Case C-249/96 [1998] ECR I-621

- Proposal for a Council Directive Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin;<sup>319</sup>
- Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation;<sup>320</sup>
- Proposal for a Council Decision Establishing a Community Action Programme to Combat Discrimination (2001–2006).<sup>321</sup>

The Race Directive was adopted in June 2000.<sup>322</sup> On 27 November 2000 the European Union adopted the Framework Directive on Equal Treatment in Employment and Occupation.<sup>323</sup> The Action Programme for the Framework Directive was launched in January 2001.<sup>324</sup> In June 2000 the Commission also brought forward proposals to amend the Equal Treatment Directive in light of the provisions of the Race and Framework Directives.<sup>325</sup>

The Framework Directive lays down minimum standards. It is without prejudice to higher national standards for the protection of the principle of equal treatment and Member States may not use the implementation of the Directive as grounds for levelling down the protection against discrimination already afforded in the Member States in respect of the grounds covered by the Directive (Article 8). Member States must implement the Framework Directive by 2 December 2003. States may, however, take an additional three years to implement the provisions on age and disability discrimination. Initial follow-up of the Directive will be by way of a report from each Member State to the Commission within two years from the date of implementation. Thereafter, implementation will be monitored by the Commission by way of five yearly reports. Member States' reports are to include the views of the social partners and relevant non-governmental organisations, and, in line with the European Union's commitment to the principle of mainstreaming in Articles 2 and 3 of the European Community Treaty, should contain an appropriate assessment of the impact of measures taken under the Directive on women and men.

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<sup>319</sup> COM (99) 566 final

<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.*

<sup>322</sup> Directive 2000/43/EC, OJ L 180, 19/07/00

<sup>323</sup> Directive 2000/78/EC, OJ L 303, 2/12/2000

<sup>324</sup> Council Decision of 27 November 2000 Establishing a Community Action Programme to Combat Discrimination (2001–2006), 2000/750/EC, OJ L 303, 2/12/2000.

<sup>325</sup> Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 76/207, COM (2000) 334 final

## 10.2 Enforcement of Sexual Orientation Equality Rights and the Framework Directive on Equal Treatment

There is often a mismatch between declarations of rights and effective enforcement of these rights. Research has documented the difficulties associated with litigation of sex equality claims.<sup>326</sup> The individual nature of equality litigation in the majority of Member States, coupled with problems relating to access to information and support for the pursuit of equality claims, seriously impedes the effective resolution of equality disputes.

A commitment to effective enforcement of equality legislation is at the heart of the new European Union measures. Member States must take appropriate steps to promote the rights in the Directive by bringing them to the attention of all relevant persons (Article 12). Article 17 requires Member States to establish sanctions for breaches of the Directive. Reflecting the jurisprudence developed by the Court of Justice under the Equal Treatment Directive these must be “effective, proportionate and dissuasive”<sup>327</sup> and may include the payment of compensation to the victim. Member States are further required to ensure that laws contrary to the principle of equal treatment should be abolished and that discriminatory terms in contracts or collective agreements or in the internal rules of undertakings or in the rules governing professions and workers’ and employers’ organisations should be declared null and void or amended (Article 16).

### 10.2.1 Challenging Indirect Discrimination

Recital 15 of the Preamble to the Directive provides that indirect discrimination may be established by any means including on the basis of statistical evidence. Article 2(b) provides that:

“Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.”

The test which must be satisfied to establish indirect discrimination in sex equality disputes is set out in the Burden of Proof Directive.<sup>328</sup> Satisfaction of this test presents difficulties for individual litigants as it often requires the production of complex statistical evidence. The original text of the proposed Directive favoured the test for

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<sup>326</sup> Blom, Fitzpatrick, Gregory, Knecht and O’Hare, *The Utilisation of Sex Equality Litigation Procedures in the Member States of the European Union*, V/782/96-EN, Commission of the European Communities, Brussels (1996)

<sup>327</sup> See *inter alia* Case 14/83 *Von Colson* [1984] ECR 1891; Case C-271/91 *Marshall No. 2* [1993] ECR I-4367.

<sup>328</sup> Directive 97/80/EC, OJ L14, 20/1/1998. Article 2(2) provides that indirect discrimination occurs where “an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.”

establishing indirect discrimination as set out in the *O'Flynn* case.<sup>329</sup> This test is not heavily dependent on the production of statistical evidence, rather requiring it to be established that a condition or practice would be liable to disadvantage the relevant group. It may be argued that the *O'Flynn* formula is a more appropriate test for dealing with indirect discrimination on the grounds of sexual orientation because statistics on sexual orientation may not be as readily available as statistics relating to sex. Article 2(b) of the Framework Directive, however, favours neither the Burden of Proof Directive test nor the *O'Flynn* test. Rather it attempts to strike a balance somewhere between the two. The maintenance of disparate tests for establishing indirect discrimination on different grounds of discrimination may generate unnecessary confusion in the enforcement of equality rights, particularly when it comes to challenging multiple discriminations.<sup>330</sup>

### **10.2.2 Burden of Proof**

The reversal of the burden of proof in equality cases is intended to compensate for the burdens on individual litigants in terms of access to resources, expertise and information. In the sex equality field, the Burden of Proof Directive requires the partial shift of the burden of proof to the respondent once a *prima facie* case of discrimination has been established. This significant development in sex equality law for enhancing access to justice has been extended to the Framework Directive (Article 10). Recital 31 of the Preamble to the Directive provides, however, that it is not for an employer to prove the sexual orientation of the complainant in the event of a claim. The rules on the burden of proof apply to individual litigation and agency litigation of equality claims (see below). The shift in the burden of proof does not apply to criminal procedures nor to cases where it is for the court or “competent body” to investigate the facts of the case (Article 10(3) and 10(5)).

### **10.2.3 Access to Justice and Agency Litigation**

Article 9(1) requires Member States to ensure that:

“judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.”

One of the most significant features of the Directive is the emphasis on institutional support for equality litigation. Research has shown that this can positively affect the ease

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<sup>329</sup> Case 237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617. The Court held that “unless objectively justified and proportionate to its aim a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.”

<sup>330</sup> See Report of the House of Lords European Union Committee on the Framework Directive. Fourth Report, Session 2000 – 2001 available at <http://www.parliament.the-stationery-office/ld/200001/ldselect/lducom/13/1301.htm>.

with which individuals can pursue their equality rights.<sup>331</sup> Interest groups or other agencies, such as trade unions, who “in accordance with the criteria laid down by their national law” have “a legitimate interest in ensuring that the provisions of this Directive are complied with” may, with the approval of complainants, act on behalf of or in support of victims of discrimination in any judicial and/or administrative procedure for the enforcement of the obligations under the Directive (Article 9(2)). In its opinion on the draft Directive, the European Parliament proposed that Member States should be obliged to provide adequate funding for such agencies and that relevant agencies should be able to commence a collective action *in their own name* where they believe there to be evidence of discrimination.<sup>332</sup> Neither of these recommendations were incorporated into the final text of the Directive.

The persistent problem of inadequate resources was raised by a number of lesbian, gay and bisexual groups who participated in this research as a factor inhibiting their capacity to act in support of the lesbian, gay and bisexual community. For this reason, these groups indicated that the Northern Ireland Human Rights Commission should offer financial and legal support for litigation of rights so that access to justice should be “rights tested” rather than “means tested”. While the possibility for agency litigation may support the lesbian, gay and bisexual community’s capacity to enforce equality rights, inadequate funding to lesbian, gay and bisexual groups and other agencies will limit these opportunities: the experience in Great Britain and Northern Ireland where equality agencies are already empowered to offer assistance to litigants, has been that inadequate funding limits such assistance to the pursuit of certain strategic test-cases. Under the new Community Action Programme to Combat Discrimination, core funding will be available to non-governmental organisations (NGOs) which may facilitate and encourage a transfer of information and expertise in respect of enforcement strategies.

#### **10.2.4 Enforcement Bodies**

The newly adopted Race Directive provides for the establishment of national enforcement bodies for the promotion of equal treatment. These bodies must be functionally independent. Their functions shall be to provide independent assistance to victims of discrimination; to conduct surveys concerning discrimination and to publish reports, including recommendations, relating to issues of discrimination. This innovation is duplicated in the proposed amendments to the Equal Treatment Directive but not in the Framework Directive. As the Directive is without prejudice to higher national standards, however, there is nothing in the Directive to preclude the UK from establishing a specific agency to work towards the elimination of sexual orientation discrimination. Within Northern Ireland this task would be performed by the Equality Commission.

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<sup>331</sup> Blom *et al*, The Utilisation of Sex Equality Litigation Procedures in the Member States of the EC.

<sup>332</sup> As recommended by the European Parliament in its Opinion on the draft Directive, Doc. A5-1036/2000. See in this regard the recommendations of UK equality agencies, the Equal Opportunity Commission (Great Britain) and the Commission on Racial Equality (Northern Ireland), that they should be able to bring actions in their own name: Equality in the 21<sup>st</sup> Century (1998) and Recommendations for Changes to the Race Relations (Northern Ireland) Order (1997) reported in No. 88, Equal Opportunities Review (1999).

### **10.2.5 Victimisation**

Effective protection from victimisation is a prerequisite to the enforcement of equality rights. Article 11 requires Member States to introduce into their legal systems those measures which are necessary to protect employees from dismissal or other adverse treatment by the employer as a reaction to a complaint of discrimination.

### **10.2.6 Social Dialogue**

In the widest sense, enforcement of equality rights may be promoted through social dialogue that encourages an understanding of the nature of the rights under the new Directive. The Directive requires Member States to take adequate measures to promote dialogue amongst the social partners on the promotion of equal treatment (Article 13). This includes monitoring of workplace practices, codes of conduct, research and exchange of good practice. The Directive also requires Member States to encourage dialogue with appropriate NGOs (Article 14). This may be supported by core funding to NGOs under the new Community Action Programme to Combat Discrimination. The formalisation of NGO participation in dialogue about the subject matter of the Directive is important for two reasons. First, because it encourages ownership of the Directive and, second, because the NGO community has been instrumental in bringing the issue of sexual orientation discrimination to the fore of the European equality agenda and their grassroots activism can inform the development of further policy at a national and transnational level.

## **10.3 The Action Programme**

Beyond judicial or administrative enforcement of sexual orientation equality rights, much can be achieved by creating a culture which, by fostering tolerance and mutual respect, can help to combat discrimination. In recognition that legislation is only one component of a “co-ordinated and integrated strategy” to combat discrimination the Action Programme sets out a range of complementary capacity-building measures which seek to mobilise actors within Member States to encourage the exchange of information and good practice. Action will be pursued in respect of all the grounds of discrimination with the view to supporting existing national action on anti-discrimination. Three areas for strategic action are identified: the analysis and evaluation of the nature of discrimination, the effectiveness of measures to tackle it, capacity building and the promotion and dissemination of best values and practices. Since the Action Programme encompasses all the grounds of discrimination listed in Article 13, it will enable the sharing of valuable expertise amongst those with most experience in combating discrimination on the well established grounds such as sex, with those who do not yet enjoy the same capacity and expertise. The “dual approach” of legislative measures supplemented and supported by an action programme has been an important facet of Community Action to combat sex discrimination and there is every reason to anticipate that this approach will contribute to the process of the promotion of awareness of the new rights and the development a culture of non-discrimination.

## 10.4 Proactive Remedies and Enforcement

The Directive does not require Member States to make provision for pro-active remedies such as programmes of affirmative action in the event of a finding of discrimination.<sup>333</sup> It does not require Member States to compel undertakings to actively monitor their compliance with the terms of the Directive by way of statistical returns and evaluations of employment and other policies. As well as facilitating the litigation of discrimination claims, this would have other benefits. The availability of monitoring returns would enable undertakings to come to an informed assessment of the appropriateness of positive action measures and facilitate national equality agencies to more effectively monitor progress towards equality.<sup>334</sup> However, monitoring may raise particular issues for the lesbian, gay and bisexual community. There may be privacy concerns associated with monitoring sexual orientation status and these have to be carefully balanced against the demands of effective enforcement of equality rights.

## 10.5 Conclusion

The provisions of the Framework Directive establish basic common standards that must be achieved for enforcement of sexual orientation rights. The provisions on the reversal of the burden of proof, the protection against victimisation and agency litigation are to be welcomed. On the other hand, the omission from the Directive of any requirement to establish national enforcement bodies is difficult to defend. The issue of multiple discriminations is unresolved by the adoption of the Community's package of measures. More generally, a victim of discrimination on the grounds of sexual orientation, race and religion will have to consider under which of the Directives a claim for discrimination would be best raised.

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<sup>333</sup> See Barnard, "Gender Equality in the European Union: A Balance Sheet" in Alston, P. (ed.) *The European Union and Human Rights* (1999) Oxford University Press pp. 215 – 280.

<sup>334</sup> See also in this respect the recommendations of the UK's CRE and EOC on national equality laws: Review of the Race Relations Act (1997) and Equality in the 21<sup>st</sup> Century (1998).



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## **Appendix Two: Methods**

The research for the audit comprised a number of stages and methodologies between November 1, 2000 and February 28, 2001, as follows:

### **Literature review**

A search and review of relevant literature from printed, database and online sources was conducted.<sup>335</sup>

### **Assessment of best practice & recent developments**

The audit includes a wide-ranging review of best practice and recent developments internationally based on published literature, internet searches and follow-up contacts, with particular reference to developments in South Africa, Canada, Denmark, The Netherlands, Australia, and the USA.

### **Consultative meeting with relevant organisations**

At the outset, the researchers attended a consultative seminar in Belfast with relevant organisations in Northern Ireland in order to determine the nature and extent of issues of concern to those organisations.

### **Obtaining information about and from Government, governmental and non-governmental organisations**

The audit involved obtaining information about and from Government, Governmental and Non-Governmental Organisations, as follows:

#### *Government*

Human Rights Unit of the Office of First Minister and Deputy First Minister  
Department of Culture, Arts and Leisure  
Department of Health, Social Services and Public Safety  
Department of Higher and Further Education, Training and Employment  
Department for Social Development  
Department of Education  
Criminal Justice Services, NIO  
Belfast City Council

#### *Statutory Organisations*

Director of Public Prosecutions

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<sup>335</sup> The review is based on selected references; much of the international literature, for example, in the Netherlands has not yet been translated into English.

Equality Commission for Northern Ireland  
Health and Social Services Boards, Councils and Trusts  
Northern Ireland Human Rights Commission  
Police Ombudsman  
Probation Board for Northern Ireland  
Royal Ulster Constabulary  
*'Next Steps' Agencies*  
Social Security Agency  
Northern Ireland Housing Executive  
Northern Ireland Prisons Service

*Northern Ireland Court Service*

*Non-governmental (voluntary) organisations*

Association of Independent Advice Centres  
Belfast Pride Committee  
Butterfly Club  
Committee on the Administration of Justice  
Community Relations Council  
CoSO (Coalition on Sexual Orientation)  
Foyle Friend  
Foyle LGB Support  
Gay Lesbian Youth NI (GLYNI)  
Law Centre, Belfast  
Lesbian Line  
NIACRO  
NICAB (Northern Ireland Citizens Advice Bureaux)  
NICEM (Northern Ireland Council on Ethnic Minorities)  
NICVA  
NIGRA (Northern Ireland Gay Rights Association)  
NUS/USI  
OutRage!  
Press for Change  
Queer Space  
Save the Children  
Stonewall (GB)  
UNISON  
Youth Council  
Victim Support

*Medical/health care organisations*

AIDS Helpline NI  
Body Positive NI  
Chiron Counselling  
Gay Men's Health Network  
Health Promotion Agency

Institute of Counselling  
National AIDS Helpline  
PRAXIS  
Rainbow Project  
Terrence Higgins Trust  
Voluntary AIDS Forum

*Professional bodies*

Law Society of Northern Ireland  
Bar Council of Northern Ireland  
Institute of Professional Legal Studies, Belfast

### **Comparative research: Ireland and Scotland**

The researchers contacted government, governmental and non-governmental organisations in Ireland and Scotland in their assessment of law and best practice given the cultural similarities between these jurisdictions, and, in the case of Scotland, developments in devolution.<sup>336</sup> Interviews were conducted with a number of individuals and organisations during a two-day visit in the Republic of Ireland. Organisations approached in Ireland included:

Gay and Lesbian Equality Network (GLEN)  
Nexus  
Irish Council for Civil Liberties  
Equality Studies Centre, University College Dublin  
Department of Justice, Equality and Law Reform  
Equality Authority

### **Advisory Group**

An Advisory Group comprising several leading academics in the area of law, sexual orientation and transgender in Britain, as follows, advised the research:

**Mark Bell** PhD, Lecturer in Law, University of Leicester. Dr Bell has completed a doctorate and written extensively on law and policy regarding sexual orientation in the European Union.

**Nicola Moran**, Doctoral candidate, University of Manchester, who is researching policies affecting same-sex partners in the Netherlands, the United Kingdom and Ireland.

**Stephen Whittle**, PhD, Senior Lecturer in Law, Manchester Metropolitan University. Dr Whittle has written extensively, advised and litigated on legal issues concerning transgender people.

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<sup>336</sup> Given constraints of time and funding, it was not possible to conduct interviews in Scotland. However, information was obtained from the following organisations: Equality Network, Gay Scotland, Healthy Gay Scotland and Outright Scotland.

**Academic seminar**

The University of Ulster organised a one-day seminar on sexual orientation, transgender and the law in December 2000 to complement the research. Papers were presented by the following members of the Advisory Group: Dr. Bell, Dr. Whittle and Ms. Moran. The seminar was attended by interested parties and informed the shaping of some issues for further research.

**Summative seminar for relevant organisations**

The researchers held a seminar in February 2001 for relevant organisations in order to feed back preliminary findings and to identify and address any remaining issues.

## Appendix Three: Health and Welfare Issues Important to the LGBT Community

- Training of health workers, mental health professionals and social workers concerning issues of sexual orientation
- Mental health issues/pathologising of sexual orientation
- Hospital visitation rights for same-sex partners
- Information on LGBT services and organisations made freely available in hospitals, GP surgeries, GUM clinics, public libraries etc.
- Maintenance of confidentiality
- Reversal of the current ban on blood donations from gay men
- Sexual health education addressing the needs of lesbians
- Reproductive rights, access to *in vitro* fertilisation
- Availability of condoms and dental dams in public buildings
- Treatment of LGBT patients in nursing homes
- Benefit entitlements, social security issues
- Consideration of LGBT people's social, psychological and spiritual welfare
- Treatment of LGBT prisoners: sexual health, conjugal visits, issues around HIV/AIDS status such as medication regimes
- End to recording of sexual orientation of patient on patient's medical records, e.g. by GPs, for non-medical reasons. This practice can lead to discrimination [against] LGBT people by insurance companies.

*Coalition on Sexual Orientation* (2001), p.4.

## **Appendix Four: Recommendations to the Northern Ireland Human Rights Commission**

### **Casework**

- We recommend that, given the concern of adverse publicity for lesbian, gay or bisexual people, the Commission should litigate on the rights of these people, where appropriate, in its own name.
- We recommend that the Commission should seriously consider bringing test cases in its own name to establish the extent to which the term “family” in Northern Irish legislation can be interpreted to include same-sex partners in long-standing, stable, loving relationships.
- We recommend that the Commission should consider supporting a same-sex partnership willing to litigate in the parties’ own names.

### **Investigations**

- We recommend that the Commission should consider the extent to which the welfare system in Northern Ireland discriminates against same-sex partnerships by excluding such partnerships from the same welfare entitlements as cohabiting opposite-sex partnerships.

### **Research**

- We recommend that further research into the rights of lesbian, gay and bisexual people should be undertaken jointly by the Northern Ireland Human Rights Commission and the Human Rights Commission in the Republic of Ireland.

### **Educational activities**

- We recommend that the Commission should address lesbian, gay and bisexual issues in its future educational work, liaising closely with lesbian, gay and bisexual organisations.
- The Commission has a particularly important role to play in setting a lead in education in schools on the rights of lesbian, gay and bisexual people, especially given the lack of positive education about sexuality and the high incidence of homophobic bullying.
- We recommend strongly that the Commission should make public the findings and recommendations of this report, particularly in view of the support for such action amongst the lesbian, gay and bisexual organisations in Northern Ireland.

## **Protecting rights in a Bill of Rights for Northern Ireland**

- We recommend that the Commission should further address lesbian, gay and bisexual issues in any future consultation on a Bill of Rights for Northern Ireland.
- We recommend that the Commission should incorporate into the proposed Bill of Rights for Northern Ireland a clause prohibiting discrimination based on sexual orientation. We believe that such protection is best achieved within the core of the Bill of Rights and should not be placed in an accompanying protocol.
- We recommend that the Commission should incorporate into the Bill of Rights for Northern Ireland a clause providing an inclusive definition of “family”.
- We recommend that the Commission should explicitly refer to the rights of lesbian, gay and bisexual people within the welfare system in any section of the proposed Bill of Rights dealing with economic and social rights.