

Law Reform Commission Annual Conference
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Address by Anne Colley, Chairperson, Working Group on Domestic Partnership

Views of the Working Group

Background

The Working Group on Domestic Partnership, which I chaired, was established in late March 2006 by Mr Michael McDowell T.D., Tánaiste and Minister for Justice, Equality and Law Reform. The Working Group was charged with preparing an Options Paper on Domestic Partnership by the end of October 2006, and its terms of reference were:

- to consider the categories of partnerships and relationships outside of marriage to which legal effect and recognition might be accorded, consistent with Constitutional provisions,
- to identify options as to how and to what extent legal recognition could be given to those alternative forms of partnership, including partnerships entered into outside the State, and
- to take into account models in place in other countries.

The Working Group included representatives from the Gay and Lesbian Equality Network (GLEN), the Family Lawyers Association, the Equality Authority, officials from various Government Departments and the Office of the Attorney General and others with family law and socio-economic expertise and perspectives.

Consultation

One of the Group's first actions was to invite submissions from the public. There was a large response from individuals and groups and a broad range of views were expressed. Over 50 separate submissions were made by groups and organisations and more than 130 were from individuals. We also received approximately 4000 similarly framed submissions from individuals who opposed change in this area.

Many submissions put forward options for legal reform for the Group to consider. The option of making marriage available to same-sex couples was proposed by some. Several arguments were made supporting this view particularly on equality grounds. Others urged no change in the current situation with regard to marriage, basing their argument on the Constitution, religion and the common good. Between these opposing

views were proposals ranging from minimal or incremental approaches to substantial change short of the full marriage option. These included a statutory civil registration scheme enabling cohabitants to register their partnership and avail of most of the rights and duties of marriage. Some submissions suggested civil registration for same-sex couples only or, for both same and opposite-sex couples. Others proposed a presumptive scheme, to provide a limited set of rights and duties, either on its own or in conjunction with a registration scheme.

The submissions confirmed for the Working Group that the absence of legal recognition leads to considerable inequities for some of the family types now common in Irish society. The elimination of these inequities requires legal reform across a wide range of policy areas including: Property, Next of Kin rights, Taxation, Social Welfare, Pensions, Dependency, Succession, Health and the Welfare of Children. I will return to this point later.

Together with the Equality Authority and GLEN, the Working Group also convened a conference on 26 May 2006, which many of you attended, on "The Legal Status of Cohabitants and Same-Sex Couples". As well as contributing to public debate, the conference made an important contribution to the Working Group's understanding of many issues in relation to cohabiting couples.

What are Domestic Partnerships?

There has been little quantitative sociological study of the phenomenon of cohabitation in Ireland. While the Working Group found some research it mostly related to experience outside the State, with some recent, but not comprehensive nor long term, research emerging on the situation in Ireland. It appears to the Group that a comprehensive study of cohabitation in Ireland should be commissioned with a view to establishing who cohabiters are, and their reasons for cohabiting, and informing a review of the relevant legislation to identify where reforms may be required.

At an early stage the Group examined the range of domestic partnerships and relationships to which legal recognition might be given and we found it useful to categorise these into three distinct cohabiting groups which are:

- Opposite-sex couples
- Same-sex couples
- Non-conjugal relationships

People in these relationships tend to develop mutual dependencies which deepen over time. There are benefits for them as individuals and couples, and for society, in providing them with a legal framework of recognition along with a range of rights and duties towards each other. Some of these rights and duties may resemble some of the attributes of marriage in law but in other respects differ substantially from marriage.

Models in other countries

The Working Group looked at other jurisdictions to identify the range of schemes in place elsewhere which might be considered in the Irish context. A number of other jurisdictions have legislated for various forms of relationships, often following court judgments. In recent decades a number of alternative models have arisen. These include the extension of marriage to encompass gay and lesbian couples, the creation of opt-in schemes, such as partnership registration, and legislation for presumptive schemes. Some examples of these various models are outlined in the Options Paper. Other speakers will address this issue more fully in the afternoon.

Guiding Principles

In considering the various options the Group applied a framework of principles to guide its work. These principles included

- equality in terms of treating persons in similar situations similarly, unless differentiation is objectively justified.
- diversity is seen in terms of differing adult conjugal and non-conjugal relationships, opposite and same-sex relationships and a broad range of family types, and the alignment of State policy with, and identifying and responding to, the particular needs arising from those different relationships,
- recognition concerns the status and standing of a group in society and how society values and affirms any particular group
- autonomy and privacy in personal or domestic relationships encompass the right to freely choose the form that one's personal relationships will take,
- the welfare of children under domestic law and international instruments, including the UN Convention on the Rights of the Child.

Some of the principles are competing. They are not absolute and are balanced in practice by the common good and the need to protect vulnerable persons.

In its consideration of options across each of the categories, the Group was mindful of the implications for children, be they children of one or

both of the partners. The Group was very conscious that there is an existing body of law providing a range of rights for children and duties of parents, irrespective of the marital status of their parents, in areas such as maintenance, access and custody. The Working Group was of the view that, given the complexity of legal relationships between children and their parents under legislative, Constitutional, European and international law, a separate and comprehensive review of the law in this area would be required to fully inform policy decisions on new rights for children vis-à-vis partners of their parents. However, the Group was also of the view that civil partnership schemes would have the benefit of conferring on a non-traditional family a formal status not currently available, which would have psychological and social status advantages, as distinct from legal consequences.

The Options Paper does not make recommendations for legal reform because this was not our task. Instead it sets out feasible options for consideration when proposals for legislative reform are being developed. While we were conscious of the requirement to present options that were consistent with constitutional provisions, we could not and did not take a definitive view of the constitutionality of some of those options, believing that our role did not extend to giving constitutional advice to the Minister.

Options

With the exception of some recent statutes, the law gives limited recognition to unmarried opposite-sex cohabiting couples. Same-sex couples have even less protection before the law and non-conjugal relationships are virtually invisible in terms of statutory provision. Cohabitants do not have the degree of legally enforceable rights and duties to each other or the level of benefits from the State that are available to married couples.

On the break-up of a cohabiting relationship, whether married or unmarried, one of the partners is frequently vulnerable to serious consequences including homelessness and loss of income. Marriage brings with it recourse to the protection of the law. Unmarried couples do not have this protection. The Working Group put forward five options to address the vulnerability of such couples on the ending of the relationship, and also in certain situations during the continuing relationship.

The first of these, *Contractual Arrangements*, does not require legal reform. As the law now stands cohabiting couples are free to regulate some aspects of their relationship by way of contract governed by

contract law, enforceable through the courts, such as jointly owned property or financial assets. Patricia Rickard-Clarke has referred to this in detail in her presentation and I apologise in advance for any repetition in this and other sections of my presentation, which is necessary for a full understanding of the views of the Working Group.

It is currently open to opposite-sex couples to regulate areas of their relationship by means of private contractual arrangements, most notably in property and financial matters. If the contract is not contingent on a requirement to perform marital duties, the Group was of the view that it is difficult to see how this would be unenforceable in the Courts, as was the case in *Ennis V Butterly*¹. Couples may also regulate any aspect of their relationship by executing a deed, including for example financial provision by one to the other, which could be seen as akin to maintenance. There would be tax consequences with either of these approaches.

Couples in same-sex and non-conjugal relationships are also free to regulate their property and financial affairs in these ways. The Working Group agrees with the Law Reform Commission that cohabitants should be actively encouraged to make use of these currently existing legal arrangements. The Provisions proposed in the Law Reform Commission's draft legislative scheme aimed at removing any doubt as to the enforceability of cohabiting contracts are to be welcomed.

The Working Group recognises that many couples will never make contracts for all kinds of reasons, such as a lack of awareness of the legal consequences of an unregulated relationship, unwillingness of one or both to make any formal commitment, one or other party being already married to someone else or an intention that the relationship be casual or transient. As a result, vulnerable partners in unregulated relationships enjoy little, if any, legislative protection at present and the consequences, financial and otherwise, at the end of a long relationship owing to death or break-up may be catastrophic. Hence, the Working Group agrees in principle with the Law Reform Commission recommendation for a *Presumptive Scheme* for both opposite-sex and same-sex couples and this is the second option put forward by the Group.

The presumptive scheme described in the Options Paper draws heavily on the Law Reform Commission's 2004 Consultation Paper. As in the Law Reform Commission scheme, qualified cohabitants are persons who,

¹([1997] 1 ILRM 28 (HC))

although not married to each other (or to anyone else), live together in a marriage like relationship for a continuous period of three years. I am now aware that the Commission has decided in its report published today that the marriage of one or both of the partners should not preclude the making of an application to court under what is now termed the redress model, and I will be very interested to discuss further the implications of this approach with members of the Commission, not having had a real opportunity to study the Commission's report in detail at this stage. The Working Group was swayed by the argument that it would be very difficult to allow legal recognition in such a situation, where there is a presumption that marriage and cohabitation in this context both involve exclusivity.

The Commission's approach to the question of married partners and the qualification period in its final report is indeed valuable for many couples who are in a limbo type situation in the period before they qualify for applying for divorce, and may be one that could be adapted by the Government for use in conjunction with the Working Group's scheme of options.

The Working Group also suggests in a point of departure from the thinking of the Commission that, where there is a child of a cohabiting relationship, the presumptive scheme should take effect immediately on the birth of that child. The Group feels that the presence of a child in a relationship alters the situation so fundamentally that immediate protection for the other partner, typically the mother, is required. It was also felt that, in effect, a new family institution had been created, however loose its binds may be, which did have implications for any children in it.

The presumptive scheme is designed to protect the vulnerable dependent partner in a relationship in the absence of any other formal recognition of that relationship. It would apply, generally speaking, at the end of a relationship either through the death of one of the partners or the breakdown of the relationship at which point it would be open to either partner to make an application to court for relief.

Cohabitants would need to be aware of the existence and legal consequences of a presumptive scheme. It would be necessary that the introduction of a presumptive scheme should be preceded by a widespread information campaign to ensure cohabitants were aware of their new legal situation, and of the need to be in a position to prove a

joint contrary intention if they do not wish the provisions of the scheme to apply to them.

The legal consequences of a presumptive scheme would be to impose certain rights and duties on qualified cohabitants in a wide range of areas. This is a very major change in approach, and one that could have negative implications for principles of autonomy and privacy within society.

Registered limited civil partners would be entitled to:

- apply to court for the right to reside in the couples home, to the exclusion of the other partner;
- apply to the Court to argue that proper provision has not been made for him or her in the deceased's will, or on intestacy, similar to an application under s.117 of the Succession Act 1965;
- extract a grant of administration intestate, or a grant of administration with will annexed, to the estate of their deceased partner at the discretion of the Probate Office and on production of such proofs as may be required, and to be placed above siblings of the deceased in the list of persons entitled to extract such grant;
- apply for compensatory maintenance in exceptional circumstances;
- payment of a survivor's pension in the Public Service Spouses and Children schemes in circumstances where there is no legal spouse and where a person nominates a cohabiting partner as a beneficiary;
- be included within the category of persons, mentioned in the Medical Council Guidelines, with whom a doctor should confer when treating a seriously ill patient who is unable to communicate or understand;
- be included within the definition of dependents section 479(1)(c) of the Civil Liability Act 1961 (as amended) which deals with civil actions for wrongful death.

The presumptive scheme is equally valid for opposite-sex and same-sex cohabitants but may be adapted for non-conjugal relationships, which I will deal with in more detail later in this paper.

The third option described by the Group is a limited civil registration scheme - *Limited Civil Partnership*. This entails introducing a statutory registration scheme, which extends status and a limited selection of the rights and duties of marriage to cohabiting couples who choose to register their partnership. The parties must not be married or in an existing registered partnership and must not come within the prohibited degrees of relationship. Limited Civil Partnership must be an exclusive union between two people aged 18 years or more.

A Limited Civil Partnership scheme would provide legal recognition and status for those opposite-sex cohabitants unwilling to enter into or opposed to marriage, and for same-sex couples who are currently unable to marry. It would provide some protection for vulnerable persons in cohabiting relationships at the end of the relationship, on break-up or death.

The legal consequences of registering a Limited Civil Partnership for the parties extend to those limited elements of family law required to protect vulnerable interdependent parties as set out in the presumptive scheme referred to above, with some additional provisions including:

- an entitlement to apply for a property adjustment order in exceptional circumstances, and to apply for a right to reside in the home pending that application being decided, such application to be made within one year of the date of dissolution;
- the extension of the Family Home Protection Act 1976 to the home of a couple who have registered for a Limited Civil Partnership;
- for Capital Acquisitions Tax purposes registered partners would be placed in Group Threshold 1, in addition to the existing relief available for the principal residence in which they reside;
- stamp duty relief of 50% for transactions between the registered partners;
- for immigration purposes a registered limited civil partnership would be proof of a durable relationship under the EC Free Movements of Person Directive;
- registered partners would be treated as spouses for the purposes of domestic violence legislation.

Effectively this is an opt-in and expanded version of the presumptive scheme.

The Group considered very carefully where to strike the balance of rights and responsibilities along the continuum of legal consequences for Limited Civil Partnership, from the full set of family law provisions under marriage to the presumptive model set which acts as a base-line to protect vulnerable partners at the end of the relationship.

In the Group's view, Limited Civil Partnership has merit in that it allows cohabitants choose to sign up to a range of rights and duties towards each other with immediate effect. Alongside this, a presumptive scheme is a safeguard measure to protect vulnerable unregistered partners when a relationship ends.

The Group believes that Limited Civil Partnership is sufficiently different from marriage that its vulnerability to constitutional challenge is reduced. Any perceived constitutional frailty is absent if a Limited Civil Partnership Scheme was to be confined to same-sex couples

Another option described in the Options Paper is *Full Civil Partnership*. This is a civil registration scheme extending the full range of rights and duties of marriage to cohabiting couples who choose to register their partnership. The parties must not be married or in an existing registered partnership and must not come within the prohibited degrees of relationship. Full civil partnership must be an exclusive union between two people aged 18 years or more. The notification and other formalities before registration would be the same as those for civil marriage. The partnership would have to be formally registered in the same way as civil marriage. Full civil partnership could only end on death or dissolution by a court and dissolution would be subject to the same requirements as divorce.

The legal consequences for the parties to a registered full civil partnership would extend to all the elements of marriage and family law including both public and private law and parental responsibilities. The legal rights and responsibilities of registered partnerships are the same as those of civil marriage, but without the benefit of constitutional protection.

Full Civil Partnership would have the benefit of according status and recognition to cohabitants. However, full civil partnership is already available to opposite-sex couples in the form of civil marriage.

Introducing an alternative, which is equivalent to marriage for opposite-sex couples, is vulnerable to constitutional challenge on the ground that it constitutes an attack on the institution of marriage by providing a competing institution.

The Group's view is that Full Civil Partnership is a viable option for same-sex couples in the event that same-sex marriage is not possible. Full Civil Partnership falls short of full equality for same-sex couples as it does not ascribe a marital identity and does not offer the protection the Constitution affords to marriage and family life.

The Group examined the option of introducing *civil marriage for same-sex couples*. The Group was mindful of the constitutional situation particularly in view of the fact that the first case on extending the definition of marriage to include same-sex couples was heard recently by the High Court and a judgment is awaited. On this point the Options Paper states, and I quote:

“Introducing civil marriage for same-sex couples is likely to be vulnerable to constitutional challenge given the special position marriage is afforded in the Constitution and the interpretation of the definition of marriage in constitutional actions before the Courts that marriage is the voluntary and permanent union of one man and one woman.”

Another quote from the Options Paper is noteworthy:

“Same-sex couples have no opportunity to attain formal state or societal accreditation for their relationships with the legal recognition, status and social acceptance that flows from these. Unlike for opposite-sex couples, a wide range of the benefits, protections and duties towards one another, consequent on a committed relationship, cannot be attained in a same-sex relationship.”

There is no stronger case for legal reform than this. While this is a sensitive issue, the Group believes that same-sex marriage would achieve equality of status with opposite-sex couples and would underpin a wider equality for gay and lesbian people.

In addition to the options set out above, the Group also suggests the carrying out of a programme of *Legislative Review and Reform* alongside whatever legal reforms are introduced to accord legal recognition and protection to cohabitants. This would entail a review of relevant legislation, to identify where reforms may be required to address issues

relating to opposite and same-sex couples and to non-conjugal relationships. This would be an efficient and effective manner in which to deal with many of the issues facing cohabitants and could address any issues not addressed by the other options. However, legislative review and reform is not put forward as an alternative to the other options outlined but should be considered in tandem with them.

These options are not mutually exclusive. The Working Group believes that a combination of a number of options is required to adequately address the range of issues of concern to cohabiting couples taking into account their different circumstances and preferences

I would like to refer briefly to the Working Group's consideration of the recognition of foreign registered relationships and same-sex marriages as it is likely to arise quite regularly in the future given the number of EU countries, and other jurisdictions which have introduced legislation in this area in recent years, including our nearest neighbours, the United Kingdom.

It is not envisaged that opposite-sex full civil partners coming from abroad would have their relationships recognised here, unless full civil partnership is available to opposite-sex couples as an option in this jurisdiction. If those partners wish to assume rights and obligations to each other under Irish law, then it is open to them to marry in this country. Similar arguments would apply to same-sex civil partners coming from abroad in the event that marriage is an option for them in this country.

In the event that same-sex couples become entitled to marry in this country, then it is most likely that same-sex marriages validly entered into abroad on the same conditions (e.g. that neither is married to any other person) would be recognised here.

If a scheme of full civil partnership for same-sex couples only is introduced, then rules of recognition should allow for those same-sex couples who have validly married abroad to be treated as civil partners under Irish law. Further, any same-sex couple who have entered into a partnership bearing the attributes of full civil partnership in this country should be treated as if they have entered into such an arrangement in this jurisdiction.

If the partnership entered into abroad (either by same-sex or opposite-sex couples) is of limited scope then it would be open to those partners to

avail of the rights arising under the Irish presumptive scheme or to register their limited domestic partnership here.

Many complex legal issues already arise from the introduction of civil partnerships and same-sex marriages abroad; for example, same-sex couples from this jurisdiction can travel to the United Kingdom to enter into civil partnerships. Two separate issues arise in relation to recognition, firstly, whether such partnerships or marriages would be recognised as a matter of public law, and secondly, whether Irish private law would recognise the contracts entered into abroad by the partners. It is likely that State recognition would not be given in the event that there is no equivalent institution in this country. However, there is no impediment to recognising contractual arrangements entered into abroad so that there could be a measure of recognition afforded to such couples.

The Working Group notes that the European Commission in its Green Paper on matrimonial property rights, which was presented in July 2006, specifically refers to the fact that in member states more and more couples are formed without a marriage bond. The Commission is considering proposing specific conflict rules for the break up of such relationships and for dealing with the property consequences of separation of *de facto* unions.

In this context the Group is of the view that the European Union is a useful forum for considering matters of recognition of "overseas relationships".

Finally, I would like to deal with the situation of *non-conjugal relationships*, and why the Working Group felt there were difficulties in addressing the needs of a cohort when we were unsure of firstly who made up that cohort, and secondly what their needs were.

The information the Working Group had about such households is not extensive. The 2002 Census shows that the number of persons living in such households was as follows: -

Category	Number of Households (000's)	Number of persons (000's)
Non-family households containing no related persons	53	153
Non-family households containing related persons	39	93

There is very little research in Ireland or elsewhere on non-conjugal relationships. The Group was made aware of the 2001 report of the Canadian Law Commission “Beyond Conjuality” on close personal adult relationships, which examined such relationships and made proposals for organising them legally. The few submissions to the Working Group of relevance to this category raised specific issues of concern in relation to carers, pensions and employment law, while others either favoured or were against the inclusion of cohabiting relatives in a domestic partnership scheme.

The Group saw difficulties in applying a scheme such as the presumptive scheme across a very diverse range of relationships where there would be no intention on the part of those living together to create a mutual interdependency, and certainly no wish for such people to be seen as “partners in life”. Without reliable analysis, and in light of the dearth of submissions on the subject, even after seeking them out, the Group considered that there is very probably a need for protection for some people in these arrangements, but that this need might be better served through regular review of legislation and reform where necessary.

In conclusion, I would like to emphasise that the Options Paper does not recommend any one of the options over the others. We tried to present the full set of available options, to identify where particular obstacles to their implementation might arise, and to elaborate on the legal consequences of each for cohabiting couples. The policy choice as to which option or combination of options to implement is for Government to make.

I am happy to say that, despite the very short time frame that we had for such an important and wide ranging examination of this sensitive and very relevant area of socio-legal policy, my colleagues and I on the Working Group, with the able and committed assistance of the secretariat in the Department of Justice Equality and Law Reform, achieved our

objective. I believe that this report is a useful and informative document, which I hope will be of assistance in framing what is bound to be a landmark in legislative reform.

Thank you.