

# LGBT NOISE: LEGAL ASPECTS OF FAMILY RELATIONSHIPS

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## **INTRODUCTION**

The following submission has been prepared by LGBT Noise and outlines our observations and comments on the Consultation Paper prepared by the Commission entitled "Legal Aspects of Family Relationships".

LGBT (Lesbian, Gay, Bisexual, Transgender) Noise is a non-party political voluntary organisation. The group was founded in 2007 in response to the government's continued failure to extend marriage rights to same-sex couples.

LGBT Noise very much welcomes the review of legislation in respect of family relationships and would support legislative amendments that strengthen rights and protections for children and their parents. LGBT Noise has, however, identified a number of significant omissions in the Paper. Of particular concern is that it does not make any substantial reference to nor give any consideration to the rights of same-sex parents and their children. Same-sex families exist in practice and to ignore this reality is to deprive the children raised in these circumstances of equality with other children<sup>1</sup>. LGBT Noise submits that there are widespread deficiencies in current legislation in addressing the rights of same-sex parents (in particular the rights of the non-biological parent) and their children and as a result there is little, if any, protection for them.

LGBT Noise calls on the Commission to consider the said deficiencies in current legislation and in particular the following key points (which we deal with in more detail when discussing the Chapters below):

1. the child of a same-sex relationship has no legal relationship with their non-biological parent.
2. parental rights should extend to same-sex couples.
3. the right of transgender people to have their birth certificate amended to reflect their gender identity.
4. The right of transgender people to have their parental rights recognised and upheld regardless of their gender identity.

In considering all of the above, LGBT Noise recommends that gender-neutral language be adopted by the Commission to ensure inclusiveness and to enable an accurate reflection of the reality of LGBT families.

LGBT Noise also calls on the Commission to take into account legislation in place in other countries.

Our submission recognises that the best interests of the child should be the paramount consideration.

We would be very happy to brief the Law Reform Commission on any part of the within submission.

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<sup>1</sup> K & T v Finland (ECtHR)

## **BACKGROUND**

ILGA-Europe has reported on how the failure to give due legal recognition and protection to same-sex parents and their children impacts on the child's life in practice<sup>2</sup>. The many ways in which it is detrimental to the child include that the child may have no legal relationship with her/his siblings, even if they are genetically related through a sperm donor; Where one parent dies and the family home was leased in their name the child may find themselves homeless because succession rights are not protected; Economic protections such as parental leave entitlements, income tax benefits and benefits provided on the death or injury of a parent and which are aimed at ensuring a child does not grow up in poverty may not be available to a same-sex partner whose relationship with the child is not legally recognised; A child has no formal protection either financial or of their relationship with their non-biological parent who may have been her/his primary care-giver in the event of a breakdown in the relationship between its parents; The negative psychological effects of the lack of recognition of the legitimacy of the relationship and the secrecy which can often follow are exacerbated by difficulties such as when filling in administrative forms which request family information or attending family events at school. The report concludes that:

*"Undoubtedly a lack of legal recognition has contributed to the destruction of many loving LGBT families".*

The results of the NLGF's Burning Issues Survey 2009,<sup>3</sup> found that 1 in 5 women and 1 in 14 gay men in Ireland have children. This figure increased for respondents over 35 years old, where it found that 4 out of 10 women and 1 in 6 male respondents have children. The results of this survey are similar to data gleaned from studies carried out in U.S., Australia and New Zealand which suggests that between 15 - 20% of lesbians have children while data obtained from Statistics Netherlands suggests that about 9% of households headed by a same-sex couple include at least one child and that number rises to 18% in lesbian households.

A review of the law on family relationships in other jurisdictions is insightful, as many have made huge strides in developing their legislation to reflect the diverse society we now live in. For instance, New Zealand enacted the Care of Children Amendment Acts 2004 and 2005, and in its explanatory note it stated:

*"Family and ethnic demographics in New Zealand have changed considerably since the 1968 Act was enacted. The 1968 Act is premised upon a traditional nuclear family model that does not reflect the diversity of family arrangements that now exist in New Zealand. More modern legislation must provide a framework that recognises and supports all types of family units that care for children, for example single-parent households, extended families, reconstituted families, and de facto relationships (including those of the same sex)."*

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<sup>2</sup> "The Rights of Children Raised in Lesbian, Gay, Bisexual or Transgender Families: A European Perspective" Written by Dr Loveday Hodson on behalf of ILGA-Europe, December 2008. ILGA (International Lesbian and Gay Association) Europe.

<sup>3</sup> In Spring 2009, the National Lesbian and Gay Federation (NLGF) conducted a survey to gain a comprehensive reading of the issues and priorities of key concern to Lesbian, Gay, Bisexual and Transgender people (LGBT) people in Ireland.

A wide body of research documents conclude that the sexuality of a child's parents bears no detriment on the welfare and development of the child<sup>4</sup>. It is the care and love put into a child's upbringing that is of utmost importance, and lesbians and gay men demonstrate just as good capabilities at loving and caring for their children as their heterosexual counterparts. The American Academy of Pediatrics<sup>5</sup> have carried out a number of comprehensive studies whose findings confirm that children raised by lesbians and gay men are just as happy and well-adjusted as children raised in other familial structures. Other national and regional studies, such as a review of social science and psychological research carried out by the Gay & Lesbian Rights Lobby (NSW) Inc<sup>6</sup>, further backs up this wide body of research. However, as stated above, difficulties arise for LGBT families as a result of the denial of basic rights and social bigotry.

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<sup>4</sup> Charlotte Patterson (2000) 'Family Relationships of Lesbians and Gay Men', *Journal of Marriage and the Family* 62: 1052 at 1064; Mike Allan & Nancy Burrell (1996) 'Comparing the Impact of Homosexual and Heterosexual Parents of Children: Meta-Analysis of Existing Research', *Journal of Homosexuality* 32(2): 19; Charlotte Patterson (1992) 'Children of Lesbian and Gay Parents', *Child Development* 63: 1025; Fiona Tasker & Susan Golombok (1996) 'Do Parents Influence the Sexual Orientation of their Children? Findings from a Longitudinal Study of Lesbian Families', *Developmental Psychology* 32: 3; Paul Hastings, Johanna Vyncke, Caroline Sullivan, Kelly McShane, Michael Benibgui & William Utendale (2006) *Children's Development of Social Competence Across Family Types*, Canada: Department of Justice, at 34.

<sup>5</sup> The mission of the American Academy of Pediatrics is to attain optimal physical, mental, and social health and well being for all infants, children, adolescents, and young adults.  
<http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/341>

<sup>6</sup> "Meet the Parents: A Review of the Research on Lesbian and Gay Families" by Jenni Millbank for the Gay & Lesbian Rights Lobby (NSW) Inc., January 2002.

## **CHAPTER 2: REGISTRATION OF THE BIRTH OF A CHILD**

### **Overview:**

The Commission, in its consideration of the rules governing the registration of births, has neglected to consider a range of birth scenarios in which same-sex parents may need to register the birth of their child or where the gender of one or both parents has changed.

These factual scenarios include, but are by no means limited to, the following:

1. A lesbian couple where one party conceives via an artificial conception procedure with an anonymous sperm donor;
2. A lesbian couple where one party conceives via an artificial conception procedure with a known sperm donor;
3. A gay male couple entering into a surrogacy arrangement, where one or both donate sperm;
4. A gay male couple entering into a surrogacy agreement, where the sperm is from an anonymous donor;
5. A transgender person who has been registered as either the mother or the father of a child and subsequently transitions; and
6. Transgender people who wish to amend their birth certificates to accurately reflect their gender identity.

Equally and by extension, it appears that the Commission has failed to consider the impact of any proposed reforms to the rules governing the registration of births on same-sex parents and their children.

### **Submissions:**

It is submitted that this oversight, if enshrined in law, would constitute discrimination against same-sex couples and their children.

It is submitted that the children of same-sex parents are entitled, like all children, "to know his or her identity and part of this is being aware of who his or her parents are."<sup>7</sup>

It is submitted that many same-sex couples with children feel strongly that the reality of their family structures should be reflected on their children's birth certificates and that this can be achieved by listing the non-birth mother or father, and not the donor or surrogate, as the other parent of the child.

Some same-sex couples would like to have the name of the donor or surrogate recorded on their child's birth certificate if the donor has a parental role in the child's life, or if they simply would like to formally acknowledge the donor's biological role in the child's conception. Again, they want their child's birth certificate to reflect the reality of their conception and the make-up of their family. The recording of a donor's name on the birth certificate should be at the discretion of the parents.

LGBT Noise notes that some of the concerns raised here are equally applicable to certain heterosexual couples and single parents. For example, a heterosexual couple

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<sup>7</sup> Consultation Paper, paragraph 2.15.

or single person might conceive via an artificial conception procedure with a sperm donor or enter into a surrogacy agreement. These factual scenarios are entirely excluded by the Commission's consideration of the rules governing the registration of births. Again, it is submitted that this oversight perpetuates discrimination against such parents and their children.

It is further submitted that the Commission cannot and should not ignore the predicament of same-sex parents and there is no justification for deferring consideration of these children until future legislation governing the relationship between same-sex couples becomes law.<sup>8</sup> Same-sex families exist notwithstanding the absence of legislation providing for civil partnership/marriage. The Civil Partnership Bill 2009 does not address the needs or rights of child being raised in LGBT families.

Finally, the Commission appears not to have taken adequate consideration of the steps taken in other jurisdictions to facilitate same-sex parents and children in the area of birth registration. Below, we refer to a non-exhaustive list of jurisdictions where steps have been taken to enable the registration by same-sex parents of the birth of their children.

### **Recommendations:**

LGBT Noise hereby calls upon the Commission to review its provisional recommendations, taking into account the rights of same-sex parents to register their children's births and the corresponding entitlement of those children to know their identity and to know who their parents are.

LGBT Noise considers that the system of Registration of Births ought to allow for the registration of same-sex couples as co-parents of a child. The recording of the identity of a biological father or sperm donor (in the case of a female couple) or a surrogate (in the case of a male couple) might also be included on the birth certificate should the registered parents so desire.

LGBT Noise submits that mandatory joint registration should exist, subject only to certain limited exceptions. It is generally in the best interests of the child that both de facto parents would be registered.

In the Registration of Births system LGBT Noise recommends that gender-neutral language be adopted throughout to ensure inclusiveness and to enable an accurate reflection of the reality of LGBT families.

LGBT Noise urges provision be made for transgender people to have the option of amending their birth certificate to reflect their gender identity. In 2007 Dr. Lydia Foy secured a declaration of incompatibility under s.5 of the European Convention on Human Rights Act 2003 regarding the Civil Registration Act 2004 and Article 8 of the ECHR. Noise urges movement to address the rights of transgender people and their families without further delay.

Finally, LGBT Noise suggests that the Registration of Births system should correctly

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<sup>8</sup> The current draft of the Civil Partnership Bill does not reference or give any protection to children of same-sex parents.

reflect the reality of family relationships to allow and encourage parents to make their own arrangements for the care of their children, rather than a requirement that a family must go through a court hearing to gain recognition for their situation.

### **Comparative rules governing the registration of births:**

It is clear that many other jurisdictions have re-examined the rules governing the registration of births to reflect the reality that a proportion of children born in those jurisdictions are born to same-sex couples. It is submitted that the Commission is obliged to have regard to these comparative regimes and to have regard to the efforts made to modernise those systems of birth registration.

The following is a non-exhaustive survey of jurisdictions to which the Commission ought to have regard:

#### **United Kingdom**

The same rights given to opposite-sex couples - on registering the birth of a child conceived as a result of fertility treatment - have now been awarded to female same-sex couples in the UK pursuant to the Human Fertilisation and Embryology Act 2008. From 1 September 2009, female civil partners conceiving a child via fertility treatment - the same treatment as straight married couples may obtain – are able to have the names of both female parents recorded on the birth certificate.

Similarly, if couples who are not in a civil partnership at the time of undergoing fertility treatment both give written consent to their licensed fertility clinic where they receive the treatment, the non-biological female parent shall be regarded as one of the child's parents.

In both cases, the female partner of the biological mother can be recorded as a parent in the birth or still-birth registration and any other certificates issued.

From April 2010, the 2008 Act provides that male couples who have a child through egg donation and surrogacy may apply for a Parental Order which, if granted, would enable them both to be named parents on the child's birth certificate.

#### **New Zealand**

Pursuant to the Births, Deaths, Marriages, and Relationships Registration Act 1995 (as amended), except in some limited circumstances, both parents of a child born in New Zealand must, as soon as is reasonably practicable after the birth jointly notify the Registrar of the birth of their child. The term "Parent" includes couples in a same-sex relationship.

Where fertility treatment is used, the donor is not recognised as a legal parent in New Zealand law, however, parents and donors can make formal agreements as to how things will work with the Courts having flexibility as to whether they recognise these agreements or not.<sup>9</sup>

#### **New South Wales**

In New South Wales, same-sex couples can obtain a "Same-sex Parents Birth Registration Statement" from the Registry of Births Deaths and Marriages. The Miscellaneous Act Amendment Act came into effect on 17 September 2008. Subject

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<sup>9</sup> S.41 of the Care of Children Amendment Act, 2004.

to the requirements of the Act, both women in a same-sex de facto relationship may now be recognised on their child's birth certificate.

### **Victoria**

In Victoria, the Assisted Reproductive Treatment Act 2008 (Vic) ("ARTA") was passed on 4 December 2008, with parts of the Act coming into operation on the day after Royal Assent or by no later than 1 January 2010. The ARTA corrects major discriminations against same-sex parents and provides legal security for children of same-sex parents, including the following:

a woman and her partner, if any, and irrespective of gender, can access assisted reproductive technology (ART) procedures if the woman is "unlikely to become pregnant" without that assistance;

1. the Status of Children Act 1974 (Vic) ("SoCA") is amended to provide that the female partner of the birth mother is presumed, for all purposes, to be the legal parent of any child born as a result of the pregnancy if she was the partner at the time of the procedure and she consented to the procedure;
2. the man who produced the semen is presumed for all purposes not to be the father, whether or not he is known to either woman;
3. these presumptions are irrebuttable (not open to question) and prevail over any conflict;
4. the Act provides for the registration of the non-birth mother as the parent on the child's birth certificate;
5. the ART provider must provide the donor's name to the Registrar of Births, Deaths and Marriages, which can then be disclosed to the child, the parents, the child's descendants or the donor by application to the Registrar;
6. ART providers may carry out procedures under surrogacy arrangements if approved by the Patient Review Panel established by the Act;
7. the commissioning parents of a child born under a surrogacy arrangement can apply for a substitute parenting order, which irrebuttably presumes the parents will be named as the child's legal parents where both parents consented to the arrangements.

### **British Columbia**

In British Columbia a lesbian co-mother of a child conceived by her partner using anonymous sperm can be listed as the child's second parent on the birth certificate.

### **California**

Same-sex parents are accepted on a child's birth certificate in California. It allows for the names of the "father/parent" and "mother/parent" on the birth certificate.

## **CHAPTER 3: THE RESPONSIBILITIES AND RIGHTS OF NON-MARITAL FATHERS**

### **Overview:**

While we recognise and fully support the development of the law in respect of the responsibilities and rights of non-marital fathers, the Commission in its considerations failed to consider the same responsibilities and rights of non-marital partners in respect of same-sex relationships. No recognition is given to the fact that same-sex relationships can result in rights and responsibilities being denied to parents regardless of their gender.

Currently, the reality of co-parenting by same-sex couples is not reflected in Irish law. There is little protection for same-sex parents and their children. There is no facility whereby the non-biological parent of a child can acquire guardianship rights. Nor is it open to such same-sex couples to jointly adopt. There is no legal relationship between a child and the same-sex partner of her mother or father, even where the partner is parenting the child on a day-to-day basis. This creates difficulties when the second parent cannot consent to medical treatment or school trips for example. It also creates financial inequities; the child and second parent are treated as strangers for the purposes of inheritance and gift tax and the child is not entitled to inherit under the rules of intestacy. Surrogacy situations are also not addressed in the report.

### **Submission:**

The lack of recognition of the relationship between the child and the second parent is discriminating, demeaning and damaging and does not take into account the fact that there are many children in Ireland living in LGBT families.

### **Guardianship**

Under Irish law currently, a same-sex partner cannot be appointed as a guardian (except under a will as a testamentary guardian).

LGBT Noise submits that while the ECtHR has not as yet recognised the right of a child to the guardianship of her/his parent's same-sex partner, the case law suggests that it considers parental responsibility as an important social and not merely biological role. It has therefore held that the existence of family life for the purposes of Article 8 is a question of fact depending on the real existence in practice of close personal ties. In *Mazurek v France* the court stated that

*"the institution of the family is not fixed, be it historically, sociologically or even legally".* (para 52).

The Court has referred to the importance of factors such as that the couple had lived together for two years before the relationship ended, evidence of a caring paternal role, and (in the context of a potential relationship between a child born out of wedlock and its natural father) the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child before and after its birth.

LGBT Noise further submits that biological ties are not decisive in establishing the

existence of a family as evidenced by *Nylund v Finland* where the ECtHR held that there was no family life between a man and a child whom he had never met and with whom he had established no emotional bonds. It stated that it was:

*"justifiable for domestic courts to give greater weight to the interests of the child and the family in which it lives than to the interest of an applicant in obtaining determination of a biological fact."*

In *K and T v Finland* the Court did recognise the existence of a family life between a man who co-habited with a woman and her children from an earlier relationship. These cases recognising the important social function of parenting illustrate that in the view of the ECtHR there is no barrier in principle to legal acknowledgement of the strong ties that can exist in practice between a child and her/his step-parent and to upholding the legal rights and responsibilities that come with this. Indeed clearly this can often be in the best interests of the child. In a report published by ILGA-Europe,<sup>10</sup> Dr. Loveday Hodson notes that the approach of the Court in these cases "suggests that the definition of the family under the ECHR is inclusive and based on the social and emotional realities of family ties, and that it does not rely upon definitions of the family found in national laws. In particular, it implicitly recognises that a range of relationships may be important to a child's development, and not necessarily only the relationship with his or her biological parents."

### **Assisted Conception**

There is no regulation in relation to assisted conception in Ireland. We understand the Commission will be considering this issue in the future. In advance of that report, we submit that Irish legislation should take into account those same-sex couples who choose to start a family together. Children of these relationships should be entitled to the protection and benefits of having two parents and guardians. A presumption of parenthood should apply to same-sex couples in a civil partnership or de facto relationship who choose to have children. A presumption of paternity currently exists for married couples. No investigation is made into the paternity of a child of married parents even though it is, of course, possible that the child has been fathered by another person. Similarly, where a civilly partnered or de facto couple choose to have a child, a presumption should be made that both parties are going to be the parents of the child and as such, should automatically be guardians.

### **Adoption**

Adoption is a right of the child and there is no 'right to adopt'. The Civil Partnership Bill 2009 does not address the issue of same-sex civil partners and adoption. Within Ireland, as was previously the position within Northern Ireland (see below) couples or a single person may adopt if the Adoption Board is satisfied that in the particular circumstances, it is desirable to grant the adoption order. Similarly, a person may be an eligible relative of the child and may be in a position to adopt. There is currently no law in relation to consideration for adoption by same-sex couples or unmarried opposite sex couples.

While in a significant number of European States a same-sex step-parent can adopt their partner's child, this is not possible in Ireland. Even if it were, it is not a sufficient solution as it is more consistent with the child's best interests that parental

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<sup>10</sup> *infra*

responsibilities be automatically recognised from birth because, for example, a co-parent could die before an adoption can be arranged which would deprive the child of succession, pension and other rights.

ILGA-Europe argues:

*"It is illogical to have a social parent - who may be acting as the main carer - prevented from accepting legal responsibility for a child when he or she is willing to do so, and it is certainly not in the child's best interests. We argue that denying a child a legal relationship with his or her social parent(s) violates that child's right to identity (CRC: Articles 7 & 8; ECHR: Article 8) and right to respect for his or her family life (ECHR: Article 8). It also violates the obligation to support and promote the common responsibilities of both parents in raising a child (CRC: Article 18)."*

Article 14 prohibits discrimination on grounds of birth. If the language of Irish family law is to change to become more child centred in line with international norms, then it becomes clear that in a situation where a child is not legally entitled to the continuation of the care provided by its biological or adoptive parent's partner because of limitations on guardianship rights, then this must be acknowledged as discrimination based on birth status contrary to Article 14 in conjunction with Article 8 and the child's right to family and/or private life. According to the judgment of the ECtHR in *Thlimmenos v Greece* a State is prohibited from indirectly discriminating against persons by failing to treat persons whose situations are significantly different in a different manner. Where the parents of a child are prohibited from marrying and ensuring the continuation of their family life in this manner, it can be argued that this situation is significantly different from that where the parents choose not to marry and should therefore be treated differently. Protections must be put in place to ensure that a de facto parent who cannot marry is capable of legally ensuring the continuity of their relationship with the child through guardianship rights.

The ECtHR in *E.B.v France* and the House of Lords in *Re G* have both stated that human rights concerns are integral to the adoption process, both from the point of view of best interests of the child, but also in ensuring no discrimination is entailed within the adoption process for potential adopters.

In relation to the possibility to apply for adoption for single persons under Irish law, by virtue of the European Convention on Human Rights Act, 2003 and possibly under the Equal Status Act, 2000, there should be no discrimination on the basis of sexual orientation.

In *Re P and Others*, the House of Lords held that a blanket ban on joint adoptions by unmarried couples could not be justified and that it was unlawful under Articles 8 and 14 of the ECHR to reject applications by prospective adopters for the sole reason that they were unmarried.

### **The Civil Partnership Bill 2009**

The proposed Bill is significant to same-sex couples in that it provides, for the first time in Ireland, a comprehensive scheme for the legal registration of same-sex relationships. This civil partnership registration scheme is confined solely to same-sex couples. Noise criticises this blatant discrimination against opposite-sex couples and notes the continued exclusion of same-sex couples from the right of civil

marriage as laid down in the Civil Registration Act 2004. Noise also highlights the lack of consideration given to married transgender people and how the Civil Partnership scheme would affect them (and any children they have or may have) once the State moves to recognize their gender change in law. Noise deems the failure to address the existence of children in LGBT families the most heinous aspect of this discriminatory piece of legislation.

*"While the Bill is not entirely silent regarding children, it largely proceeds by reference to the couple as a self-contained unit. There is relatively scant regard for any children who may reside with them. This appears to be deliberate - the Government, while content to acknowledge same-sex couples, seems reluctant to recognise the position of same-sex couples as parents. This is evident, in particular, in the continued failure to countenance civil partners jointly adopting children, even though a gay or lesbian person may do so as an individual."*

Ryan continues to state that:

*"... while marriage legislation generally requires the courts to have regard to children in a family unit as well as the adults, the equivalent provisions in this Bill generally do not address the position of children. For instance, the protections afforded in respect of the shared home make no reference to the accommodation needs of dependent children as a relevant criterion. A dissolution may be obtained, moreover, without having regard to whether proper provision has been made for any dependent children. A child living with civil partners, moreover, will not be able to claim maintenance from the partner who is not her biological parent. Nor will the child have any legal right to claim from that partner's estate on death (unless the latter made a will in the child's favour). Even with civil partnership, the couple will not be able to adopt jointly, while custody and guardianship rights are and will still be denied to the non-biological parent."<sup>11</sup>*

It is clear that the Civil Partnership Bill, if enacted in its present form, will not resolve the issues facing children of same-sex couples nor those facing the same-sex parents of such children.

### **Recommendations:**

LGBT Noise submits that a non-marital father in a de facto relationship should automatically be a guardian. Automatic guardianship should apply to couples (same sex and opposite sex) who are in a de facto relationship or in a civil marriage or civil partnership (if legislation is enacted in the future to allow same-sex couples to enter into marriage or civil partnership and opposite sex couples a civil partnership).

All other parties should continue to avail of the current mechanisms for appointing guardians i.e. by court application or by statutory declaration on consent.

LGBT Noise submits that a central register should be established. This would avoid difficulties where disputes arise, or where a declaration is lost or damaged. The General Registry has the resources in place to create and maintain such a register

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<sup>11</sup> Fergus Ryan (1999) 'Civil Partnership: Your Questions Answered' for GLEN (Gay and Lesbian Equality Network).

and so is ideally placed. The register should be publicly available. It may be necessary to consider a "not disclosed" option.

## **Comparative Rules Governing Guardianship, Assisted Conception and Adoption**

### **United Kingdom**

#### **Guardianship**

The Civil Partnership Act 2004 amended the UK legislation in relation to parental responsibility of same-sex couples. The legislation provides the non-birth mother with a status akin to "step-parent". In the case of civil partners, where one civil partner has parental responsibility for a child, a legally binding agreement may be reached with the child's other biological parent whereby the other civil partner becomes a "step-parent" with parental responsibility for the child. In the alternative, an order may be made by the Court, on application to it by the civil partner, for parental responsibility as a step-parent of the child.

There is no provision for parental responsibility to be ordered by the Court in respect of a child of a same-sex couple who are not civil partners.

#### **Assisted Conception**

The Human Fertilisation and Embryology Act 2008 (the "2008 Act") introduced a new concept of parenthood for a mother's female partner in certain circumstances, making equivalent provision to that for opposite sex couples.

The 2008 Act gives guardianship rights to:

1. The civil partner of a woman who carries a child conceived using IVF;
2. The same-sex partner of a woman who carried a child conceived using IVF provided the following conditions are met:
  - i. Both parties have consented in writing to the de facto partner being treated as a parent of any child resulting from that IVF treatment;
  - ii. No such consent has been given to any other person (male or female) to act as legal parent of the child; and
  - iii. the couple is not within prohibited degrees of relationship.

#### **Adoption**

The Adoption and Children Act 2002, as amended, which came into force in December 2005, extended the right to jointly apply for an adoption order to civil partners and to two people of the opposite sex who are living together in "an enduring family relationship". The legislation does not expand on the definition of an enduring family relationship.

The 2008 Act makes provision in relation to parenthood in respect of children born after a surrogacy arrangement, which is intended to put same-sex couples and unmarried opposite sex couples in the same position as married couples.

The view of the House of Lords is of interest. In re G (Adoption: Unmarried Couple),

the courts considered an application by two unmarried applicants who had been living together for over ten years. The couple wished to apply jointly to adopt the biological child of the woman (X) in the relationship, but is unable to. The man to the relationship (Y) was not the biological father of the child (G). The male party wished to adopt the child while allowing the woman to remain the child's legal mother. However, Article 14 of the Adoption (Northern Ireland) Order 1987 provided that an adoption order could only be made for more than one person where the applicants were a married couple. The man and woman claimed that Article 14 of the 1987 Order breached Article 8 and Article 14 of the ECHR. The Court of Appeal in Northern Ireland rejected the applicants' contention that the 1987 Order breached the Human Rights Act, 1998. However, on appeal the House of Lords a 4 to 1 majority stated by virtue of the Human Rights Act, 1998 that the man and woman had a right to apply to adopt the child. Hope L.J noted that where opposite sex unmarried couples were allowed to be considered for adoption, this had to equally apply to same-sex couples. Baroness Hale stated that the primary issue to hand "...is whether the child should be deprived of the opportunity of having two legal parents..." and concluded that "...there is no longer an objective and reasonable justification for the blanket ban on joint adoption by unmarried couples."

In Northern Ireland the law in relation to adoption is currently under consideration.

## **Australia**

### **Guardianship**

Same-sex marriages are not currently permitted under Australian law. However, same-sex couples who can prove that they are in a de facto relationship have most of the same rights as married couples. Furthermore, same-sex couples have access to domestic partnership registration in some states.

The Miscellaneous Acts Amendment (Same-sex Relationships) Act 2008 (the "Same-sex Relationships Act") extended the rights of same-sex couples to provide that both same-sex parents of a child will be legally recognised as a parent. It is also introduced a number of changes to existing legislation to ensure that same-sex parents have most of the same rights and entitlements as opposite-sex parents. Same-sex step-parents will also be recognised where opposite-sex step-parents are currently recognised. The laws apply to families which are intact, as well as families which have separated.

### **Assisted Conception**

The Act amends the Status of Children Act 1996 to extend to same-sex partners of birth mothers parenting rights in relation to children born through assisted conception procedures, provided that the partner has consented to the procedure. This means that to be recognised as parents of the child, the same-sex couple must have chosen to have the baby together as a couple at the time that the child was conceived. The law also applies retrospectively to children already born through assisted conception procedures where consent to the procedure was given.

The Family Law Act 1975 was also amended to provide that the parent-child relationship between the non-biological parent and child in a same-sex union is now legally recognised for the purposes of child support, child maintenance and determining who has parental responsibility for the child, where the child lives and

with whom the child spends time.

### **Adoption**

Certain Australian states allow same-sex couples equal access to adoption procedures.

### **New Zealand**

#### **Guardianship**

Where a parent has a new partner who has been sharing day-to-day care of the parent's child for a year or more, the parent may be able to appoint the new partner as a guardian of the child. If the other biological parent of the child is alive, then both biological parents must make the appointment. The legislation expressly provides that the new partner may be married, in a civil union or in a de facto relationship.

#### **Assisted Conception**

Same-sex couples in New Zealand enjoy similar rights to their counterparts in the UK and Australia. Part 2 of the Status of Children Act 1969, as amended, extends the status of parent to a woman living as a partner of a birth mother in relation to children born through assisted conception procedures, provided that the partner has consented to the procedure. The donor is not recognised as a legal parent in New Zealand law.

### **Adoption**

Under New Zealand adoption law, as governed by the Adoption Act 1955, while it is possible for an adoption order to be made in favour of an individual applicant, (with the exception of a female child being adopted by a male applicant), it is not currently permitted for same-sex couples to adopt a child as a couple, whether they are a civil unioned or a de facto couple. The Adoption Act 1955 allows only married couples to adopt.

### **Canada**

#### **Guardianship**

A same-sex couple in which one party is a biological parent of a child from a previous relationship can choose to have a "step-parent adoption" so that both spouses are parents in law.

#### **Assisted Conception**

In Canada, the province of Quebec has enacted legislation expressly recognising the same-sex partner of the birth mother as a parent. Where a child is born to a couple consisting of two women in a civil union, the spouse of the woman who gives birth to the child is regarded as the other parent of the child under Canadian law and enjoys all the same rights and obligations attributed by Canadian law to fathers of children in so far as they differ from the mother's. This legal status, known as a 'bond of filiation' is not available for a civil union consisting of two men as the law expressly states that any agreement whereby a woman agrees to procreate or carry a child for

another is null and void. The donor of genetic material does not acquire any legal rights in relation to the child.

### **Adoption**

Adoption in Canada is governed by provincial laws. In most provinces, same-sex couples can adopt a child together in the same way as opposite-sex couples. Prohibiting a same-sex couple from adopting on the grounds of sexual identity alone would amount to discrimination in violation of the Canadian Charter of Human Rights and Fundamental Freedoms 1982. This was illustrated in the case of *Re K and B*, (1995) 125 DLR (4th) 653. In that case, the Ontario Court found the Child and Family Services Act 1990 (Ontario) infringed section 15 of the Canadian Charter of Human Rights and Fundamental Freedoms 1982 by not allowing same-sex couples to bring a joint application for adoption. The court modified the Act's definition of spouse to include same-sex couples, thereby permitting same-sex joint applications under the Act. As the result of legislative amendments, same-sex couples may also jointly apply to adopt in other Canadian provinces.

## **Chapter 4: The Responsibilities and Rights of Members of the Extended Family**

### **Overview:**

On the 20th anniversary of the United Nations Convention on the Rights of the Child, LGBT Noise agrees with the Law Reform Commission using the Convention as the benchmark against which to measure any proposals and recommendations. The Commission refers to Articles 5 and 9, among others.

### **Submissions:**

It is submitted that Article 2 of the United Nations Convention on the Rights of the Child is instructive in setting out fundamental principles in respecting the rights of the child and should also be considered. Article 2 reads:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Furthermore, we would submit that consideration should also be given to Article 8 which contains the right of a child to retain its family relations and Article 9 which requires States to ensure that a child is not separated from its parents against her/his will unless it is in the child's best interests as determined by judicial authorities. Should a child be separated from one or both of its parents Article 9 states that the child has a right to maintain personal relations and direct contact with them on a regular basis unless this is contrary to the child's best interests. Under Article 18 CRC States parties are obliged to ensure that parents or guardians as the case may be have the primary responsibility for the upbringing and care of a child.

Mark Bell<sup>12</sup> writes in relation to Article 2 and the European Charter of Fundamental Rights:

*"There are two points to note about this provision. First, it is non-exhaustive - forbidding discrimination of "any kind". This is important because although sexual orientation and gender identity are not explicitly mentioned, these are well-recognised grounds of discrimination (at least within ECHR and EU law) and should be presumed to fall within the scope of this guarantee. Second, it is clear that discrimination on grounds of the sexual orientation or gender identity of the child's parent or guardian should be regarded as incompatible with the Convention.*

*The Charter and UN Convention provide the foundation for a children's policy that takes full account of children with LGBT parents. It is clear that this*

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<sup>12</sup> Mark Bell is Professor of Law at the Centre for European Law and Integration, University of Leicester.

*should be guided by non-discrimination, the best interests of the child and ensuring the right of the child to maintain personal contact with their parent."*

The Charter has been given legal standing by way of the Lisbon Treaty, which provides:

*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

The European Union has also now acceded to the European Convention on Human Rights.

LGBT Noise submits that any proposals for reform of domestic Irish law should take into account the Brussels II Bis regulation. This regulation has direct effect and has been immediately enforceable in all EU member states, with the exception of Denmark, since entering into force. The effect of Brussels II Bis has been summarised by the European Commission's Judicial Atlas in Civil Matters:

*A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.*

*A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. An application for a declaration of enforceability shall be submitted to the court appearing in Finding a court for an application. The appeal against the decision on the application for a declaration of enforceability shall be lodged with the court appearing in the Finding court for an appeal.*

*Judgments on access rights and judgments concerning the return of the child are recognised and enforceable in other Member States, without the need for a declaration of enforceability, provided they are accompanied by a certificate.*

The Irish courts have to date ruled in several cases concerning Brussels II Bis, among other issues. It is clear that the Irish courts may be faced with matters concerning recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility in the context of marriages from Holland, Belgium, Spain, Sweden, Norway, and Portugal. Marriage in these jurisdictions are available equally to same-sex and opposite-sex couples.

It is submitted that if Ireland, through domestic court rulings, recognises and enforces judgements in matrimonial matters, while failing to recognise the marriages to which those judgements relate a logical and legal absurdity will be created. It is submitted that if Ireland refuses to recognise marriages based on the gender of the spouses, this would constitute a breach of its anti-discrimination obligations. It is further submitted that if Ireland does recognise the marriages of persons married under the laws of other EU member states, but does not permit persons domiciled in Ireland to marry or to recognise their marriages from abroad, this could constitute discrimination based on nationality, in breach of Ireland's obligations.

It is also to be remembered that Ireland, together with each of the EU member states, has obligations under the 2004 EU directive on the right to freedom of movement to facilitate the freedom of movement of citizens of the EU, which may include same-sex families.

LGBT Noise submits that account must also be taken of the Good Friday Agreement. The IHRC in its Discussion Document on the Scheme of the Civil Partnership Bill 2008" (Dec 2008) writes:

*"The IHRC recalls that in signing the Belfast/Good Friday Agreement the Irish State, upon assent of the citizens of Ireland, committed itself to ensure that the protection of human rights in the State would be at least as strong as that in Northern Ireland."*

It is possible in Northern Ireland for same-sex couples to enter into a civil partnership under the Civil Partnership Act 2004, and the level of protection provided to the children of those couples, while not ideal, is significantly greater than that which exists in the Republic. Section 196 of the 2004 Act, for example, makes financial provision for children in the event of a breakdown in the relationship. At present no such protections exist in the Republic and even the proposed Civil Partnership Bill 2008 contains no specific financial obligations in relation to the non-biological parent in a same-sex couple. The Northern Ireland Civil Partnership Act 2004 amends the relevant legislation so as to define "a child of the family" to include a child of a marriage or any other child of civil partners where the child is treated as being a child of their family, other than a child placed with the civil partners as foster parents or by voluntary organisations. A step-parent in Northern Ireland is entitled to acquire parental responsibility and Section 199(4) of the Act entitles a civil partner to acquire parental responsibility in the same way.

Although we would strongly argue that Northern Irish legislation is still largely deficient, LGBT Noise submits that while a co-parent in Northern Ireland can acquire parental responsibility and such remains impossible in the Republic, Ireland is failing to honour the commitments made as part of the Good Friday Agreement and as such has an international obligation to amend the existing legislation. This failure to ensure equivalency of rights protection is likely to lead to an increasing number of problems given the number of civil partnerships which are being entered into in Northern Ireland since December 2005 and the fact that many of these involve Irish citizens whose rights are protected on one side of the boarder but not on the other.

### **Recommendations:**

**LGBT Noise** agrees with the Law Reform Commission which "considers that there is probably little to be gained from including a statutory definition of the term *in loco parentis* in the legislative provisions, and that there is in fact a benefit to having a flexible understanding of what amounts to being in *loco parentis*. LGBT Noise submits that it would not be appropriate to include a statutory definition of the term in *loco parentis* in the legislation governing family relationships.

It is submitted that the understanding of what amounts to being in *loco parentis* as "a person who is not the biological parent of a particular child but takes on him or herself parental offices and duties in relation to the child" is sufficient to encompass various forms of family existing in Ireland.

As the law currently stands, there are no provisions in Irish law to extend marriage to include same-sex relationships. Marriage between same-sex couples is expressly prohibited by s.2(2)(e) of the Civil Registration Act, 2004. It is therefore not possible for same-sex partners who are in parental roles to become step-parents through marriage to their partner.

The proposed Civil Partnership Bill 2009 currently makes no provision for children raised by same-sex parents. While the Bill amends certain family law legislation, such amendments are purely technical, rather than substantive, in nature.

Irish legislation - existing and proposed - is silent as to rights and duties concerning children who are parented in a same-sex family setting. While such families exist de facto, they require recognition de jure in order to secure those rights, duties and any protections available to other families.

LGBT Noise agrees with the Commission that the leave stage provided for by section 11B(2) of the Guardianship of Infants Act 1964, as inserted by section 9 of the Children Act 1997, should be removed. As noted in the Consultation Paper, in practice, leave is rarely refused. In addition, in practice, substantive matters are often heard at leave stage.

LGBT Noise agrees that categories of persons who can apply for contact/access should be expanded to include persons with a bona fide interest as is currently provided for by section 37 of the Child Care Act 1991.

LGBT Noise submits that the right to apply for contact/access (or to apply for leave to apply for contact/access) should be extended to include the child. It is submitted that it may then be for the court to decide on the weight to be attached to the child's wishes, depending on age, maturity and any other relevant considerations.

For example, in *R v R* [2008] IEHC 162 (21 May 2008), having considered evidence from a child and a consultant psychologist in a case concerning Brussels II bis and the Hague Convention, Sheehan J stated:

*"I hold that the minor in this case is a ten year old girl, mature for her age who objects to returning to Latvia. On the basis of [consultant psychologist] Mr Hogan's evidence I hold that there are reasonable and coherent grounds why she has come to this view. [...] I take into account her views as a mature 10-year-old. I do not regard them as determinative. In this case the court has had the benefit of having an experienced consultant psychologist, not only report her views but also comment on them. He has said the minor was expressing her own views. [...]"*

*Mr Hogan also described the minor as bright, intelligent and robust. I rely on this evidence.*

*Accordingly, I hold that the objections to return are made out and I further hold that the age and maturity of the minor are such that it is appropriate for the court to take into account those objections."*

Sheehan J also took into account the judgment of the Supreme Court in *B v B* (Child Abduction) [1998] 1 IR 299 and the opinion of Baroness Hale in *Re M* (Abduction: Child's Objections) [2007] EWCA Civ 260, [2007] 3 FCR 631, [2007] 2 FLR 72.

## **Comparative rules regarding the Responsibilities and Rights of Members of the Extended Family**

### **Ontario**

Growing amounts of jurisprudence from other jurisdictions support the proposition that it is becoming increasingly impossible to deny that the best interest of the child principle requires legal recognition and protection of the relationship that exists between a co-parent and the child of their same-sex partner. The Court of Appeal for Ontario has recently recognised that:

*"Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or 'natural' parents. The [relevant legislation], however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide".*

Prior to this judgment, the Ontario Superior Court of Justice held that an Act, which prevented the inclusion of both lesbian parents on the Statement of Live Birth of their child conceived by alternative insemination, was contrary to the Canadian Charter of Rights and Freedoms. The Court stated that:

*"the notion of parentage should be interpreted broadly to include not only biological parents, but also social parents."*

### **South Africa**

The South African Constitutional Court likewise has held unconstitutional a national law that prevented both members of a lesbian couple from being registered as the parents of twins conceived by artificial insemination. In *Du Toit and De Vos v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC) the Constitutional Court also found unconstitutional legislation which restricted joint adoption and guardianship of children to married couples only. The Applicants argued that the relevant provisions violated their rights to equality and dignity and failed to give place the best interests of the child first. The High Court held that the provisions did violate the Constitution and ordered that certain words be read in which would allow for joint adoption and guardianship of children by same-sex life partners. In the Constitutional Court the Court put the difficulties arising from adoption of the children by only person thus:

*"As a result of the current law the applicants cannot jointly adopt the siblings. Although first applicant is not the legally recognised adoptive parent, she is the primary care-giver. She provides the children with their principal source of emotional support within the family and, because of the constraints of the second applicant's professional life, she spends more time with them during week days than does the second applicant. Yet, she has no legal say in matters such as granting doctors permission to give either of the children an injection or the signing of school indemnity forms for school tours or sporting*

*activities. More importantly, in the event of the partnership between herself and the second applicant ending, her claim to custody and guardianship of the children would be at risk."*

It went on to note that

*"... legal conceptions of the family and what constitutes family life should change as social practices and traditions change."*

The Court concluded that:

*"In their current form the impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships and who would otherwise meet the criteria set out in section 18 of the Child Care Act.<sup>20</sup> Their exclusion surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons. Excluding partners in same-sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle enshrined in section 28(2) of the Constitution. It is clear from the evidence in this case that even though persons such as the applicants are suitable to adopt children jointly and provide them with family care, they cannot do so. The impugned provisions of the Child Care Act thus deprive children of the possibility of a loving and stable family life as required by section 28(1)(b) of the Constitution. This is a matter of particular concern given the social reality of the vast number of parentless children in our country. The provisions of the Child Care Act thus fail to accord paramountcy to the best interests of the children and I conclude that, in this regard, sections 17(a) and (c) of the Act are in conflict with section 28(2) of the Constitution."*

The Court also found that the impugned provisions discriminated unfairly against the Applicants on grounds of their sexual orientation and that the failure by the law to recognise the value and worth of the first Applicant as a parent was demeaning and limited her right to dignity. It then confirmed the order of the High Court.