

*Equality Coalition*

***Submission on the Social Welfare  
(Miscellaneous) Bill 2004***

*March 2004*

**The Equality Coalition includes:**

*Amnesty International (Irish Section)*  
*Age and Opportunity, Ireland*  
*Cherish*  
*Community Workers Co-operative*  
*European Anti-Poverty Network (EAPN)*  
*Gay and Lesbian Equality Network (GLEN)*  
*Equality Studies Centre, University College Dublin*  
*Free Legal Advice Centre (FLAC)*  
*Forum for People with Disabilities*  
*Integrating Ireland (Comhlamh)*  
*Irish Council for Civil Liberties (ICCL)*  
*Immigrant Council of Ireland (ICI)*  
*Irish National Organisation for the Unemployed*  
*(INOUE)*  
*Irish Refugee Council (IRC)*  
*Irish Traveller Movement (ITM)*  
*National Lesbian and Gay Federation (NLGF)*  
*National Women's Council of Ireland (NWC)*  
*NEXUS*  
*One Parent Exchange Network*  
*Outhouse*  
*Pavee Point*  
*Treoir*

## ***Contents***

Equality Coalition .....	3
Executive Summary .....	3
1.Introduction .....	4
2. Section 19 of the Social Welfare (Miscellaneous) Bill 2004.....	4
3. Partnership rights in other European jurisdictions.....	5
4. European Convention on Human Rights (ECHR).....	6
5 European Union.....	7

## **Glossary of terms**

<b>EA</b>	Equality Authority
<b>ECHR</b>	European Convention of Human Rights
<b>ECtHR</b>	European Court on Human Rights
<b>ECJ</b>	European Court of Justice
<b>EEA</b>	Employment Equality Act, 1998
<b>ESA</b>	Equal Status Act, 2000
<b>EU</b>	European Union

## *Equality Coalition*

The Equality Coalition is an (alliance of groups and organisations concerned with equality issues). It evolved out of a recognised need to monitor Irish anti-discrimination law, to safeguard the legislation against efforts to roll back or undermine its provisions, and to campaign for the improvement of existing measures. The Equality Coalition has no fixed “membership” list, but comprises non-governmental organisations spanning the various constituencies whose rights are protected by the Employment Equality Act (EEA) 1998 and the Equal Status Act (ESA) 2000. The organisations share the common goal of creating a more equal society and see legislation as a key means of achieving this vision. In that regard we mirror and complement the work of the Equality Coalition in Northern Ireland, which comments in particular on the enforcement of the statutory duty to promote equality under Section 75 of the Northern Ireland Act, 1998. The Equality Coalition recalls that Chapter Six of the Good Friday Agreement requires the Irish Government to “ensure at least equivalent protection of human rights as will prevail in Northern Ireland” and that this obligation extends to all equal protection against discrimination.

## *Executive Summary*

- The amendment to the Social Welfare Bill is discriminatory against gays and lesbians and will affect in particular older couples.
- The amendment would mean that the Irish government is the only EU country to have introduced deliberately discriminatory legislation against lesbian and gays for over a decade.
- This amendment has been included by the Department of Social and Family Affairs to reverse the outcome of a successful Equal Status case.
- The Government has put forward no reasonable justification for this amendment and it is therefore in breach of Article 14 (obligation not to discriminate) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR). The ECHR is now in force.
- Ireland will potentially be in breach of European Union Community Law.
- The Equality Coalition calls on all members of Seanad Éireann to delete section 19 of the Social Welfare (Miscellaneous Bill 2004).

## *1. Introduction*

- 1.1 The Social Welfare (Miscellaneous) Bill 2004 contains discriminatory amendments, which are detrimental to the rights of gays and lesbians and older people. In a deliberate decision to reverse an anti-discrimination case under the Equal Status Act 2000, which was conceded by the Government in September 2003, the Department of Social and Family Affairs has included an amendment to exclude same sex, couples from the definition of 'spouse' or 'couple' for state welfare schemes.<sup>1</sup>
- 1.2 The proposed amendment is not only an attack on gay and lesbian couples, but it is also an attack on the rights of older people. In a regressive move which goes against law and practice in other European jurisdictions, the proposed amendment is contrary to the European Convention on Human Rights and current opinion in the European Parliament. If the proposed amendment remains in the Social Welfare Bill, Ireland will be the only country in Western Europe to enact deliberately discriminatory legislation against same-sex unions in recent years. This would be a disgrace for the Government at anytime, but at a time when it holds the EU presidency, the decision of the Government to discriminate against same sex couples is particularly shameful. The Equality Coalition calls on all members of Seanad Éireann to delete section 19 of the Social Welfare (Miscellaneous Bill 2004).

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<sup>1</sup> The definition will be limited to a married couple and to an opposite sex cohabiting couples

## *2. Section 19 of the Social Welfare (Miscellaneous) Bill 2004*

- 2.1 Section 19 of the Social Welfare (Miscellaneous) Bill 2004 amends the principal social welfare act to restrict the definition of 'spouse' or 'couple' to a married couple and to an opposite sex cohabiting couple for state welfare schemes. In practice, this section will have a huge impact on same-sex partnerships because it extends to all statutory and administrative schemes.
- 2.2 This amendment has been included by the Department of Social and Family Affairs to reverse the outcome of a successful Equal Status case and is a deliberate attempt to discriminate against persons in same-sex couples. There is no justification for discriminating against gay and lesbian couples and the Equality Coalition calls for section 19 to be deleted. The Equality Coalition considers that it can no longer be considered acceptable to have a society where lesbians and gay men are not treated equally.
- 2.3 The Equal Status Act case involved an older same-sex couple where one partner possessed a free travel pass but had been refused one for this partner. Usually both partners in married and cohabiting couples are eligible for the pass when one of them becomes eligible. In settling the case, the Department of Social and Family Affairs accepted that it had unfairly discriminated against the couple on the basis of sexual orientation under the Equal Status Act, 2000.
- 2.4 This amendment would be the third time the current Government has tried to amend Ireland's equality framework, and reverse Equal Status Act decisions to reduce protection for vulnerable categories. The proposed amendment is shameful and also indicates the Government's willingness to change legislation when it does not agree with the outcome or decision from an independent decision-making body.

### 3. Partnership rights in other European jurisdictions

3.1 The proposed amendment in the Social Welfare (Miscellaneous Bill) 2004 is the first time the Irish Government has tried to pass discriminatory legislation against same-sex partnerships. This move goes against an overall trend throughout Europe where the recognition of same-sex couples is part of law, practice and considered necessary in a democratic society. For example, several countries already recognise same-sex partnerships through civil registration or legal marriages: Belgium,<sup>2</sup> Denmark,<sup>3</sup> Finland,<sup>4</sup> Germany,<sup>5</sup> Iceland,<sup>6</sup> the Netherlands,<sup>7</sup> Norway,<sup>8</sup> Portugal,<sup>9</sup> United Kingdom and Sweden.<sup>10</sup> Other countries are currently preparing or deciding on such legislation, including: Croatia, Liechtenstein, Luxembourg, Poland, Switzerland (all federal regions) and the

United Kingdom (UK) (discussed in Section 5 of this document). In light of these developments, the Equality Coalition believes that section 19 goes against an overall trend in other democratic European nations and makes Ireland appear archaic to the international observer.

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<sup>2</sup> Civil registration of partnerships has been permitted since 2000 and legal marriages for same-sex couples since 2003. Both provide protections, responsibilities and benefits.

<sup>3</sup> Since 1989, a full range of protections, responsibilities and benefits have been available to same-sex couples through registered partnerships.

<sup>4</sup> Registered partnerships have been permitted since 2002 in Finland, which grant similar rights and responsibilities as married partners.

<sup>5</sup> In 2000 Germany enacted legislation to recognise life partnerships which provides almost the same protections, responsibilities and benefits as legal marriage.

<sup>6</sup> Since 1996, Iceland has granted almost a full range of protections, responsibilities and benefits of marriage to same sex couples.

<sup>7</sup> Since 2001, same-sex couples can now legally marry in the Netherlands.

<sup>8</sup> In 1993, Norway started granting a full range of protections, responsibilities and benefits of marriage to same-sex couples.

<sup>9</sup> Portugal passed legislation in 2001 to grant same-sex and heterosexual couples living in *de facto* unions for more than two years, similar benefits afforded to legal marriages.

<sup>10</sup> Since 1994, Sweden has been granting the full range of protections, responsibilities of marriage to same-sex couples through registered partnerships. Sweden is also currently considering a proposal to replace partnership law with full marriage.

#### 4. European Convention on Human Rights (ECHR)

4.1 The European Convention on Human Rights (ECHR) has finally been given further effect in Irish law through the ECHR Act 2003.<sup>11</sup> The Convention affords protection to all individuals within the jurisdiction of contracting states. Article 14 protects against discrimination but it is also parasitic right, in that the obligation not to discriminate relates only to the rights and freedoms located in the Convention. It reads:

*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 Equality Coalition believes the Government's actions are in violation of the Convention.

4.2 Article 8 of the Convention provides that everyone has a right to respect for private and family life. In a seminal case, *Karner v. Austria*,<sup>12</sup> the European Court of Human Rights (ECtHR) ruled that discrimination suffered by same-sex couples was illegal. Siegmund Karner lived in an apartment in Vienna with his male partner who had started renting the apartment a year earlier. His partner died and left the lease on the apartment to Karner. The landlord tried to terminate his residency and ignore Austria's domestic legislation protecting families renting property, which allows persons living as life partners to leave rental leases to each other. When the case went to the Vienna Regional Court, it decided the legislation in question extended to homosexuals. The

Austrian Supreme Court ruled in favour of the landlord in 1996 and decided that the legislature had not intended to include persons in same-sex relationships when Austria's legislation on tenancy rights was originally drafted in 1974.

4.3 When the case was decided in Strassbourg last year, the ECtHR ruled there had been a breach of Article 8 together with Article 14. It found that the provision at issue protected persons who had been living together for a long time without being married against sudden homelessness and applied to heterosexuals as well as homosexuals. In its judgement, the Court stated that:

*... (F)or the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Furthermore, very weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.*

The Government has put forward no reasonable justification for section 19. Therefore, it is currently incompatible with the ECHR and the Equality Coalition urges all members of Seanad Éireann to delete it.

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<sup>11</sup> The ECHR Act came into force on 31 December 2003.

<sup>12</sup> *Karner v. Austria*, July 2003.

## 5 European Union

- 5.1 In 1994, the European Parliament published a *Resolution on equal rights for homosexuals and lesbians in the EC*. This resolution called on all EU Member States to provide legal protection from discrimination to lesbians and gay men and to introduce partnership registration schemes. However, it was not until the Amsterdam Treaty in 1997 that a more inclusive notion of equality was set down. Article 13 provides that the Council of the European Union must take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- 5.2 In *Grant v. South West Trains*, the European Court of Justice (ECJ) declared that EU sex equality legislation did not protect persons against discrimination on the grounds of sexual orientation. Lisa Grant worked for South West Trains in the UK, which provided free travel for employees' spouses, and unmarried cohabitants who had been together for over two years. Even though Grant had been living with her female partner for many years, her partner was denied free travel. Grant claimed to be discriminated against because of her sex i.e. if she had been a man, she would have applied for the benefits and received them. However, the ECJ ruled against Grant and stated that it was a case of discrimination on the basis of sexual orientation and not sex/gender. The Court also made clear that the present state of law within the Community did not provide equivalent rights/protections to heterosexual couples/unions and same-sex couples.

- 5.3 In the case of *K.B. v National Health Service Pensions Agency, Secretary of State for Health* from January 2004, the ECJ distinguished the *Grant* case and indicated a development in EU law with respect to protection from discrimination. In that case, the ECJ ruled that UK law which prohibited a transsexual from marrying and therefore excluded that person from being part of a married couple and hence benefiting from the pension rights of her partner, was contrary to Article 141 EC. The ECJ relied heavily on the fact that the UK law also contravened the ECHR. The amendment which would deliberate exclude a lesbian or gay person from ever being part of a couple for the purpose of social welfare provisions, would stand to be assessed under this jurisprudence.
- 5.4 Indeed in the UK several important developments have occurred since the *Grant* case. In 2003, the UK Government then produced a consultation document proposing a scheme for the registration of same-sex couples.<sup>13</sup> A similar consultation is ongoing in Northern Ireland and the Scottish Executive also completed one for Scotland. The Queen spoke of legal recognition for same-sex partnerships in England and Wales in her annual televised speech in December 2003. Furthermore, the European Parliament voted in early March 2004 to widen the definition of "family" to simplify how lesbian and gay Europeans and their families can move and live in the EU. While the new Directive only applies to countries that recognise same-sex partnerships, it indicates an overall move and acceptance that gays and lesbians should be afforded full rights.

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<sup>13</sup> UK Government (2003) *Civil Partnership: A framework for the legal recognition of same-sex couples*, Government Stationary Office.

5.5 The Equality Coalition is critical of the Government's failure to take account of these developments particularly at a time when Ireland holds the European Presidency. Ireland is completely out of step with developments throughout Europe and soon with the UK. Ireland is in breach of the ECHR and potentially EU Community law.