EQUALITY NOW
for Lesbians and Gay men

CONTENTS

PREFACE

Lesbians and gay men in this country are actively struggling for their basic human rights, both to equal respect as persons and to the opportunity to live and work as freely and openly as any other citizen, without encountering prejudicial discrimination.

This claim to equality has met with irrational, prejudiced opposition. The most infamous opposition has come from a majority of the Supreme Court, whose decision is regularly invoked by those who oppose reform. However, the decision of the European Court of Human Rights in a case brought by Senator David Norris authoritatively restates that respect for the right of lesbians and gay men to sexual privacy and intimate association is a fundamental human rights obligation which Ireland is bound to meet.

At the time of writing, the Government has yet to say how it intends to meet this obligation. During the 1989 General Election three gay candidates stood for election to signify, among other things, that the issue of equality for Ireland's largest minority, lesbians and gay men, deserved greater priority on the political agenda. Three other advances are worthy of mention here. Firstly, the Criminal Law (Rape) (Amendment) Bill 1988 defines sexual offences in a gender-neutral way and proposes the repeal of s.62 of the Offences Against the Person Act 1861 in respect of indecent assault. The Prohibition of Incitement to Hatred Act 1989 includes "sexual orientation" among its protected statuses. Although the ICCL opposes the Act on the ground that it violates freedom of expression, we view the inclusion of "sexual orientation" and "travellers" as a positive thing. Finally, the Law Reform Commission in 1989 supported the principle that homosexual conduct and heterosexual conduct should be put on an equal legal footing.

The time is therefore surely ripe for a contribution to the debate by an independent, broad-based civil liberties organisation such as the Irish Council for Civil Liberties. This Report is the work of the ICCL Working Party on Lesbian and Gay Rights. In June 1988, the Annual General Meeting of the ICCL authorised the ICCL Executive to name a Working Party for the purpose of elaborating our civil liberties policy in what would also be a campaigning document. The Working Party which completed this Report included: Ursula Barry, Tom Cooney, Aideen McCabe, Chris Robson and Kieran Rose. The Council gladly acknowledges its debt of gratitude to them for their unstinting work.

The Working Party relied on an extensive group of people, who critiqued successive drafts of the work-in-progress on the basis of their own knowledge and research experience. The ICCL would also like to thank all those who generously contributed to the financing of this Report. The ICCL was extremely fortunate to have the invaluable benefit of Eadaoin Ní Chléirigh's creativity, skills and experience with regard to designing and publishing the Report. We owe thanks to Brian Grimson who read the proofs with the utmost care. The ICCL alone is responsible for any errors in the text. We acknowledge our more diffuse debts to all those who gave us advice, insights and support.

This case for equal treatment of lesbians and gay men has a special urgency. In an effort barely to meet its obligations under the European Convention of Human Rights, the Government might be tempted to adopt the current British approach. To transplant the British Sexual Offences Act 1967 - or a more restrictive version of it - to this country, would be to transplant a grotesque and harsh injustice and to make an absurd mockery of reform. The 1967 Act has not affirmed for lesbians and gay men an equal place in society. For example, it makes it a crime for gay lovers to make love in a private home if more than two persons are present; it does not apply to the army or navy; it fails to protect lesbian or gay affectionate expressions in a public place; it unjustifiably sets the age of consent at 21 years; and because it encourages unethical and corrupt police methods in order to criminalise gays, it has aggravated police harassment of gays and lesbians, with the result that since the Act came into force convictions of gay people have quadrupled in Great Britain.

The Irish Council for Civil Liberties firmly holds that lesbians and gay men have an inviolable human right to equality of treatment. Unequivocally, we claim that homosexuality is a normal variation in the range of diverse human sexualities. Unconditionally, we say that the law on homosexual behaviour should be placed on the same basis as the law relating to heterosexual behaviour. In plainer terms the age of consent for homosexual men and women should be the same for heterosexual men and women. There are no social interests having a rational basis overriding the claims of the lesbian and gay minorities to equal respect. Current law debases both its victims and this

state, for it tramples on the fundamentals of genuinely egalitarian democracy. We call on Government and lawmakers of all parties not to duck this urgent issue. To those politicians who reflexively resist the case for lesbian and gay equality, we point out that unjust policies never make good law.

Tom Cooney
Chairperson, Irish Council for Civil Liberties.

January 1990.

INTRODUCTION

Chapter One

What is the proper and just relation between the individual and the state? In this Report, we take the approach that each adult person is entitled to equal respect as a rational autonomous agent capable of forming and acting upon an intelligent conception of how to live his or her life. On this view, each person has a right to the greatest equal liberty compatible with a like liberty for all. This principle supports the noble idea that each person has a civil liberty to love.

The principle, we believe, requires the state to show tolerance in regard to diverse sexualities and sexual activities. It would justify the state in dropping all sexual offences that do not satisfy the principle of equal respect, and in enacting anti-discrimination legislation to deal with the different invidious discriminations which lesbians and gay men meet in workaday life.

We should make it clear at the outset that we are not putting forward completely new ideas or proposing solutions previously unthought of in an Irish context. Indeed we are well aware that we have in places adopted or modified ideas worked out by the many Irish lesbians and gay men who have argued and campaigned on these issues for at least the last fifteen years.

In a civil liberties Report that examines prejudice against lesbians and gay men, we gladly acknowledge the work of the many lesbian and gay organisations founded since 1974 which have succeeded in spite of hostility. These include the Irish Gay Rights Movement, the National Gay Federation, the Lesbian and Gay Collectives, the Campaign for Homosexual Law Reform, and the advice services, Lesbian Line, Gay Switchboard, Gay Health Action, and Gay Information Cork. That these advice services have between them dealt with some 40,000 calls shows their essential role and gives the lie to the notion that somehow in Ireland the proportion of lesbians and gay men is less than elsewhere in the world. Other initiatives have included national conferences, and a wide range of magazines, newsletters and books. Thus, there is a community in existence within our larger society, which despite reverses, has established its own infrastructure and support services in areas of real need, and it is a community, we recognise, that fosters equal concern and respect for the individuality of its members.

CIVIL LIBERTIES PERSPECTIVE

Since we claim that lesbians and gay men suffer grave injustice in this state, it seems useful at this stage to outline the values on which this view is based. To view individuals as having human rights is to accept two assumptions: firstly, that all individuals have a capacity for personal autonomy; and secondly, that all deserve equal concern and respect. Human rights express and embody these principles. Human rights may be positive in providing a claim to society's affirmative action, or negative in justifying a claim to the state's tolerance or forbearance. In this Report our chief concern is with the negative rights, or liberties, of lesbians and gay men to be free from unjust state intrusion into their private sexual lives, and to be free from legal and social prejudice in respect of their sexual orientation.

Personal autonomy is an assumption about human capacities, developed or undeveloped. Individuals have a range of capacities that enable them to create, act upon and revise plans of action which aim at a life they, subjectively, consider worthwhile or virtuous. Such capacities encompass thought, expression, work and creativity, caring, sexual love, and so on. Moreover, individuals can prioritise their personal aims and desires. They can regularise satisfaction of their basic needs or wants such as food and education. They can delay satisfying other desires, such as sex, or cultivate under-developed capacities, such as love. Autonomy enables individuals to call their lives their own. Developing the capacity to individuate oneself is, from early childhood on, the basic task of becoming an independent person.

The capacity for autonomy requires that people be treated as moral equals. Autonomy constitutes what it is to be a person and since all are equal in their right to personhood, all are entitled to equal concern and respect. This right to

equal concern and respect as autonomous persons underpins notions of justice and civil liberties. To take civil liberties seriously involves evaluating how far laws, institutions, and social practices assure each citizen equal concern and respect.

Of course, people differ in effective autonomy. Justice does not rest on actual autonomy, but on the capacity for it. Children are not autonomous, but have an, as yet undeveloped, capacity for autonomy. Commitment to justice requires that we facilitate their growth to autonomy. In this regard, the state properly protects children against sexual exploitation by adults since children cannot, it is reasonable to assume, give informed consent to sexual activity with an adult. Thus, child prostitution in any form should be the target of the criminal law. Similarly, it is defensible for the state to protect individuals against activity, including sexual activity (by, for example, enacting laws providing for the crime of rape), which impairs their autonomy. But these matters do not concern us here.

We are concerned with the right of the adult to equal sexual liberty, regardless of his or her sexual orientation, compatible with a similar liberty for all others. In the third and fourth chapters in particular, we will make the point that the claim of lesbians and gay men to equal sexual liberty is a fundamental civil liberties issue.

STRUCTURE OF REPORT

We have decided to produce a reasoned elaboration of our case for reform because the urgency and sensitivity of the issue of lesbian and gay rights seems to require more than a simple statement of our position. We are convinced that constructive public debate cannot be effectively maintained without providing some understanding of the discrimination against lesbians and gay men. This background appears very necessary to create greater awareness of past and current attitudes to lesbians and gay men, to show the basis for traditional prejudices and misconceptions, and to open the way for a new and much fairer approach to policy-making in the area. As a result, the final form of our Report takes a position somewhere between that of a research document and a practical, campaign-oriented work. We have tried to harmonise the best elements of both approaches.

Chapter one

The nature of the Report has led us to divide it along the following lines: Confronting Prejudice; Prejudice in the Supreme Court of Ireland; A European Human Rights Advance; The Need for an Anti-Discrimination Law; Discrimination against Young Lesbians and Gay Men; and Equality - A matter of Principle.

Chapter two

Traditionally, homosexuality has been portrayed as the perverse negative of heterosexuality which has been represented as the only proper, natural, moral, healthy, socially beneficial form of sexuality. The second chapter indicates the pertinent ways - in the areas of religion, medicine, social thought, and economic forces - in which we have been almost programmed to consider heterosexuality the norm. With the help of contemporary research, an effort is made to show that the various misconceptions about homosexual people are not based in fact. The basic theme of the chapter is that the existence of prejudice against same-sex erotic preferences or orientation must be recognised as a problem for society as a whole similar to the problem of prejudice on grounds of religion, gender, skin colour, or ethnic background. Once this is recognised as the basic context, our community may then be able to formulate appropriate social, political, and legal responses to the question of prejudice and discrimination. This chapter counteracts the misinformation and degrading stereotypes which are often used in discussions about reform, and it should help to detoxify public debate.

Chapter three

The third chapter deals with the law criminalising gay sexual activity. Its primary purpose is to document and analyse the breathtakingly irrational attempt by the High Court and a majority of Supreme Court Judges, in Senator David Norris's constitutional challenge of 1980, to codify heterosexism and homophobia into our constitutional case law and to undermine the authentic potential of constitutional principles of equality, sexual privacy, intimate association and self-expression as protections for lesbians and gay men. It might be thought that there is little point in reviewing the case since the mentioned constitutional doctrines were of no avail 1 to the plaintiff. However, we believe it is important not to concede the higher constitutional ground to the majority of judges in the case since the doctrines were - and still are - open to a more coherent and liberal interpretation. In our view, the majority simply got it wrong. It is also important to show how the court ignored solid evidence in favour of the plaintiff's case and manipulated the wholly unfounded connotations of unnaturalness, disease, and moral degeneracy - considered in the second chapter - into reasons to deny equal justice to homosexuals. We also argue that the *Norris* decision in the Irish courts was less an instance of impartial decision- making and more a case of lawmaking by prejudice. For this reason it should be put to one side in the discussion of how we should meet our obligations under the European Convention of Human Rights.

Chapter four

Now that Senator Norris has won his case before the European Court of Human Rights, it is clear that some politicians and pressure groups consider that the Supreme Court's decision would justify the Oireachtas in either ignoring Ireland's obligations under the European Convention of Human Rights or enacting restrictive legal provisions regarding the sexual autonomy of lesbians and gay men. This chapter also points out that the European Court of Human Rights, which shares with us the same democratic constitutional concepts, has interpreted those concepts to guarantee a right on sexual privacy or autonomy to lesbians and gay men. Finally, the chapter states the ICCL position with regard to reforming the law of sexual offences. Clearly, the European Court leaves Ireland with a margin of discretion as to how it will meet its human rights obligations in respect of lesbians and gay men. Our unequivocal claim is that the principle of equal treatment should be applied and that there should be a common age of consent for homosexuals and heterosexuals alike.

Chapter five

Chapter five provides information on the legally and socially practised hostility to lesbians and gay men in relation to workaday activities. They are often forced to repress their identities. Their workaday activities of child-care, employment, church involvement, socialising, falling in love are all undertaken with a sense of risk and danger from a potentially destructive environment. Against this, the ICCL embraces the merits of an approach based on equality. It accepts the legitimacy of many historically denied sexual practices. It supports the maximisation of the possibilities of non-exploitative freedom of sexual choice. It rejects the dangerous allure of a sexual tradition based on prejudice and hierarchy. The crux of this chapter is to appeal for an anti-discrimination statute which would outlaw and give legal remedies against discrimination based on sexual orientation. The general lines of an appropriate anti- discrimination law are contained in Appendix One.

Chapter six

Chapter six examines the ways in which the state, particularly in the area of schooling and services for young people, fails to facilitate young homosexual persons to grow in self-esteem and autonomy. In particular, it highlights the various forces in society which seek to regiment sexuality according to a heterosexist model and actively to impair the young person's process of growing up.

Appendix One

The abstract egalitarian principle that people must be treated as equals is the foundational principle of democracy. The problem is that in responding to people's tastes, preferences and choices, legislators may sometimes corrupt their policies by giving effect to political preferences based on prejudice. The principle of equality justifies the claim that preferences that are rooted in some form of prejudice against one group can never count in favour of a policy that includes the disadvantage of that group. In this society there are many groups who are treated differently, and the basis of the different treatment lies in prejudice. Groups of people whose interests have not always been taken into account in the proper way include travellers, those having health disabilities, religious minorities, women, as well as lesbians and gay men. The Elements of a Model Equality (Anti-Discrimination) Bill contained in Appendix One seek to show how greater legal protection can be extended to these groups.

Concluding comment

The agenda put forward in this Report is not an easy one. But it is only by helping to shape it will we finally escape a sexual tradition which violates the constitutive principle of equality. An open mind will see that no public interest justifies our own sexual apartheid. However, it must be said that there are irrational forces that affect the outcome of any debate on public policy and that are sometimes stronger than rational discussion or science. How often and how painstakingly the pernicious misconceptions concerning lesbians and gay men have to be tackled with the corrective power of rational argument it is difficult to say. But it is vitally important to do just this. It is the very task we now begin in the next chapter.

CONFRONTING PREJUDICE

Chapter two

PREJUDICE AND DISCRIMINATION

The roots of prejudice and discrimination against lesbians and gay men lie in the rigid way male and female roles are treated in our society. Fear and hostility are directed against those who do not conform to the prevailing image of "being a man" or "being a woman." From their earliest age, children are narrowly channelled into types of behaviour, play and dress considered "appropriate" to their gender. Any deviation is treated with abuse and ridicule. A key aspect of this is discrimination against women combined with powerful sexist attitudes which are deeply ingrained in our culture. In challenging such a social system with its restrictive and subordinate role for women, the "women's movement" found itself in immediate confrontation with both the dominant value system and traditional institutions such as the Catholic Church.

The promotion of heterosexuality as the only acceptable form of sexual expression (i.e., heterosexism) is directly linked to the wider relationship between the sexes in our society. The family, based on heterosexual marriage, is propagated and represented as the only valid social unit. Diverse sexual expression, experiencing sex as pleasure and in fact any attempt to separate sexuality and reproduction are perceived as a threat to social order. This was reflected in the long drawn-out and bitter struggle which eventually resulted in the "legalisation" of contraception in 1979. Roman Catholic morality in Ireland has always emphasised a "single morality," leaving little room for individual expression, the rights of minorities or different beliefs and lifestyles. Unfortunately this outlook is reflected in our laws and in the policies of social institutions, particularly education and health services, which for the most part, deny the very existence of lesbians and gay men in this society.

SECOND CLASS CITIZENSHIP

Gay men and lesbians have long been a discrete minority facing widespread social prejudice and institutionalised discrimination. Despite the existence of constitutional guarantees of equality and privacy, homosexual acts are criminalised and carry severe penalties under 19th Century legislation. In Ireland, there are no laws to protect lesbians and gay men against discrimination. Criminalisation means that gay men and lesbians are vulnerable to wide-ranging prejudices and inequalities affecting every area of life.

In this society inequality affects many sections of the population and various groups are denied rights and suffer discrimination. Travellers, for example, are subjected to economic deprivation as well as widespread abuse and prejudice. Lesbians and gay men because of their sexual orientation are denied rights and liberties which heterosexuals take for granted. Those who declare their sexuality openly can find employment very difficult to come by and opportunities very restricted. They can be dismissed from their jobs, restricted in their professions as doctors, teachers and lawyers or deemed untrustworthy as civil servants particularly where official secrets are involved. As parents, they can have their children taken from them in custody proceedings. As caring adults, they cannot adopt children. As students, they have been denied the use of educational facilities and their organisations have been denied recognition. As tenants, they can be refused lettings or face eviction. As patrons, requiring food, shelter or recreation they are not guaranteed equal access to public accommodation. As lovers and committed partners they face attack where they display affection in public and, like many heterosexuals living together, cannot legitimise their unions under law.

WIDESPREAD SOCIAL PREJUDICE

Together with such institutionalised discrimination, lesbians and gays are the target of pervasive social prejudice often amounting to open hostility or physical assault. Fr. Michéal Mac Gréil defines prejudice as "a hostile negative attitude or set of attitudes to a person or persons, perceived to belong to a group or category, and presumed to possess negative qualities ascribed to that group or category".[1]

Such attitudes tend to be based on misinformation, fear, intolerance or specific ideologies. The strength of the prejudice against lesbians and gay men in this society is directly linked to the criminal status ascribed to homosexual acts under the law, the hostility expressed towards homosexuality in much Christian, and particularly Catholic church teachings and much unfounded irrational fear. Misinformation is also prevalent as evidenced in the attempts to categorise AIDS as " a gay plague" and in negative myths associating homosexuality with sexual assault, particularly on children. In reality, statistical evidence indicates that the highest rate of sexual assault is among adult male heterosexuals. It is important to point out that prejudice against lesbians and gay men is propagated by a minority in this society. As early as 1972-73, Mac Gréil's study of attitudes among Dublin adults showed that 45% favoured the decriminalisation of homosexual acts and a further 15% were unsure.

The ideology which underlies prejudice and discrimination against gay men and lesbians asserts always that heterosexuality is "normal" or "natural" and homosexuality and lesbianism are "abnormal" or "perverted". Heterosexual relations are assumed to be superior in a manner similar to other areas of prejudice such as racism or

sexism where the superiority of one race or one sex is assumed. The term heterosexism will be unfamiliar to many, because it is fairly new. It has been coined to describe an attitude that categorises, denies, ignores and then dismisses a whole group of people by assuming that no one can naturally be homosexual but must be a failed or corrupted heterosexual.

Homosexuality as sin

Anti-gay arguments are widespread and come in all shapes and guises. Perhaps the most common are that gay men and lesbians are "unnatural", that they are mentally ill, hormonally imbalanced, a threat to society and condemned by the Bible. In fact, cross-cultural studies reveal that homosexuality is widely practised in a variety of societies across the world[2]. Anthropological and historical evidence shows that homosexuality has been common in western societies since before the Christian era. J. Boswell suggests that there was a relatively tolerant attitude in the first thousand years of Christianity and that it was not until the time of St. Thomas Aquinas in the 13th Century that homosexuality was condemned as "unnatural" heading a hierarchy of sex-related sin, including non-procreative and non-marital sexual conduct.[3]

This religious view does not hold that there is lesbian or gay identity but focuses primarily upon homosexual acts and judges them wrong and sinful. The basic idea behind this Christian-inspired view was and is that all non-procreative or non-marital sexual acts are wrong and in certain circumstances warrant the attention of the criminal law. A characteristic feature, historically speaking, of this view was that it did not label those who had same-sex relationships with a homosexual identity so long as they repented of their sinful acts. This moral code did not distinguish sharply between same-sex activity and other forms of sin; sodomy "represented a capacity for sin inherent in everyone". [4]

The notion that non-procreative or non-marital sexual acts are sinful evolved in the context of a more-or-less homogeneous society to which diversity and freedom were not intuitively acceptable values and in which the family was the basic religious, social and economic unit. In such a society the fact of diverse sexualities and sexual desires was not naturally obvious. More obvious was the idea that all persons were equally capable of sinful acts that contravened an authoritatively declared moral orthodoxy. Significantly, lesbian sexual acts were not explicitly condemned. "Lesbians were censured by silence: sexual acts between two women were unimaginable". [5] This attitude reflected the assumption that women were asexual and that the deliberate spilling of human seed outside of the marital sexual act was a grave wrong. This approach to lesbian and gay sexualities exerted a considerable influence on the majority of the judges in the Supreme Court when they rejected Senator David Norris's claim that gay men have a right of sexual privacy under the Irish Constitution.[6]

Homosexuality as illness

What was then a sin, later became a crime but more recently has been defined as an illness. On this view, homosexuality is considered to be a symptom of illness. In Foucault's opinion, the birth of the "psychological, psychiatric, medical category of homosexuality" was in the 1870s; the medical and psychiatric professions invented the label "homosexuality," and took it for granted that it described an illness. Much energy was devoted to finding "cures" to the disease.[7] The concept of homosexual persons as a distinct category of people encouraged differentiation among various socially disapproved sexual acts. Psychiatric and medical ideas neatly labelled persons who had same-sex desires as "homosexuals" and cast a shadow of morbidity over gay activity and gay relationships. The vast majority of health professionals no longer consider homosexuality to be a disorder. The American Psychiatric Association removed homosexuality from its list of mental disorders in 1973 stating that "homosexuality *per se* implies no impairment in judgement, stability, reliability or general social or vocational capabilities"[8]. One series of studies failed in an attempt to establish that homosexual people are characterised by abnormal hormone levels or other abnormal physiological characteristics[8]. Most importantly, the World Health Organisation (WHO) in 1988 decided to remove homosexuality from the recognised categories of disorder and indeed has now adopted resolutions encouraging member states to remove legal prohibitions that inhibit community health programmes.

Homosexuality as the negative of heterosexuality

Sexuality is a negative social construct. There is validity in J. Katz's view that "(a)ll homosexuality is situational, influenced and given meaning and character by its location in time and social space."[10] The gender of those to whom a person is attracted becomes important only if society attaches importance to it. As we said above, not all societies have condemned same-sex relationships, and in some societies forms of same-sex conduct have been acceptable. Lesbians and gay men emerge as a social and political minority only in the context of a society which is dominated by heterosexist attitudes and practices. The assumption that heterosexuality is the only proper model of human sexuality and the doctrinaire scripting of gender roles caused the label "homosexual" to be imposed upon those who have same-sex desires as a stigmatising mark of difference. The crucial move in this labelling is to create a

difference by forcing persons to choose exclusively between "deviant" same-sex desires and "normal" opposite-sex desires as society defines those desires.

Advocates of equality for lesbians and gay men reject the view that homosexuality is wrong or sick or dangerous. The concern of lesbians and gay men to combat the prejudices and practices which have attempted to subjugate the right of sexual choice gave birth to the lesbian and gay rights movement[11]. The women's movement helped this development with their fundamental assault on ideologies and practices which have denominated them as inferior by nature and attempted to regiment them according to sexual boundaries and gender roles. Also influential, particularly during the 1960s and 1970s was the related matter of increased candour about and weakening taboos in regard to sexuality.

With respect to the politics of sexuality, lesbians and gay men - though it would be a serious mistake to assume that the histories, experiences, and beliefs of all members of the two groups are identical - to a large extent view themselves as a coherent minority group sharing the struggle for equality. This is not to say that there is an essential strait-jacketing orthodoxy in either of the two communities. There is a rich diversity of social and political life within the communities coloured by such basic factors as political vision, class, education, employment, domestic or family life, and so on. The driving political concern of the lesbian and gay rights movement, however, is rationally to oppose social prejudice, to struggle for equal civil liberties, and to affirm and support a culture of positive sexual attitudes, sexual choice, and personal and political self-esteem. It is important to keep clearly in mind that while lesbians and gay men "undoubtedly constitute a constituency of shared interests in relation to the workings of police, state and other institutions of power", this "does not imply any essential unity to homosexual desire as such"[12]. It is fundamentally the "diversity of human sexuality in all its variant forms" which lesbian and gay politics bring to the fore, and it is precisely "this question of sexual choice which is foregrounded most directly by homosexuality…[13]". The dominant ideology regarding sexuality deploys irrational prejudices (usually called homophobia), legal coercion, ideas of nature, religion, social harm and illness all to reinforce the notion that heterosexuality is the only proper form of sexuality.

Heterosexism fears lesbian and gay equality because it threatens to dissolve rigid heterosexist categories of proper forms of sexual desire and gender roles. It seeks to do this by portraying lesbians and gay men as 'the abject' inhabiting a psychic domain of unnamed horror, terror and loss of self-hood but particularly by making heterosexuality compulsory in society[14]. Attempts to enforce heterosexuality - compulsory heterosexuality - are a violation of human rights and self-hood, and must be challenged with as much determination as is used to challenge other forms of oppression". Prejudice against lesbians and gay men is more than a question of attitudes, for it tends to be reinforced by a system of power: heterosexuality holds almost an exclusive dominance within the media and the educational system, within religious practices and wherever images of sexuality appear. Stereotypes of lesbians and gay men abound although most people would say that they don't personally know any lesbians or gay men. The reality is that lesbians and gay men are probably the largest and yet the most hidden of all minorities in this country and that despite the false myths, lesbians and gay men are in every social class and every part of the country.

Hostility towards lesbianism is particularly intense. Laws which criminalise homosexual acts do not generally mention lesbianism not because discrimination is less severe but because - as we said earlier - the legislators refused even to recognise its existence. Lesbians face a form of double prejudice: as women challenging the dominant male order and as lesbians taking on the heterosexual establishment. This makes them particularly vulnerable to physical assault and, where they have children, they live in constant fear of being declared 'unfit' mothers. Significant numbers of gay men and lesbians in this country have children, many living in fear that their sexual orientation will be discovered or that their children will suffer at school or in the community from anti-gay attitudes. Anxiety associated with rearing children in an atmosphere hostile to gay men and lesbians is high as children themselves will often reflect the prevailing prejudice and negative attitudes towards gays. Dealing with doctors, teachers, social workers and all kinds of community organisations is fraught with apprehension.

The pain experienced as a result of rifts with family and the wider community is exacerbated within the Catholic church, where many attempt to hold onto their religious beliefs and practices despite its generally condemnatory attitude. Wider social isolation is particularly acute in circumstances of illness, accidents or bereavement when because of the lack of recognition given to lesbian and gay relationships, even lifelong partners may find themselves outside the social expressions of grief and loss. At another level, the usual practice of transferring pensions, life assurance and other benefits is denied as lesbian and gay relationships (as well as many heterosexual couples) have no status under the law.

HOMOPHOBIA AND HETEROSEXISM

It is important to keep in mind that homophobia and heterosexism are social constructions while at the same time stressing the responsibility each individual has to shed prejudice against lesbians and gay men. The word

'homophobia' has been interpreted in a sense which suggests individual pathology, as though it were a mental illness arising from and expressing fear and loathing of same-sex desires and behaviour.

Dr. Charles Weinberg claims that that anti-homosexual attitudes and behaviour, i.e. 'homophobia', make up a debilitating personality disorder. He said that he 'would never consider a patient healthy unless he had overcome his prejudice against homosexuality'[16]. On an analogy with more widely known phobias (fears), such as claustrophobia which prevents the sufferer from entering enclosed spaces, he suggests that homophobia, too, restricts the sufferer's range of possibilities. That is particularly so, according to Weinberg, in relationships between men, because homophobic reactions were typically directed by men towards other men. By creating fears of being "womanish" and passive, homophobia limited the development of one's personality. By imposing a taboo on all but the most abrupt and brusque physical contact between men, it denied to men the closeness, fondness and tenderness that women could experience together.

Weinberg puts forward five possible motives for the homophobic attitude. He first mentions the religious motive which he thinks springs from the generally negative attitude of Judaoe-Christianity to sexuality and pleasure. This factor is not enough on its own, he says. A second factor is fear of one's own homosexual desires. In such a person, an open and tolerant approach to the issue of homosexuality threatens the defences they have built up over time against same-sex desire and affection. Again he considers this factor on its own insufficient.

The third motive concerns the apparent devaluation of masculinity which the gay man personifies to the homophobic person. The heterosexual man who is insecure about his own masculinity - a fear aggravated by the feminist challenge to traditional male dominance - can be further threatened by gay men who seemingly find such a highly-valued attribute unimportant and irrelevant and also by gay men who deliberately set out to show that being gay is wholly compatible with traditionally valued male attributes. Allied to this concern, he believes, is an envy of the less burdensome life gay men appear to have. Gay men can, this prejudice runs, enjoy sex without the responsibility of courtship, marriage, a family and reproduction of the species.

The fourth of the motives relates to the threat that gay men are seen to pose to the dominant values of society. In particular gay men are considered to be a threat to traditional family life and as having abdicated the male obligation to transmit traditional values through the medium of the family. A fifth is an unwillingness to accept that someone should be able to live with the knowledge that they are not going to propagate children and leave them behind in one's own image, as it were.

This approach is not entirely satisfactory. It is rather short-sighted to see the problems of minority persecution as the result of thwarted personality types, though undoubtedly that aspect has its place in an analysis of anti-homosexual prejudice. Fundamentally, such prejudice involves 'the social generation of a problem which subsequently gets justified through a learned ideology'. To view homophobia simply in terms of personality disorder is to view prejudice as a problem of individual pathology or mental illness, rather than of social construction of maligned minority groups.

In order to understand homophobia, it is necessary to place the phenomenon within its historical and social context. As Jeffrey Weeks points out, attitudes to homosexuality "are inextricably linked to wider questions: of the function of the family, the evolution of gender roles, and of attitudes to sexuality generally…'official' and popular responses to homosexuality and the homosexual can be taken as crucial indicators of wider notions of sexuality"[17].

Moreover, the approach excludes lesbians from the account since homophobia in the sense employed by Weinberg implies fear of male homosexuality usually with respect to the threat it poses, it is assumed, to masculinity. However, misogyny has been an active feature of sexual injustice against lesbians as well as informing prejudice against gay men.

Finally, to suggest that anti-homosexual attitudes, feelings and responses are the result of a "phobia" is to suggest that it is the phobic individual who is the sufferer from the syndrome and experiencing the trauma. Conditions such as claustrophobia limit the lives of sufferers in a number of more or less debilitating ways. But the main sufferers of homophobia are those labelled 'homosexuals' who are subject to various forms of prejudicial discrimination. The most direct expressions of homophobia are insults, derision and threatened or actual violence. Most people's reactions to lesbians and gay men fall short of explicit abuse and physical violence. But there are more subtle ways in which the message is conveyed that lesbians' or gay men's place in society is that of a stigmatised minority. In this way, the lesbian and gay minority in our society constitutes an identifiable source of irrational fear and loathing for 'homophobes.' Thus, despite the difficulties inhering in the concept of homophobia, at a descriptive level it points to a recognisable phenomenon.

Hostility to lesbians and gay men is connected to other traditional, restrictive attitudes about sex roles in society's. Lesbians or gay men do not threaten traditional heterosexist assumptions by their actual behaviour but rather by the

symbolic significance of their behaviour. In this regard, lesbians and gay men do not threaten the family as such, for lesbian or gay relationships can foster the same intimacy, caring, and enduring commitment that are valued in most traditional families[19]. However, lesbian and gay relationships do call into question a certain traditional ideology of the family. That ideology is one in which men, but not women, naturally belong to the public world of work and politics and are not so much partners as rulers of their families. On this view, women should rear children, create and manage the home, be available for sexual activity, and submit to their husband's authority. This patriarchal ideology has been challenged for some time. Much of the prejudice against lesbians and gay men can be traced to this ideology's profound anxiety about the breakdown of the boundaries of gender under the stress created by the women's liberation movement.

The crucial move in heterosexist ideology is sharply to differentiate between the sexes. The idea here is that biological differences between men and women as a matter of natural fact entail certain social roles. In other words one's status in society is necessarily dictated by the form of one's genitals. Lesbian and gay sexualities impugn sexual hierarchy because their very existence suggests that anatomical shape has less to do with one's role in society than one might have supposed. However, just as marriage between blacks and whites in apartheid South Africa is treated as threatening because it challenges the distinction and superior status of being white, lesbians and gay men are considered as threatening because their sexual autonomy challenges the distinction and superior status of being male. The thrust of the ideology holds that men cannot at the same time be used as women and remain powerful because they are men. As Simon Watney says 'homosexuality problematises the casual identification of primary power with the figure of the biological male as masterful penetrator' [20]. Lesbianism challenges male privilege because it upsets the assumption that female sexuality exists for the purpose of male satisfaction. Again in the words of Simon Watney, it 'problematises the parallel identification of powerfulness and passivity with the figure of the biological female as submissive and penetrated' [21]. It creates a heterosexist male anxiety that women could be indifferent to men, or could insist on negotiating the terms of a relationship from a position of equality.

The upshot of this analysis is that lesbians and gay men are a threat to the family only if the survival of the family depends on the subordination of women. This view implies that law reform to achieve sexual equality is a mistake and that without traditional sexual domination and rigid gender differentiation people will no longer form stable family units. The view that inequality is good is antagonistic to the very core of democracy. And the very inegalitarianism of heterosexism provides the ideological forcing ground in which homophobia thrives.

BREAKING THE CYCLE

Prejudice and discrimination result in the marginalisation or ghettoisation of the lesbian and gay communities. The experience of ridicule, rejection or physical attacks restricts lesbians and gay men to particular clubs, pubs and other meeting points. Fear of discovery isolates lesbians and gay men from family, work mates and heterosexual friends. The basic right of sexual identity and expression is denied, forcing the individual into a dual existence and whole communities into a sexual underworld. Despite the scale of social prejudice and institutionalised discrimination, a growing minority of lesbians and gay men in this country are asserting their needs and demands, no longer willing to remain socially invisible or politically marginalised.

Homophobia, the irrational fear of homosexuality and deep prejudice against lesbians and gay men, is widespread in this society. Information and discussion can begin to undermine that fear, but such hostility drives many in the gay community underground making it more difficult to break the cycle of fear through direct knowledge and experience. Important organisations, such as trade unions, political parties and community groups can play a leading role in combating fear. Irish people have been and continue to be on the receiving end of racist attitudes when living or working abroad. Women in this country have been forced to confront deeply sexist attitudes in all areas of social life. Travellers have been subjected to intense racist abuse. These experiences give us all some insights into the devastating impact of prejudice and discrimination, particularly on those who are the targets but also on those who perpetrate such attitudes.

It is critical to understand that existing patterns of socialisation reinforce and strengthen negative individual attitudes and social prejudice. Our sexuality is a critical aspect of our individual identity and social role - it is a primary part of what we are and plays a key role in all kinds of social situations. Sexual repression fractures that identity and distorts social interaction. The challenge to prejudice and discrimination must focus on laws, institutions, individual attitudes, social exclusion, ideologies and misinformation. It is essential that decriminalisation of homosexual acts and the introduction of laws to protect gay men and lesbians from discrimination be a starting point.

PREJUDICE IN THE SUPREME COURT OF IRELAND

Chapter three

In *Norris v Attorney General*[1], the Irish High Court and Supreme Court upheld the laws criminalising gay sexual activity. The purpose of this chapter is to show - in some detail - that the decision is an expression of nothing less than gross judicial intolerance and lawmaking by prejudice.

Why pursue this analysis?

In the first place, it is important to show that the decision of the majority of judges in the case which denied Senator David Norris his claim to equality, sexual privacy, intimate association, and self-expression is utterly wrong.

Secondly, the majority's decision was defective not only in respect of substance - that is to say, in respect of the principles they applied in the case - but also in respect of the process of decision-making employed in the case. The decision lacked common sense elements of impartial decision-making, and therefore should be viewed as inherently unfair.

Thirdly, some of those who oppose equal treatment for lesbians and gay men have asserted that the Supreme Court's decision in *Norris* holds that the laws criminalising gay sexual activity are a constitutional requirement. They have made this assertion in order to pressure the Government into avoiding the State's obligation under the European Convention of Human Rights to reform the laws criminalising gay sexual activity. This assertion is groundless. As O'Higgins C.J. said in the case, the court was concerned only with the question whether the challenged laws had been carried over into our legal system by the people when they adopted the Constitution in 1937. Therefore the question before the court was not whether the Constitution compels the state to outlaw homosexual activity. In any event, we say the decision was wrong in principle and wrong in procedure and should be consigned to history as a sorry mistake.

THE RELEVANT CRIMINAL LAW

It would be useful now to take a look at the laws that were challenged in the *Norris* case. At common law, and at present by statute, gay sexual activity is a criminal act punishable on conviction by a sentence of imprisonment. Ireland has a specific statute - s. 61 of the Offences Against the Person Act 1861 - which explicitly prohibits buggery, and another statute - s. 11 of the Criminal Law Amendment Act 1885 - which explicitly, though in extremely vague terms, prohibits homosexual conduct which does not involve sexual intercourse. Both of these statutory provisions were challenged by Senator David Norris.

Section 61
S. 61 comes under the heading in the 1861 Act of "Unnatural Offences." As amended by the Statute Law Reform Act 1892, s. 61 provides:

> "Whosoever shall be convicted of the abominable crime of buggery, committed with mankind or with any animal, shall be liable to be kept in penal servitude for life." Under s. 62 of the 1861 Act, whoever "shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years".

Section 11

S. 11 of the Act of 1885 is included in Part 1 of the Act under the heading "Protection of Women and Girls." It reads:

"Any male person who, in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

Until the middle of the sixteenth century homosexual activity was within the jurisdiction, mainly, of the ecclesiastical courts. During the Reformation in England, the church courts lost their jurisdiction and in 1533 a statute made sodomy a crime punishable at the hands of the criminal courts by death. The 1861 Act was intended to he a reform abolishing the death penalty for sodomy. However, pathological medical notions about homosexuality gained

prominence and in 1885 a private amendment to what became the Criminal Law Amendment Act, 1885, sought to proscribe all homosexual activity whether it took place in public or in private. These statutory provisions have never been considered by the Oireachtas (the National Parliament) and were simply carried over into the legal system of the Irish Free State and then later into the legal system founded on the 1937 Constitution of Ireland. The issue of human rights for lesbians and gay men has yet to receive a full-blooded debate before the Oireachtas but the issue will have to be joined sooner or later.

THE NORRIS CASE BEFORE THE IRISH COURTS

In *Norris* the plaintiff challenged the constitutionality of ss. 61 and 62 of the Offences Against the Person Act, 1861, and s. 11 of the Criminal Amendment Act, 1885.

In the High Court, McWilliam J. noted that the plaintiff had stated in evidence that he was exclusively, congenitally and irreversibly homosexual and, as such, was not and never was sexually attracted by or to women but, from a very early age, had been emotionally and physically attracted towards men. The Judge observed that the plaintiff believed, from investigations made and reports prepared in other countries, that approximately 4% of all men in Ireland are also exclusively homosexual and that another larger group (about 10%) has very pronounced homosexual tendencies. He also underlined the plaintiff's testimony that

> "the sections of which he complains have oppressed him, have encouraged and increased general prejudice against homosexuals and thus caused him distress; ... that those sections have left him in fear of blackmail, have prevented him from indulging in sexual activity in a manner which enables him to fulfil a homosexual relationship, and that the stress and anxiety caused for all these reasons have affected his health and that, for a period in his life in 1969, his health was affected to such an extent that he had to go to hospital and subsequently had to attend a psychiatrist for a period of about six months".

Then the judge stated that, having reviewed all the evidence, he was compelled to draw the following conclusions:

1. There is probably a comparatively large number of people with homosexual orientations in Ireland.
2. Of these, a proportion are exclusively homosexual.
3. The exclusively homosexual orientation is congenital and not a matter of choice.
4. There is not any satisfactory method of treatment to alter this exclusively homosexual orientation, so the homosexual must live with it, although there have been a few successful changes in orientation effected.
5. There is no foundation for any of the common beliefs that male homosexuals are mentally unbalanced, effeminate, vicious, unreliable or less intelligent, or are more likely to assault or seduce children or young people than are heterosexual males.
6. There is general prejudice against homosexuals with a lack of consideration for their problems.
7. One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which can follow from that unfortunate condition"[3].

Despite his close attention to the evidence, which showed unequivocally that no compelling public interests or the common good would be injured by recognising that gay men should have access to equal liberty of sexual autonomy or privacy, McWilliam J. refused to hold that the challenged laws violated rights to equal protection, privacy, bodily integrity, freedom of expression and the right to form associations, or the right to be free from unjust punishment.

A majority of judges in the Supreme Court (O'Higgins C.J., Finlay P. and Griffin J.) dismissed the plaintiff's appeal, in a judgement read by the former Chief Justice.

A minority (Henchy and McCarthy JJ.) wrote separate dissenting judgements which, besides other things, contain a forceful critique of interpretations of law and evidence composing the majority's judgement. The basis of their position was that the right claimed by the plaintiff inhered in a free and equal human personality.

Ignoring the clear sense of the plaintiff's evidence, which the State had not attempted to rebut, the majority held that having regard to the Christian nature of the State, the immorality of the deliberate practice of homosexuality, the damage that such practice causes to the health of citizens, and the potential harm to the institution of marriage, there was no constitutional infirmity in the challenged laws. At this point we will examine the majority's treatment of the plaintiff's arguments in their approach to the various issues. In the next chapter we will evaluate the majority's assertion that respecting the right of gay men to sexual autonomy would have harmful consequences for society.

EQUAL PROTECTION

The plaintiff argued that the impugned laws violated his right to equality before the law. Neither the High Court nor the Supreme Court gave serious consideration to the merits of the plaintiff's claim that the challenged laws fell foul of principles of equal protection. We submit that the laws criminalising sodomy should have been found wanting from an equal protection point of view.

Such laws, even though they prohibit sodomy between gay partners and heterosexual partners alike, do discriminate unfairly against gay men. The 1861 Act proscribes all anal intercourse. It bans, therefore, on pain of criminal condemnation, some sexual activity that may be engaged in by heterosexual partners. When considered with the 1885 Act, however, which can be taken to have criminalised all gay sexual activity, its effect is to condemn all forms of gay sexual love.

Moreover, the majority's rejection of the claim that s. 11 of the 1885 Act unfairly discriminated against gay men since it criminalised "gross indecency" by a male with another male but did not make it an offence for two women to commit an act of "gross indecency" is unconvincing. McWilliam's comment that "gross indecency may obviously take quite different forms when committed by men than when committed by women," seems to give anatomical differences between males and females a moral significance they do not inherently have. Also, the distinction seems to sustain the prejudiced view of women in that it assumes they are the weaker and more passive gender in society and therefore less likely to engage in activity which attracts social disapproval.

But was a more convincing approach possible?

In our view, a more convincing line of equality analysis was open to the courts. The right to equal protection has an explicit basis in the Constitution. Article 40 of the Constitution, in its first sentence, provides that "all citizens shall, as human persons, be held equal before the law." The Article's second sentence makes it clear that equality does not mean uniformity of treatment and that lawmakers may classify so as to "have due regard to differences of capacity, physical and moral, and of social function." The principle of equality can be used to protect identifiable minorities or traditionally disadvantaged groups against prejudice, especially when that prejudice is enforced through bare majority rule.

This point has been judicially acknowledged in earlier decisions. For example, Walsh J. has stated that the concept of equal protection is a guarantee related to the dignity of citizens as human beings and "a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individuals or classes of individuals by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community"[4]. In reality the Irish courts have failed to make equality into a practical legal principle[5].

To illustrate the potential which the concept of equal protection has as a constitutional weapon to combat legally enforced prejudice it is instructive to note recent case law developments in the United States. The federal courts in the United States have taken the principle of equal protection - which is encoded in the 14th Amendment of the United States Constitution - more seriously. A very brief examination of the recent decision of the California Appeals Court in *Watkins v United States Army*[6] shows how legal classifications disadvantaging people on the grounds of sexual orientation violate the principle of equality. In the case, the Army discharged and refused to re-enlist a soldier on the grounds that he was homosexual. The court invalidated the relevant regulations on equality grounds.

In *Watkins,* the court decided that the factors which have led the United States Supreme Court to protect other groups, such as aliens and racial or ethnic minorities, against laws burdening them, apply equally to gay people. The Supreme Court in the United States generally takes the view that laws using such classifications which are rooted in prejudice are constitutionally suspect. The use in law of these classifications is subjected to a searching form of judicial analysis. In practical terms, this means that the onus of justifying such a classification shifts in a constitutional case to the state. If the state cannot produce compelling or substantial public interests strictly related to and justifying the classification, and show that there are no less drastic alternative means of achieving a legitimate public interest, the law falls.

In identifying which classifications are suspect, the courts usually consider: whether the group in question has suffered a history of purposeful and malign discrimination; whether the disadvantaged group is defined by a characteristic which really bears no relation to ability to perform or contribute to society; whether the class has been subjected to unique disabilities because of prejudice or inaccurate stereotypes; whether the characteristic defining the group is immutable or so central to an autonomous person's identity that it would be abhorrent for government to punish or disadvantage a person because he or she has that characteristic; and whether the group burdened by the discrimination lacks the political power necessary to obtain redress or justice from the legislative branch of government.

Equal protection in action

In *Watkins,* the Federal Appeals Court applied these factors to the gay plaintiff's case and its reasoning was as follows:

In the first place, it is, said the court, indisputable that lesbians and gay men have historically been the object of hateful, pernicious, and sustained, hostility. They have frequently been the victims of gratuitous violence.

Sexual orientation has no relevance to a person's ability to perform constructively or contribute to society. In the case, the court accepted as well-founded evidence that homosexuality in no way "impairs a person's ability to perform military duties" and said that the soldier's exemplary record of military service stood "as a testament to quite the opposite."

This irrelevance of sexual orientation to the quality of a person's contribution to society also suggests that classifications based on sexual orientation reflect, and reinforce prejudice and inaccurate stereotypes rather than rationality. Harmful misconceptions include the notion that lesbians and gay men will conscript others to a homosexual orientation, that gays are more likely to molest children even though there is hard evidence that heterosexuals are more likely to be aroused by children than are lesbians and gay men, and that lesbians and gay men are psychologically or physically diseased although there is absolutely no evidence to support these assertions.

Finally, although the court considered immutability relevant, it refused to hold that only groups with immutable traits are entitled to more stringent constitutional protection. Also it said that immutability does not mean that members of the group must be physically unable to change or mask the characteristic defining their group. People can have operations to change their sex. The status of illegitimate children can be changed. Some people can change their racial appearance with pigment injections. But the court stated that the invention of a pill to change skin pigment would not suddenly make racial discrimination constitutional. At bottom, then, the court was willing to treat a characteristic as effectively immutable if changing it would involve great difficulty or an inherently coercive change of an autonomous person's identity. Thus, immutability may be broad enough to describe those characteristics which are so constitutive of a person's identity that it would be abhorrent for government to punish a person for refusing to change them, regardless of how hard or easy that change might be.

In the court's view, sexual orientation should be considered immutable for equal protection purposes. Although the causes of homosexuality, or indeed heterosexuality, are not fully understood, the burden of scientific research suggests that persons have little control in their early years over their sexual orientation, and that, once acquired, for many people, sexual orientation is largely settled. Allowing the state to penalise sexual orientation when it is a central part of personal identity in an individual would be abhorrent to the values underpinning the ideal of equality.

The final factor the court considered was whether homosexuals lack the political power necessary to obtain fair and just treatment through the legislative process. The court noted that legislators are likely to have difficulty understanding or empathising with lesbians and gay men. Most people have little conscious exposure to lesbians and gay men. Moreover, the social, economic, and political pressures to conceal one's homosexuality deter many lesbians and gay men from advocating anti-discrimination legislation, thus intensifying their inability to make effective use of the political process. Even when lesbians and gay men overcome this prejudice enough to participate openly in politics, the general animus towards homosexuals may render this participation wholly ineffective. Legislators sensitive to public prejudice may refuse to approve legislation that appears to condone lesbian and gay lifestyles.

The *Watkins* case did not concern the issue of homosexual activity but rather the status of being homosexual. The logic of the court's reasoning applies also to homosexual activity. In *Norris* the Irish State failed to offer any evidence regarding its assertion that compelling public interests justify the laws criminalising homosexuality. On the analysis offered above - which the Irish court could have developed if it had a mind to do so - these inherently suspect laws should have been struck down by the courts. That these laws were not subjected to careful analysis to determine whether they were corrupted by prejudice against a discrete minority justifies the concern that the majority of the Supreme Court clouded the issue of equality in the case and failed to pierce through the veil of prejudice.

PRIVACY, FREEDOM OF INTIMATE ASSOCIATION AND SELF-EXPRESSION

The High Court and Supreme Court in *Norris* also failed to appreciate the plaintiff's arguments in relation to the right to privacy and freedom of association and expression in the sexual context.

The right of privacy, as a constitutional civil liberty, was inferred by the Supreme Court in *McGee v Attorney General* [7]*.* There the Supreme Court upheld the right of a married couple to import contraceptives for use within their

marriage. The majority relied on Article 40.3 of the Constitution to declare that there was a general, unspecified right to a zone of privacy enjoyed by the individual into which the state should not intrude unless it had objectively compelling reasons to do so. Only one judge, Walsh J., based his judgement exclusively on Article 41 dealing with the rights of the married family. In *Norris,* both the High Court and a majority of the Supreme Court rejected the claim that Article 40.3 guaranteed a right of privacy encompassing gay sexual activity and the claim that the constitutional guarantees of association and expression fortified such a right.

The judges, we submit, missed the point that at the heart of the privacy doctrine developed by the Supreme Court in *McGee* lies a right to freedom of sexual autonomy, intimate association and self-expression, and that the implications of the values which give this liberty its most coherent sense cannot be stifled at the boundaries of formal marriage or procreational sex. The values involved include: the value of being intimately associated with another person; the value of caring for and commitment to another, recognising that to be human is to need to love and to be loved; the value of intimacy, embodying the ideas of sanctuary, secrecy and enjoyment of friendship; and the value of self-identification or expression, involving the shaping of an individual's sense of his or her own identity. It is the autonomous choice to form and maintain an intimate association that allows one fully to realise the values that give substance to the right. The decision of the Supreme Court in *McGee* can be best explained in terms of these values.

In our view, the marital relationship deserves legal protection because at a very fundamental level it is a form of society through which individuals express and live out a conception of intimacy, loyalty, commitment, and love. There is no rationally defensible reason in either logic or political philosophy why these human capacities and aspirations cannot be developed and expressed in other forms, such as, for example, a lesbian or gay partnership, than a traditional, heterosexual marriage. Consequently, there is no convincing basis for limiting the right to privacy, in the sense of sexual autonomy, intimate association and self-expression, to the traditional marriage.

In the same way, the decision whether or when to have children was properly protected by the Supreme Court in McGee. The reason is that the decision about procreation reflects a profoundly personal judgement about whether and how we choose to enjoy the society and company of other persons and whether or not we believe as autonomous persons that the love, caring, commitment, and pleasure, which children occasion, are vital to the independently created plan of life and the realisation of personal identities we think worthwhile. As the court recognised in McGee, the decision whether to have sexual relations resulting in the conception or birth of children, is a decision which belongs to each person as an individual. Moreover, as the enactment of the Health (Family Planning) Act 1985, which makes contraceptives available to single persons, attests, it is a decision which cannot be confined to marriage, because, to identify the unarticulated assumption behind this law, the marital relationship is only one of many forms of society which can serve as a vehicle for one's search for and expression of caring commitment, intimacy, love, and physical and emotional self-fulfilment.

On this analysis, the majority in Norris are responsible for an extremely ugly contradiction in their judgement. Recall that the court in McGee gave constitutional protection under the umbrella of the constitutional right of privacy to the right of a married couple to import contraceptives for use in their sexual relations. This case makes sense only if it is taken, candidly, to rest on a general repudiation, as an exclusive model of natural or proper sexual function, of the procreational model of human sexuality, according to which sexual activity is proper only when it is engaged in with the intention and probability of conceiving a child. On this approach, the court accepted the view that sex can be used non-procreationally just for the purposes of expressing love, caring, commitment, and personal identity. Furthermore, the court endorsed the view that the decision of the plaintiffs in McGee to arrange their sexual fife according to their own lights implicated so profoundly the values of privacy, sexual autonomy, and intimate association and expression that significant state interference with the autonomous choice to engage in non-procreative sex required justification by reference to state interests of the highest order. The state could not produce any evidence of interests of that magnitude. Thus, the court, finding no sound empirical or principled arguments in favour of the challenged anti-contraceptive law upheld the plaintiff's claim. Significantly, the court also rejected the view that the dominant, religiously inspired conventional morality should be enforced in its judgement. The implicit reason for this attitude was that interpreting public morality in this uncritical way would violate the postulate that legally enforceable moral ideas be based on equal concern and respect for the autonomy, or dignity and freedom, of individuals. Disquietingly, the majority in Norris chose, incoherently, to forfeit this principled approach and refused to extend the insight of the court in McGee to consensual gay sexual conduct'.
In our view, the McGee decision should have been read by the Norris court as exemplifying the principle that every individual has the right, consistent with a like right or liberty for all, to be free from unwarranted interference with his or her decisions on matters of sexual autonomy and intimate association. A mature person's choice of an adult sexual partner would seem, clearly, to be a decision of the utmost private and intimate concern. We submit that private consensual sexual activity between adults are matters, in the absence of evidence that they are harmful, in which the state has no legitimate interest.

JUDICIAL FAILURE TO GIVE AN IMPARTIAL DECISION

Some people have adopted the extreme view that the state should continue to violate its obligation under the European Convention of Human Rights to treat lesbians and gay men justly. They assert that the decision of the Supreme Court in the Norris case provides a sound reason why we should jettison our human rights obligations under the Convention. In this section we argue that a close analysis of the majority's approach in that case shows that it subverted basic canons of impartiality.

Though judicial decisions are not on all fours with ethical judgements, they should, as genuine ethical judgements attempt to do, respect conditions of impartiality. For constitutional judgements to be impartial certain common-sense conditions must be satisfied: (a) the decision maker should give due weight to the arguments of the parties in the case; (b) the principle used to resolve the controversy should be one which is not simply manufactured in an ad hoe way to dispose of the case but instead should be a principle which is judged to be worthy of general, consistent, or universal, acceptance and application within the best theory of constitutional principle viewed as a whole; and (c) the decision maker should consciously reduce the influence on his or her decision of entirely fortuitous human differences, like gender, race, and so on, as a ground for differential treatment[9].

David Norris's arguments were not accorded their due weight

(a) Resolving a constitutional controversy impartially requires, as a minimum, that due weight be given to the arguments of the parties to the case, and that the court decide in a way which takes full account of those arguments. The method of judicial review of the parties' arguments in Norris failed to satisfy this basic criterion of impartiality.

The issue before the courts was whether the challenged statutes were inconsistent with the Constitution on the ground, besides others, that they violated the plaintiff's right of sexual privacy, intimate association, and self-expression. Since the statutes had been enacted before the Constitution of 1937 had come into force, they were not entitled to a "presumption of constitutionality." So if the plaintiff had raised a prima facie case that the statutes were inconsistent with the Constitution and the State had failed in response to produce rebutting evidence, it would have been proper for the courts to hold that the statutes were constitutionally blemished. In fact, the plaintiff made out a *prima facie* case on the basis of hard evidence against the statutes and the trial judge, McWilliam J., accepted this evidence. Indeed the plaintiff called ten witnesses to support the argument that decriminalisation of gay sexual activity in different jurisdictions of the world had not been inconsistent with the maintenance of public order and morality. Henchy J. noted in the Supreme Court that not a single witness was called by the Attorney General to rebut the plaintiff's case that the degree of decriminalisation sought by him posed no real threat to public order or morality.

Disquietingly, the State brought forward no controverting evidence, yet McWilliam J., in the High Court, denied the plaintiff his claim on the ground that it was reasonably clear that current Christian morality in this country does not approve of buggery or of any sexual activity between persons of the same sex, and this approach was upheld by the majority in the Supreme Court. Focusing on the trial judge's handling of the case, in the Supreme Court Henchy J. observed:

> 'In my opinion, since this was an oral hearing on oath carried out under our adversary system (which is based on the determination, from sworn testimony, according to the required onus and level of proof of the relevant issues), where the outcome of the case depended on a judicial conclusion from the actual or potential effect on our society of specified statutory provisions or of their alternatives, when the conclusions expressed overwhelmingly supported the plaintiff's case, the trial judge was bound in law to reject the Attorney General's defence and to uphold, at least in part, the plaintiff's case"[10].

The majority, like McWilliam J., simply substituted their own conclusions, in the face of the plaintiff's arguments and evidence, including what Henchy J. described as the massive and virtually unanimous volume of evidence, given almost entirely by experts in sociology, theology and psychiatry, as to the personal and societal effects of the challenged laws. The majority of judges in *Norris* failed to give due weight to the plaintiff's arguments and evidence.

The majority failed to preserve the integrity of constitutional principle

(b) To be impartial a legal or constitutional judgement should make a claim of principle which is not arbitrarily confined in an *ad hoe* way to the circumstances of the controversy before the court. In the language of impartial moral reasoning this is called the principle of universality. In constitutional cases, it would require that judges - when they hand down a judgement concerning human rights - seek to arrive at a decision which fits articulately into the form and substance of constitutional principle viewed as a whole. In other words, a particular decision must be intended to have universal appeal in the legal system as part of the law's integrity. From this point of view, the majority's approach in *Norris* lacked integrity.

First, when the majority stated that homosexual acts were wrong because they were non-procreative, they were no doubt making an assertion they believed in. As a matter of constitutional principle, however, they were profoundly

inconsistent. For the Supreme Court in *McGee* repudiated this general approach to matters of human sexuality. There the court, it will be recalled, upheld a married couple's challenge to anti-contraceptive laws which had the effect of denying them access to contraceptives. It might be said, though, that the *McGee* decision has no relevance to the *Norris* claim because the marital relationship is different in significant respects. Of course, the majority in *Norris* took exactly this view. But this assertion is unconvincing when set against the background of principle. The Supreme Court gave constitutional effect in *McGee* to the normative attitude that non-procreative sexual activity - for that is what sexual intercourse using contraception is - as a means of expressing love is entitled to constitutional protection. The majority of judges in *McGee* actually held that the right of sexual privacy was essential to protect the inviolability of the human personality. It was precisely this principle the plaintiff invoked in *Norris.*

Second, the majority's use of Christian moral theology to arrive at a constitutional decision under a Constitution, which guarantees freedom of religion in Art. 44 is itself a radical inconsistency. The logic of such an approach in principle and in practice is to subordinate the liberal democratic nature of human rights and judicial review to a sectarian order of things. In fact, in *McGee* Walsh J. stated that the courts were not to become the arbiters of the merits of the various religiously inspired codes. Moreover reflexive endorsement of bare, deposited tradition, religious or otherwise, does not provide a source of critical principle for judging whether laws measure up to human rights standards. If tradition were self-evidently right, good or valid, slavery would still be an institution with the force of natural law behind it[11].

Third, the majority simply translated the attitudes of a religious majority into constitutional law. In effect, the majority decided to use conventional moral attitudes as a source of constitutional principle. This approach contradicts the whole rationale for having a system of judicial review to protect the individual or minorities against the legislative dominance of the majority since it is likely to expose minorities to the prejudices of the majority. This method of reasoning would seem to suggest that constitutional principles for resolving constitutional controversies about human rights are valid only by virtue of being accepted by a majority in our society. In other words, it denies the possibility of developing critical constitutional principles regarding human rights in light of which disagreements before the courts can be resolved in an impartial way. There is a fatal contradiction here: it makes no sense whatsoever to use the attitudes of the majority as a touchstone for determining what rights the individual or a minority has against the majority. In *Norris,* the majority judged the validity of the plaintiff's claim in terms of whether it agreed or disagreed with the standards espoused by the majority. This was a denial of impartiality.

The majority was influenced by fortuitous human differences that have no value in themselves

(c) Another feature of an impartial method of constitutional reasoning is a commitment to reduce as far as possible the influence of entirely fortuitous human differences as a basis of differential treatment. The point here is that an impartial decision-maker will refuse to assess a party's arguments on the basis of a morally irrelevant characteristic they may share with others. For example, gender in itself does not identify a morally relevant characteristic of a person with reference to which one may justly judge individual worth, virtue, or achievement. Gender merely points to a certain physical type. Similarly, sexual orientation identifies only one's preference in terms of sexual activity with a person of the same or different gender. It is not correlated with any other characteristic of moral relevance. McWilliam J. accepted evidence that there is no foundation for any of the common beliefs that male homosexuals are mentally unbalanced, effeminate, vicious, unreliable or less intelligent, or more likely to assault or seduce children or young people than are heterosexual males. In other words, being lesbian or gay in one's sexual orientation is a neutral thing, just as being heterosexual is a neutral thing; sexual orientation in itself is a morally irrelevant characteristic. Yet, after accepting this argument the majority elevated homosexuality into a morally relevant characteristic on the basis of mistaken ideas of human sexuality and sectarian theological ideas and held that it is unnatural and intrinsically immoral.

A STIGMATISING CRIMINALITY

Senator David Norris - in our view - was denied justice in his challenge before the Irish courts, though the judgements of Henchy and McCarthy stand like beacons on a dark night. The majority judgements were insensitive in other respects as well. For one thing, they showed no appreciation of how oppressive the unwarranted stigma of criminality is for a gay man who quite reasonably values his dignity and freedom.

Generally speaking, consensual adult gay sexual activity is not prosecuted in this country. The vast majority of offences prosecuted in the Irish courts under the laws challenged in the *Norris* case involve coercion, or young boys. These are the kinds of offences which would remain offences were the law to be changed to allow statutory equality for heterosexual and homosexual activity. The problem is that the current law connects, quite irrationally, behaviour which is not intrinsically harmful to that which is detrimental. Thus, consenting gay partners are pigeonholed in the criminal law. This can lead to aggravations which have no place in a genuine democracy.

First, police sometimes gather information about gay men. Clearly there are dangers of misuse of such information by the authorities. Moreover, gay men who feel they are under surveillance in this way feel uneasy about exercising basic democratic freedoms. Therefore the intrusiveness of this practice is compounded by the chilling effect it has on personal freedom.

Second, a consequence of the criminal status of male homosexuality is the cloud of false legitimacy that status gives to activities where gay men are singled out for adverse treatment. Such treatment sometimes includes violence. Without overstating the point, it is fair to say that this social terrorism gains an insidious form of endorsement from the law.

Thirdly, the unfairly imposed criminality is directly responsible for the reluctance of many gay men to report to the police criminal offences committed against themselves. Their fear is that they themselves may be subject to prosecution.

Finally, another form of aggravation which is encouraged by the present law is blackmail. The Wolfenden Committee in England[12] found that 32 of the 71 cases of blackmail reported to the police in Wales from 1950 to 1953 were connected with male homosexuality. The United States National Institute of Mental Health Task Force on Homosexuality stated that decriminalisation would serve to reduce the possibilities for blackmail, which are a constant hazard to gay men under the present conditions[13].

CONCLUSION

In summary, we submit that the majority in Norris undermined the salient features of our constitutional democracy. Our democracy does not start from the premise that majority rule is good or just, regardless. Nor does it rest on a scepticism about the possibility of working our rationally defensible principles in light of which the rights; of the individual implicit in our constitutional order may be protected. On the contrary, the foundations of our constitutional democracy are principles of justice, including human rights, and judicial review is an institution created for the purpose of realising, impartially, in concrete cases, the requirements of these principles. And just as the United States had eventually to put aside their Supreme Court's decision in *Plessey v Ferguson*[14], which upheld that country's system of racial apartheid, Ireland has an obligation, which has the force of the European Convention of Human Rights behind it, to put aside its form of sexual apartheid. It is to the Convention we must now look for common sense and justice.

A EUROPEAN HUMAN RIGHTS ADVANCE

Chapter four

Ireland is a signatory of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has by its terms a binding force on the Government of this state. Not until the 1970s did the human rights institutions under the Convention take the opportunity fully to consider complaints by gay plaintiffs of violations of rights under the Convention[1]. The precise statutory provisions in question before the Irish courts in *Norris* were held by the European Court of Human Rights in *Dudgeon v United Kingdom*[2], in 1981, and then in *Norris v Ireland*[3], *in* October 1988, to be in breach of Article 8 of the Convention. The *Dudgeon case* concerned the laws as they used to apply in Northern Ireland while the *Norris case* considered them as they currently apply in this state. This chapter examines the essentials of those cases as they concern our obligation to reform the laws criminalising gay sexual activity.

DUDGEON AND NORRIS

In both cases the court held that one's sexual life is also a part of private life. The court based its holdings on Article 8 of the Convention, which states, in paragraph (1), that "(e)veryone has the right to respect for his private and fancily life, his home and his correspondence," and in paragraph (2), that there "shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. "

The United Kingdom and Ireland in *Dudgeon* and *Norris* respectively argued that the laws were necessary in a democratic society for the protection of morals or of the rights and freedoms of others. In response, the court stated that the term "necessary" does not mean "useful", "reasonable," or "desirable," but connoted the existence of pressing social needs. As the cases involved a most intimate aspect of private life there must exist, said the court, particularly serious reasons before permissible interferences could be made. Moreover, any measures adopted by a state had to be proportionate to the legitimate aim pursued.

In the court's view, the laws so far as they related to sexual activity in private between consenting males constituted an interference with the principle of respect for private life. It rejected the defence that the law was a dead letter because there had been no stated policy with regard to non-enforcement and there remained the possibility of private prosecutions for such offences.

Regarding Article 8(2), the court held that although some degree of legal regulation of all forms of sexual conduct by the criminal law can be justified as necessary in a democratic society, the failure to prosecute homosexual conduct in private by consenting males made it impossible to maintain that there was a pressing social need for the prohibitions. The court did not accept that the moral and social requirement obtaining in Northern Ireland or in this state differed from those obtaining elsewhere. The court took into account the decriminalisation of gay sexual activity in most member states of the Council of Europe. The court did not accept that there was a sufficient threat of harm to vulnerable sections of society requiring protection.

The court held that the laws lacked proportion. Whatever justifications as there were for retaining the laws were far outweighed by the detrimental effects which the very existence of the prohibitions in question could have on the life of a gay man. Although members of the public who regard homosexuality as immoral might be shocked, offended or disturbed by the commission by others of private homosexual acts, this could not on its own warrant the application of penal sanctions when it is consenting adults alone who are involved. Accordingly, the court repudiated the argument that prohibiting homosexual conduct in private between consenting males was justifiable as being necessary in a democratic society. The Government must now regard the emancipation of lesbians and gay men as an inviolable human rights obligation.

It is clear that the European Court of Human Rights in *Norris* recognised that it is "for Ireland to take the necessary measures in its domestic legal system to ensure performance of its obligations" under the Convention. Moreover, two decisions of the European Commission of Human Rights, which were handed down in the early 1970's, say that member States have a margin of discretion in relation to setting the age of consent for sexual activity. However, it must be stressed that the Commission approvingly noted that the trend in European developments was "to emphasise tolerance and understanding"[4]. In our view, the best sense of tolerance and understanding in an enlightened democracy is to require equality of treatment for lesbians and gay men especially in relation to the age of consent and sexual autonomy.

EQUAL RIGHTS IS THE PROPER RESPONSE

In fact, we believe that the only appropriate response to our obligations under the European Convention of Human Rights is to treat homosexuals and heterosexuals equally in the law governing sexual activity.

In particular, we believe that the Government should resist pressure to adopt the British Sexual Offences Act 1967 because it has proved to be a draconian piece of legislation. During the 1950s the British Government set up the Wolfenden Committee to examine, *inter aria,* policy in relation to lesbians and gay men. In 1957 the Committee reported back to Parliament and recommended, with only one dissenting, opinion, that homosexual activity in private between consenting adults should cease to be a criminal offences[5].

The Sexual Offences Act was passed in 1967 and it provides that notwithstanding any statutory or common law provision "a homosexual act in private will not be an offence provided the parties consent thereto and have attained the age of 21 years." But this Act discriminates against lesbians and gay men. The privacy requirements are harsh in law and in fact, for, unlike heterosexuals, two male homosexuals may not have sex in a place where a third party might simply be present. Heterosexuals may lawfully have group sex. A heterosexual male can have sex with a woman at 16 years; homosexuals must wait until 21 years. If a man over 21 and a man under 21 (but over 16) are caught in a homosexual act, the former is liable to five years' and the latter to two years' imprisonment. Members of the Armed Forces and also sailors in the Merchant Navy are forbidden homosexual activity. "Soliciting or importuning" remains an offence, thus making it a crime for gay men to make the forms of sexual invitation which are acceptable in heterosexual men. The penalty for "gross indecency", which seems to cover any form of affectionate conduct between gays except anal intercourse, has increased, where one of the persons is under 21, from 2 to 5 years imprisonment. The reforms turned out to be a legal charter for police harassment, and convictions for "homosexual offences" have increased fourfold in Britain since 1967.

We suggest that the minimum legal age of consent for sexual activity, as well as the legal conditions governing sexual conduct, should be equal for heterosexuals and homosexuals alike. Principles of justice unambiguously justify laws protecting children from the sexual advances of all adults, but there is absolutely no sensible reason for a restriction other than one which specifies the same minimum age for heterosexuals and homosexuals. We support the idea that the age of consent for heterosexual and homosexual activity be fixed at not more than 16 and certainly not below 14 years. A significant number of European countries have fixed a common age of consent at 16 or lower: 15, in Denmark, France, Poland and Sweden; 16, in Holland, Italy and Norway. In many of these countries there is no differentiation made between heterosexuals and homosexuals. We support this approach.

In Britain, the Police Advisory Committee on Sexual Offences (PAC) published its *Report on the Age of Consent in Relation to Sexual Offences* in 1981[6]. They rejected the idea of setting the same age of consent for heterosexuals and homosexuals. They recommended by a majority that the age of consent for homosexual activity should be reduced to 18; a dissenting minority recommended 16. The work of the Committee was remarkably incomplete, thin, and homophobic. Yet the Criminal Law Revision Committee in its *15th Report on Sexual Offences* published in 1984, simply endorsed the PAC's proposal[7].

The main concern voiced by PAC was that young men and women between 16 and 21 are, they alleged, especially vulnerable to seduction by older adults, and consequently are in need of special protection. This concern is wholly unjustified. In 1968, the Dutch Government set up a committee of experts to advise on the age of consent for homosexual acts. 16 out of 17 experts who gave evidence in the exhaustive inquiry conducted by the Speijer Committee rejected the assumption that a 16-year-old person can be transformed into a lesbian or gay man through seduction[8]. Moreover, expert committees in two other European countries (i.e. Denmark and Switzerland) have concluded that sexual orientation is settled before the age of 14. Indeed, as early as 1957 the Wolfenden Committee accepted the view of medical witnesses that sexual orientation is usually fixed before 16. Most significantly, the Royal College of Psychiatrists in Britain taking account of the process of maturation in young people and its bearing on the age of consent recommended that the age of consent for homosexuals - and heterosexuals - be fixed at 16. They unequivocally rejected the assertion that homosexual activity would alter a young person's sexual orientation, which they said is settled early in life. Indeed, there is a respectable body of professional opinion which holds that sexual orientation is settled before 5 or 6 years of age.

Concern about the possibility of young persons being seduced by adults can be met in a number of ways. First, the threat of disciplinary proceedings should be sufficient to deter most adults from abusing a position of trust to take unfair advantage of boys or girls under 15. Second, it should be possible for legislators to enact a child sexual abuse law to deal with abuse of special relationships such as, for example, that of teacher-pupil. Or where material inducements are offered in return for sex with someone under, say, 15[9].

DISCRIMINATION WOULD BE UNJUST

It is our conviction that the enactment of special, restrictive, legal arrangements in respect of homosexual activity would constitute a reflexive endorsement of unjust social prejudice, for there are no compelling public interests justifying treating homosexuals differently from heterosexuals. It is vitally important that the Government show leadership in combating the pernicious, hostile, and wholly groundless myths which have stood in the way of full emancipation for lesbians and gay men.

First, there is the myth that gay men are inherently sexually promiscuous and are incapable of maintaining stable, loving relationships. Some gay men, like some heterosexual men, prefer to have many sexual partners. It is irrational to assert that a plurality of sexual relationships is, of itself, wrong. More importantly, the assumption that a lesbian or gay man cannot have lasting, caring relationships is groundless. The reality of successful lesbian and gay relationships is often masked by the hostile social environment in which such relationships must exist. Persons who support this myth are simply ignorant of the research which shows, for example, that lesbians experience high levels of satisfaction and fulfilment in their relationships[10]. Despite the problems unique to homosexual relationships, both heterosexual and lesbian women express similar levels of satisfaction and commitment from their relationships, as do heterosexual and gay men from theirs[11]. In fact, the differences in satisfaction and commitment which may exist between heterosexual and homosexual relationships arise not from the sexual orientation of the couple, but from the gender of the individuals[12].

A second myth is that homosexual people prey on vulnerable people[13]. The category of victims may include, it is alleged, children and adolescents. This stereotype of lesbians and gay men as compulsive seducers or proselytisers of adolescents is without factual basis. Sexual abuse is committed, overwhelmingly, by heterosexual males[14]. Many homophobes fear that gay men and lesbians are unfit to be parents and that a child of a gay or lesbian parent might be conscripted into a homosexual orientation[15]. In reality, no significant differences have been found between the child-rearing practices of lesbian or gay parents and heterosexual parents[16]. The children of homosexual parents show little difference with regard to gender identity, social adjustment, psychological development, or sexual orientation from the children of heterosexual parents[17]. Several studies of the children of lesbians show the striking similarity between such children and the children of heterosexual women. The only significant difference is the tendency of daughters of lesbian mothers to reject the idea that women are inherently subordinate or dependent[18], something an egalitarian community should value.

Thirdly, the most common misconception relating to lesbians and gay men is the belief that homosexuality is biologically "unnatural", and that if allowed to persist, such unnatural acts will result in the proliferation of homosexuality, threatening the survival of the species and the institution of marriage. The essence of this argument is that homosexuality disfigures nature's true grain in some way.

The permanence of homosexuality in human culture belies the notion that it is somehow at odds with Nature[19]. Moreover, it illustrates that attempts to prohibit homosexuality are futile and that allowing lesbian and gay sexual activity will not lead to a standardisation of human sexual behaviour according to an imagined homosexual model.

Humans are not mere animals but participate as agents in social and political culture. Many religiously inspired thinkers suppose sexuality to be a wild, uncontrollable passion whose drives impair human capacities for rational self-control. In the past, Irish law considered that procreation was the proper end of sex which redeemed an otherwise shameful desire. This approach ignores the reality that humans, in contrast to animals, can subject sexuality to self-conscious control and uniquely inform sexual activity with the aims, beliefs, concerns, and experiences of love quite apart from considerations of gender, procreation and the seasons of the year.

Fourthly, there is the myth that decriminalised homosexuality would cause a decline in heterosexual marriages. This assumption is completely unsupported by evidence and is a most irrational assumption. Lesbian and gay relationships are compatible with heterosexual marriages. The states which have decriminalised homosexual activity have shown no decline in the rate of heterosexual marriages[20]. Celibacy has long been an honoured institution in this society but it has not destabilised marriage. So, why single homosexuality out for harsh treatment? It may be that those persons who hold on to this myth are victims of the irrational assumption that gay sexual preference is so strong and heterosexual preference so weak that people would abandon marriage if homosexuality were legitimised. A silly idea.

Finally, there is the myth that current laws further public health goals. In particular, that they help to prevent the transmission of venereal diseases. The laws do not deter conduct that spreads sexually transmissible diseases, but probably do deter conduct essential to fighting such diseases. The achievement of public health goals depends upon the co-operation of many persons, including patients, health carers, and public officials. Legal provisions such as ss. 61 and 62 of the Offences Against the Person Act 1861 and s. 11 of the Criminal Law Amendment Act 1885 can seriously retard essential public health strategies by forcing individuals to conceal or distort relevant information and

by inhibiting public education efforts. Fearing both social disapproval and criminal penalties, gay men may settle for anonymous sex with its attendant dangers, and may be fearful of making full disclosures to their doctor. Also, the laws may harm public health by interfering with efforts intended to advise the public how to minimise or avoid contracting sexually transmissible diseases[21]. Indeed the whole burden of education about safer sex practices for all citizens has fallen on the lesbian and gay community.

The laws are also counterproductive with respect to psychological health goals. Freedom to choose whether or not to engage in sexual activity benefits personal mental health. Deterring individuals from engaging in such conduct is inimical to health. Lesbians and gay men are commonly viewed in terms of undesirable stereotypes, and become stigmatised as "deviants." Some persons cannot cope with homophobia and may become psychologically troubled[22].

GENERAL GUIDES TO LEGISLATIVE REFORM

The major features of the terrain of analysis, argument and research we have so far traversed lead straight to acceptance of the idea that the principle of equality should govern reform of law relating to sexual orientation and sexual activity. Legislative change should advance on the basis that homosexual activity and heterosexual activity are on an equal footing. Thus, as the Irish Law Reform Commission recently advised, the legislature should treat consensual heterosexual and homosexual activity as prima facie lawful, but at the same time, "provide for carefully defined circumstances in which, for diverse reasons, it should be unlawful" to engage in specified forms of sexual activity[23]. In particular, the law should be shaped so as to allow people, including young people, develop their sexual autonomy and at the same time to protect young people against sexual exploitation. The Law Reform Commission's position represents a most constructive contribution to the debate on the need to accommodate the right of sexual autonomy in our law.

The Law Reform Commission has put forward for debate a number of considerations to guide the definition of sexual offences. First, "consensual sexual activity should not be the subject of criminal sanctions"; but nevertheless, "the law should define circumstances in which either or both parties to sexual activity are guilty of a criminal offence"[24]. We wholly endorse this view. Our lawmakers should respect the liberty of competent individuals who are capable of giving free and informed consent, to control their own sexual lives. It is quite compatible with this approach that lawmakers should enact criminal laws - and provide education and support services - for vulnerable persons including those young persons or mentally disabled persons who are unable to give genuine consent to sexual activity.

There is an important regard in which we think the Law Reform Commission's statement of its position is marred, though in making this criticism we are aware that the Commission makes no firm recommendation in this respect. Specifically, the Commission states, in an aside, that in respect of gay sexual activity there might be scope for a "possible exception" in relation to "the age at which sexual autonomy should be allowed." It is worth pointing out that the Commission adduces no objective evidence in favour of this possible exception but instead declares, correctly, that "no case has been established for fixing a higher age for homosexual activity"[25]. Indeed, we consider that the notion is inconsistent with, and would totally eclipse the Commission's governing principle that "constraints imposed by the criminal law on consensual activity should be the same for homosexuals as for heterosexuals"[26]. As we said above, the age of consent in respect of sexual activity should - as a matter of justice - be the same for heterosexuals and homosexuals.

We think it sensible at this point to suggest a way in which these considerations could be applied through legislative change. This move would seem necessary because the Government is likely simply to introduce a Bill to amend the current law, without any public debate, and there is good reason to fear that the Government may lack the courage or commitment to principle to produce a Bill that keeps faith with the principle of equality. However a *caveat* must be entered here. Our recommendations are sketched at a general level and are not intended to be a detailed plan of a statute. Therefore we say that a possible line of approach should be faithful to the following points.

1. Sections 61 and 62 of the Offences Against the Person Act, 1861, and section 11 of the Criminal Law Amendment Act, 1885, which criminalise, respectively, buggery and gross indecency between male persons should be repealed.
2. Sexual offences should be gender-neutral as far as possible and should make no discriminations based on sexual orientation. The Law Reform Commission recommended this approach to sexual offences in its *Report On Rape*[27]*.*
3. It should be an offence to have sexual intercourse with a person under the age of consent. The age of consent should not be less than 14 years or more than 16 years. There should be a defence of reasonable mistake as to age where a defendant actually believed at the time of the act, and had reasonable grounds to believe, that the young person had attained the age of consent.
4. We strongly urge that the ingredients of offences such as indecent assault should be precisely and clearly defined. For example, specific acts should be set out in the law as included in the general definition of "indecent" assault. It is a fundamental principle of legality that offences give clear and precise notice of what exactly is being proscribed by law.

5. We state that there are no compelling reasons for any exceptions to the reforms we propose in respect of members of the Defence Forces, Gardaí, or Merchant Navy.
6. We consider that the offences of outraging public decency and conspiracy to outrage public decency should be abolished. The law should not discriminate against lesbians and gay men kissing or showing affectionate conduct in public. Moreover, it should be clarified by statute that the offence of causing a breach to the peace does not apply to lesbians or gay men or heterosexuals showing affection in public.

It should never be an offence for a person whether male or female, whether heterosexual or homosexual, peaceably to approach another person, who is of or above the age of consent, to invite or request them to participate in an affectionate or intimate sexual relationship. "Homosexual advances" should never afford a defence of provocation to a charge of assault or homicide.

CONCLUSION

We urge the Government to show leadership in creating a political and legal climate in which lesbians and gay men will be afforded equal treatment. The Government is in a unique position to appeal to the inherent fair-mindedness of the Irish people. It also has scientific research, the human rights tradition, and the moral and legal force of the European Convention of Human Rights behind it. We therefore call on the Government to declare its support for the principle of equality and to repeal the current criminal laws, which were declared unjust by the European Court of Human Rights and to provide for an age of consent in regard to sexual activity which treats homosexuals and heterosexuals equally.

THE NEED FOR AN ANTI.DISCRIMINATION LAW

chapter five

By anti-discrimination law we mean a detailed statute prohibiting classifications, decisions and practices which depend on stereotypical prejudices to disadvantage members of social groups which have been traditionally treated as inferior. A fully developed anti-discrimination law would guarantee equal treatment regardless of sex, race, religion, sexual orientation, age, physical handicap, membership of the travelling community or other such classification. Here we focus upon the need for a law outlawing discrimination based on sexual orientation. Its purpose would be to prevent and rectify sexual injustices.

RATIONA LE[1]

The anti-discrimination law would be based on the idea that we should protect individuals. (i) against the process of decision-making by which discriminatory decisions are made on the basis of sexual orientation; and (ii) against the serious injurious consequences of such decisions.

(i) In the first place, decisions disadvantaging lesbians and gay men often purport to be based on rational and legitimate considerations. For example, an employer might seek to justify the dismissal of a lesbian employee on the grounds that her known sexual orientation makes her colleagues apprehensive and therefore interferes with productivity. This decision actually rests on the straightforward assumption that heterosexual women are superior. Such discrimination is objectionable because it fails to extend to a minority the same recognition of humanity given as a matter of course to one's own group. It may also stem from a desire on the part of heterosexual persons to increase and reinforce their own power and esteem by maintaining the dominance of their group. The unequal treatment could be justified only if one group were actually more deserving of concern and respect than the other. No such justification exists.

(ii) A second rationale for the anti-discrimination law is the prevention of the harms which may result from invidious decisions based on sexual orientation. Often the most obvious injury is the denial of the opportunity to achieve a preferred benefit or good - a job, promotion, family life, insurance. But this does not fully describe the consequences of decision-making based on sexual orientation. Decisions based on beliefs concerning differential worth, and on selective concern or indifference, inflict psychological injury by stigmatising lesbians and gay men as inferior.

Moreover, because acts of discrimination tend to happen in pervasive patterns, their victims suffer especially frustrating, cumulative, impoverishing and debilitating injuries. For example, a gay man who is singled out for adverse treatment because of his sexual orientation stands to lose a whole range of benefits in his life. To start with,

he might lose his job. Then, as door after door is shut in his face, the individual acts of discrimination combine into a systematic and grossly unfair frustration of liberty and opportunity.

The employer who prefers heterosexual employees solely for reasons of productivity might argue that customers would be deterred from buying in the store if they knew that one of the employees was a gay man. The anti-discrimination approach recognises that if every employer were allowed to use similar generalisations then gay men would suffer great cumulative harm, and holds that a just society cannot tolerate this form of injustice. This approach would assume that the employer's decision was based on homophobic prejudice.

For these reasons an anti-discrimination law would make good sense. Its practical usefulness would be to encode an open-ended prohibition against discrimination on the basis of sexual orientation combined with a list of specific forms of prohibited discrimination. Given that it is often difficult to flush out the specific homophobic motives behind discriminations against lesbians and gay men, the crucial legal move would be to impose a presumptive invalidity on all decisions and practices which disfavour lesbians and gay men. Moreover, an aggrieved person would be able to sue for damages to vindicate his or her right to equal treatment.

In more specific terms, an anti-discrimination law should outlaw both direct and indirect discrimination. Direct discrimination would cover situations where a person discriminates against another person on the grounds of sexual orientation, if, because of the person's sexual orientation, a characteristic that appertains generally to the person's sexual orientation, or a characteristic that is generally imputed to the person's sexual orientation, that person treats the other person less favourably than other persons in the same circumstances, or in circumstances which are not materially different.

Indirect discrimination occurs where a condition applies in theory to persons of all social groups, but is in practice such that an appreciably smaller proportion from one social group, say, lesbians or gay men, can comply with it than the proportion from other groups.

At this point, we move on to consider certain discriminations which confront lesbians and gay men in their workaday lives.

DOMESTIC PARTNERSHIPS

The right to form an intimate association in a domestic partnership is a fundamental issue for lesbians and gay men. Marriage is a legal status which is not open to persons of the same sex. It has been judicially described as 'the voluntary union for life of one man and one women to the exclusion of all others'[2]. Our society creates many formal and informal legal and economic benefits for married persons. For example, they may veto the sale of the family home, they may own property with legally enforceable survivorship rights, enjoy in some circumstances tax benefits, inherit automatically by statute, visit their spouse in hospital, control arrangements for burying their spouse, and receive widower's and widow's allowance.

Also, insurance companies which provide life and or property insurance tailor policies for married persons and do not permit non-married cohabitors, including same-sex partners, to enjoy these benefits. Moreover, being married is an important social status in our society. The commitment implies stability and responsibility. Marriage is also a public statement of family relationships based on love.

In our view, the law should formally recognise lesbian or gay domestic partnerships, and give them equal access to the various benefits conferred on married heterosexuals. First of all, as we argued in Chapter Four, the decision of two people to form an intimate association and to choose with whom they wish to have consensual sex should be protected against gratuitous state interference. Second, lesbians and gay men are not 'sick' and do not need to be 'cured.' Homosexuality is a normal human condition, and the aspiration to have society formally recognise the dignity of a relationship based on love is a compelling one. Thirdly, the concept of equality is intended, in part, to Protect minorities against discriminatory treatment imposed by virtue of a majority's deeply felt beliefs. In South Africa, many white people believe that interracial marriages are immoral and seek to maintain legal prohibitions on such marriages. Similarly, the reluctance legally to recognise lesbian or gay domestic partnerships rests not on substantial secular justifications but on naked prejudice. An anti-discrimination law should explicitly recognise the right of lesbians and gay men to form domestic partnerships in which people may nominate each other as their partner, and confer on them a status equivalent to that of a married spouse.

It may be noted that the Danish Parliament has enacted by 71 votes to 45 a law (effective from the 1 October 1989) which allows lesbian and gay couples to get married. The law gives lesbian and gay partnerships equal rights with heterosexual couples in all domestic areas but adoption. The discrimination in regard to adoption was retained

because the Danish Parliament made the unreasonable claim that they feared a backlash based on prejudice from Third World countries with respect to making children available for adoption. The new law gives lesbian and gay marriages the status of a 'registered partnership' with full inheritance rights, duties of mutual support, the same taxation position as married heterosexuals, and the same access to social services. To dissolve such a partnership the couple must go through divorce proceedings.

CUSTODY AND ADOPTION

Another legal matter which involves discrimination against lesbians and gay men concerns child custody, fostering and adoption.

Some homosexual persons marry and have children. When the lesbian mother or gay father is party to a judicial separation, a child custody issue may arise. Often, gay parents have not contested a custody suit because of threats of blackmail. The heterosexual parent in some cases threatens the gay parent that if he or she contests the custody issue, then parents, friends, and employers will all be told, and the question of the gay parent's sexual orientation will be raised in court. Such gay parents, wishing to protect their livelihood as well as to protect their children from the distress of an ugly battle in court, tend to give in.

Custody decisions are made in the civil courts. The judges, for the most part, are male, middle-class, Catholic and over fifty years. Theoretically, the standard to be applied is the welfare of the child'. However, this standard is so vague that judges can, and sometimes do, apply their own standards. Some judges may be inclined to hold that homosexuality *per se* or participation in a lesbian or gay intimate relationship, is a reason to refuse custody to a parent. There is a clear need for a statutory provision prohibiting such discrimination. The right of a parent to have and raise children is essential to the right of a free person to pursue a happy life. If the state wishes to remove a child from a gay parent because of parental conduct, the relevant court should be satisfied that the conduct renders the parent so unfit as to endanger the child's welfare. There is no evidence that a parent's homosexuality or involvement in a homosexual relationship adversely affects children'.

The law of this state does not allow a single person to be an adoptive parent'. There are no valid considerations for denying single persons the opportunity to adopt so long as the relevant person is in a position to take proper care of the child and if it is in the best interests of a child's welfare that an adoption order be made. We have no objection to the Adoption Board first requiring that the applicant or applicants for adoption be of good moral character, have sufficient means to support the child and be suitable persons to have parental rights and duties'. Again, it must be stated discrimination has been because of sex or class or religion. The great disparity in employment rates between the middle and working class areas of our cities is striking. Men get better jobs than women, whose average earnings are still 40% lower. Some categories of people are almost excluded from jobs altogether: travellers, the severely disabled, women with young children.

The consequences of such discrimination are obvious: lack of opportunity and status, poverty and ill-health. A secure job will enable a person to deal much more effectively with other forms of discrimination, and the implied threat of losing a job is perhaps the most potent control experienced by the majority of people in their lives. Discrimination on the grounds of sex or religion is increasingly discussed, and attempts are being made to counteract it, but other forms continue, especially those unrecognised or ignored. One such form is discrimination against lesbians and gay men.

Hidden discrimination

In Ireland there are many unofficially documented cases of discrimination against lesbians and gay men but none has yet been fully and publicly resolved". In Britain and in other countries, on the other hand, there are all too many officially documented cases 13. It is simple enough to understand this discrepancy: people will fight discrimination, and so publicise it, when they believe they may win, with the help of their co-workers or their Unions, or with the force of public opinion as represented in legal forms of redress. Even in Britain the huge majority of discrimination cases go unreported. Again the reason is simple: there is such strong social pressure to conceal one's sexuality that it may be difficult or impossible to approach one's co- workers, even if one believes they will give support. Equally, most people who are pushed aside or sacked continue to seek another job. A public fight "on the grounds of sexual orientation" is a very effective way of diminishing one's future employment prospects. A slightly less obvious problem is the extreme difficulty of proving that the discrimination actually was "on the grounds of sexual orientation". Managers usually deny this and it is very difficult to prove. Fortunately the Labour Court has now accepted a statistical test of probability as proof of discrimination'4. Even to fight publicly for lesbian and gay rights within trade unions or political movements is very difficult when such public action becomes a declaration of one's sexuality.

Lesbians and gays who have worked on these issues know well that the above arguments are frequently disbelieved. The very hiddenness of what goes on makes it easy to deny, and people often point out that they know of gay men or lesbians who seem to manage very well in business, the professions, or in the media. This is partially a question of class but it should also be pointed out that many such people hold their jobs on sufferance: they must totally conceal their sexuality or at the very least be reticent about it. A parallel might be that: 'you can keep your job just as long as you deny your religion or stay silent about it.' It is entirely appropriate to use the word discrimination about such forms of social control. It also seems reasonable to point out that, as with many of the discriminations and difficulties we discuss in this whole document, were they to be suddenly introduced for heterosexuals, people would not stand for them for a single moment.

Kincora

The Kincora Boys' Home in Northern Ireland is remembered as the focus of a confused scandal of sexual abuse, alleged security forces involvement, and supposed political cover-up. It should also be remembered as the excuse for an unprecedented attempt to stigmatise all lesbian and gay social workers, and an attempt to deprive them of their jobs.

Kincora was run as a local authority home as part of the social services network. It was not only very badly managed, but for a period of many years those in charge sexually coerced and abused many of the adolescent boys and young men in their care. Such abuse and coercion of girls or boys, young men or young women, by those in positions of power is always intolerable and the outcry caused by Kincora was justified. The Hughes Report, commissioned by the U.K. government, analysed the case and found a record of gross mismanagement with lax procedures and badly-trained staff [15]. Among its proposed recommendations were more and better-trained staff, and a completely reorganised system of management and accountability.

As a way of bypassing these overdue reforms the Eastern Health and Social Services Board (Northern Ireland) proposed a simplistic solution: the sacking of those lesbian and gay employees that could be discovered who were working in areas connected with social services for young people. The very notion of this as an acceptable solution can be contrasted with the likely reaction to an equivalent solution if (as has certainly happened elsewhere) girls had been abused in similar circumstances. Would every heterosexual man and woman in the entire social service field be interrogated and then sacked? Even to think in these terms is to realise how preposterous and prejudiced the scheme was, how totally inappropriate a solution it was to the actual problem. Most depressingly, the Hughes Committee seemed to accept the suggestion, at least in part, and recommended that the relevant Department should establish the legal position regarding the exclusion of homosexuals from employment in residential child care, and define its policy on this issue for the benefit of child care organisations.

It was greatly to the credit of the Unions involved (NIPSA and others) that they were outraged at this proposal and resolutely fought for the rights of all their members. This was a courageous stance at a time of great public pressure, and it was important that in this stance they also had the full backing of the Irish Congress of Trade Unions (ICTU). The Health and Social Services Board were finally instructed by the government to implement instead the real solutions to the problem of mismanagement.

Trade Unions

The Irish Congress of Trade Unions has gone further than giving support in such cases. It has also recognised that "there is widespread prejudice against lesbian and gay workers in society generally and that this prejudice affects their rights in the workplace." Accordingly, in 1987 it took the initiative and adopted a detailed and radical document "Lesbian and Gay Rights: Guidelines for Negotiators". These guidelines are a striking example of ICTU leadership in both national and international contexts. The Guidelines provide a framework of positive action which is already in place and which will complement the legal reforms for which we are calling. The basis of this positive action is that the ICTU "recognises and demands the right of everyone, irrespective of sex, marital status or sexual preference to pursue their economic independence and to full participation in the social, cultural and political life of the community in conditions of freedom, dignity and equality."

The ICTU recognises that discrimination means "treating workers less favourably because of their sexuality or because other people may have prejudices against that sexuality." Their analysis is important in also demonstrating the dual pressures both from management and from co-workers. They point out the extra pressures and prejudices in the areas of teaching and youth social work, and the strong cultural pressures in certain traditional male jobs, for example, in the construction industry, where all women as well as gay men can find great antagonism. They show how these various discriminations make it more likely that lesbians and gay men will be unemployed, or forced to emigrate, or be confined to low-paid and insecure jobs.

According to the ICTU, "management can discriminate in hiring and firing, in training and promotion and in onerous supervision and discipline." The ICTU recognises that lesbian and gay workers are often subject to harassment from management and from co-workers. Harassment can be broadly described as "persistent, unwanted behaviour intended to humiliate a person." The harassment can be verbal such as unwanted personal questions and remarks, offensive jokes, innuendo and malicious gossip. A lesbian or gay worker may be isolated by management or by co-workers. In extreme cases a worker may be physically attacked.

Discrimination can also be indirect. Pensions and benefits are paid for but cannot be passed on to partners. Partners are given no recognition in relation to sickness and bereavement [17].

To counteract this discrimination the ICTU has recommended that its 84 affiliated unions, representing almost 700,000 workers, adopt a serious anti-discrimination programme which would include:

- negotiating, with employers, equality agreements which would specifically refer to discrimination on the grounds of sexuality;
- negotiating procedures with employers for handling complaints of discrimination on grounds of sexuality;
- examining collective agreements and conditions of employment for direct and indirect discriminatory provisions.

The objective of the Guidelines is to create a "workplace environment where lesbian and gay workers can have equality of opportunity and be free of harassment or possible reprisals from other workers or management." The ICTU also hopes, by issuing the Guidelines and ensuring their wide distribution beyond the workplace, to make a positive contribution to the fight against prejudice and discrimination in society. This uncompromising stand against prejudice along with practical action to combat discrimination is an example which other organisations should follow.

Progress

Equality claims have been lodged with several employers by various Unions, using the ICTU procedures, and a number have already been successfully concluded. Probably the most significant use to date of the Guidelines has been their effect on one clause of the Irish Civil Service Policy on AIDS, proposed by the Civil Service Unions and agreed and issued by the Government in May 1988. In addition to the clauses on medical confidentiality, continued rights to employment, etc., the Policy also states that "discrimination on the basis of sexual orientation... will not be tolerated in the Civil Service."

This is the first such anti-discrimination commitment ever given by an Irish Government and as such is a landmark achievement. It is important that the Government has recognised the need for anti-discrimination codes and has already acted on it. A precedent has been set for some, at least, of the changes for which we are now calling.

Unfair Dismissals

Since the enactment of the Unfair Dismissals Act, 1977, employers can be required to defend their decisions to dismiss employees before the Employment Appeals *Tribunal Under section 6(1) of the 1977Act*, the dismissal of an employee is deemed to be unfair *"unless, having regard to all the circumstances,* there were substantial grounds justifying the dismissal." The burden of proof lies with an employer to show the reason or reasons for dismissal, and to establish that the reason fits within one of the categories likely to be regarded as "fair" under s. 6(4) of the Act, or that there are other substantial grounds which justify the dismissal. Acceptable reasons may relate to the capability, competence or qualifications of the employee, the conduct of the employee, redundancy, or statutory prohibitions.

Certain reasons are deemed unfair under ss. 5 and 6 of the 1977 Act. These reasons include: dismissal for participation in strikes or other industrial action; trade union membership or activities; religious or political opinions; involvement by an employee in civil or criminal proceedings against or involving an employer; race or colour; pregnancy; maternity; or, unfair selection for redundancy. As we mentioned above, the 1977 Act does not outlaw discrimination on the basis of sexual orientation.

In the absence of explicit protection lesbians and gay men are most vulnerable indeed to employment discrimination, a vulnerability which has been heightened in the wake of the High Court's decision in *Flynn v Sisters of the Holy Faith'*[8]. The plaintiff was a teacher in a New Ross convent secondary school and was dismissed in 1982 for stated reasons solely to do with her private life. She was living with a man whose wife had left him and by whom she was pregnant. Despite the absence of evidence showing that her lifestyle adversely affected the children she taught, the High Court affirmed the decisions of the Employment Appeals Tribunal and the Circuit Court upholding her dismissal. Thus, it was held lawful for an employer to dismiss an employee on the basis of the former's objections to aspects of the latter's private life. If a teacher can be dismissed for being a practising heterosexual, the disquieting implications

for lesbians and gay men are obvious. Although we understand that the Tribunal in 1978 found that an employee's gay sexual orientation did not amount to substantial grounds for dismissal (the sexual orientation of the employee was disclosed to the Tribunal at a private hearing), we are not confident that this decision will be treated as a precedent.

In our view, an explicit anti-discrimination provision protecting lesbians and gay men against employment discrimination would fulfil constitutional principles viewed in their best light. In *Murtagh Properties Ltd. v Cleary'9,* the High Court held that employers were constitutionally bound to respect a prospective employee's right against arbitrary treatment in respect of the right to earn a livelihood. This statement has clear application to the employed person as well. The right does not require that employers act identically with respect to all employees. It is necessary that differences in treatment have some reasonable relationship to legitimate purposes concerning the particular form of employment. A person's sexual orientation is not in itself a legitimate reason to discriminate against an employee.

Of course, the *Flynn* case has special application with regard to employment in religiously controlled schools. The reality is that a teacher's right to earn a livelihood depends on his or her private life being acceptable to their religious employers. It must be conceded that the churches have played a crucial role in advancing education in this state mainly because of the failure of successive governments to provide a meaningful system of publicly funded schools. It is extremely disturbing that homophobic themes informing the educational system, as it is currently structured, render it almost impossible for the many hundreds of lesbians and gay men who teach in schools to be open about their sexual orientation. This makes it urgent that an anti-discrimination law be brought into force which protects lesbians and gay men in every area of employment.

The Irish Congress of Trade Unions and the Council for the Status of Women, along with other bodies, have stated that lesbians and gay men should be specifically protected by the Unfair Dismissals Act. The Joint Oireachtas Committee on Women's Rights has also called for legislative provisions to provide employment protection to an employee in circumstances similar to those of Ms. Flynn [20]. Sadly the Minister for Labour, in a discussion document issues in 1987, declined to accept that it was feasible to amend the 1977 Act to guarantee that a person's behaviour in his or her private life may not be used as grounds for dismissal [21]. We consider it to be a human rights obligation to include such a provision - and to protect all groups of workers who are vulnerable to prejudicial treatment - in any future amending legislation.

Employment equality

The principle of employment equality is provided for in two Acts, namely, the Anti- Discrimination (Pay) Act 1974 and the Employment Equality Act 1977. The Employment Equality Act outlaws discrimination on grounds of sex or marital status in relation to access to employment, conditions of employment (other than pay or conditions relating to an occupational pension scheme), training or experience relating to employment, promotion, regarding or classification of posts. The Act prohibits not only actions which are directly discriminatory on the grounds of sex or marital status but also actions which have the effect of discriminating indirectly against persons of a particular sex or marital status. The Act also makes it unlawful to dismiss an employee for pursuing a case of alleged discrimination under the 1974 or 1977 Acts. While it is aimed primarily at the prevention of discrimination by employers, the Act also prohibits discrimination by organisations concerned with the provision of training courses, as well as in placement and guidance services provided by employment agencies. Discrimination as regards admission to membership of trade unions and employer organisations is also prohibited, as is the display or publication of discriminatory advertisements.

In an enlightened decision under the 1977 Act, the Labour Court recently held that "freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect." The court declared that it would treat "any denial of that freedom as discrimination within the terms of the Employment Equality Act 1977". [22]

The Act of 1977 established the Employment Equality Agency. Its functions are: to work towards the elimination of discrimination in relation to employment; to promote equality of opportunity between men and women in relation to employment; and to keep under review the working of the 1974 and 1977 Acts and, where necessary, to recommend amendments. The Agency has the task of enforcing the policies behind the Acts. It may conduct formal investigations and, if satisfied that there are practices or conduct in contravention of the Acts, it can issue non-discrimination notices requiring that they cease. The Agency may seek a High Court injunction in respect of persistent discrimination. It has the sole right to initiate proceedings in cases of discriminatory employment advertisements, pressure on persons to discriminate in relation to employment, and a general policy of discriminatory employment practices. Although the Agency in October 1986 recommended to the Minister for Labour that a provision outlawing employment discrimination on grounds of sexual orientation should be included in amendments to the 1977 Act, no legislative action in this direction has materialised. Certainly the 1977 Act needs revision because as the 1987 discussion document noted: "subtle forms of discrimination, generally of an indirect nature, still persist." This, the document

suggested, is especially true of sexual discrimination where the "pattern of women's employment still reflects the effects of past discrimination and attitudes". We would urge the Government to overhaul our employment anti-discrimination legislation in its own right - and to include sexual orientation as a prohibited ground of discrimination - or to achieve this goal in the context of a new and comprehensive anti-discrimination law covering all traditionally disadvantaged minorities and groups.

PUBLIC AND PRIVATE HEALTH

Throughout the nineteenth Century the perception of the homosexual as criminal was, in most Western societies, superseded by the model of homosexuality as a disease. Despite Ireland's retention of criminal sanctions, this second perception was also widespread in Ireland. In many respects, it still is.

For decades past, lesbians and gay men had been persuaded, or frequently forced to "see a doctor" or attend a psychiatrist for no reason other than their sexual inxlin-ations [23]. "Treatment" varied from persuasion to incarceration in mental hospitals; and aversion therapy, using drugs or electric shocks, was a known practice. This punitive approach has diminished in recent years, yet in 1987 it was necessary for Mr. Fred Lowe, a senior Clinical Psychologist with the Eastern Health Board, to complain at a public seminar that not only was there a hostile attitude among much of the general population, but that clinicians frequently shared this attitude [24]. He mentioned the many referral letters from general practitioners asking, for example, for treatment "because he claims to be a homosexual," or "can you sort him out for me?"

This medical prejudice may once have been part of a worldwide hostile attitude towards lesbians and gay men, but in the light of more recent knowledge, it has become indefensible. It is, after all, fifteen years now since the American Psychiatric Association declared that "homosexuality, *per se,* implies no impairment in judgement, stability, reliability, or general social or vocational capabilities", and that "in the reasoned judgement of most American psychiatrists today, homosexuality *per se* does not constitute any form of mental disease" [25]. All studies in the years since 1973 have made it abundantly clear that the great majority of gay people come to terms with their sexual orientation and integrate it into their lives.

It is time that the Irish Medical Association backed this stance of the American Psychiatric Association and took positive steps to ensure that psychiatric services are used to help people to be happy in their lives, whatever their sexual orientation. Such help may well, of course, involve the resolution of stresses induced by living in a society that criminalises or stigmatises gay and lesbian people.

The model of homosexuality as a disease has sadly received new life since the advent of AIDS. AIDS is not, of course, a 'gay disease', but wide misreporting in the press has given that impressions. In truth, gay men are just one of a number of groups at somewhat greater risk of HIY infection. Like everyone else, they must be informed about safer-sex practices. For this reason, widespread and highly specific education programmes are important [27].

There have been suggestions that gay male sexuality should remain illegal in order to prevent the spread of AIDS, though there is compelling evidence to suggest that the threat of criminal prosecution actually harms the public health effort by driving the disease underground, where it is more difficult to study and contain, and by impeding the flow of information about prevention from public health experts to the population at risk. This dominating issue of illegality has badly distorted the Irish experience of the fight to contain the HIV virus. In almost every other Western country, gay community groups providing this crucial educational information have received generous funding. Precisely because these groups can easily reach gay men who are part of the community, they have everywhere been the most effective elements in the fight. Direct Government funding to Ireland's Gay Health Action group, however, amounted to £1500 for the printing costs of their first general leaflet in 1985. Since then there has been no further funding. This is certainly not because the Department of Health disapproves of their education programme, for the Department has repeatedly praised its quality. The lack of funding derives instead from a legal opinion that the Government cannot fund a gay organisation providing explicit sexual and gay men - would be an advance. The National Union of Journalists has produced guidelines in this area. Second, freedom of expression can be a valuable means to confident self -realisation. Through public expression a lesbian or gay man may seek to develop personal goals, understanding of their sexual orientation and a confident identity. Relevant here would be educational and social activities which may include organising events from seminars to same-sex dancing. Finally, lesbians and gay men need to use expression as a means of participating in the marketplace of political ideas and influencing the political process to advance the cause of equality. Central is the freedom to engage in such activities as public debates, demonstrations, media discussion, advertising and the use of facilities such as conference halls and hotels. Important too is symbolic expression such as drama, cinema, wearing liberation insignia, or public displays of affection, as a form of political advocacy and protest.

Even with legislative reform in this area there is a danger that some courts could continue their own agenda to impose restrictions on lawful sexual activity between lesbians or gay men. In *Attorney General v Open Door*

Counselling Ltd [33], Hamilton P. in the High Court held that there is an offence in Irish law known as 'conspiracy to corrupt public morals'. The upshot of this offence is that anything which assists or promotes the commission of activity which is not criminal in itself but which is contrary to the dominant conventional morality constitutes a common law offence triable before a jury. This chameleon-like expansible crime violates basic principles of fairness in that it does not afford people notice of what conduct precisely is prohibited. It is a charter for the moral- police in our society to hunt down those who do not accept the dominant moral code. In England in 1973, in the case of *R v Knuller (,Publishing) Ltd* [34], a conviction for conspiring to corrupt public morals, by publishing advertisements by gay men seeking partners for a sexual relationship , was upheld by the House of Lords. The legal authority for this decision was *Shaw v D.P.P.35* where it was held in the House of Lords that the accused, who had published a directory of prostitutes, had been properly convicted of the offence of conspiracy to corrupt public morals even though he had been told by the police and his legal advisers that there was no law prohibiting his venture. The *Shaw* case was cited by Hamilton P. in the Irish High Court as authority for his decision. The implication of this development is that anything which assists or promotes the commission of lawful sexual practices between lesbians or gay men may be judged contrary to public policy, and for that reason is liable to be judged a criminal offence. The only reasonable response to this development is to pass legislation explicitly removing the offence from our criminal code.

HUMAN RIGHTS COMMISSION

We urge the Government to create a Human Rights Commission to monitor and enforce the policies of an anti-discrimination law. Its functions should include: promoting the policy of non-discrimination in regard to minorities; promoting education and research intended to eradicate unjustified discrimination; reviewing the efficiency of anti-discrimination legislation; promoting the settlement of complaints about alleged breaches of the anti-discrimination law with the agreement of all the parties, requiring by way of a non-discrimination notice parties in breach of the law to cease and desist; initiating court actions in respect of complaints which have not been settled by agreement and arguing in court for the position which best promotes an anti-discrimination policy. Such a Commission might be composed of seven members, including a lawyer, a person with experience in trade union activities, and a person with experience in public administration. The idea of a Human Rights Commission is not novel, and indeed the Employment Equality Agency functions

in its statutorily defined area, concerning gender discrimination, as a form of such Commission. The idea makes sense given the need to guarantee protection against discrimination to various groups, including travellers, religious and non-religious minorities, who have historically been the targets of malign discrimination. Moreover, the evolution of an international law of human rights with provisions against discrimination supports our view that anti-discrimination laws with effective enforcement procedures are part of a noble idea whose time has come [36].

CONCLUSION

We urge that legislators recognise that they owe their entire political constituency equal concern and respect. They violate this bedrock duty if they tolerate laws or practices based on pernicious, hostile, and prejudicial stereotypes of a discrete minority. The principle of equal citizenship forbids government from treating a lesbian or gay man as if she or he belongs to an inferior category of human being. In 1981 the Parliamentary Assembly of the Council of Europe adopted a Recommendation calling on Member States to guarantee equal treatment for homosexuals. In 1984, the European Parliament adopted a similar recommendation. The laws of many countries contain provisions, which render unlawful certain forms of discrimination based on sexual orientation. Included in this group of countries are many European countries such as France, Denmark, Holland, Norway, Sweden, and Greenland. Anti- discrimination laws have been passed in Canada (e.g. Yukon), United States (e.g. Wisconsin), Australia (New South Wales). In the United States, a number of cities have adopted anti-discrimination measures (e.g. Portland, Seattle, and Washington) [31]. These laws reflect the principle that legislators should, as a matter of solemn obligation, be vigilant against invidious discrimination of minorities by ensuring that the law treats each person as an equal, responsible and participating member of the community. The Irish Government could meet this obligation by enacting a law declaring that sexual orientation, race, colour, religion, sex, nationality, and membership of the travelling community, to mention some common grounds of discrimination in our society, are prohibited bases for discrimination.

DISCRIMINATION AGAINST YOUNG LESBIANS AND GAYS

Chapter six

INTRODUCTION

dolescence in Ireland as in many cultures is viewed as a potentially stormy and stressful period' . For many young people this stage of development is a difficult and challenging one. Coupled with the physical changes experienced, sexuality and sexual expression are very important in this period of young people's lives, and both are an important part of sexual and social development. Stevi Jackson in 1986, discussing adolescent sexuality comments;

> "They must assimilate and make sense of the facts in terms of their own desires, emotions, behaviour and relationships. They must begin to cast themselves and others in sexual roles and learn how to establish and manage sexual relationships" 2.

Young people are not experiencing these challenges and pressures in a vacuum - they receive societal messages through peers, parents, education, and so on, to begin heterosexual relationships, consider career paths and other tasks of adulthood.

This chapter discusses the important question of the rights and the experiences of young lesbians and gay men. Firstly, while it is true that a person's sexual identity evolves from a very early age, adolescence is the time when this identity is self- consciously developed and explored. Imposed burdens of denial, shame, or ostracism can prevent the achievement of personal integrity and a fruitful realisation of the freedom to become an autonomous adult. Secondly, because it is clear, both in Ireland and elsewhere, that in campaigns for more liberal policies in respect of sexual diversity and social reform - such as those concerning access to birth control, divorce, and gender discrimination - the main locus of opposition has often been the supposed adverse effects of change on young people. This conservative attitude is characterised by such catchphrases as "the need to protect our youth," or "the need to protect our youth against corruption." This attitude diminishes or denies the rights of young people to be sovereign in regard to their own identity and their rights to plan, pursue and revise their own lives.

Here, as elsewhere in this Report, we unequivocally accept that society must have laws to prevent the sexual coercion of any young person, and we accept also that a common age of consent in relation to sexual activity should be determined for all young people. Moreover, we do not advocate special rights or privileges for young lesbians or gay men. What we vigorously stand for are their rights, as Irish citizens, to equality with their heterosexual peers in treatment, protection and respect.

THE EXPERIENCE OF DISCRIMINATION

The societal messages that young people receive through peer and popular culture are, despite being stereotyped and inadequate, at least generally relevant to young heterosexuals. They omit almost entirely, however, the experiences, desires and hopes of young lesbians and gays. Young people's magazines, mainstream music, advertising, T.V. and films, text books and religion all promote the ideal of "model heterosexuality". This portrayal of sexuality and of model lives excludes the lived experience of young lesbians and gays, and is the start of discrimination against them. By monopolising and institutionalising the ideology of sexuality, its development and experience, this portrayal ignores the realities of all difference and diversity.

It is not just the lack of positive images that is the problem, but the fact that those images that do occur are almost always of negative stereotypes, belittlement and caricature. The constant portrayal of insulting caricatures, such as the limp-wristed squeaky-voiced, nonentity and the predatory man-hating woman, sets up real conflicts in the minds of young people trying to understand themselves and develop a secure self-esteem. Their response might understandably be: "Does being gay mean I'm going to end up like that, for God's sake?" or "That has nothing to do with me - if that's what lesbians are really like, then what am I?" There would be a public outcry if any other minority, racial or otherwise, was almost invariably represented by such insulting and demeaning images. For lesbians and gay men it is so pervasive as to go unnoticed and to pass for the norm.

Young lesbians and gay men experience all the usual adolescent pressures but society, by ignoring and denying homosexuality, ensures that young lesbians and gay men face the added pressures of denial and shame. They must confront their own desires, accept the validity of those desires, and, if they so choose, declare their gayness or lesbianism to others. Declaring their lesbianism or gayness is peculiar to young lesbians and gay men. Young heterosexuals do not have to make any announcement about their sexual orientation, because their sexuality is assumed, and their sexual awareness and preference is considered to be part of normal development and progression into adulthood. However, even with these approved and assumed norms, young heterosexuals frequently face guilt and confusion in a society itself confused and guilt- ridden about sexuality. It is easy to understand how much more difficult it is for young homosexuals to negotiate the socially imposed difficulties in the way of growing up.

Declaring their sexuality for lesbians and gay men can often mean rejection at home, school and by friends. Rejection at home can often result in a young person leaving home and becoming powerless, with no economic and social support. The lesbian and gay community points out that,

> "As far as we're concerned the main issues affecting young lesbians are the difficulties of living at home - having to be secretive; knowing parents will not understand and accept; the fear of hurting them and the consequent feelings of guilt and the fear of financial hardship if our parents kick us out of the family home. Then there's the issue of being lesbian at school; sneers from classmates, prying questions always being asked with a giggle, fear of our teachers finding out and their prejudices in terms of exams and reports" [3].

It should also be said that despite all the problems young lesbians and gay men encounter, and the pressure exerted on them to deny their homosexuality, research has shown that many young self-defined homosexuals are happy with their sexuality and have experienced fulfilling and ongoing relationships [4]. For those who come out in unhappy circumstances, and for the majority of young lesbians and gays who find that pressures of heterosexism make it too difficult to come out, the recommendations made in this Report will, if followed, help their acceptance of themselves and their ability to find happiness in their relationships.

EDUCATION

Many institutions in Ireland serve to regiment young people's sexuality through narrow definitions, limited discussions and constraints on behaviour. Education is no different.

There are young lesbians and gay men in every school in every school in Ireland. The great majority of them are silent about their identity, and to a greater, or lesser degree they feel the pressure, prejudice and discrimination of living in a homophonic society. Irish education reinforces this pressure maintaining yet again that heterosexuality is the only imaginable way. Lesbianism or gayness are mentioned, it is only to deny their, possible acceptance.

Though negative images may well be promoted, more usually it is by their omission from curricula, texts and discussions that homosexuals are invalidated.

It is ridiculous to pretend that sexual education or lifeskills programmes in Ireland are somehow grand for heterosexuals and terrible for others. They are poor for everyone and frequently absent together. Too often, they ate limited one-sided "conversations" with a strong guiding direction. Rarely are they even forums for real analysis or explorations of the majority experience, let alone explorations of alternative lifestyles and expressions of human sexuality. Along with traditional sexist images and the casting of all women in subordinate roles, they deny or at best trivialise other choices. The most positive likely mention of homosexuality is in terms of patronising "compassion" for people who are unfortunate enough to be "that way." In other words, the true lived experience of homosexuality or homosexual relations is ignored.

Even in the ordinary curriculum only traditional heterosexual images occur, from Maths to History, from English to Biology. Maths "examples" are likely to reinforce the stereotype of the father paying the mortgage, and the housewife balancing her allowance. They have not progressed to equal financial arrangements, let alone to choosing "examples" from other lifestyles. In History or English, how likely is there to be a mention of the contribution of lesbians and gays to politics or literature, art or music? In Civics class how much discussion is likely to occur on the discriminations in Irish society against travellers or other ethnic groups, let alone against sexual minorities?

The discrimination which has not been tackled in Ireland has been challenged elsewhere. In 1988 the Toronto Board of Education trustees adopted a sex education policy that will include education against "homophobia" in the school curriculum [5].

At 10% of the population, lesbians and gay men are the largest minority in Ireland. In schools this means that out of a thousand pupils, one hundred of them are receiving an inadequate education in an area central to their lives.

But the omission of homosexuality together with the heterosexism inherent in Irish schooling, not only discriminates against a large group of Irish citizens, it also diminishes the lives of the majority by denying the reality of other authentic human lives, and the experience of rich and shared diversity.

IRISH YOUTH SERVICES

The organised youth service in Ireland is another important area where professionals work directly with young people. The majority of youth services, ranging from scouts guides and clubs to youth political organisations are affiliated to the main National Youth organisations. In general, the role of National Youth organisations is to lobby on behalf of youth, organise and distribute government funding, and to represent young people at a national level. The National Youth Council of Ireland's priorities are:

- ensuring the necessary funding for youth organisations from government.
- lobbying government for more comprehensive services for young people.
- promoting the invaluable work of youth organisations.
- representing the views of all member organisations at a national and international level.
all our member.
- providing the necessary information and services to organisations [6].

In 1985 at a conference of the National Youth Council, the National Gay Federation Youth Group was refused admission as an associate member by a conference vote.
Comhairle le Leas 6ige consider that its purpose is,

> "to fulfil its responsibilities as a Local Youth Service Board and thereby provide or ensure the provision of development and educational experiences, complementary to the family and formal education, for young people to meet their own personal development needs and to equip them to play an active part in our society".

In 1986, Comhairle le Leas 6ige, the statutory youth service for Dublin decided not to re-register the National Gay Federation Youth Group. The Youth Group had been a member since 1981, and fulfilled all criteria laid down by Comhairle. A new system of registration was introduced in 1986, replacing annual affiliation with a once and for all registration. The main objections to registering the N.O.F. Youth Group appeared to be based on the view that teenagers could not be sure about their sexual identity. The legal position regarding homosexual activity was also raised [7].

The brief of the National Youth Policy Committee Report of 1984 was to make recommendations on youth policy, to compile representations from all youth groups and services. This body refused to acknowledge submissions given to them by the National Gay Federation Youth Group and failed to include any reference or part of the submissions made to them in their final report.

It is clear that important statutory youth bodies in Ireland have had, and continue to have a policy of blatant discrimination against the lesbian and gay community, and particularly the National Gay Federation Youth Group. These national bodies that define their aims and priorities as representing young people, providing a forum for the young person's development, are clearly failing in those aims in relation to young lesbians and gay men.

LIFE IN YOUTH CLUBS

The apparent lack of awareness on the part of the leadership of youth services and their inability to understand the position of lesbians and gay men in Irish society is reflected in many youth clubs throughout the country. Youth clubs have been criticised for their sexist emphasis on boys' activities and poor provision for girls who attend. It has been aptly said that,

> "In Ireland, as elsewhere, this type of club has attracted greater participation by boys, with girls either absent or else watching the boys' activity... Thus, despite some Irish youth organisations beginning to critically examine their own stereotypes and methods of work in the last five years or so, the stereotyping of participants along gender lines has not been challenged strongly, or adequately"[9].

However, it is also clear, as with the experience of sex education in schools, that youth clubs, discussion groups, girl guides groups, etc. do not provide any forum for discussions on sexual diversity. Limited discussions on sexuality and on relationships may occur, but lesbians and gay men, as usual, disappear from view. There are exceptions, with committed and aware youth leaders, but for most young homosexuals a youth club can be yet another place to feel uncomfortable and to hide feelings, instead of an arena to express emotions and to feel relaxed. They are not welcoming places.

The Irish Youth Services are quite obviously not meeting the needs of a large minority of Irish young people. Because of the policy of many of the official bodies, the strong influence of the churches in youth services, and the system of education of youth workers, there is little or no positive information, resources, discussion of homosexuality for members of youth organisations.

THE RIGHTS OF YOUNG LESBIANS AND GAY MEN

Young lesbians and gay men, as Irish citizens growing up in Ireland, should enjoy equal rights with their peers. As citizens, they should be protected against discrimination in all aspects of their lives, school, work, youth clubs etc.

They have the right to expect representation and recognition on National youth bodies and in the youth services generally.

Young lesbians and gay men have a right to explore and to enjoy sexual relationships at the same age as their heterosexual peers.

All young people have the right to expect the support and facilities of an environment, which enables them to develop into mature adults. Being lesbian or gay should not be an excluding criterion.

EQUALITY - A MATTER OF PRINCIPLE

CHAPTER SEVEN

MATTER OF PRINCIPLE

The Irish courts have refused - without even the thinnest of justifications - to develop a coherent idea of the right of sexual privacy, intimate association, and self-expression. They have chosen instead to characterise the right as protecting decisions or activity involved in only certain narrow areas of private life, specifically marriage, family and procreation. On this view, homosexual conduct bears no relationship to these categories, and therefore, its protection within the right of sexual privacy is not required.

A sounder approach was taken by the European Court of Human Rights which focused on the intensely personal aspects of the right of sexual privacy, therefore promoting the values of personal autonomy and freedom of choice. This approach is entirely defensible. We say that the basic value of a right of privacy which protects personal decisions regarding sexual conduct is its protection of the right of independence in defining one's own sexual identity. This is a matter of principle.

Providing legal shelter to highly personal relationships would reflect awareness of the profound degree to which people draw much of their moral and emotional enrichment from intimate relationships with others. Protecting these relationships, whether they are heterosexual or homosexual, safeguards the fundamental, defining, human capacity independently to develop one's own identity, which is central to the concept of equality. To deny sexual autonomy to lesbians and gay men is ruthlessly to ignore the fact that homosexuals, like heterosexuals, derive much of their emotional enrichment from intimate relationships. Because intimate, consensual sexual conduct is integral to self-identity, the current law wrongly denies lesbians and gay men the ability to define their own identity.

We have made the point that the fact that prejudice against homosexuals is long- standing is not itself a reason to assume it is justified, any more than the almost universal existence of slavery up to this century is any reason for its continuance today. The long history of discrimination against lesbians and gay men, like the long history of legal discrimination against women, illustrates the need for legal reform, not the legitimacy of oppression. Blind and prejudiced imitation makes no sense. To cite a history of oppression as support for retaining any form of discrimination against lesbians and gay men, is to subordinate principles of justice to preserving the *status quo* without regard to the suffering of a minority who lack the political power to vindicate their rights. To fail to respond in a principled way would be to turn on its head the democratic axiom of special concern for historically maligned minorities and their characteristic activities in order to ensure them equal respect.

DECRIMINALISATION BENEFITS SOCIETY

There are people who, because they are caught in a stranglehold of prejudice, will resist, in a foot-stamping style, the obligation to approach the question of reform in a fair and open-minded way.

A common homophobic reflex is the assertion that lesbians and gay men are "biologically absurd" and have "pathological" personalities whose anti-social potential the law keeps in check'. This idea was among those associated with homosexuality by Nazi propagandists'. Such propaganda is designed to evoke the deepest irrational feelings and fears. It is wholly untrue and seeks only to impose ignorance so as to prevent reform.

The facts are as follows: First, sexual orientation does not affect a person's ability to contribute, positively, to society. Homosexuality is not a mental disorder. Both the American Psychiatric Association and the American Psychological Association stressed, in a "reasoned judgement," that homosexuality per se" implies no impairment in judgement, stability, reliability or general social or vocational capabilities." Homosexual and heterosexual people cannot be distinguished from each other on the basis of standard psychological tests, and a similar majority of the two groups appear to be free of psychopathology. "Theories" claiming that homosexuality implies maladjustment are "irresponsible, uninformed or both"[3].

Second, studies show that people holding negative attitudes toward homosexual people "are less likely to have had personal contact with lesbians or gay men," and, hence, are basing their attitudes on popular beliefs and misconceptions. Such people tend to label homosexuals according to stereotypes (e.g., gay men are said to be effeminate, ill, promiscuous, lonely, insecure, neurotic, and likely to be child molesters, while lesbians have been described as masculine, aggressive and hostile toward men) and to see stereotypical behaviours, whether or not they occur"[5]. These stereotypes are untenable. Nonetheless, they can be so influential that those homosexual people - the overwhelming majority - who simply do not match stereotypical expectations may actually be despised for that reason [6].

Third, a person's sexual orientation is not a matter of whim but is extremely important to individual identity. The causes of sexual orientation - whether we have homosexuality or heterosexuality in mind - have not been reliably determined7. Research indicates that sexual orientation develops at a very early age, perhaps by six and certainly by adolescence, and that once settled upon it is highly resistant to attempts to change it. Psychologists generally agree that psychological adjustment is positively correlated with openness about one's sexual orientation. The majority of lesbians and gay men manage, in the face of pervasive and hostile prejudice, to 'integrate their sexual orientation into their personal identity.

Fourth, the present laws stigmatise homosexuals and pressure them to conceal their sexual orientation, which may be harmful to health. In other words, the majority of lesbians and gay men, like the majority of heterosexual people, are psychologically well-adjusted. For some homosexual people, just as in the case of some members of most persecuted groups, prejudice can impose heavy psychological costs. As Allport points out in his book, *The Nature of Prejudice* [8], some people may feel compelled to deny membership of their group, experience self-hatred and hatred of others in their group, and act out self-fulfilling prophecies about their supposed inferiority.

Opponents of reform are likely to assert that decriminalisation of gay sexual conduct will produce harmful social consequences. There is little research available on this question, but there is absolutely none to support the assertion regarding harm.

In 1976, Geis, Garrett and Wilson [9] surveyed gay men, district attorneys, and police in seven states in the United States which had decriminalised homosexuality. They reported that those surveyed felt that the changes had not led to any increased involvement of gay men with minors, nor any increases in the number of offences involving coercion. The authors point out that if the consequences of decriminalisation had been negative or socially disruptive, such effects would have resulted in an obvious adverse reaction on the part of the law enforcement agencies. They suggested that the police felt that it enabled them to devote more time and resources to real crime. The homosexual community felt that decriminalisation eased the anxieties and burdens experienced by gay men in a homophobic atmosphere.

In 1985, Fr. Sinclair and Dr. Ross published the findings[10] on a comparison between gay men in two Australian states, Victoria (before decriminalisation) and South Australia (eight years after decriminalisation). Their studies revealed that the consequences of decriminalisation did not include an increase in what were alleged to be negative aspects of homosexual activity, such as public solicitation of partners or sexually transmissible disease. The incidence of sexually transmissible diseases was higher in Victoria, a fact attributable to the pressure the criminal law put on gay men to find anonymous sexual partners in public places. The number of gay men who never made contacts in public places was higher in post-law reform South Australia. In South Australia, law reform had a beneficial effect on the adjustment of gay men to their life-style. Gay men experienced more self- acceptance of their sexual orientation and felt more secure in their close relationships. There was no increase in relationships with minors, or encounters with the police. The report shows that the negative consequences so often detailed in the arguments of opponents of reform do not occur. In fact, reform is likely to provide benefits to society.

The current discrimination against lesbians and gay men is based on outmoded, empirically discredited conceptions of homosexuality, and are in conflict with the modern scientific understanding of sexual orientation. Such discrimination is harmful: it is seriously detrimental both psychologically and otherwise to lesbians and gay men; it often deprives our institutions of government and our society of well-qualified people; and it encourages people who

hold negative attitudes to persist in holding those attitudes by giving them official approval. Such harms are the classic consequences of invidious discrimination.

CONCLUSION

Discrimination against lesbians and gay men, indeed against all powerless minorities, slows our progress to maturity as a free democracy founded on ideals of equality. For too long a hive of confused prejudices has been allowed to stand in the way of the political road to tolerance and mutual respect. Discrimination is a severe indictment of our avowed commitment to the cause of human rights in the world by contradicting within our own frontiers the root principle of equal concern and respect for minorities we advocate abroad. Such discrimination, particularly as it concerns sexual autonomy, violates the European Convention of Human Rights and Fundamental Freedorns. Most of all, it is wrong.

But we should be categorical in our consciences that it is not just because of our obligations under the European Convention that we should act to dismantle our system of sexual apartheid. It is not because we feel we should smuggle in a small contraband of pluralism to avoid international embarrassment. It is not even because no harm to compelling public interests would result from reform. Nor should we feel compelled to search our consciences and hearts to find compassion for lesbians and gay men, for no citizen who puts value on self-esteem wants condescension. The governing reason is because it is right as a matter of principle grounded in the fundamental requirements of justice.

The Government has talked long enough about this question of justice, and it has had a long time to consider the arguments. It is past time to state its sense of justice. The Government must have the courage to show leadership in creating a political and legal climate in which lesbians and gay men will be afforded equal treatment. The Government is in a unique position to appeal to the inherent fair-mindedness of the Irish people. It also has scientific research, the human rights tradition, and the moral and legal force of the European Convention of Human Rights behind it.

The Government must declare its support for the principle of equality and repeal the current criminal laws which were held unjust by the European Court of Human Rights and provide for an age of consent in regard to sexual conduct which treats homosexuals and heterosexuals equally. It is now time to write the next chapter of sexual justice - and to write it in the black-letter text of our statutory law.

Appendix 1

ELEMENTS OF A MODEL EQUALITY (ANTI-DISCRIMINATION) BILL

(This statement is intended to serve as a guideline relating to the desirable minima of an anti- discrimination statute. It summarises the more important elements required by an anti- discrimination statute. It is not intended to serve as a model statute, because it lacks the necessary detail and makes no attempt to adhere to the conventions of parliamentary drafting practice.)

1 - Declaration of Principle

Every person, regardless of race, religion, colour, ethnic origin (including membership of the travelling community), sexual orientation, gender, family status, health disability, or *(the statute should include other statuses, e.g. age, used in our society as badges of inferiority to discriminate against people),* is entitled to equal concern and respect before and under the law.

2 - Definitions

"prohibited grounds" are race, religion, colour, ethnic origin (including membership of the travelling community), sexual orientation, gender, family status, health disability, *(specify other statuses);*

"a person with a health disability" is any person who has a physical impairment which substantially limits one or more of such person's major life activities or occupations, has a record of such impairment, is regarded as having such an impairment, has a contagious or infectious disease, or who currently has no incapacity at all, or who has a disability which does not limit major life activities or occupations, but who is merely generally perceived as having an impairment which substantially limits such activities;

The term "contagious or infectious disease" includes any transmissible disease which impairs the essential function of the immune system, limiting the ability of the body to fight infection and preserve health, and causing physical debilitation which affects strength and endurance;

The term "major life activities or occupations" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working;

The term "physical or mental impairment" includes any physiological condition affecting the lymphatic system or the immune system;

I equal" means that no otherwise qualified person shall, solely by virtue of his status, be excluded from participation in, or denied the benefits of, or be subjected to discriminatory treatment in respect of, basic autonomy, opportunities, rights, entitlements or liberties, but shall be entitled to equal concern and respect;

"family status" means the status of being in a parent and child relationship;

"domestic partner" means the person with whom a person is living in a domestic relationship and who is registered as that person's domestic partner;

"sexual orientation" means attraction to or selection of a sexual partner according to gender, includes having a history of such attraction or selection or being identified with such attraction or selection, and is limited to heterosexuality, homosexuality or bisexuality;

A person commits "unlawful discrimination" against another person, when on the basis of

(a) any status covered by the prohibited grounds;

(b) a characteristic that appertains generally to such a status; or

(c) a characteristic that is generally imputed to such a status

he/she treats or causes him/her to be treated less favourably in the same circumstances, or in circumstances which are not materially different, than he/she treats or would treat a person whom be/she did not think had such status.

A person commits "unlawful discrimination" against another person on a prohibited ground if he/she requires the person discriminated against or causes the person to be required to comply with a requirement or condition

(a) with which a substantially higher proportion of persons who do not have the status covered by the prohibited grounds comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the person discriminated against does not or is not able to comply.

3 - Unlawful Discrimination: Employment

It is unlawful for a person to do, directly or indirectly, any of the following acts as a result of the fact, in whole or in part, that a person has a status covered by the prohibited grounds or is perceived to have such a status:

(1) For an employer to refuse to consider for employment or refuse to employ, or to dismiss any person, to discriminate against any person with respect to remuneration, terms, conditions or privileges of employment, including promotion; or to limit, segregate or classify employees in any way which would deprive or tend to deprive such individual of employment opportunities, or otherwise adversely affect his/her status as an employee;

(2) For an employment agency to fail or refuse to refer for employment any individual, or otherwise to discriminate against any individual;

(3) For a trade union to exclude or expel from its membership or to otherwise discriminate against any individual;

(4) For an employer, employment agency, trade union, or government agency:

(a) to discriminate against any individual in consideration for, admission to, or employment in, any programme established to provide apprenticeship or training or, inclusion in any on-the- job training programme; or

(b) to print, publish, advertise or disseminate in any way, or cause to be printed, published, advertised or disseminated in any way, any notice or advertisement with respect to employment, membership of, or any

classification or referral for employment or training by any such organisation, which indicates an unlawful discrimination or preference.

4 - Bona Fide Employment Qualification

In any action brought under Section 11 of this Bill, if a person asserts that an otherwise unlawful discrimination is justified as a *bona fide* employment qualification, that person shall have the burden of proving that:

(a) the discrimination is in fact reasonably related to the satisfactory performance of the duties of the job;

(b) there is a sustainable factual and not unreasonable basis for believing that a person with a status covered by the prohibited grounds would be unable to perform satisfactorily the duties of the job with safety;

(c) there exists no less discriminatory means of satisfying the *bona fide* employment qualification

5 - Unlawful Discrimination: Housing

It is unlawful for any person to do, directly or indirectly, any of the following acts as a result of the fact, in whole or in part, that a person has a status covered by the prohibited grounds:

(1) To interrupt, terminate, or fail or refuse to initiate or conduct any transaction in real property, including but not limited to the rental, lease or sale thereof; to require different terms for such transaction; or falsely to represent that an interest in real property is not available for transaction;

(2) To refuse to lend money, guarantee the loan of money, accept a deed of trust or mortgage, or otherwise refuse to makes available funds for the purchase, acquisition, construction, alteration, rehabilitation, repair or 'maintenance of real property; or impose different conditions which are unreasonable in the circumstances of such financing; or refuse to provide title or other insurance relating to the ownership or use of any interest in real property;

(3) To include in the terms or conditions of a transaction in real property any clause, condition or restriction relating to a status covered by the prohibited grounds;

(4) To refuse or restrict facilities, services, repairs or improvements for any tenant, lessee, or owner; or

(5) To make, print, publish, advertise or disseminate in any way, or cause to be made, printed or published, advertised or disseminated in any way, any notice, statement or advertisement with respect to a transaction or proposed transaction in real property, or with respect to financing related to any such transaction, which unlawfully indicates exclusion, limitation or adverse discrimination on the basis that a person has a status covered by the prohibited grounds or is perceived to have such a status.

6 - Exceptions and Exclusions

(1) Nothing in Section 5 of this Bill shall affect the standard procedures for determination of financial capability - so long as those procedures have a sustainable and not unreasonable basis - to enter into real property transactions.

(2) Nothing in Section 5 of this Bill shall prohibit a religious body from limiting the sale, rental. or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion or from giving preference to such persons, unless membership in such religion is restricted on account of a person having a status covered by the prohibited grounds.

(3) Nothing in Section 5 of this Bill shall prohibit a private club not open in fact to the public, which as an incident to its primary purpose provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members, or from giving preference to its members.

(4) Nothing in Section 5 of this Bill shall bar any person from owning and operating a housing accommodation in which rooms are leased, subleased or rented only to persons of the same sex, when such housing accommodation contains common lavatory, kitchen or similar facilities available for the use of all persons occupying such housing accommodation.

(5) Nothing in Section 5 of this Bill shall prohibit the sale, rental, lease or occupancy of any dwelling designed and operated exclusively for elderly adults and their spouses, unless the sale, rental, lease, or occupancy is further restricted on account of a person having a status covered by the prohibited grounds.

7 - Unlawful Discrimination: Business

(1) It is unlawful for any person to deny any person the full and equal enjoyment of the goods, services (including visits to a hospital), facilities, privileges, advantages and accommodations of any business establishment or public accommodation as a result of the fact, in whole or in part, that a person has a status covered by the prohibited grounds or is perceived to have such a status.

(2) No person shall make, print, publish, advertise or disseminate in any way any notice, statement or advertisement with respect to any business establishment or public accommodation which indicates that a person is doing or will do anything which this Section prohibits.

8 - Unlawful Discrimination - Local Government

It is unlawful for any person to deny any person the full and equal enjoyment of, or to impose different terms and conditions on the availability of:

(a) the use of any local authority facility or service as a result of the fact, in whole or in part, that a person has a status covered by the prohibited grounds or is perceived to have such a status.

(b) any service, programme or facility wholly or partially funded or otherwise financially supported by a local authority, as a result of the fact, in whole or in part, that a person has a status covered by the prohibited grounds or is perceived to have such a status.

9 - Safeguards

(1) It is unlawful for any person to do any unlawful discriminatory act as a result of the fact that a person associates with anyone who has a status covered by the prohibited grounds or perceived to have such a status.

(2) It is unlawful for any person to do any unlawful discriminatory act, or to retaliate against a person because a person:

(a) has opposed any act or practice made unlawful by this Bill;

(b) has complied with this Bill and its enforcement;

(c) has lodged a complaint under this Bill with the Human Rights Commission or initiated an action for redress in the courts;

(d) has given evidence, assisted or participated in any way investigation, proceeding, or litigation under this Bill.

10 - Testing

(1) No person shall require another person to undergo any medical procedure or test designed to show or help to show whether a person has a health disability unless such testing is strictly necessary as a *bona fide* occupational qualification.

(2) Nothing in this Section shall be construed to prohibit any blood bank, blood centre or plasma centre or any medical facility which procures, processes, distributes, or uses a donated human body part from conducting any test for medical acceptability of blood, plasma, or the body part.

11 - Remedies against Discrimination

(1) (a) A person having a status covered by the prohibited grounds who is discriminated against may initiate proceedings before the Human Rights Commission which shall have jurisdiction to determine whether or not such a person is suffering from an unlawful discrimination.

(b) If at any time the Director of the Human Rights Commission shall receive or discover credible evidence and shall have reasonable cause to believe that any person or Persons have committed an unlawful discrimination as prohibited by this Bill, as to which no complaint has been lodged or is about to be lodged, the Director shall prepare and file a complaint upon his/ her own motion and in his/ her name and such complaint shall be treated in the same manner as a complaint lodged by a person aggrieved.

(c) Upon the lodging or referral of a complaint, the Director shall cause to be made a prompt and full investigation of the matter stated in the complaint.

(2) The Human Rights Commission shall render a decision within 6 weeks after the claim has been lodged.

(a) the individual circumstances of the person which, when considered with the person's health disability, present a clear and imminent danger to the health of other persons;

(b) the relevant characteristics of the other persons, which, when considered with a person' health disability, present a clear and imminent danger to the health of others;

(c) the degree of certainty and unanimity among medical experts regarding the risk that the health disability can be transmitted by casual contact;

and

(d) whether there are any less restrictive means than adverse differential treatment, which are sustainable and not unreasonable, to protect against the risk of infection or contagion.

(4) In rendering a decision on a complaint that a person has been discriminated against on the grounds of a health disability, the Commission may not consider the-following factors:

(a) a person's life expectancy:

(b) the possibility that a person with a health disability will be ostracised or the victim of prejudice in whatsoever place, including his/her place of residence, place of work, place of education, or place of entertainment; or

(c) the possibility that a person with a health disability, because of his/her lack of immunity or other weakened health condition, will be in increased danger because of interaction with other persons.

(5) The person lodging a claim alleging discrimination with the Commission

(a) has the burden of proving that he/she is a person having a status covered by the prohibited grounds,

(b) need only establish a *prima facie* case of discrimination by showing that the respondent has subjected him/her to differential treatment, and

(c) has the benefit of a rebuttal presumption of unlawful discrimination upon any respondent who treats a person having a status covered by the prohibited grounds in a differential way.

(6) If after investigation it is determined that there is reasonable cause to believe that the complaint is well-founded, the Director or a conciliator who has not participated in the investigation, shall attempt to bring any such alleged discriminatory practice to an end by informal methods of consultation, conciliation and persuasion.

(7) If after determining that there is reasonable cause to believe discrimination occurred, and the Director or conciliator is unable to secure from the respondent an acceptable conciliation agreement after investigation, the Director shall present his/her findings to the Commission, and if after review of the case, the Commission agrees with the findings of the Director, the Commission shall, upon a majority vote, refer the case to the Director of Public Prosecutions for prosecution.

12 - Human Rights Commission

(1) The Human Rights Commission shall be composed of such persons, being not fewer than he seven, as are appointed by the Minister for Justice.

(2) The Commission may authorise any function of the Commission to be performed by a division of the Commission composed of at least three members of the Commission.

(3) It is the function of the Commission,

(a) to advance the policy that the dignity and worth of every person be recognised and respected he and that equal rights and opportunities be provided without discrimination that is contrary to law;

(b) to promote an understanding and acceptance of and compliance with this act;

(c) to recommend for consideration by the Government a special plan or programme of affirmative tire action designed to relieve hardship or economic disadvantage or to assist disadvantaged groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights;

(d) to develop and conduct programmes of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Bill;

(c) to examine and review any statute or regulation, and any programme or policy made by or under a statute and make any recommendations on any provision, programme or policy that in its opinion is inconsistent with the intent of this Bill or the basic rights of the citizen;

(f) to take appropriate action under Section 11 of this Bill to eliminate unlawful discrimination.

13 - Domestic Partnership

(1) A single person who co-habits with another person, regardless of whether the other person is of the opposite or same sex, shall be entitled, with the consent of the other person, to register the other person by name in the office of the Registrar of Marriages as his/her domestic partner.

(2) Where under any statute, regulation or rule, rights are given to a person who is a spouse, that statute, regulation or rule, shall have the same effect as if those rights were given to a domestic partner.

(3) Single persons shall be eligible to adopt, foster, or provide care for, children, and in proceedings where the custody, guardianship, or access to children or adoption is in issue, the court or tribunal, as the case may be, may not take into account the fact that a party has a status covered by the prohibited grounds against that person.

14 - Expression and Sexual Orientation

(1) The rights of expression, association and assembly extend to lesbian and gay student organisations at publicly funded schools and institutions.

(2) Such organisations shall be entitled to the same recognition and benefits as any other officially recognised student organisation.

(3) The rights of expression, association and assembly include advocacy, disseminating information, stating opinions and beliefs, and symbolic expression in relation to issues concerned with or affecting sexual orientation.

(4) The broadcast media have a duty to take account of the lesbian and gay communities in ascertaining general community needs and interests in current affairs and news programme.

(5) The common law offence of conspiring to corrupt public morals is hereby abolished.

15 - Penalties

(1) Any person who knowingly, intentionally or recklessly violates any provision of this Bill shall be subject to a fine....

16 - Additional Remedies

Nothing in this Bill shall preclude any aggrieved person from seeking any other remedy provided by law.

17 - Public Policy

Any written or oral agreement which purports to waive any provision of this Bill is against public policy and void.

Appendix 2

SOME HELPFUL SOURCES

1. For information on lesbian and gay community facilities, publications, groups, and so on, in the country as a whole

Lesbian Line c/o Council for the Status of Women, 64 Lower Mount St., Dublin 2. tel. (01) 613777.

Gay Switchboard Dublin, contact The Doctor's Residence, Old Richmond Hospital, Brunswick St., Dublin 7. Tel: (01) 710503.

Gay and Lesbian Equality Network, c/o 10 Fownes Street, Dublin 2. Tel: (01) 710939.

2. *Out for Ourselves, The lives of Irish Lesbians and Gay Men,* Dublin Lesbian and Gay Men's Collectives and Women's Community Press, Dublin 1986, 224pp. This is the only book written by Irish lesbians and gay men about their experiences in "coming out", relationships, emigration, the workplace and so on. Available from 12 Chelmsford Avenue, Ranelagh, Dublin 6 (£4.95 P&P).

3. *Second International Lesbian and Gay Association Pink Book,* a global view of lesbian and gay liberation and oppression, Interdisciplinary Gay and Lesbian Studies Dept., Utrecht University, 1988, 272 pp. This is an invaluable guide to the international situation on the subject. Distribution by Turnaround.

4. *Homosexuality: A Research Guide,* W.R. Dynes, Garland, London, New York, 1987, 770 pp.

5. *Policing Desire, Pornography, AIDS and the Media,* Simon Watney, Comedia, London 1987, 159pp.

NOTES

Chapter One: Introduction

(1) See John Rawls, *A Theory of Justice* (1971); and Ronald M. Dworkin, *Taking Rights Seriously* (1977), where at p. 182, he says: "We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with a capacity to make plans and give justice."

(2) See *Out For Ourselves, The Lives of Irish Lesbians and Gay Men,* Dublin Lesbian and Gay Men's Collective and Women's Community Press, Dublin (1986); and, for an international review of the development of the cause of lesbian and gay equality, see *Second International Lesbian and Gay Association Pink Book,* Interdisciplinary Gay and Lesbian Studies Dept., Utrecht University, (1988).

Chapter Two: Confronting Prejudice

(1) See "Sexual Orientation in the Workplace: Social Attitudes and Legal Position," (Paper read to ICTU Seminar on "Sexual Orientation in the Workplace," at the People's College, Parnell Square, Dublin, 29 November 1985.

(2) See J. D. Weinrich "Is homosexuality biologically unnatural?" In W. Paul, J.D. Weinrich, J.C. Gonsiorek and M.E. Hatvedt (eds.), *Homosexuality: Social, Psychological, and Biological Issues* (1982), Beverly Hills: Sago, 197 - 208.; R.M. Denniston "Ambisexuality in animals," In J. Marmor (ed.), *Homosexual Behaviour.. A Modern ReappraisaL* (1980) New York: Basic Books.

(3) See J. Boswell *Christianity, Social Tolerance, and Homosexuality, (1* 980) Chicago: University of Chicago Press; and "Revolutions, universala and sexual categories," (1982) Salmagundi, 58/59, 89 - 113.

(4) See D'Emilio, " Making and Unmaking Minorities: The Tensions Between Gay Politics and History," *14 N. Y. U. Rev. L & Soc.* Change 915, at 917 (1986); See also Goldstein, "History, I-Iomosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v Hardwick," 97 *Yale L.J.* 1073 (1988); J. Katz, *GaylLesbian Almanac* (1983) 29 - 65.

(5) See, Sylvia Law, "Homosexuality and the Social Meaning of Gender," 1988 *Wis. L. Rev,* 187, 202. See also; D. Greenberg, *The Construction of Homosexuality 376* - 77 (1988); D. *West, Homosexuality Re-examined* 177 (1977);

L. Faderman, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present* 157 (198 1); Smith-Rosenberg, "The Female World of Love and Ritual: Relations Between Women in Nineteenth Century America," 1 *Signs 1,* (1975); A. Rich, "Vesuvius at Home: The Power of Emily Dickinson, " in *On Lies, Secrets and Silence: Selected Prose 1966 - 1978,* - (1979);

(6) *Norris v Attorney General* (1984) I.R. 36.

(7) See M. Foucault, *The History of Sexuality* 43 (R. Hurley trans. 1978); V. Bullough, *Homosexuality: A History* 7(1979); Goldstein, supra note (4); J. D'Emilio, *Sexual Politics Sexual Communities: The Making of a Homosexual Minority in the United States, 1940* - 1970, 17(1983).

(8) See R. Boyer, *Homosexuality and American Psychiatry* (1981) New York: Basic Books. 63

(9) For accounts of the evidence, see F. L. Meyer - Bahiberg, (ed.) (1984) "Gender Development: Social Influences and Prenatal Hormone Effects," Special issue of Archives of Sexual Behaviour, 13, 391 - 502; A. A. Erhardt and F. L. Meyer-Bahiberg, "Effects of prenatal sex hormones on gender-related behaviour," (1981) *Science,* 211, 1312 - 18.

(10) See J. Katz, *supra* note (4) at **p,**

(11) See M. Bronski, *Culture Clash: The Making of Gay Sensibility* (1984). Most observers locate the start of a highly political gay and lesbian rights movement in the events involving the Stonewall Bar riot in New York in June 28, 1969, a response to police harassment and brutality.

(12) See Simon Watney, *Policing Desire* (1987) Comedia p. 25

(13) *Ibid.*

(14) The phrase "the abject" comes from Julia Kristeva's book *The Powers of Horror,.* it is used instructively by Judith Williamson in, "Every Virus Tells a Story," in *Taking Liberties,* E. Carter & 5. Watney (eds.) (1989) pp**.** 69 - 80.

(15) See also, A. Rich, "Compulsory Heterosexuality and Lesbian Existence," in *Blood, Bread and Poetry: Selected Prose 1979 - 1985, at* 51 - 52 (1986).

(16) Weinberg used the term "homophobia" to describe the irrational "Fear of being in close quarters with homosexuals". G. Weinberg, *Society and the Healthy Homosexual* (1972), p.4.

(17) See generally, Jeffrey Weeks, *Coming Out, Homosexual Politics in Britain from the]9th Century to the Present,* Quartet, London (1977); See also: Herek, "Beyond Homophobia: A Social Psychological Perspective on Attitudes Towards Lesbians and Gay Men," 10 *J. Homosex.* 1, 15 - 17 (1984); and Herek, Attitudes Toward Lesbians and Gay Men: A Factor-Analytic Study, 10 *J. Homosex.* 39, 49 (1984).

(18) See S. Law, *supra note* (5).

(19*) Ibid.*

(20) See *supra* note (12) at p. 28.

(21) *Ibid*

Chapter Three: Judicial Intolerance

(1) (1984) I.R. 36.

It may be noted that consensual lesbian activity between women over 15 years is not an offence. There was an attempt in the United Kingdom to create an offence of "acts of gross indecency between female persons. The Criminal Law Amendment Bill, which was rejected in the House of Lords, was introduced because, according to its sponsor, "the dreadful degradation" of lesbianism was part of "the falling away of feminine morality (which) was to a large extent the cause of the destruction of the early Grecian civilisation, and still more the cause of the downfall of the Roman Empire." See M. H. Hyde, *The Other Love,* Mayflower Books (1972), pp/ 199 - 205. This crazy pseudo-history failed to save the Bill which was rejected on the grounds that enacting the law would bring lesbianism to the notice of women who were unaware of it, that society women would be subjected to blackmail and that, in any event, female sexuality was passive in nature. See Jeffrey Weeks, *Coming Out.. Homosexual Politics in Britain,* London, Quartet (1977). Sadly, the prejudice-laden notion that female sexuality is inherently passive has found

expression in the European Commission of Human Rights, see Application No. 5935172, *X. v Fed. Rep. of Germany 1972.*

(2) (1984) I.R. 36, 41 - 42.

(3) *Ibid,* 42.

(4) See *Quinn's Supermarket* Ltd. v *Attorney General* (1972) I. R. 1, 14. For an excellent exposition of the Irish Courts' approach to the equality ideal, see J. P. Casey, *Constitutional Law in Ireland* (1987), pp. 346 - 370.

(5) See the depressing litany of cases where the courts shied away from giving Article 40.1 teeth: *Brennan v Attorney General (1984) LL.R.M. 355; Norris v Attorney General (1984)].R. 36,. O'B. v* S. (1984) I.R. 316; and *Draper v Attorney General(1984)LR. 268. In Draper,* the plaintiff claimed that the Electoral Acts discriminated against her in violation of the equality guarantee because they did not provide her with a right to vote by post even though she was physically disabled. Although counsel for the plaintiff made lengthy and rigorous arguments on the equality issue, the Court summarily rejected them.

(6) 847 F. 2d 1329 (9th Cir.), rehearing granted *en banc,* 847 F. 2d 1362 (9th Cir. 1988) (withdrawn 3 May 1989). See also *benshalom v Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989) (following Watkins). See also High Tech Gays v Defense Industrial Security Clearance Office,* 668 F. Supp. 1361 (N.D. Cal. 1987).

(7) (1984) I.R. 284.

(8) For a profound constitutional analysis of the failure of the United States Supreme Court to extend the constitutional right of privacy to gay sexual activity, see D.A.J. Richards, "Constitutional Legitimacy and Constitutional Privacy," 61 *N. Y. U. L. Rev. 800* (1 986). In 1986, the United States Supreme Court in *Bowers v Hardwick* 478 U.S. 186 (1986) upheld, on the grounds of moral tradition, a Georgia statute which criminalises anal-genital and oral-genital sex. The decision has been roundly condemned for its unprincipled and prejudiced stance. See L. Tribe, *American Constitutional Law,* at 1422-35 (2nd ed. 1988); Stoddard, "Bowers v Hardwick: Precedent by Personal Predilection," 54 *U. Chi. L. Rev.* 648 (1987). D.A.J. Richards says: "Traditional moral condemnation of homosexuality has eroded the intimate resources and imaginative, emotional, and intellectual freedom through which homosexuals can construct a personal and ethical life in the only way that generates value in living. That erosion of moral independence is not at the periphery of the historical meaning of the protection of constitutional privacy as an unremunerated right; it is at its very core." 61 *N. Y. U.L.* Rev. 800, 853 (1986).

(9) See S. Hampshire, *Morality and Conflict (1983),* See especially, D.A.J. Richards, "The Theory of Adjudication and the Task of the Great Judge," *1 Cardozo Law Review* 171 (1979). Also see J. Rawls, "Outline of a Decision Procedure for Ethics," 9 *Phil. Rev.* 177-97 (1951); and R. Brandt, *Ethical Theory* 244-538 (1959).

(10) (1984) I.R. 36, 76-77.

(11) See the judgements of Henchy and MacCarthy JJ. on the absurdity of judges relying on tradition in a reflexive fashion when deciding claims about constitutional rights.

(12) Report of the Committee on Homosexual Offences and Prostitution, Cmnd. 247, 1957. **(13)** See A. Bell & M. Weinberg, *Homosexualities* 188, 191, 193 (1978).

(13) See A. Bell & M. Weinberg, *Homosexualities* 188, 191, 193 (1978).

(14) 163 U.S. 537, 16 S.Ct. 1138, 41 L,Ed. 256 (1986).

Chapter Four: A European Human Rights Advance

(1) App. no. 7215/75, 11 D.R. 36 (1977) (from England); App. 7525/76, 11 D.R. 117 (1978) (from Northern Ireland; it became known as the Dudgeon case).

(2) (1981) 4 E.H.R.R. 149.

(3) European Court of Human Rights, judgement of 26 October 1988. For a review of the Norris case, see Tom O'Malley, "Norris v Ireland - An Opportunity for Law Reform, " *Irish Law Times,* December 1988, 279-284.

(4) See Application No. 5935/72, Eur. Comm. H.R. 3D.R. 46, at pp. 54-5.

(5) See *Report of the Committee on Homosexual Offences and Prostitution.*

(6) See 1957, Cmnd. 247. *Report on the Age of Consent in relation to Sexual Offences*. (1981).

(7) At para 6, 2.

(8) For a review of this evidence, see Hindley, "The Age of Consent for Male Homosexuals", (1986) *Crim. L. Rev.* 595. In 1981 the Parliamentary Assembly of the Council of Europe urged member states to "apply the same minimum age of consent for homosexual and heterosexual acts." *Recommendation* 924 (1981).

(9) *Ibid*. See also the recommendations contained in the *ICCL Report on Child Abuse* (1988); and in the Irish Law Reform Commission's *Report on Child Sexual Abuse* (1989).

(10) See Peplau & Amaro, "Understanding Lesbian Relationships," in *Homosexuality: Social, Psychological, and Biological Issues*, 235, 245-46 (1982); Peplau, Padesky, & Hamilton, "Satisfaction in Lesbian Relationships," 8 J. *Homosex*. 23,34 (1982). The hostile social environment forces stable gay and lesbian couples to remain invisible: Fyfe, "Homophobia or Homosexual Bias Reconsidered," 12 *Arch. Sex. Behav*. 549, 552 (1983); Larson, "Gay Male Relationships," in *Homosexuality*: etc., 219-26 (1982).

It should be said that a high percentage of lesbians and gay men live with a partner. In the late 1960s, the Kinsey Institute in the United States found that 71% of his sample of gay men aged 36-45 was living with a partner. Another study, done in the 1970s, found that 82% in the sample were currently living with someone. A recent major study of married, cohabiting heterosexual, and homosexual couples in the United States concludes that "(c)ouplehood," either defined as a reality or an aspiration, is as strong among homosexual people as it is among heterosexuals." Blumstein & Schwartz, *American Couples* 25-45 (1983).

(11) See Duffy & Rusbult, "Satisfaction and Commitment in Homosexual and Heterosexual Relationships," 12 *J.Homosex*. 1, 18-19 (1985-86).

(12) *Ibid.,* at 20-21. The point is that people tend to learn socially inculcated gender attitudes and behaviour at a much earlier age than they become aware of sexual orientation.

(13) See Lehne, "Homophobia among men," in *The Forty-Nine Percent Majority: the Male Sex role* 70 (1976).

(14) see Groth & Birnbaum, "Adult sexual Orientation and Attraction to Underage Persons," 7 *Arch*. *Sex Behav*. 175, 180-81 (1978). And see Finklehor & Araji, "Explanations of Pedophilia: A Four Factor Model," 22J *Sex*. Research 145 (1986).

(15) See Harris & Turner, "Gay and Lesbian Parents," 12 *J. Homosex. 101,* 103 (1985-86); Lewin & Lyons, "Everything in its Place: The Coexistence of Lesbianism and Motherhood," *in Homosexuality:* etc. (1982).

(16) Harris & Turner, supra note (15); Kirkpatrick, Smith, & Roy, "Lesbian Mothers and Their Children: A Comparative Study," 5, *A. J. Orthopsychiatry. 545,* 5"51 (1981); Miller, Jacobsen, & Bigner, "The Child's Home Environment for Lesbian vs. Heterosexual Mothers: A Neglected Area of Research," 7 *J. Homosex.* 49,55 (1981).

(17) See Green, Mandel, Hotyedt, Gray & Smith, "Lesbian Mothers and Their Children: A Comparison with solo Parent Heterosexual Mothers and Their children," *15 Arch. Sex. Behav.* 167, 179-83 (1986); Green, "Sexual Identity of 37 Children Raised by Homosexual and Transexual Parents," 135 *Am. J. Psychial.* 692, 696 (1978); Hoeffer, "Children's Acquisition of Sex-Role Behaviour in Lesbian-Mother Families," 51 *Am. J. Orthopsychiat.* 536,551 (1981); Hotvedt & Mandel, "Children of Lesbian Mothers" In *Homosexuality: Social, Psychological, and Biological Issues,* 275, 284 (1982); and Lewin & Lyons, supra note 15.

(18) See Green, supra note (17), at 180, Hoeffer, supra note 22, at 542-43.

(19) SeeV. Bullough, *Sexual Variance in Society and History(1976); W. Churchill, Homosexual Behaviour Among Males,* 70-73 (1968); Carrier, *"Homosexual Behaviour.. A Modern Reappraisal* 100-22 (J. Marmor ed. 1980); Whitam, "Culturally Invariable Properties of Male Homosexuality: Tentative Conclusions from Cross-Cultural Research," 12 *Arch. Sex. Behav.* 207, 209-17 (1983). Moreover, it must be stressed that anal sex and oral-genital sex are biologically natural and, along with mutual masturbation, are extremely common - healthy activities - among both homosexuals and heterosexuals. Kinsey's statistics indicate that (in the United States) 54010 of exclusively or predominantly heterosexual men and 490/o of exclusively or predominantly heterosexual women engage frequently in anal or oral-genital sex. See Kinsey, Pomeroy, Martin & Gebhard, *Sexual Behavior in the Human Female* (1953); J. Gaganon, *Human Sexuality (1978);* and McCary, *McCary's Human Sexuality* (1978). Kinsey also reported that

600/o of married, college-educated people engaged in oral-genital sex on a fairly regular basis. A more recent study reports that approximately 800/o of single men and women between the ages of 25 and 34 and 90% of married couples under the age of 25 engaged in oral-genital sex. See M. Hunt, *Sexual Behavior in the Seventies* (1974). A very recent study of unmarried university women reported that 61% had performed oral sex on their partners and 680/o had experienced their partners performing oral sex on them. See Harold & Way, "Oral-Genital Sexual Behavior in a Sample of University Females," 19 *J. of Sex Research* 327-338 (1983). Hunt reports that 25% of subjects under 35 years had experienced anal intercourse in the year preceding the study. Another study found that 30% of the female subjects said that they enjoyed anal intercourse. See Hite, *The Hite Report: A Nationwide Study on Female Sexuality* 76 (1976).

(20) See Gels, Wright, Garrett, & Wilson, "Reported Consequences of Decriminalisation of Consensual Adult Homosexuality in Seven American States," 1 *J. Homosex.* 419 (1976); and Sinclair & Ross, "Consequences of Decriminalisation of Homosexuality; A study of Two Australian States," 12 *J. Homosex.* 119 91985).

(21) Any claim that restrictions on consensual gay sexual activity are justified as protecting the public or individual health is a transparent and unfounded attempt to exploit the current climate of ignorance and fear about AIDS. Safer sex practices greatly reduce the risk of transmission of AIDS for homosexuals and heterosexuals alike. See "Questions and Answers 252 J. *Am. Med. A.* 826 (1984). The achievement of public health goals depends upon co-operation within the community as a whole. Societies with harsh penalties for homosexual conduct suffer from poorer reporting and treatment of sexually transmissible diseases than more tolerant societies. See Ostrow & Altman, "Sexually Transmitted Diseases and Homosexuality," 10 *Sex. Trans. Diseases* 208, 212 (1983). In an oppressive social and legal climate, homosexual people have reason to fear telling their doctors about their sexual orientation. See Dardick & Grady, "Openness between Gay Persons and Health Professionals, " 93 *Annals of Internal Med. 11* 5 (Pt. 1 1980).

(22) Lesbians and gay men who repress their sexual orientation have been shown to be the most troubled and dysfunctional. See 1-lammersrnith and Weinberg, "Homosexual Identity: Commitment, Adjustment, and Significant Others," *Sociometry* 36, 56-57 (1973); M. Weinberg *&* C. Williams, *Male Homosexuals: Their Problems and Adaptation (1974).*

(23) At para. 4.25

(24) At para. **4.26.**

(25) At para. 4.32. **(26)** At para. 4.26. **(27)** LRC 24 - 1988

Chapter Five: The Need for an Anti-Discrimination Law

(1) See Paul Brest, I 'Supreme Court 1975 Term Foreword: In Defence of the Antidiscrimination Principle," 90 *Harv. L. Rev.* (1976) 1. On "Indirect discrimination," see *Griggs v Duke Power Co.,* 401 US 424 (1971).

(2) *Per* Lord Penzance in *Hyde v Hyde* (1866) L.R. 1 P.D. 130. 133. Cited, approvingly, in *Griffith v Griffith* (1944) I.R. 35.

(3) See S.3 of the Guardianship of Infants Act, 1964,

(4) See Chapter Four

(5) See 5. 11 of the Adoption Act, 1952

(6) *Ibid., 5.13(1)*

(7) In the United States, child custody issues are the most litigated of gay and lesbian issues. See Rivera, "Recent Developments in Sexual Preference Law," *30 Drake L. Rev.* 311 (1980-198 1). Several courts have denied custody to lesbian and gay parents because of their sexual orientation. See "Note, Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis, " *102 Harv. L. Rev.* 617 (1989). At least ten states have rejected presumptions against granting custody lesbian and gay parents; they include Alaska, California, Indiana, Massachusetts, New York, West Virginia, and Washington.

(8) In the United States studies suggest that fear that children will be harassed by homophobic people is rarely supported by evidence. See I-litchens & Price, "Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert

Testimony," 9 *Golden Gate U. L. Rev.* 451, 468-69 (1978-79). Some courts have sensibly taken the view that being aware of prejudice in society may help to strengthen child's character. See "Developments - Sexual Orientation and the Law," 102 *Harv. L. Rev. 1508,* 1638 (1989).

(9) Gay and lesbian parents are no more likely to have lesbian and gay children than are heterosexual parents. See Golombok, Spencer, & Rutter, "Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisals," 24 *J. Child Psychology & Psychiatry*
551,568 (1985); Green, "The Best Interest of the Child With a Lesbian Mother," 10 *Bull. Am. A cad. Psychiatry & L.* 7,13 (1982); Green, Mandel, Hotvedt, Gray& Smith, "Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and their Children," *15 Arch. Sex. Beh.* 167, 181 (1986); Kirkpatrick, Smith & Roy, "Lesbian Mothers and Their Children: A Comparative Survey," 51 *Am. J. Orthopsychiatry 545,* 551 (1981); and Bozett, "Children of Gay Fathers," in *Gay and Lesbian Parents,* 47 (F. Bozett ed. 1987); and "Note,

The Avowed Lesbian Mother and their Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied," 12 *San Diego L. Rev.* 799, 860-61 (1975).

(10) See F. Von Prondzynski, *Employment Law* (198'

(11) See, e.g., Employment Equality Act, 197

(12) We understand that one case before the Employment Appeals Tribunal was resolved in camera.

(13) See *Gardiner v Newport County Borough Council* (1974) IRLR 262; *Jarrett v Governors of the Bishop of Llandaff* School, unreported, Cardiff Industrial Tribunal, 1977; *McNamee* v *St. Monica's Roman Catholic Primary School,* unreported, Liverpool Industrial tribunal, 1977; *Saunders v Scottish National Camps Association Ltd., (1* 980) IRLR 174 (198 1) IRLR 277; and *Wiseman v Salford City Council (198* 1) IRLR 202. In *Saunders* a maintenance worker was fired simply because he was gay; the EAT upheld his dismissal and decided that prejudice was a sufficient ground for dismissal.

(14) See *North Western Health Board v Martyn,* Supreme Court, 21 December 198'

(15) *See Report of the Committee of Inquiry into Children's Homes and Hostels; and Pinkerton & Kelly,* "Kincora - The Aftermath", *Youth and Policy,* No. 17, 1986.

(16) Copies of the document (issued in June 1987) are available free of charge from the ICTU at 19, Raglan Road, Dublin **4.** Tel. (01) 680641.

(17) For instructive discussion of these issues, see *Danger! Heterosexism at Work, A Handbook on Equal Opportunities in the Work place for Lesbians and Gay Men,* J. Egerton et al, Greater London Council; *Changing the World, A London Charter for Gay and Lesbian Rights,* Greater London Council; *Tackling Heterosexism, A Handbook of Lesbian Rights,* Greater London Council; *In the Out Tray,* A video in two half-hour parts about lesbian and gay employment rights. Albany Video Distribution, London.

(18) (1985) I.L.R.M. 336.

(19) (1972) I.R. 330,

(20) See Irish Times 3 March 1988

(21) See Dept. of Labour, discussion document *Unfair Dismissals, Employment Equality. Payment of Wages.* (1987) pp. 17-19.

(22) *A Worker v Garage Proprietor* EE 02/1985

(23) See *Out for Ourselves (1986*

(24) Reported in the *Irish Times.*

(25) See Bayer, *Homosexuality and American Psychiatry (1981),*

(26) See Simon Watney, *Policing Desire (1986:*

(27) See "The Beast of Bigotry

(28) See (1987) I.L.R.M. 47'

Out September, October 1988

(29) See *Out for Ourselves (1* 986).

(9) Farrell & Prendiville, *Resource Pack for Youth Workers,* Discussion Document (unpublished).

Chapter Seven: Equality - A Matter of Principle

(1) See H. Swanson, *Human Reproduction: Biology and Social Change 108* (1974).

(2) Homosexuals were one of the groups persecuted by the Nazis in their obscene attempts to ensure the purity of the Aryan race. See Haeberic, "Swastika, Pink Triangle and Yellow Star - The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany, " 17 *J. Sex Research* 270 (1981).

(3) See Gonsiorek, "Results of Psychological Testing on Homosexual Populations, 25 *Am. Behavioral Sci.* 385, 394 (1982); and Reiss, "Psychological Tests in Homosexuality," in *Homosexual Behavior. A Modern Reappraisal 296-31* 1.

(4) See Glasner & Owen, "Variations in Attitudes Toward Homosexuality," 11 *CornellJ. Soc. Rel.* 161, 165 (1976); Hansen, "Measuring Prejudice Against Homosexuality (Homosexism) Among College Students: A New Scale," 117 *J. Soc. Psychology* 233, 235 (1982). Homophobic prejudice tends to be more aggressively held by males. Homophobes would appear to be more conservative regarding sexual issues and tend to exhibit much higher levels of guilt about sex: Yarber & Yee, "Heterosexuals' Attitudes Toward Lesbianism and Male Homosexuality: Their Affective Orientation Toward Sexuality and Sex Guilt," 31 *J. Am. College Health* 203, 207-08 (1983). Homophobes tend to show racist and sexist attitudes more often than others: Henley & Pincus, "Interrelationship of Sexist, Racist, and Anti-Homosexual Attitudes, " *42 Psychology Rep. 83,* 88 (1978); Larsen, Cate, & Reed, "Anti-Black Attitudes, Religious Orthodoxy, Permissiveness, and Sexual Information: A Study of the Attitudes of Heterosexuals Toward Homosexuality," 19 *J. Sex Research 105,* 111-112 (1983). Homophobes seem to be more religiously orthodox, more authoritarian, more cognitively inflexible, and more intolerant: Smith, "Homophobia: A Tentative Personality Profile," 29 *Psychology Rep.* 1091, 1093-94 (1971). It is truly to be wished that the Irish legislative mind is capable of more tolerance.

(5) See Glasner & Owen, *supra* note (4).

(6) See references, *supra* note (4).

(7) See A. Bell, M. Weinberg and S. Hammersmith, *Sexual Preference. Its Development in Men and Women (198* 1); and Storms, "Theories of Sexual Orientation," *J. of personality and Soc. Psychology* 783-792 (1980).

(8) (1954). As regards psychological problems connected with variant sexual conduct, whether engaged in by homosexual or heterosexual people, it is clear that they are usually the product of internalised social condemnation or of external pressure and ostracism of those who engage in it. Thus, the health problems sometimes associated with variant sexual practices can be seen as social pathology rather than personal pathology: see Gonsiorek, "Social Psychological Concepts in the Understanding of Homosexuality," in *Homosexuality: Social, Psychological, and Biological Issues, at* 115-1 19 (1982). Repression of sexual desires in this context can **lead** to sexual dysfunction and pathology: Coleman, "Developmental Stages of the Coming-Out Process, " *ibid* at 1 SO- 1 5 1.

(9) See "Reported Consequences of Decriminalisation of Adult Homosexuality in Seven American States," 1 *J. Homosex.* 419 (1976).

(10) See "Consequences of Decriminalisation of Homosexuality: A Study of Two Australian States, 12 ***J.*** *Homosex.* 119 (1985).