Rights of Sexual Minorities in Ireland and Europe: Rhetoric versus Reality

Bruce Carolan

Follow this and additional works at: http://elibrary.law.psu.edu/psilr

Recommended Citation
Available at: http://elibrary.law.psu.edu/psilr/vol19/iss3/2
Rights of Sexual Minorities in Ireland and Europe: Rhetoric versus Reality*

Bruce Carolan**

I. Introduction

The Government of Ireland and the European Union ("EU"), through web pages and printed matter, promote a popular perception that recent legislative changes have advanced the cause of equality for sexual minorities in Ireland and Europe. The public image promoted might be called "mono-thematic": "equality" is good and we promote "equality."

The question poses itself: are these self-congratulatory images justified? If we apply the relevant law to the affected groups, does it achieve what might be regarded as "equality?" This essay argues that the law fails to achieve the lowest-common-denominator notion of equality. Application of the relevant Irish and European law to a hypothetical fact situation, however, produces results that are at odds with any common sense notion of equality.

---

** Head of Department of Legal Studies, Dublin Institute of Technology, Aungier Street, Dublin 2, Ireland. bruce.carolan@dit.ie
These results are bad enough. What is worse, in my view, is that the images created by the Irish and European Governments lull affected groups and concerned citizens into a false sense of security, and a complacency over the need to continue to militate for progressive change. If the affected minority groups were confronted with expressly anti-gay, discriminatory messages, they likely would mount or continue high-profile campaigns designed to affect legislative change. However, due to the false images promoted by the relevant authorities, there is less incentive to lobby for legislative change. Members of the affected minority groups likely become aware that the law fails to provide a modicum of protection when it is “too late”—that is, when they confront discriminatory treatment and find the law deficient.

Furthermore, the bland, monothematic message discourages a wider debate on the philosophical issue of achieving equality in a just society. For instance, is equality achieved through tolerance of diverse groups, or should equality require the celebration or active inclusion of minority groups by the majority group? Instead of fostering a wider debate, the public image gives an impression that equality is readily knowable and is being pursued by the relevant authorities within the Irish and EU governments.

I explore the foregoing contentions in the following ways:

First, I review the recent legislative landscape. Next, I explore the tactics and images employed by the Irish Government and the European Union to create the popular perception of progressive change with respect to sexual minorities. These tactics largely involve creation of Internet sites and distribution of printed matter to interested parties. I describe these images employed and the perceptions likely created by them.

I then present a hypothetical factual example of an employment issue involving a same-sex couple. It concerns denial of employment benefits to a same-sex partner, and the subsequent loss of employment due to being in a same-sex relationship. It is fair to say that this hypothetical factual example presents issues that an average person might regard as implicating discrimination based on sexual orientation.

Third, employing a close reading of the relevant statutory provisions and some decisions of the Irish and European Courts, I apply the relevant law to determine whether, and to what extent, the law affords relief in the hypothetical situation.

My conclusion is that the results of this exercise are counterintuitive. It is possible that, despite recent changes in the law, a person denied employment benefits for a same-sex partner
and fired for being in a same-sex relationship would not have a remedy. That is, despite claims of progressive change with respect to sexual minorities, in fact little or no relief is afforded by the respective legislative regimes.

Thus, this paper seeks to expose a gap between rhetoric and reality. I seek to point out that, behind the soothing rhetoric of equality and diversity created by the manipulation of words and images, the hard reality is that groups discriminated against are left without a remedy. The false sense of progressive change promoted by the public relations tools of the Irish and EU governments is more dangerous than expressly anti-gay attitudes. Such false images lull affected groups into complacency, and reduce the likelihood of effective lobbying.

Recently, Ireland has somewhat plugged this gap, and it was not by adopting more progressive legislation. Instead, it published a pamphlet on the rights of same-sex couples that highlighted deficiencies in existing laws. This approach illustrates that governments might adopt a more nuanced approach to the messages they propagate. That is, while acknowledging their mandate to promote equality, they might also acknowledge shortcomings so as to inspire affected individuals to militate for change. This approach also might stir debate on the complex issue of what constitutes equality.

The European Union has not shown signs of promoting a more complex message. Quite the opposite. The EU promotes the empty notion of “equality” while its laws, as interpreted by the European Court of Justice, deprive affected minorities by relying on stereotyped notions that the law is meant to undermine. The EU appears to be on the way to adopting a conceptual approach to equality for sexual minorities that would denude the term of any real meaning. In the EU, it appears that the image is more important than the reality.

II. The Rhetoric

A. The Legal Landscape

In order to evaluate recent claims of progressive legislative change, it is helpful to survey the legislative landscape in Ireland and the European Union with respect to sexual minorities, and to review recent legislative changes.

on Human Rights Practices for 1996 for Ireland." The Report generally presented a positive view of human rights practices in Ireland. However, Section 5, entitled, "Discrimination Based on Race, Sex, Religion, Disability, Language or Social Status," stated that:

Except as regards employment, neither the Constitution nor the law prohibits discrimination on the basis of disability, race, sex, language, or social status. [Note that the report does not even acknowledge the concept of discrimination against sexual minorities.] To address these and other shortcomings in Irish civil law, the Government in 1993 created the Department of Equality and Law Reform. The Department has drafted an equal status bill and an employment equality bill, but neither bill was passed by year's end. The Constitution, as amended, already forbids state promotion of one religion over another and discrimination on the grounds of religious profession, belief, or status.²

With regard to private employment, there was an extensive regulatory regime designed to protect Irish citizens against unfair dismissal. However, this regime did not protect against claims of anti-gay discrimination.³

The lack of protection against anti-gay discrimination became clear in a case arising in the early 1990's in Cork, Ireland. A female employee of a Leisure Centre was dismissed from employment after a patron complained that she had seen this employee kiss another woman in the changing room. The terminated employee brought an unfair dismissal action against the Leisure Centre. The hearing officer concluded that the employee would not have been dismissed if she had been reported for kissing a man at work. Therefore, the dismissal was due to the employee's homosexuality.

---

2. Id. at § 5.
3. Unlike American law, Irish law does not provide for employment at will. Instead, after one year of employment, an employee is protected against unfair dismissal by the Unfair Dismissal Act. See Unfair Dismissal Act of 1977, available at http://www.bailii.org/ie/legis/nem_act/uda1977198/ (last visited Aug. 24, 2001); Also, see Unfair Dismissal Act (Amendment), 1993, available at http://www .bailii.org/ie/legis/nem_act/uda1993278/ (last visited Aug. 24, 2001). Employees who believe their employment has been wrongly terminated may bring a claim in front of an employment tribunal. See Unfair Dismissal Act, § 7, 1977. These proceedings are relatively prompt and inexpensive, and typically, biased in favor of the employee. The awards are relatively modest by U.S. standards.
In other words, the employee had been treated unfairly when her situation was compared to that of a similarly-situated heterosexual employee. However, the hearing officer concluded that Irish employment law did not protect against anti-gay discrimination and ruled in favor of the Leisure Centre.

However, since the middle of the 1990's, there ostensibly has been a flurry of legislative activity directed towards protecting against anti-gay discrimination.

Perhaps the most significant legislative activity has been the adoption of an Employment Equality Act\(^4\) and an Equal Status Act.\(^5\) Ostensibly, these Acts of Irish legislation purport to prohibit discrimination in employment and public accommodation situations on a variety of grounds, including sexual orientation.\(^6\) These Acts also created an Equality Authority.\(^7\) The presentation of these Acts by the Equality Authority, and a close reading of these Acts in the context of a hypothetical factual situation will be discussed below.

2. Law of the European Union—On the surface, developments in the European Union have been even more dramatic than developments in Ireland.

Until recently, there were no Articles of the European Community Treaty or the Treaty of European Union (the two treaties underpinning the European Union) that expressly addressed sexual orientation. There was no secondary legislation that addressed sexual orientation. The Council of Ministers\(^8\) and the European Commission—roughly termed the "legislature" of the European Union—took the view (in response to questions posed by the European Parliament) that the then European Community lacked competence to legislate anti-discrimination measures designed to prevent anti-gay discrimination.

The Community has no power to intervene in possible cases of discrimination practiced by Member States against sexual minorities. The powers deriving from the Treaties allow the Community to intervene only in respect of discrimination on the grounds of nationality or in order to ensure equal treatment for male and female workers in the field of labor relations and social security.\(^9\)

6. Id. at § 3(2)(d).
7. Id. at Part IV.
10. See id.
The Court of Justice underscored this point when it ruled in Case C-24/96, *Lisa Grant v. Southwest Trains*, that the law of the European Union, as it then stood, did not afford protection against anti-gay discrimination in employment. (This ruling came despite a ruling in an early case, C-13/94, *P v. S. and Cornwall County Council*, which determined that EC law prohibited employment discrimination based on transsexuality.)

However, in amendments to the European Community Treaty brought about by the Treaty of Amsterdam, 1997, the European Community obtained express power to legislate against discrimination based on sexual orientation. Article 13 provided:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting with the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.\(^{11}\)

Pursuant to the powers afforded under Article 13, the Commission has proposed a Council Directive establishing a General Framework for Equal Treatment in Employment and Occupation.\(^{12}\) The preamble to the Directive provides:

Discrimination based on . . . sexual orientation may undermine the achievement of the objectives of the Treaty establishing the European Community, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion, an solidarity, and the fostering of free movement of persons.\(^{13}\)

To this end any direct or indirect discrimination based on . . . sexual orientation . . . should be prohibited throughout the Community. Harassment which produces an intimidating, hostile, offensive or disturbing work environment in relation to


\(^{13}\) *Id.* ¶11.
any discriminatory ground should be deemed to be discrimination.¹⁴

In addition, in the run up to the European Summit at Nice, France, which produced the Treaty of Nice, the European Union debated the creation and adoption of a Charter of Fundamental Rights.¹⁵ Ultimately, the participants from EU Member States adopted such a Charter at the Nice Summit.

The Charter contains a number of provisions that are relevant to consideration of anti-gay discrimination. Chapter III of the Charter concerns “equality” and Article 21 pertains to “Non-discrimination.” Article 21, the most significant provision with respect to anti-gay discrimination, provides, in relevant part: “Any discrimination based on . . . sexual orientation shall be prohibited.”¹⁶

The overall impression one might obtain from reviewing these legal provisions is that of a progressive move towards increased protection of sexual minorities from discrimination based on sexual orientation. Of course, most Irish and European citizens will not refer to the primary texts of these legal provisions, but will instead rely on material disseminated by government and EU officials. The next section of this paper describes the materials distributed by these sources of information, and the likely impression created by these materials.

B. Irish and EU Images of Equality

1. Ireland—The Equality Authority of Ireland provides information to the public through a web page and through printed matter distributed to interested parties. This information will form the basis of understanding for the majority of Irish citizens, including those who might need to avail themselves of Equality Authority’s services. This section of the essay explores the images employed and the likely impressions created.

The Authority’s web page employs images and simple messages designed to inform interested parties of the nature of the Equality Authority, its responsibilities and the state of Irish law with respect to discrimination based on, among other things, sexual orientation.¹⁷

¹⁴. Id. ¶12.
¹⁶. See id. at art. 21.
The home web page for the Equality Authority includes four photographic images.\(^\text{18}\) An older person hunches over a book, a person of African heritage stares off into the middle distance in a thoughtful pose, a mother cradling an infant in arms clicks on a mouse while talking on the telephone, and a two women cuddle, front-to-back, in a playful, flirtatious pose.\(^\text{19}\)

Beneath these images appear the words, “The Equality Authority, Equality in a Diverse Ireland,” and “Welcome to the Equality Authority Homepage.”\(^\text{20}\)

A click on the mouse brings a web browser to an index of web sites, including a “Mission Statement,” “9 Grounds for Discrimination,” “Meet the Board,” “Guest Book,” and “Links.”\(^\text{21}\)

The Mission Statement provides that:

[The Equality Authority is committed to realizing positive change in the situation of those experiencing inequality by: 1. Promoting and defending the rights established in the equality legislation, AND, 2. Providing leadership in—building a commitment to addressing equality issues in practice—creating a wider awareness of equality issues—celebrating the diversity in Irish society—mainstreaming equality considerations across all sectors.]\(^\text{22}\)

Another click takes us to a page entitled, “Discrimination,” and purports to answer the question, “What is Discrimination?”\(^\text{23}\) The web surfer may “click on a topic to learn more about it” and is invited to learn more about “Discrimination” generally as well as “Indirect discrimination,” “What to do if you are discriminated against,” “Relief,” “Time limits,” etc.\(^\text{24}\)

Under “What is Discrimination,” the web page provides that “The [Employment Equality] Act prohibits direct and indirect discrimination on nine grounds.”\(^\text{25}\) It lists sexual orientation as one of the nine grounds. It further provides that “All aspects of

\[ 18. \quad \text{Id.} \\
19. \quad \text{Id.} \\
20. \quad \text{Id.} \\
24. \quad \text{Id.} \\
25. \quad \text{Id.} \]
employment are covered,” including such items as “conditions of employment,” “promotion” and “dismissal.”

It further provides a more detailed description of “Discrimination.” It states that “[a] person is said to be discriminated against if she/he is treated less favorably than another is....” With respect to “discrimination based on sexual orientation,” it states that “the comparison must be between a person of a particular sexual orientation, and one who has a different sexual orientation....”

2. European Union Images of Equality—The European Union web sites employ equally lofty language and images in support of the general concept of equality. Some of these occur in the context of equality based on sexual orientation.

For example, the web site for the Council of Ministers has a link to the Draft Charter on Fundamental Rights of the European Union. The purpose of the web site is to keep the public informed of developments and to allow contributions in the creation of the recently-adopted Charter of Fundamental Rights. It likely creates the impression that the Council is concerned with the issue of equality and committed to the idea of a diverse European society.

The introduction to the Council’s comments on the Charter notes that the protection of fundamental rights “is a founding principle of the European Union” and “an indispensable prerequisite for its legitimacy.” The introduction excerpts from the Treaty on European Union (“TEU”) [Article 6 (ex. Article F)] to the effect that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.” It also quotes the TEU as providing that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights.”

The Charter itself provides that “the Union is founded on the indivisible, universal values of human dignity, freedom, equality

26. Id.
27. Id.
28. The Equality Authority, supra note 22.
31. Id.
32. Id.
and solidarity." Furthermore, "it places the individual at the heart of its activities. . . ."\textsuperscript{33}

Article 21 of the Charter concerns "Non-discrimination" and provides that "[a]ny discrimination based on any ground such as sexual orientation shall be prohibited. . . ."\textsuperscript{34}

The European Commission has proposed a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation.\textsuperscript{35} The Proposal accompanying the draft directive, designed to implement principles of non-discrimination enumerated in Article 13, continues the themes of equality for all contained in other Community propaganda.\textsuperscript{36} It notes that "[t]he fight against discrimination constitutes a major challenge for the European Union."\textsuperscript{37} It specifically notes that "[d]iscrimination on the basis of sexual orientation also occurs in various forms in the workplace. The problems of workplace discrimination arising from sexual orientation and the lack of legal protection at the EU level were highlighted in a recent decision of the European Court of Justice."\textsuperscript{38}

In light of the foregoing, a member of a sexual minority living in Ireland might feel fairly secure under Irish and European law. However, the following hypothetical illustrates otherwise.

III. The Reality

A. Hypothetical Factual Situation

For our hypothetical, perhaps we can imagine the same-sex couple pictured on the web page of the Irish Equality Authority. Call them Jill and Barbara. Jill is a British national and Barbara an American citizen. They are living together in London when Jill is transferred to Dublin, Ireland, to take up a position as a software consultant in the booming Irish economy.

After moving to Ireland, Jill works without incident for a period of months. Eventually, Jill learns that her employer provides free software to the spouses of its employees. She approaches her boss and explains that her "spouse," Barbara, whom the boss has met at previous firm functions, is an aspiring

\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id. (citing Case C-249/86, Grant v. Southwest Trains, 1998 E.C.R. I-62).
writer and would benefit from some of the software packages made available to spouses of employees. The boss tells her he will get back to her.

The boss has noticed Jill and Barbara at firm functions, but did not realize they were lovers. At the next such function, he watches the two of them more closely. He notes them holding hands and at one point stealing a kiss at the function.

The following Monday, Jill receives a memo from her boss. It says that the employer only provides free software to spouses, and that, as Jill's same-sex partner, Barbara does not qualify under this policy as a spouse.

The memorandum goes on to note that the employer did not realize that Jill was in a same-sex relationship when she was employed. The memorandum states that her employer does not approve of relationships outside traditional marriage, and that he or the company does not wish to take steps indicating approval of such relationships. The memo states that granting free software might be seen as approving relationships outside marriage, and therefore, the policy is limited to spouses in the legally defined sense of the term.

Furthermore, the memorandum states that employing someone in a same-sex relationship might be seen as approving this immoral arrangement and, for that reason, Jill's employment is being terminated, effective immediately. The memorandum concludes by thanking Jill for her hard work, and wishes her good luck in her future endeavors.

Jill, shocked, notifies the Irish Equality Authority, and seeks advice regarding her rights under European Community law. To determine the likelihood of success, we must look beyond the rhetoric of equality contained in web pages and welcoming brochures, and engage in a close reading of the relevant statutes. Recent case law also might indicate how vague principles of equality might be interpreted and applied by the Courts.

B. Irish Law

Surprisingly, Irish law would offer little protection to Jill in these circumstances. Neither the denial of employment benefits to Jill's partner, nor the termination of Jill's employment for being part of a non-traditional relationship would appear to constitute acts of discrimination based on sexual orientation under Irish law.

1. Denial of Benefits to Jill's Partner—Section 34 of the Employment Equality Act, 1998, is entitled, "Savings and
exceptions related to the family, age or disability.”

This section essentially provides exceptions to the general prohibitions against discrimination—such as discrimination based on sexual orientation—that might otherwise apply.

Section 34(1) (b) provides that nothing contained in the relevant sections of the Employment Equality Act shall make it unlawful for an employer to provide a benefit to a person “in respect of a person as a member of an employee’s family.”

But isn’t Barbara, in a very real sense, a member of Jill’s family? Again, not according to the Employment Equality Act. Section 2 of the Act provides definitions, and Section 2(1) provides that “member of the family” in relation to any person, means, “(a) that person’s spouse, or (b) a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant of that person or that person’s spouse.”

The Act does not define spouse. It is likely, however, that the Irish courts, in interpreting that phrase, would refer to its definition under Irish law. No Irish cases have held that “spouse” extends to a same sex partner.

Thus, despite the Act’s surface or superficial prohibition against discrimination based on sexual orientation, the combined effect of Section 34 and the definitions section of the Act operate to exclude from its protection the type of discrimination of which Jill complains.

2. Termination of Jill’s Employment—Would the Employment Equality Act regard the termination of Jill’s employment by reason of her being part of a same-sex relationship as constituting discrimination based on sexual orientation? The answer is not altogether clear. Definitions contained in the Act and debates in the Irish Senate highlighted a likely deficiency in the law. It is possible that this form of discrimination would not be viewed as sexual orientation discrimination. It is possible, in fact, that this type of discrimination would not be prohibited at all.

In Senate Debates in the Irish legislature, Senator Brendan Ryan questioned the Minister for Justice, Mr. John O’Donoghue.

In response to these questions, the Minister conceded that discrimination against a lesbian or gay man for living with another

40. Id.
41. Id. at § 34(1)(b).
42. Id. at § 2.
person of the same sex would not constitute sexual orientation discrimination under the Act. This would be discrimination based on cohabiting.

What, then, does the Act provide regarding discrimination based on cohabiting?

The Act does not prohibit discrimination against someone on the basis that they are cohabiting with a member of the same sex. Instead, the Act only prohibits discrimination based on marital status, and, according to the definitions provided in the Act, marital status does not include cohabiting couples.45

The definition section of the Act, Section 2, provides that "'marital status' means single, married, separated, divorced or widowed."46 Thus, marital status discrimination occurs only if a person is discriminated against because she is single, married, separated, divorced or widowed. Discrimination against someone based on cohabitation does not constitute marital status discrimination, because such a person is not being discriminated against by reason of being single, married, separated, divorced or widowed.

Senator David Norris railed against this anomaly in the Senate debates, in support of amendments to expressly prohibit this type of discrimination. To quote Senator Norris, "[i]f I were an employer, I would say I did not discriminate against you because you are single, married, divorced, separated or widowed but because you are a pair of fairies living together and I did not like it."47

According to Senator Norris's reading of the Act, this type of practice is not outlawed.

The Irish Government resisted efforts to amend the definition of marital status to include cohabiting couples. Minister for Justice John O'Donaghue said "[t]his legislation seeks to ensure equality in employment and to eliminate prejudice and discrimination. It does not seek to change the marital status of individuals or provide for different types of marital status."48

Perhaps this quote most starkly illustrates the gap between the rhetoric of equality and the reality as experienced by those who suffer discriminatory practice. On the one hand, the Irish Attorney General can praise the legislation as designed to eliminate prejudice and discrimination, while simultaneously arguing that terminating a lesbian by reason of her participation in a same-sex

46. Id.
48. Id. at Col. 379.
partnership does not constitute employment discrimination against her on the basis of her sexual orientation.

Might Jill try to argue that she is being discriminated against by reason of her family status? Again, her argument is defeated at the outset, by a definition that provides that "family status" means "responsibility (a) as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years, or (b) as a parent or the resident primary career in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis." 49

The Act is deficient in other respects. For one thing, the Act itself discriminates, depending upon the type of discrimination suffered. For example, someone who suffers discrimination based on sexual orientation is limited to two years back pay for relief. Someone who suffers discrimination based on sex does not face a similar "cap" on relief. The Act also provides exceptions or loopholes for those accused of sexual orientation discrimination. For example, the Act allows Irish religious institutions to treat certain individuals more favorably than based on their religion and allows these institutions to "take action against" individuals who "threaten the ethos" of the institution. When one considers that hospitals and schools can be considered "religious institutions" for the purposes of the Act, these are potentially far reaching exceptions.

C. European Community Law

Perhaps Jill could seek to invoke European Community law, by reason of her having moved to Ireland from the UK in order to take up a job. Would she fare any better?

1. Denial of Employment Benefits and Termination of Employment—It is not clear that Jill would do any better under EC law. In Grant v. Southwest Trains, 50 Lisa Grant complained when she was refused travel benefits for her same-sex partner. 51 The man who had occupied the job before her had obtained travel benefits for his live-in girlfriend, but the company policy limited such travel concessions to married couples or to "opposite sex" couples in long-term relationships. 52

51. Id. ¶¶ 7-8.
52. Id. ¶ 9.
In other words, the policy did not simply distinguish between married and unmarried couples (as is the case in many employee benefit policies). Instead, it distinguished between same-sex and opposite-sex couples; the latter included both married and unmarried individuals. Ms Grant took an action in the UK national court, and the national court referred a question to the European Court of Justice.

The European Court of Justice concluded that EC law, particularly the general principle of EC law providing for equality of citizens and non-discrimination, did not prohibit discrimination against lesbians or gay men. Thus, in the Court's view, the practice of restricting benefits to opposite-sex couples did not violate EC law, because EC law did not prohibit anti-gay discrimination. The Court reached this conclusion despite its ruling in an earlier case, Case C-13/94, P & S and Cornwall Council, that general principles of equality implicit in EC law prohibited discrimination against transsexuals.

The Court of Justice cited the pending Treaty of Amsterdam amendment, Article 13, which would have expressly empowered the Council of Ministers to adopt EC legislation outlawing discrimination on the basis of sexual orientation. In essence, the Court of Justice handed the issue to the Council for a legislative solution.

But would the pending Directive Establishing a General Framework for Equal Treatment actually prohibit the type of discrimination of which Lisa Grant complained? Maybe not. There are several ominous soundings contained in the comments accompanying the proposed directive. The Commission notes, at page 8 of the commentary accompanying the proposal:

With regard to sexual orientation, a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behaviour, which is not. Furthermore, it should be underlined that this proposal does not affect marital status and therefore it does not impinge upon entitlements to benefits for married couples.

55. Id. at 8.
Thus, in defense of a claim of sexual orientation discrimination under the Directive, one could argue that one was not discriminating against Jill by reason of her status as a lesbian, but rather by reason of her sexual behavior of being in a relationship with another woman.

Furthermore, one might follow the lead provided in the second sentence of the Commission commentary and argue that one is not discriminating against Jill by reason of her sexual orientation, but rather by reason of her being in an unconventional same-sex relationships.\textsuperscript{56}

In fact, the Commission already has expressed the opinion that the discrimination faced by Jill is not sexual orientation discrimination. In the \textit{Grant} case, the Court considered whether refusing travel concessions to Grant's same-sex partner constituted sexual orientation discrimination.\textsuperscript{57} The Commission made a submission to the Court. The Court summarized the Commission's position as follows:

In its opinion... the discrimination of which Ms Grant complains is based not on her sexual orientation but on the fact that she is not living as a 'couple' or with a 'spouse,' as those terms are understood in the laws of most Member States, in Community law and in the law of the Convention. It considers in those circumstances the difference of treatment applied by the regulations in force in the undertaking in which Ms. Grant works is not contrary to Article 119.\textsuperscript{58}

Therefore, in the opinion of the European Commission, which is responsible for drafting the law designed to prohibit discrimination based on sexual orientation, it does not constitute sexual orientation discrimination to deny employment benefits to the same-sex partner of a worker. This is true even where those benefits are granted to the unmarried opposite-sex partner of a worker.

Of course, even though the Commission drafts the directive, and its views will be highly influential, it will not have the last word on the interpretation of this directive. The Court will have the last word as to whether this constitutes sexual orientation discrimination. It seems unlikely the Court will prove more generous.

In \textit{D & Sweden v. Council of the European Union}, the Court of First Instance (which considers disputes between employees and

\textsuperscript{56} \textit{See id.}
\textsuperscript{57} \textit{Case C-249/96, Grant v. Southwest Trains, 1998 E.C.R. I-62.}
\textsuperscript{58} \textit{Id.} ¶ 23
Community institutions in the first instance), considered a claim by an employee of the Council of the European Union. The individual, D, had a registered partnership with his same-sex partner under the laws of Sweden. According to Sweden, which intervened on behalf of D, this provided essentially all the same rights and obligations as in a civil marriage between opposite-sex partners.

D sought supplemental employee benefits that the Council provided to married employees. The Council refused to provide these, and D sued.

While the case was pending, the Council adopted regulations prohibiting discrimination based on sexual orientation, but the Court did not consider these in reaching its decision.

The Court of First Instance ruled in favor of the Council of Ministers. It refused to assess the Council’s behavior against the later-adopted regulations prohibiting discrimination based on sexual orientation, but, if their reasoning was the same as the Commission in Grant, that would not have made a difference.

Instead, the Court stated that:

an employer is not obliged to accord to the situation of a person maintaining, like the claimant, a stable relationship with a partner of the same sex, even if this has been the object of official registration with a national agency, the benefits devolving from the civil status of a person engaged in the relationship of a traditional marriage.

The case was appealed to the European Court of Justice. However, D and Sweden fared no better there. In fact, preliminary observations suggest that, from a human rights perspective, the situation deteriorated on appeal.

Advocate General Mishco delivered his opinion in the case on 22 February 2001. He recommended that the Court affirm the judgment of the Court of First Instance. He argued that there is no protection for same-sex couples by reason of the general

60. Id. ¶ 22.
61. Id. ¶ 5. While the case was pending the Council adopted regulations prohibiting discrimination based on sexual orientation.
62. Id. ¶ 29.
64. Id. ¶ 119.
principle of equal treatment under EC law. His argument was based on his conclusion that differences "in nature" between same sex and opposite sex couples render the situations dissimilar; therefore, unequal treatment does not violate the principle that like cases should be treated alike.65

What about the EU Charter of Fundamental Rights, adopted with the Treaty of Nice? This was of no use to the claimant, and, in fact, worked against his position. First, the Charter is not a legally binding document, and can not be relied upon as an enforceable law.

Second, the Advocate General relied upon the Explanatory Memorandum accompanying the Charter of Fundamental Rights to justify his conclusion that the claimant had not been discriminated against. Mischo cited that portion of the Charter that states that there is no obligation to require same-sex marriages as a result of the Charter.

The Court of Justice followed the recommendation of the Advocate General and affirmed the judgement of the Court of First Instance.66

Concerning the argument, put forth by Sweden, Denmark and the Netherlands, that denying these benefits violated the general principle of equality under Community law, by discriminating against D by reason of his sexual orientation, the Court wrote:

[as regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner.67

It should be noted that, although the discussion of Community law thus far has been in the context of the denial of employment benefits for a same-sex spouse, the conceptualization of discrimination based on sexual orientation would deny relief to one who was terminated by reason of being in a same-sex partnership. That is, this would not be seen as a form of sexual orientation discrimination, and, because same-sex couples are, by their very nature, different from opposite sex couples (even unmarried opposite sex

65. Id. ¶ 80.
67. Id. ¶ 42.
couples), there is no violation of the basic principle of equality that like cases must be treated alike.

IV. Conclusion

The public image presented by Ireland and EU—with regard to the attitudes towards lesbians and gay men—is that of a modern, progressive, caring government, devoted to principles of diversity, inclusiveness and non-discrimination. The web site for the Irish Equality Authority goes so far as to portray a same-sex couple in an amorous embrace.

However, a close reading of the relevant legislation and case law reveals that the law does not protect same-sex couples.

The reasoning behind the decisions reveals a true perversion of the common-sense notion of equality. It reminds one of the phrase, 'The law, in its majesty, prohibits the rich as well as the poor from sleeping under bridges.' Except in this case, the reasoning is dangerously close to being, 'The law, in its majesty, prohibits heterosexuals as well as homosexuals from forming same-sex partnerships.' It is only a small step to refusing to see criminal penalties for same-sex conduct as not violating principles of equality, because these penalties apply equally to heterosexuals and homosexuals.

However, the public image of progressive change poses an even greater threat. It lulls affected groups and concerned individuals into a sense of complacency, and diminishes militant action for change.

Only recently has the Irish Government adopted a more nuanced approach to the issue of presenting images of law to the public. In a widely publicized document entitled, "Partnership rights of same sex couples," the Equality Authority audited the legal situation of same sex couples. The results can be summarized from the introduction:

It will be seen that a wide range of legal privileges and obligations are triggered by the status of marriage. Interestingly, in a small but growing number of recent legislative provisions, some significant consequences have been attached to the status of "living together as husband and wife" without being formally married. Although the matter has not been tested in the courts, it appears that this formula does not encompass same sex couples.\textsuperscript{68}

\textsuperscript{68} See infra pp. 1-2.
Although the report does not make any recommendations, and does not express an opinion whether differential treatment conceptually equals sexual orientation discrimination, it does indicate that governments can present a more complex view of the status of equality claims by minority groups, without forfeiting the broader commitment to the general principles of equality.