

The Legal Recognition of Same-Sex Relationships: Emerging Families in Ireland and Beyond

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Across Europe the legal position of same-sex families is changing. The right to marry is gradually being extended to same-sex couples and for the largely Eastern countries the European Court of Human Rights is developing its jurisprudence requiring Member States to provide same-sex couples access to a formalised relationship status. In the sphere of same-sex parent-child relations, we are seeing policymakers at both the domestic and international levels confronting the challenges faced by medical advances in donor-assisted reproduction and grappling with cross-border dimensions, especially in relation to surrogacy.

This context provides the perfect backdrop for Tobin's monograph, *The Legal Recognition of Same-Sex Relationships: Emerging Families in Ireland and Beyond*. Tracing the emergence of same-sex families in Ireland and beyond, Tobin recognises the 'remarkable' rate of progress in this field while at the same time highlights the considerable work left to be done to fully recognise these families in law.¹ Indeed, inherent within this ever-changing and emerging framework is a fragility whereby victories for same-sex families can easily be reversed and achievements undone. Tobin engages with this socio-political context throughout the book. While applauding successes, Tobin exposes deficiencies in the existing law and proffers much-needed reform strategies.

The Legal Recognition of Same-Sex Relationships largely centres on the legal framework applicable to same-sex families in Ireland. Early chapters see Tobin critique same-sex marriage, Ireland's brief romance with civil partnerships and the financial redress mechanism offered to both same- and mixed-sex cohabiting couples. The book then explores parent-child relationships and, in particular, the parental rights for donor-conceived or surrogate-born children. With Ireland being a member of the Council of Europe, Tobin concludes by looking at legal protections guaranteed by the European Convention on Human Rights and how the Strasbourg Court's jurisprudence furthers and potentially frustrates the protection of same-sex families.

While adopting a focus on developments in Ireland, the book also looks beyond that jurisdiction. Comparative law perspectives add a richness to the analysis and extend the reach of the book so that it can help shape international debates. Interestingly, these perspectives are not merely intended to act as a point of contrast to the Irish position but are also used to spotlight ways the Irish approach can illuminate the path to legal reform elsewhere. This investigation is useful when it is appreciated that Ireland adds a distinctive contribution to these debates. For example, Ireland became the first country in the world to extend marriage to same-sex couples by way of a referendum in 2015, with Australia subsequently following in 2017. Similarly, the privileging of marriage in the Irish Constitution meant that its scheme of same-sex civil partnerships was phased out. Curiously, despite the strong constitutional protection of the marital family, Ireland still managed to introduce legal protections in 2010 for unmarried couples. These distinct reform patterns offer fascinating perspectives for other jurisdictions.

More importantly, Tobin demonstrates that the conversation regarding reform has not ended in Ireland. Adoption and surrogacy remain 'live issues', as noted by Gerard Hogan of the Irish Supreme Court in the Foreword to the book. Similarly, on the 8th March 2024 there will be two referendums in Ireland, one of which aims to extend the constitutional definition of the family beyond marriage. Tobin's book cannot be better placed to capitalise on the momentum for change and help shape the public discourse surrounding same-sex families.

The book is comprised of five chapters. The first substantive chapter explores marriage equality in Ireland and its realisation through a popular vote. Following the successful plebiscite, Article 41 of the Irish constitution was amended

¹ At 1.

to offer marriage to two persons without distinction as to their sex with the first marriages taking place on the 17th November 2015. Tobin offers fascinating insights into the political machinations that preceded this development and usefully contrasts the position in Ireland with Australia that took a similar approach a few years later. What is striking from Tobin's analysis is the difficult trade-off between the successful vote and the cost to the LGBT+ community in Ireland. While constitutional recognition of same-sex marriage offered 'ultimate societal affirmation of the legitimacy of same-sex relationships',² it did so at the price of fuelling hateful anti-LGBT+ discourse and debate. Moreover, Tobin observes that such exercises in participatory democracy were 'crude, unnecessary and uncertain'.³ That said, whilst marriage equality could have come via legislation, as it did in England and Wales in 2013, enshrining the right to marry within the Irish Constitution gives it an enhanced level of protection. After all, it should not be forgotten, as Tobin reminds us, that anti-LGBT administrations can always row back and even repeal hard-won protections for same-sex families when they exist outside the Constitution.

The next chapter explores same-sex relationships beyond marriage in the form of Ireland's short-lived civil partnership scheme and its protections offered to cohabitants that still operate today. As for civil partnerships, Tobin traces the different path Ireland navigated regarding formalised relationships outside of marriage. Following marriage-equality, had Ireland retained its civil partnership regime there was a risk it may induce couples not to marry and thus be considered constitutionally suspect. The safer approach of phasing out the same-sex only registration regime following the introduction of same-sex marriage was adopted, as it was done previously by the Scandinavian countries when faced with the same dilemma. But, interestingly, Tobin argues that it is 'lamentable' that strict conformity with the Irish Constitution prevented civil partnerships the opportunity to 'emerge' as a genuine alternative to marriage.⁴ Tobin draws upon the experience of the UK that curiously both retained their civil partnership regime post marriage equality and then extended it to mixed-sex couples in 2019. While the UK approach was hardly a masterclass in principled law reform, it hopefully might offer insights for Ireland and assist with Tobin's aim to 'reignite the debate surrounding civil partnership or an equivalent mechanism as an alternative for same-sex and opposite-sex couples in Ireland'.⁵

The final section of this chapter interrogates the Irish redress scheme for cohabitants with Tobin arguing it strikes a fair balance between State intrusion into the private sphere of interpersonal relationships and affording protection to the 'truly vulnerable cohabitant'.⁶ The analysis and insights offered are particularly illuminating especially for England and Wales that currently has no equivalent statutory regime for cohabitants applicable upon separation or death. While welcoming the safety net offered by the Irish scheme, Tobin accepts that 'the redress scheme is likely to benefit very few cohabitants in practice'.⁷ This is attributable to the comparatively lengthy minimum duration periods of cohabitation that must be established and the requirement that relief for a qualifying cohabitant will only be granted if they were financially dependent on the other cohabitant. Although both aspects undermine the effectiveness of the scheme, Tobin's analysis of the limited case law available is informative for other jurisdictions considering cohabitation reform.

The next chapter turns to the parent-child relationship. It focusses specifically on children born via assisted reproductive technologies like donor-assisted human reproduction (DAHR) and surrogacy. After refuting arguments against same-sex parenting, the chapter analyses amendments made by the Children and Family Relationships Act 2015. Tobin considers that Act to be 'an important milestone on the path to establishing parental rights for same-sex couples'.⁸ However, he considers that parents of many children 'are left behind by the Act and subsequent, relevant legislative initiatives'.⁹ Spurred on by these failings, Tobin proposes that reciprocal IVF should fall within that statute. For non-clinical DAHR, Tobin proposes a potential regulatory model alongside an alternative model for regulating domestic surrogacy arrangements that aims to balance the interests of the child, surrogate and intended parents. Space precludes a discussion of these proposals, but they are presented clearly and persuasively with obvious potential to help guide policymakers in the future.

The final substantive chapter looks at the European Convention on Human Rights and how it contributes to the aforementioned areas when implemented in Ireland through their Human Rights Act 2003. Tobin considers that the

² At 2

³ At 2.

⁴ At 186.

⁵ At 2.

⁶ At 3.

⁷ At 75.

⁸ At 139.

⁹ At 139.

contribution of the Strasbourg Court to family life and marriage has been 'frustrating'.¹⁰ Given the nature of the Court as a supranational entity and its need to maintain its own legitimacy over a diverse range of Member States such observation is accurate. Afterall, the Court operates by stimulating incremental change and, in the context of same-sex relationships, a wide margin of appreciation tends to be afforded to Member States. But recent decisions have shown a more robust approach being taken, especially post *Fedotova and others v Russia* on the issue of same-sex registered partnerships.¹¹ Sadly, as Tobin notes, we are yet to see Article 12 interpreted by the Court so as to grant a right to same-sex marriage but this may happen in 'the not-too-distant-future'.¹² While Ireland, like the UK, has outpaced the demands of the Convention in relation to adult relationships, Tobin is correct that Ireland might still find Strasbourg's scrutiny of parent-child relations informative. Here the margin of appreciation remains a key barrier, especially for assisted human reproduction, but over time that position will change.

The Legal Recognition of Same-Sex Relationships makes an important contribution to how same-sex families are recognised and protected in law. Rather than accepting at a superficial level the positive victories won by the LGBT+ community in Ireland and other jurisdictions, Tobin subjects these developments to close and critical analysis. Through critiquing the origins of these changes and their later implementation, the book casts light on how the law genuinely impacts same-sex families. With reforms in this area on the horizon, it is without doubt that Tobin's book will help shape future debates and play a key role in assisting policymakers in Ireland and beyond.

¹⁰ At 184.

¹¹ [2023] ECHR 55 (Application Nos 40792/10, 30538/14 and 43439/14).

¹² At 185.



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