Foreword

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In May 2015, Ireland became the first country in the world to legalise marriage for gay couples through popular vote. The marriage equality referendum, passed by a 62 per cent majority, made international headlines. LGBT activists and groups all over the world have since sought to learn from the success of Ireland's social movement, the Yes Equality campaign, that achieved such historic progress in this traditionally conservative and Catholic country. This book will provide readers with clear insights into the campaign itself, and cogent analysis as to how the victory was won. Sonja Tiernan's invaluable contribution to the history of social progress in Ireland recognises and celebrates the many unsung heroes who worked for long years to achieve the historic 2015 result. She also ensures that the challenges and lessons of the campaign are documented, so that others may learn about how hearts and minds can be changed. Now, in the aftermath of a further successful referendum campaign in May 2018, this time to repeal the Eighth Amendment to the Constitution and ensure women's access to legal abortion in Ireland, another giant leap forward for progressive social change has been made. During the 2018 debates on women's reproductive health, many parallels were drawn with the marriage equality strategies; it became clear that we had learned much from the success of the Yes Equality campaign.

This book details the development of that campaign, from decriminalisation of homosexuality in 1993, to the initial litigation on marriage equality, to the legalisation of civil partnership, the establishment of the Constitutional Convention, and the referendum campaign itself. I feel privileged to have played some role in these events. As a practising barrister, I was Junior Counsel for Katherine

Zappone (now Minister for Children and Youth Affairs) and Ann Louise Gilligan, now sadly passed away, in their ground-breaking case seeking recognition of marriage equality (the KAL case); as an activist and later as a Senator, over many years I campaigned and agitated for greater LGBT rights and for legalisation of same-sex marriage. But over all those years, even as we came close to winning the referendum, it was hard for many of us to believe that we could win; that we could achieve such a resounding result for equality, given Ireland's historically poor record on gay rights.

In reality, over the decades prior to 2015 Ireland had moved very slowly towards equal treatment for the LGBT community. The provisions of the 1861 Offences Against the Person Act criminalising homosexuality had remained in force in Ireland many years after their repeal in England under the Sexual Offences Act 1967. By the late 1970s, a campaign was underway to seek their repeal in Ireland; it was spearheaded by David Norris, later to become a Senator. In 1977 he initiated a legal challenge to the constitutionality of the legal provisions of the 1861 act which criminalised sexual activity between men. He lost his case in the High Court and appealed to the Supreme Court, where he lost again in 1983. The majority judgment there was given by then Chief Justice O'Higgins, in an infamous speech supporting the ban on homosexuality in which he said: 'on the ground of the Christian nature of our State and on the grounds that the deliberate practice of homosexuality is morally wrong, that it is damaging to the health both of individuals and the public and, finally, that it is potentially harmful to the institution of marriage'.¹

While the majority of the judges agreed with the Chief Justice, a strong dissenting judgment was given by Judge McCarthy J, based on the right to privacy. In his opinion, the ban was unconstitutional because 'a very great burden lies upon those who would question personal rights in order to justify State interference of a most grievous kind (the policeman in the bedroom) in a claim to the right to perform sexual acts or to give expression to sexual desires or needs in private between consenting adults, male or female'.²

Norris appealed to the European Court of Human Rights, which upheld his appeal in 1988, finding that the criminalisation of sexual activity between men amounted to a breach of Article 8 of the European Convention on Human Rights (the privacy guarantee), because 'although members of the public who regard homosexuality

as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved'.³ The European Court decision ultimately led to the repeal of the relevant legislation and the decriminalisation of homosexuality in the Criminal Law (Sexual Offences) Act 1993 – a mere twenty-five years ago. The *Norris* case represents an early example of the effective use by social campaigners in Ireland of international and European law mechanisms to achieve change. Reflecting on the case more recently in an edited collection of essays exploring how legal cases have been used to effect social change in Ireland, David Norris said that before initiating his legal action he had consulted with US campaigners, who had suggested to him that 'it's all about *how* you win, as much as what you win'. Thus, Norris initiated his action with a view to raising national consciousness through litigation strategy – in his own words, 'we wanted the case to attract as much razzmatazz as possible!'⁴

Decades of progressive social change for LGBT persons were to follow after the *Norris* case, with particular highlights being the inclusion in legislation of sexuality as a prohibited ground of discrimination in employment in 1998 and in the provision of goods and services in 2000; and the passage of civil partnership legislation in 2010.⁵ These changes are detailed in this book, but Sonja Tiernan notes that the ultimate goal of marriage equality was only realised after further litigation was initiated, using the same strategies as the earlier *Norris* case.

That litigation was commenced in 2004, in the courageous case taken by Katherine Zappone and Ann Louise Gilligan seeking recognition in Ireland of their Canadian marriage and, as a consequence, the right to marry for gay couples in Ireland. They initiated a legal action following the refusal by the Irish tax authorities to recognise their marriage in Canada.⁶ They built a successful advocacy campaign around the case, and raised a range of comparative and international law arguments during the hearings. They lost the case in the High Court before Judge Dunne, who ruled in December 2006 that

if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then ... [one ground] of

justification must surely lie in the issue as to the welfare of children ... Until such time as state of knowledge as to the welfare of children is advanced, it seems to me that the State is entitled to adopt a cautious approach in changing the capacity to marry albeit that there is no evidence of any adverse impact on welfare.⁷

This was a deeply disappointing judgment. Of course, the context then was very different. At that point, civil partnership had not yet been legalised in Ireland. Only a small number of US states had by that time recognised marriage equality. But although the tide of equality had not yet turned internationally, the High Court decision still lacked logic. It ignored the nature of the right to marry and the changing nature of the institution of marriage. An argument that marriage must be confined to heterosexual couples because it was 'ever so' amounts to circular and illogical reasoning. The truth is that the definition or meaning of marriage is not fixed in any society. It has changed and evolved over time. And Sonja Tiernan does an excellent job in these pages of documenting the changes in public opinion brought about over time by the work of campaigners through litigation, but also through political action.

Indeed, although we appealed the High Court decision in the KAL litigation to the Supreme Court at the time, political developments soon overtook the legal action. Senator David Norris had already been tabling legislation in the Seanad seeking recognition of civil partnership; the day the High Court judgment in the KAL case was given, as Sonja Tiernan notes, the Labour Party introduced a further Civil Union Bill in the Dáil. Media appearances by Katherine Zappone and Ann Louise Gilligan, and other gay couples, played a large part in shifting public opinion; it gradually became clear that the public wanted to see legal recognition of same-sex relationships. The Civil Partnership Act, passed in 2010, provided that recognition; but it fell short of equal provision, and was heavily criticised by many campaigners, for whom full equality remained the goal.

And this goal was to be finally realised following the general election of 2011 when, as Sonja Tiernan explains, Labour entered government as a minority coalition partner with Fine Gael. The Labour party, with an active Labour LBGT section, had championed marriage equality in opposition, and in its 2011 election manifesto committed to holding a referendum on this. At the time, Labour

leader Eamon Gilmore famously declared marriage equality to be ‘the civil rights issue of this generation’.⁸ The Fine Gael party accordingly agreed to the establishment of a Constitutional Convention to debate the merits of holding a referendum on same-sex marriage. That convention, made up of citizens and political representatives, of which I was proud to be a member, recommended by a large majority the holding of such a referendum. By this time, as Sonja Tiernan writes, the marriage equality campaign, set up to support the advocacy initiatives around the KAL case, was well established. Spokespersons and key leaders were already in place, strategies had been devised and the campaign was underway.

The referendum campaign itself was notable for the mobilisation of civil society and of large numbers of individuals who had never previously been politically active, but who turned out to canvass for the ‘Yes Equality’ alliance that led the campaign. This alliance promoted a positive message, based on telling the human stories behind the call for equality; prominent spokespersons spoke movingly of the impact of the ban on marriage upon their lives and the lives of their children. Political and public figures who had not previously spoken about their sexuality came out during the campaign for the first time; these included broadcaster Ursula Halligan and then government Minister, now Taoiseach, Leo Varadkar TD.

The passage of the referendum itself, marking the first popular vote for change on marriage equality internationally, marked a significant milestone in the journey to achieve what has indeed been a radical transformation in the lives of LGBT people in Ireland since the 1980s. But progressive change has not stopped there. Even since 2015, there have been further positive legislative developments on LGBT rights. In that year, the Equality (Miscellaneous Provisions) Act was passed, introducing changes which give gay teachers and other employees in religious-run schools and hospitals protection against discrimination and dismissal. Until that legislation was passed, discrimination was legally permitted if the lifestyle of teachers or other employees of such institutions was perceived to be in conflict with their employers’ religious ethos. The Gender Recognition Act, passed the same year, provides legal recognition for transgender persons in Ireland for the first time. These two significant steps were both taken just months following the success of the referendum, again as Labour initiatives within government. And indeed, even since the election of

a new government in 2016, other LGBT rights initiatives have been launched. An interdepartmental review of the Gender Recognition Act, to ensure that it adequately meets the needs of transgender persons, particularly young people, is already underway. My own legislation to provide equality for gay couples who have lost out on survivors' pension entitlements because they were legally unable to marry until after 2015 has been accepted by government; other Labour legislation providing for the quashing of convictions recorded prior to 1993 in respect of consensual adult sexual relations is also making progress.

But while we continue to work on these and other progressive legal changes, it is useful to reflect on the lessons from the marriage equality campaign, in understanding that while lawmaking and litigation can be a key strategy in achieving social change, there must also be public buy-in to make that change sustainable and truly embedded in social culture. As the 2015 campaign showed us, how we win is just as important as what we win. This book provides reflective consideration on the historical context for the campaign, as well as analysing how it was organised and what specific factors contributed to its winning outcome. Sonja Tiernan has done Irish society a great service in documenting *how* that win was brought about – a truly valuable lesson for generations to come.

Notes

- 1 *Norris v the Attorney General* [1984] IR 36 (SC), at 65.
- 2 *Ibid.*, at 102.
- 3 *Norris v. Ireland* [1988] ECHR 22, at para. 46.
- 4 Ivana Bacik and Mary Rogan (eds), *Legal Cases that Changed Ireland*, Dublin, 2016, p. 54.
- 5 The Employment Equality Act 1998; Equal Status Act 2000; Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
- 6 *Zappone & Gilligan v. Revenue Commissioners* [2006] IEHC 404, [2008] 2 IR 417 (HC). This author acted as junior counsel in the case.
- 7 *Ibid.*, at 507.
- 8 Éamon Gilmore, *Inside the Room: The untold story of Ireland's crisis government*, Dublin, 2016, p. 216.