MARRIAGEQUALITY

Civil Marriage for Gay and Lesbian People

Submission
to the
Law Reform Commission
on the
Consultation Paper:
Legal Aspects of Family Relationships

December 2009

About MarriagEquality

MarriagEquality is a not for profit organization working for equality for same sex couples and our families.

Currently approximately 10% of the population has no freedom to marry and therefore have no access to the ordinary rights that are afforded to married couples such as spouses' pension entitlements, inheritance rights, taxation and social welfare benefits or even visitation rights if their partner is in hospital.

Moreover as Article 41 grants constitutional recognition & state protection to the "family" based on marriage only, until same sex couples have access to civil marriage, our families, including those with and without children, will not be recognised in law as a families and will continue to be discriminated against.

INTRODUCTION

MarriagEquality welcomes the opportunity to make a submission to the Law Reform Commission on its Consultation Paper on *Legal Aspects of Family Relationships.* Our comments follow the format adopted in the Consultation Paper and are set out on a chapter-by-chapter basis in Section 2 below. This section makes some general observations that relate to the document as a whole.

MarriagEquality agrees that reform in this area must be centred on the best interests of children and must advance children's rights to the greatest possible extent in line with Ireland's obligations under the UN Convention on the Rights of the Child. In this regard it is submitted that greater attention ought to be paid to the children of parents in same-sex relationships. The Commission's proposal concerning a consolidated Children Act is one that MarriagEquality endorses fully (para 1.60). However, any such law should take account of the various family forms in which children live. The discrimination encountered by families that do not adhere to the married heterosexual model is not uniquely encountered by the children of gay and lesbian parents but it is experienced by 100% of that group. We would therefore urge the Commission, when reporting on the legal aspects of family relationships, to specifically address the position of children that parented by people other than their biological parent/s or grandparent/s. A number of ongoing legal developments are especially significant from the perspective of such children and we now turn to address these briefly.

Assisted human reproduction

The rights of children conceived through sperm donation and other forms of assisted human reproduction are of particular concern to MarriagEquality. We respectfully suggest that the Commission take account of recent developments in this area when issuing its report. The Supreme Court judgment in *McD. v L. and Anor.* [2009] IESC 81 highlights the absence of a clear legal framework concerning the rights and interests of children conceived through sperm donation. It is highly unsatisfactory that the nature of the legal relationship between all of the parties concerned was subject to protracted legal proceedings. In the wake of the Supreme Court decision in *Roche v Roche & ors* [2009] IESC 82, the Government has announced its intention to bring forward legislation regulating the area of assisted human reproduction.[1] Any such legislation will have profound consequences for the legal aspects of family relationships as discussed in the Report of the Commission on Assisted Human Reproduction.[2] That Report considered the ethical, legal and social issues raised by the involvement of third parties as donors of sperm, ova and embryos. It foregrounds the rights of children and recommends for instance that: children born through donated gametes should be entitled to know the identity of their genetic parents; parental rights and responsibilities should be conferred on the recipient(s) of donations rather than on the donor(s); that surrogacy should be permitted subject to regulation, with the majority of the Commission recommending that a child born through surrogacy should be presumed to be the child of the commissioning couple.

Civil partnership

The Civil Partnership Bill 2009 does not remedy the absolute lack of recognition of the relationship between (1) a child and her social parent, where that social parent is in a relationship with the child's genetic mother or father (2) a child that is parented by a same-sex couple neither of whom are the child's genetic parents. As outlined in the legal opinion set out in Appendix A, non-biological children of civil partners will not be protected in most

[1] 'Harney to propose law on assisted human reproduction', *Irish Times*, December 16, 2009.
[2] Commission on Assisted Human Reproduction (2005) *Report of the Commission on Assisted Human Reproduction* (Dublin: Stationery Office).

contexts. Indeed, many sections of the Bill transpose provisions from other legislation applicable to married couples but delete references to dependent children.

Children's constitutional rights

The extent to which legislative reform is affected by the constitutional preference for married families requires further consideration in the opinion of MarriagEquality. In this regard the overarching legal position as governed by the Irish Constitution is the subject of a report to be published shortly by the Joint Committee on the Constitutional Amendment on Children. In the opinion of MarriagEquality the Law Reform Commission report would be enhanced significantly by including an analysis of any proposed changes to the status quo.

SECTION 2

Chapter 1: TERMINOLOGY

1.39 *The Commission provisionally recommends that, to ensure greater accuracy, clarity and consistency, the terms "parental responsibility," "day-today care" and "contact" should be used in relevant Irish family law legislation in place of "guardianship," "custody" and "access".*

MarriagEquality welcomes the Commission's provisional recommendations concerning the language used to describe aspects of the relationship between parents and children. The rationale behind the proposed changes is sound and we agree that the terms "parental responsibility", "day-to-day care" and "contact" should replace the terms "guardianship", "custody" and "access", respectively.

1.54 *The Commission provisionally recommends that a broad statutory definition of parental responsibility should be adopted in Ireland. The Commission invites submissions on whether this should include a requirement to consult with other parties who have parental responsibility for the child where it is practical to do so. The Commission also invites submissions on whether there should be a single parenting order to determine who should have day-today care of the child and who should have contact with the child.*

As to statutory definitions of parental responsibility, MarriagEquality believes that the Scottish approach has the merits of recognising the child's developing capacities.

A duty to consult with other parties that have parental responsibility for a child if introduced should be confined to major matters such as the placement of a child for adoption or the removal of the child from the jurisdiction, unless the terms of a parenting order provide otherwise. In this respect MarriagEquality prefers the approach set out in the Children (Scotland) Act 1995. The best interests of the child should be the overriding consideration here and so some distinction must be drawn in practice between parents that are 'fit' and actively involved in their child's lives, as opposed to those that have little or no connection with the child.

MarriagEquality is of the view that a single parenting order to determine the question of day-to-day care and the issue of contact is a preferable to multiple orders.

Chapter 2: REGISTRATION OF THE BIRTH OF A CHILD

In light of the points made in the introduction to this submission and in particular given the government's intention to legislate in the area of assisted reproductive technology (ART) MarriagEquality would welcome a thorough review of the birth registration system.[3] Currently the separate register for adopted children is the only means of recording a distinction between a child's genetic parents and his/her legal parents. In the absence of legal regulation no provision is obviously made for situations such as surrogacy and donor programmes. This situation ought to rectified as part of the overall regulation of ART. The possibility of registering two parents of the same sex as a child's parents on a separate birth register should be considered. Such a reform would bring about greater equality as between a child parented by a lesbian or gay couple and those parented by heterosexual (married or unmarried) couples.

[3] Any such review might also take account of the outcome of the appeal in *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEHC 470.

Within the confines of the Commission's current report MarriagEquality makes the following observations:

2.18 *The Commission provisionally recommends that the distinction between birth registration and the allocation of guardianship/parental responsibility should remain.*

In relation to fathers the current birth registration system maintains a distinction between legal parentage (i.e. genetic connections) and legal parenthood[4] that ought to be retained. From the perspective of MarriagEquality it is important to safeguard the position whereby men agree to act as sperm donors but do not wish to obtain any rights or responsibilities in relation to their genetic child.

MarriagEquality agrees that joint registration of the birth of a child would provide "some practical expression of the right of a child to know his or her identity" (para 2.19). However, we wish to note that access to full details as recorded on a birth certificate is not the sole or indeed primary means of obtaining information about a child's genetic parents. A child's right to know about his or her identity may be realised by his or her parents where the birth register is incomplete.

2.34 *The Commission invites submissions on whether it would be appropriate to introduce compulsory joint registration of the birth of a child in Ireland. The Commission also invites submissions on whether a non-marital father should be able to provide his details independently to the Registrar, to be registered once it is confirmed that he is the father.*

In the absence of regulation of donor programmes and of other forms of ART MarriagEquality would object to any reforms designed to compel mothers to record the name of the father on the child's birth certificate.

Chapter 3: THE RESPONSIBILITIES AND RIGHTS OF NON-MARITAL FATHERS

3.09 *The Commission provisionally recommends the introduction of a statutory presumption that a non-marital father be granted an order for guardianship/parental responsibility unless to do so would be contrary to best interests of the child or would jeopardise the welfare of the child.*

MarriagEquality agrees that any reform be based upon the best interests of the child but submits that in line with the recommendations of the Commission on Assisted Human Reproduction any such statutory presumption that a non-marital father be granted an order for guardianship/parental responsibility should not apply to children conceived through assisted human reproduction. The Commission on Assisted Human Reproduction recommended that while children born through donated gametes should be entitled to know the identity of their genetic parents; parental rights and responsibilities should be conferred on the recipient(s) of donations rather than on the donor(s) and that, children born through surrogacy should be presumed to be the child of the commissioning couple.[5] While any such presumption could have potentially serious consequences for all children conceived through assisted reproductive technology (ART) the children of same-sex couples are particularly vulnerable in that their parents cannot legally marry[6] and thereby obtain the protections afforded to the family based on marriage protected by Article 41 of the Constitution. Children raised by same-sex couples, even those who are civil partners or who are legally married in

[4] Bainham, A. (2005) *Children: The Modern Law* (Bristol: Family Law).
[5] Report of the Commission on Assisted Human Reproduction (2005).
[6] Section 2(2)(e) of the Civil Registration Act provides that it is an impediment to marriage if both parties are of the same sex.

other jurisdictions are afforded no legal protection or recognition under the Civil Partnership Bill 2009 which does not even refer to the children of same sex couples. Further, it is clear from the recent decision of the Supreme Court in *McD v. L & Anor*[7] that same-sex couple and their children are not regarded as a *de facto* family. Such children are denied vital legal protections because of who their parents are.

Under existing law, the legal status of the non-biological parent of the child of a same-sex couple is that of stranger in law. As stated above, the Civil Partnership Bill 2009 will not change this as married couples will remain the only persons eligible to apply to adopt a child jointly. This is likely to be contrary to the European Convention on Human Rights (see Opinion of Brian Barrington BL in Appendix A). Consequently, the social parent owes no obligation of support or maintenance. The child has no entitlement to inherit on intestacy and the non-biological parent can obtain only access during their partner's lifetime.[8] They cannot adopt their partner's child because although single people, including persons who are lesbian, gay or bisexual may adopt they cannot do so as civil partners because only married couples may adopt jointly.[9] The non-biological parent cannot be appointed guardian by the court or even by the agreement of the child's natural parents and can only become the child's guardian in the event of the biological parent's death, either as testamentary guardian under the terms of their partner's will[10] or by court Order.[11] The effect of any such presumption in favor of a non-marital father would be to deny children of same-sex parents any right of support, maintenance, visitation or intestate inheritance[12] from their social parent whilst creating a statutory presumption that a stranger with a biological tie to the child should be able to make all major decisions relating to the child, despite the clear intention of the donor to the contrary. Any presumption that a non-marital father be granted an order for guardianship/parental responsibility would undermine the integrity of the families in which children were born through assisted human reproduction and would have particularly deleterious consequences for families headed by same-sex couples and for their children. Such a presumption would also discourage potential donors and impact the availability of assisted human reproduction in Ireland.

MarriagEquality favours the approach taken in the United Kingdom under the Human Fertilisation and Embryology Act 2008 which recognises same-sex couples as legal parents of children conceived through the use of donated sperm, eggs or embryos. These provisions enable, for example, the civil partner of a woman who carries a child via IVF to be recognised as the child's legal parent.[13] It is submitted that such provision recognises not only the reality of the parent and child relationship but provides appropriate legal protection for the child, who then enjoys the right of support, maintenance and inheritance which ordinarily flow from the relationship of adoptive parent and child or biological parent and child. The recommendations of the Commission on Assisted Human Reproduction mirrored the UK approach as set out in the Human Fertilisation and Embryology Act 2008. The Commission recommended that gamete and embryo donation, as well as surrogacy arrangements be permitted and regulated. The Commission on Assisted Human Reproduction considered that any legislation on the provision of AHR services should reflect the general principles of the Equal Status Acts 2000-2004 (now the Equal Status Acts 2000-

[7] [2009] IESC 81.
[8] Section 11B of the Guardianship of Infants Act, 1964, as inserted by section 9 of the Children Act 1997 allows non-biological parents to apply for access in the family courts in relation to their children where they are *in loco parentis*. This is a two tiered process, in which an application for leave to apply must be brought before the application can be made.
[9] See Section 10 of the Adoption Act 1991.
[10] Section 7 Guardianship of Infants, Act 1964 (as amended).
[11] Section 8 Guardianship of Infants, Act 1964 (as amended).
[12] The Succession Act, 1965.
[13] Section 42 Human Fertilization and Embryology Act 2008.

2008) and that provided the welfare of the child is taken into account by clinicians when deciding whether treatment should be provided, same-sex couples should not be denied treatment on grounds of marital status or sexual orientation.[14] In all cases, the recipient(s) of treatment would be regarded as the legal parent(s). However, any donor-conceived child, on reaching an appropriate age of maturity, would be entitled to access the identity of the donor(s) involved in their conception, i.e. their genetic parents. Any statutory presumption that non-marital fathers should in all circumstances be granted an order for guardianship/parental responsibility would be contrary to the recommendations of the Commission on Human Reproduction and would not be in the best interests of children conceived through AHR

3.17 *The Commission provisionally recommends that a central register should be established in Ireland to keep account of the existence of statutory declarations agreeing guardianship/parental responsibility. The Commission invites submissions on whether the proposed register should be managed by the General Register Office and also whether it should be publicly available to search.*

MarriagEquality agrees that a central register should be established to keep account of the existence of statutory declarations agreeing guardianship/parental responsibility managed by the General Register Office. There would appear to be no difficulty in principle with such Register being publicly available to search. The question arises as to whether such register would enable persons who are the social parent but not the biological parent of a child to be declared a person agreeing to guardianship/parental responsibility. In the UK the Parental Responsibility Agreement Regulations as amended[15] allows both persons who have married the child's parent and civil partners of the parent to agree to assume guardianship/parental responsibility by completing the Step-Parent Parental Responsibility Form.[16] Such agreement confers guardianship/parental responsibility on the step-parent and can only be terminated when the child reaches 18 or by Order of the court made on the application of any person who has parental responsibility for the child, or by Order of the court on application of the child with the permission of the court. The advantage of such a scheme is to vest rights and responsibilities in persons who are social parents of the child without need for recourse to the courts. The child benefits from increased legal protections and rights without the need for protracted or costly court applications. Given the presence of agreement between the parties, the procedure simply recognises the reality of the child's circumstances while affording necessary legal protections. It is submitted that registration of such guardianship/parental responsibility agreements enhances the welfare of the child and ought to be followed in this jurisdiction to protect the children of same-sex parents.

3.21 *The Commission invites submissions on whether it would be appropriate to introduce automatic guardianship/parental responsibility for all fathers in Ireland.*

It is submitted that the provision of such a register facilitating agreement as to guardianship/parental responsibility would be preferable and would lessen any need for

[14] Recommendation 17, Report of the Commission on Assisted Human Reproduction, p. 34.

[15] The Parental Responsibility Agreement Regulations 1991 as amended by S.I. 2808 of 2005 The Parental Responsibility Agreement (Amendment) Regulations 2005.

[16] Form C(PRA2) Step-Parent Parental Responsibility Agreement, Schedule to the Parental Responsibility (Amendment) Regulations. Form C(PRA2) Step-Parent Parental Responsibility Agreement.

recourse to automatic guardianship/parental responsibility or statutory presumptions in favour of non-marital fathers. Irish jurisprudence on the rights of non-martial fathers already provides strong recognition of the genetic link between father and child and the consequent bond which arises where the father has contact with the child after its birth. It is submitted that this bond may differ depending on the circumstances of conception, particularly in the context of AHR and as such automatic guardianship/parental responsibility may be inappropriate and will result in the automatic allocation of rights and responsibilities to non-marital fathers who have no wish or desire to be involved in the child's life, which would not be in the best interests of the child. Further, automatic guardianship/parental responsibility would discourage surrogacy and donation and compromise the provision of Assisted Human Reproduction in Ireland. Moreover, imposition of automatic guardianship/parental responsibility on non-marital fathers might have the unintended consequence of leading in the case of unplanned pregnancies or crisis pregnancies to additional pressure to terminate the pregnancy or to give the child up for adoption where the genetic father has no wish to be burdened with automatic parental responsibility.

3.29 *The Commission provisionally recommends that there should be no link between joint registration of the birth of a child and guardianship/parental responsibilities. However, the Commission invites submissions on this issue.*

MarriagEquality agrees with this provisional recommendation. The birth registration system should continue to maintain a distinction between legal parentage (i.e. genetic parentage) and legal parenthood in order to safeguard the position of men who agree to act as sperm donors but do not wish to obtain any rights or responsibilities in respect of their genetic children.

Chapter 4: THE RESPONSIBILITIES AND RIGHTS OF MEMBERS OF THE EXTENDED FAMILY

4.26 *The Commission invites submissions on whether it would be appropriate to include a statutory definition of the term in loco parentis in the legislation governing family relationships.*

MarriagEquality would welcome a statutory definition of term *in loco parentis* which would expressly include the civil partner of the biological parent. Section 11B(2) of the Guardianship of Infants Act 1964 as inserted by section 9 of the Children Act 1997 governs applications for access/contact by persons who are *in loco parentis*. It would be preferable for the sake of clarity if a statutory definition was available, such definition could be broadly drafted and make reference to specific categories of persons as a non-exhaustive enumeration of persons who while not the parent of a particular child have taken on parental offices and duties in relation to the child.

4.35. *The Commission provisionally recommends the removal of the leave stage provided for by section 11B(2) of the Guardianship of Infants Act 1964, as inserted by section 9 of the Children Act 1997. The Commission invites submissions as to whether the categories of persons who can apply for access/contact should be expanded to include persons with a bona fide interest as is currently provided for by section 37 of the Child Care Act 1991.*

MarriagEquality would welcome removal of the leave stage provided by section 11B(2) of the Guardianship of Infants Act 1964 as inserted by section 9 of the Children Act 1997. The categories of persons who can apply for access/contact should be expanded to include persons with a *bona fide* interest. However, it is submitted that the categories, "*in loco*

parentis" and "persons with a *bona fide* interest" may be maintained so that the term *in loco parentis* can be defined for the sake of clarity and legal certainty to include civil partners and partners in same-sex relationships raising children jointly.

4.51 *The Commission invites submissions on the possibility of extending the right to apply for (or to apply to apply for) access/contact to include the child. The Commission also invites submissions on whether it would be necessary to include a leave stage to determine the capacity of the child; and to include a specific requirement in Irish law that the wishes of the child be considered in making a decision on an application for access/contact by a member of the child's extended family.*

As contact is regarded as the right of the child, it follows that the right to apply for access/contact should be extended to children where the court is satisfied that the child has sufficient understanding to make the proposed application. This is the conclusion which is most consistent with a child-centered approach and with Article 12 of the UN Convention on the Rights of the Child. Capacity of the child should be determined at leave stage. Similarly, the wishes of the child should be considered having regard to the age and understanding of the child in making a decision on an application for access/contact by a member of the child's extended family.

4.56 *The Commission provisionally recommends extending the right to apply for custody/day-to-day care to persons other than the parents or guardians of the child where the parents are unwilling or unable to exercise their responsibilities. The Commission also provisionally recommends that guardianship/parental responsibility should be linked to an order granting custody/day-to-day care in these circumstances. The commission provisionally recommends that such rights would be extended to the same category of persons who can currently apply for leave to apply for access/contact.*

It is agreed that the right to apply for custody/day-to-day care should apply to persons other than the parents or guardians of the child where the parents are unwilling or unable to exercise their responsibilities. The right to apply should be open to those who act in *loco parentis* or who have a *bona fide* interest and should expressly include civil partners. It is easy to envisage circumstances in which one civil partner becomes ill and their partner applies for custody/day-to-day care. It follows that guardianship/parental responsibility should be linked to such an order. It is agreed that the same persons who can currently apply for leave to apply for access/contact should be permitted to apply but same should expressly include civil partners as the proposed Civil Partnership Bill 2009 has left considerable lacunae in the realm of protection of the children of same-sex couples.

4.57 *The Commission invites submissions on whether the category of persons who can apply for custody/day-to-day care should be widened to include bona fide persons with an interest as currently provided for in section 37 of the Child Care Act 1991 in the context of applications for access/contact.*

Provided explicit recognition is given to civil partners and same-sex partners as being within the categories of person who can apply there is no difficulty in principle in extending the category of person who can apply for custody/day-to-day care to *bona fide* persons with an interest.

4.65 *The Commission invites submissions on whether it would be appropriate to develop a procedure to extend guardianship/parental responsibility to a step parent. The Commission also invites submissions on whether there should be a minimum time period and whether the appointment would only be by agreement or if it should be possible for a step-parent to make an independent application to court for guardianship/parental responsibility.*

MarriagEquality submits that the approach adopted in the UK pursuant to the Parental Responsibility Agreement Regulations 1991 as amended[17] should be followed here. The UK Step-Parent Parental Responsibility procedure allows both persons who have married the child's parent and persons who are civil partners of the parent to agree to assume guardianship/parental responsibility by completing the Step-Parent Parental Responsibility Form.[18] Such agreement confers guardianship/parental responsibility on the step-parent. This provides legal protection for the child and allows recognition of the family structure in which the child is raised. As in the UK these agreements should be equally open to civil partners. It should be possible for such person to make an independent application to court for guardianship/parental responsibility.

[17] The Parental Responsibility Agreement Regulations 1991 as amended by S.I. 2808 of 2005 The Parental Responsibility Agreement (Amendment) Regulations 2005.

[18] Form C(PRA2) Step-Parent Parental Responsibility Agreement, Schedule to the Parental Responsibility (Amendment) Regulations. Form C(PRA2) Step-Parent Parental Responsibility Agreement.

Appendix A

Legal Opinion of Brian Barrington BL in relation to the Civil Partnership Bill, 2009

OPINION

To : Moninne Griffith

From : Brian Barrington

Date : 22 August 2008

Re : Civil Partnership Bill 2009

Introduction

This opinion examines the provisions of the Civil Partnership Bill 2009 concerning civil partnerships, that is to say the specific provisions for same sex couples.

It does not examine Part 15 of the Bill, which makes provision with regard to co-habitants, both same sex and opposite sex, since I do not understand this to be a principal concern of Marriage Equality. However, where I have identified discrimination against same sex cohabiting couples in the statute book which the Bill does not address, I have averted to this.

In particular, this opinion examines the differences between the legal provisions for civil partnerships and those for marriage. Significant differences between what was envisaged in the Scheme for civil partnership and what the Bill provides for are also averted to.

This analysis largely follows the order of the Bill, but does not always do so.

Overall, the Bill is an improvement on the Scheme. Assuming that tax and social welfare are equalised in separate legislation, those reforms and the Bill's provisions will provide civil partners who do not have and do not wish to have children most of the same rights as married people have. But they will be denied the *status* of married people. And there will be a number of important areas where they will have lesser rights than married people.

The situation is very different for civil partners who have children – and it is above all the children of those civil partners who will suffer as a result. The Bill largely cuts and pastes provisions of Irish family law – but with one critical difference. Rights and protections for children in Irish family law are taken out in this process. This does not, of course, make the current situation worse. After all, the rights of the non-biological child of a civil partner are not recognised in Ireland at present anyway. But it does show clearly how a conscious decision has been taken not to extend rights and protections to such children. That, in turn, calls fundamentally into doubt the State's commitment to the rights of the child. Indeed, the failure to make proper provision to protect non-biological children may run contrary to Articles 8 and 14 of the European Convention on Human Rights.

Stating the obvious

Before examining what the Bill provides for – it is important to stress what the Bill does not provide for.

It does not provide for marriage for same sex couples.

Marriage was defined at common law in the 19th century case *Hyde v Hyde* as:

> "The voluntary union of one man and one woman, to the exclusion of all others."[19]

As a result, same sex marriages are void at common law.

[19] Hyde v Hyde (1866) L.R. 1 P and D 130 at 133, per Ld Penzance.

Unlike in England, nothing in Irish *statute* law renders same sex marriages void.[20]
However, s.2(2)(e) of the Civil Registration Act 2004 makes it clear that there is an impediment to a marriage if both parties are of the same sex. Parties to a marriage are required by law to declare that there is no impediment to their marriage. If they do not make the declaration, their marriage is void. If they knowingly make it a false declaration, they commit a criminal offence.[21] Also, if an impediment to marriage exists, an objection can be made in advance of solemnisation, leading to a decision by an tArd-Chlaraitheoir not to allow solemnisation.[22] While the 2004 Act therefore does not actually render same sex marriages void, it confirms the intention of the Oireachtas that they should be void and provides statutory support for the common law rule, which has also been reaffirmed in some recent cases.[23]
Nothing in the Civil Partnership Bill 2009 ("the Bill") changes this. The prohibition on same sex marriage at common law will remain. S.2(2)(e) of the Civil Registration Act 2004 also will remain.

Civil partnership to be a separate institution (Part 1)

Ss.1 to 3 of the Bill make preliminary provisions.

S.1 allows for different provisions of the Bill to be brought into effect by the Minister on different days. For example, therefore, the provisions on cohabitants could be brought into effect on a different day to the provisions for civil partnership. It is also possible to bring different provisions on civil partnership into effect at different times (for example with pension provisions to enter into force later). While there is no reason to assume that the provisions on civil partnership will not be brought into effect on the same day, it would be useful to seek a commitment to this effect.

S.3 defines civil partners to be persons of the same sex. Civil partnership is therefore a separate institution to marriage and put in place for same sex couples only.[24] Some have argued that separate can never be equal. But it is unnecessary to argue this. For while the Bill is a great improvement on the current law, the rights it affords to civil partners are clearly *not* equal to those of a married people in many respects.

Having separate and exclusive institutions of civil partnership and marriage, instead of extending marriage to same sex couples, is likely to give rise to particular problems for transsexuals. In *Foy v Ard Claraitheoir (No 2)* the High Court held that the failure to recognise the reassignment of a male to female transsexual was contrary to Article 8 of the

[20] See s.11(c) of the Matrimonial Causes Act 1973.
[21] See ss.51(3), 51(5) and 69(10)(i) of the 2004 Act.
[22] See s.58 of the 2004 Act.
[23] See e.g. DT v CT [2002] 3 IR 334, Foy v Ard Claraitheoir [2002] WJSC-HC 512, Zappone and Gilligan v Revenue Commissioners [2006] IEHC 404 (now on appeal).
[24] See also s.7(3) of the Bill which amends the Civil Registration Act 2004 to render it an impediment to a civil partnership not to be of the same sex and s.105(e) of the Bill which renders it a ground for nullity.

European Convention on Human Rights (ECHR), which protects the right to family and private life.[25] It is also clear that had the facts of that case been slightly different the Court would have held that the failure was contrary to Article 12, the right to marry, also.

However, the Bill does not make provision to bring Irish law into line with the ECHR regarding the rights of transsexuals. But when the Oireachtas does this, a problem will arise.[26] Suppose that a person is married but undergoes a gender reassignment. And suppose also, as can happen, that the couple wish to remain married. Once the reassignment is recognised, their marriage will be void. But they will be eligible to enter a civil partnership.

The "solution" adopted in Britain was essentially to deem persons who wished to remain married civil partners upon the recognition of the reassignment.[27] While better than nothing, this does underline the difficulty caused by the creation of separate and mutually exclusive institutions of civil partnership and marriage, with those eligible for each being effectively ineligible for the other. A downgrading would also carry particular consequences in Ireland, given the differences in legal protection between a marriage and a civil partnership.

Entering into a civil partnership in Ireland and other registration issues (Part 3)

Part 3 of the Bill governs registration of civil partnerships. It does so largely by amending the Civil Registration Act 2004 to make provision for civil partnership equivalent to that which pertains as regards marriage. For example, just as three months notice is generally required before one can marry, three months notice is generally required before one can enter a civil partnership.[28]

However, there are some differences.

First, there are differences of language. Whereas marriages are *solemnised*, civil partnerships are *registered*.[29] However, in a welcome move, signalled already by the Scheme, it is possible to make the declarations of civil partnership orally or to make them in writing.[30] This is one of the few respects in which the Bill is superior to the UK's Civil Partnership Act 2004, under which a civil partnership is entered into when the second civil partner signs the register.[31] Under the Bill, the parties may also take part in a ceremony in a form approved by an tArd Claraitheoir, just as people getting married can.[32]

[25] [2007] IEHC 470.
[26] The Foy case is on appeal to the Supreme Court, but it is very difficult to see how the Supreme Court could overturn the High Court ruling in view of decided Strasbourg caselaw.
[27] See Schedule 3 to the Gender Recognition Act 2004.
[28] See s.16 of the Bill, inserting s.59B into the 2004 Act.
[29] See s.16 of the Bill, inserting s.59B into the 2004 Act
[30] See s.16 of the Bill inserting s.59D into the 2004 Act. The Bill is less explicit than the Scheme as to the possibility of making the declarations in writing, but it is nonetheless clear that this is possible.
[31] s.2 of the UK Act.
[32] See s.16 of the Bill, inserting s.59D into the 2004 Act.

Those entering into a marriage must declare that they accept each other as husband and wife.[33] By contrast, in a civil partnership the parties not only declare that they accept each other as civil partners in accordance with the law – but also declare that they will live with and support each other.[34] However, even though married couples do not make declarations to live with each other and support each other, they are effectively under a duty to do so – hence the concepts of desertion and maintenance. Of course, the fact that people declare that they will live together does not mean that they can be forced to do so. But, like married people, they can be forced to pay maintenance.

Second, it is possible to get an exemption from the courts to the three month notification requirement in the case of both marriage and civil partnership. But there is a small difference in certain circumstances, as explained below.

Once the parties intending to enter into a marriage or a civil partnership have either complied with the three month notification requirement or been exempted from it, the registrar must give the couple a marriage or civil partnership registration form.[35] If the parties do not marry or enter into a civil partnership within 6 months of the date of the marriage or civil partnership registration form, they must give notice of their intention to marry or register a civil partnership again. And again, they must wait three months. However, in the case of marriage, if they have already been exempted from the three month notification requirement on the first occasion by the courts, they do not have to apply for a new court exemption to the three month notification requirement on the second occasion so long as they continued to intend to marry.[36] By contrast, while not beyond doubt, it appears that civil partners do have to apply for a new exemption.[37]

While this is a small issue, there is no good reason for marriage law and civil partnership law to vary in this way. Indeed, this difference may cause confusion and, on occasion as a result, hardship. That is because if a couple do not comply with the three month notification requirement or have a valid court exemption, their civil partnership will be void. This is so even if they were not aware that they had failed to comply with the law's requirements. It is so even if they had been told by the registrar they did not require a court exemption because the previous court exemption was still valid (as it would be under the law for married people). It is so even if they only found out that they had not complied with the law's requirement's many years after they entered their civil partnership. The law does not recognise any excuses in this regard. If they did not comply with the law's requirements, their civil partnership will be void. That is why minor technical differences between marriage and civil partnership around these rules should be avoided.

[33] See s.51(4)(b) of the 2004 Act.
[34] See s.16 of the Bill inserting s.59D into the 2004 Act.
[35] See s.48(1) of the 2004 Act and s.16 of the Bill inserting s.59C to the 2004 Act.
[36] See s.48(4)(a)(ii) of the 2004 Act.
[37] See 16 of the Bill inserting s.59C(4)

Third, marriages can be solemnised by religious bodies as well as by registrars.[38] By contrast, civil partnerships cannot be registered by religious bodies. So, for example, even if a religious body, perhaps the Unitarians, wanted to register a civil partnership, they could not do so.

To some, this may not matter. They may argue that it is quite enough to have civil marriage in a registry office. They may also believe that the State should not recognise ceremonies in churches. But if the logic of the campaign for marriage equality is that institutions should be equally open to gay couples as they are straight couples in the eyes of the law, there seems to be no reason why a civil marriage (or civil partnership) should not be entered into by gay couples in a church, if straight couples can do so.

And that is the key point. Under the Civil Registration Act 2004 the marriage entered into in a church is a *civil* marriage. It may also be that the marriage is recognised under the internal rules of the religious body as a religious marriage. But nothing in the Civil Registration Act actually requires this. So suppose that a marriage carried out in a church complies with the requirements of the Civil Registration Act, but for some reason does not comply with the rules and regulations of that church. It will still be a perfectly valid civil marriage in the eyes of the law. It is therefore incorrect to characterise what happens as the State *recognising* religious marriages. Rather, what happens is that the State allows religious bodies to perform civil marriages. Indeed, the State only allows religious bodies to perform civil marriages if rules set down by the State in the 2004 Act are complied with. So:

- in order to be entitled to marry one must be a registered solemniser;
- HSE officials can apply to be registered solemnisers, so can members of religious bodies, but not others;[39]
- the Ard Claraitheoir must register a solemniser if all of the following requirements are met. If any is not met, he or she must refuse to register the solemniser:

    - the body is a religious body or the HSE;
    - the form of marriage ceremony used contains the declarations required by Irish marriage law;
    - the form of marriage ceremony used has been approved by an tArd Claraitheoir;
    - the person is a fit and proper person to solemnise a marriage.[40]

Thus, if an tArd Claraitheoir believes that a certain priest is not a fit and proper person because he has committed sex offences, he must refuse the application to recognise the person as a registered solemniser. Equally, an tArd Claraitheoir may remove a person from

[38] See ss.51(1) and 53 of the Civil Registration Act 2004.
[39] See s.54(1) of the 2004 Act. A humanist, by contrast, could not apply since he or she would not be a member of a religious body.
[40] See s.53 of the 2004 Act.

the register of solemnisers if he or she believes that the solemniser is not a fit and proper person.[41]

What happens in a church when a marriage is performed is therefore, in the eyes of the law, a civil marriage the solemnisation of which is subject to State regulation. It is hard to see in policy terms therefore why same sex couples should be banned from entering civil marriages or civil partnerships in such venues.

None of this is to argue that any church should be obliged to marry same sex couples or to register civil partnerships. (And allowing civil partnerships or same sex marriages to be registered or solemnised by religious bodies would not create such an obligation.) But it is to argue that religious bodies should be free to do so, should they so wish in order to facilitate any of their adherents for whom marriage or civil partnership in a church is important. And it is possible that some religious bodies may, now or in the future, wish to do so – such as the Unitarian church.

Further, the question should be asked what purpose a ban on allowing same sex marriage in a church serves. It is hard to avoid the conclusion that it serves the interests of those churches who wish to exclude same sex marriages, but wish to be spared an internal debate about the issue. An internal debate that might be divisive for some churches, as the issue of ordination of gay priests is in the Anglican Church at present.

Fourth, in terms of the place of registration of a civil partnership, any venue other than a registry office must be agreed with the HSE by reference to such matters as the Minister may specify.[42] The same is true for marriage.[43] But in the case of marriage it is clear that the agreement of the HSE is not required to an alternative venue if the Ard Claratheoir or a superintendent registrar is satisfied that one or both of the parties is too ill to attend a registry office. By contrast, it appears that the agreement of the HSE may be required in the case of civil partnership. This may be due to a drafting oversight.[44] It is hard to see what useful purpose this difference serves. Indeed, it only adds an extra bureaucratic layer which may cause particular problems if one of the parties is terminally ill.

Fifth, unlike the Scheme, s.7(3) of the Bill provides that it is an impediment to a civil partnership if there is no free and informed consent. By contrast, the equivalent provision of the Civil Registration Act 2004 as regards marriage is far narrower. It only makes it an impediment to marriage if the marriage would be void by virtue of the Marriage of Lunatics Act 1811.[45] Like marriage, when parties enter a civil partnership, they are obliged to declare

[41] See s.55 of the 2004 Act.
[42] See s.16 of the Bill inserting s.59E into the 2004 Act.
[43] Except, of course, that agreement can be reached with a registered solemniser to have it in a church or other place that the registered solemniser agrees with.
[44] Being the failure to include a provision equivalent to s.52(4) of the 2004 Act, as inserted by s.105 and Schedule 2, Part 5, to the Health Act 2007.
[45] See s.2(2)(d) of the Civil Registration Act 2004.

that they do not know of any impediment to the civil partnership.[46] It is an offence to knowingly make a false declaration. Therefore, the potential for criminal liability is broader in the case of a civil partnership. But it is hard to see that there is a major problem here since criminal liability is contingent on *knowing* that there was no free and informed consent. Again, though, the difference between marriage law and civil partnership law may cause confusion in practice.

Sixth, the procedure for objecting to an intended civil partnership is in one very minor respect different. Under marriage law, an objection that the marriage is void under the Marriage of Lunatics Act 1811 must be accompanied by a certificate by a registered medical practitioner.[47] By contrast, under the Bill an objection that a party cannot give informed consent must be accompanied by a certificate made by a consultant psychiatrist.[48]

Seventh, both the Bill and marriage law require a person getting married or entering into a civil partnership to be 18 on the date of solemnisation or registration.[49] However, under marriage law, it is possible to apply for an exemption from this requirement but it must be shown that the grant of exemption is justified by serious reasons and it is in the interests of the parties to the intended marriage.[50] By contrast, it is not possible to get an exemption from the requirement to be 18 years old in the case of a civil partnership.

Eighth, the rules as regards prohibited degrees of relationships are in some significant respects different. The most significant difference is that marriages are prohibited on grounds not only of *consanguinity* (that is to say where people are related by blood) but also on grounds of *affinity* (where people are related by prior marriage).[51] By contrast, the Bill appears to prohibit relationships on grounds of consanguinity, but not on grounds of affinity.[52] So for example a man cannot enter into a marriage with the daughter of his deceased wife, even though she is not his daughter. But he can, it appears, enter into a civil partnership with the son of his deceased civil partner. The rules on affinity for marriage have been criticised and some have been found to be unconstitutional.[53] This difference with marriage law may therefore be sensible enough.

As explained below, the Bill only allows the Minister to recognise classes of foreign relationships that comply with the Bill's rules on prohibited degrees of relationships.[54] For so long as this approach is taken, it would be counterproductive to seek the same rules for civil partnerships as for marriage on affinity. Because it would mean that no civil partnership or

[46] As regards marriage, see ss.51(4)(a) and s.69(10)(i) of the Civil Registration Act 2004 and as regards civil partnership see s.22 of the Bill, amending s.69 of the 2004 Act.
[47] See s.58(11) of the 2004 Act.
[48] See s.16 of the Bill, inserting s.59F(14) into the 2004 Act.
[49] See s.31 of the Family Law Act 1995.
[50] See s.33 of the Family Law Act 1995.
[51] See s.2 of the Marriage Act 1835.
[52] See s.26 of the Bill.
[53] See O'Shea v Ireland [2007] ILRM 460.
[54] See s.5(1) of the Bill.

same sex marriage from another country could be recognised if that country did not have the same outdated rules as Irish marriage law on affinity.

Finally, it is worth noting that the Bill makes it an offence for a registrar to fail or refuse without reasonable cause to give a civil partnership registration form to one of the parties to an intended civil partnership.[55] It is also an offence without reasonable cause to refuse to register a civil partnership.[56] If a registrar refuses to do so on grounds of sexual orientation, this may well be found not to be within the reasonable cause defence and therefore an offence. After all, it is the function of a registrar of civil partnerships to register those civil partnerships.[57]

What is less clear is whether a person who is an existing registrar of marriages could refuse also to be appointed a registrar for civil partnerships.[58] While this may be a point of principle, it is questionable whether any same sex couple would in practice want to have a registrar at their civil partnership who did not want to be there.

Part 3 also provides for registration of dissolutions (the equivalent for civil partnership of a divorce) and for registration of nullity of civil partnerships. These provisions are substantively the same as those for marriage.

Status of civil partnership, including foreign partnerships and marriages (Part 2)

Recognition of foreign marriages and civil partnerships for same sex couples

Section 5 of the Bill governs the recognition of foreign registered relationships.

It allows the Minister to make an order declaring classes of legal relationships entered into by two parties of the same sex abroad to be recognised as civil partnerships in Ireland.

Five conditions have been set out for recognition to take place. These are that under the law of the jurisdiction in which the legal relationship was entered into:

(a) the relationship is exclusive in nature;
(b) the relationship is permanent unless the parties dissolve it through the courts;
(c) the relationship may not be entered into by persons within the prohibited degrees of relationship for civil partnerships in the Bill;
(d) the relationship has been registered under the law of that jurisdiction, and

[55] See s.22(b) of the Bill.
[56] See s.22(a) of the Bill.
[57] See in England and Wales Ladele v London Borough of Islington [2008] UKEAT 0453_08_1912.
[58] This depends in part on the interpretation of s.17 of the 2004 Act as it would be amended by the Bill.

(e) the rights and obligations attendant on the relationship are, in the opinion of the Minister, sufficient to indicate that the relationship would be treated comparably to a civil partnership.[59]

So there would be nothing to stop the Minister recognising Canadian marriage for same sex couples. But if the Minister did so, a Canadian marriage for a same sex couple would be recognised as a *civil partnership* in Ireland.

It may be in practice that there will be a significant timelag between, for example, the legalisation of same sex marriage or civil partnership in a certain foreign jurisdiction and a decision of a Minister to make an order recognising these as civil partnerships in Ireland.

This is all the more significant because, unlike marriage law, or UK civil partnership law, there is no jurisdiction given to the courts to recognise a foreign civil partnerships and same sex marriages.[60] This is disappointing and ought to be remedied.

Also, the Minister is not under a *duty* to recognise a class of foreign relationship that meets the conditions set out above. Rather, he has a *power* to do so. Those who wish to have their foreign civil partnership or marriage recognised in Ireland may be able to compel the Minister to take a decision on whether or not to recognise such foreign civil partnerships or marriages. But the courts may well be reluctant to compel the Minister to make regulations to recognise a foreign class of relationship.[61]

Also, it is important to note that a foreign class of relationship will only be recognised from whichever is the later of:

- 21 days after the making of the order;
- the day the relationship was registered under the law of the foreign country.

Therefore, Ms Zappone and Ms Gilligan would only be entitled to have their Canadian marriage recognised as of 21 days after the making of an order by the Minister. The Bill would not assist them in their current efforts to have their Canadian marriage recognised under the Irish tax code to date. Presumably it is for financial reasons like these that retrospective recognition is not given.

As noted above, the third condition for recognition is that under the law of the relevant jurisdiction the relationship may not be entered into by persons within the prohibited degrees of relationship set out in the Bill.

This is in fact rather sweeping. Suppose that a country does not prohibit civil partnership between a person and the brother of his father by adoption. Then no civil partnership from

[59] See s.5(1) of the Bill.
[60] See ss. 212 to 214 of the UK Act.
[61] See the comments of Finlay CJ in State (Sheehan) v Government of Ireland [1987] IR 550.

that country may be recognised – even if the person seeking recognition did not enter a civil partnership with his adopted father's brother, but instead with someone completely different. It might make more sense if this was a ground on which an individual civil partnership would be refused recognition rather than all civil partnerships or marriages from that jurisdiction.

Recognition of foreign dissolutions/divorces

As already mentioned, the term dissolution is used in the Bill instead of divorce. The same is true in the UK Civil Partnership Act 2004. But, for example, those who have a same sex marriage in Canada will not get a "dissolution" but rather a divorce. The question therefore arises how both foreign dissolutions and divorces will be recognised in Ireland - just as we have already examined how foreign same sex marriages and foreign civil partnerships will be recognised in Ireland. For convenience, I will generally refer to "foreign dissolutions" but this term should be understood to include divorces.

Unlike the Scheme, provision is made for the recognition of foreign dissolutions in s.5(3) of the Bill.[62]

However, there are some serious problems in this regard.

First, unlike marriage law, it is not possible to apply to court for a declaration recognising the foreign dissolution.[63] A foreign dissolution will only be recognised if it the minister has made an order recognising the class of foreign relationship which was dissolved.

Second, and most importantly, s.5(3) *appears* to allow recognition of foreign dissolutions of *foreign* relationships recognised by ministerial order. Interpreted literally, it does not appear to allow recognition of foreign dissolutions of *Irish* civil partnerships.[64] There appear to be *no* rules set out in the Bill for the recognition of foreign dissolutions of Irish civil partnerships. It may be that on a purposive interpretation s.5(3) would be interpreted to apply to foreign dissolutions of Irish civil partnerships, but this uncertain.

Third, s.5(3) allows the recognition of a foreign dissolution where the legal relationship was recognised by ministerial order. This is so even though the foreign dissolution may have been obtained in a country to which neither of the partners had a connecting factor such as domicile or habitual residence. By contrast, under Irish marriage law there are detailed rules for the recognition of foreign divorces and under the Domicile and Recognition of Foreign Divorces Act 1986 one spouse must be domiciled in the country where the foreign divorce

[62] See s.5(3) of the Bill.
[63] Note that s.4 of the Bill, which mirrors s.29 of the Family Law Act 1995, does not allow for declarations under s.29(1)(d) or (e).
[64] This is because s.5(3) refers to the dissolution of "legal relationship" and that term in s.5 appears to refer to

was obtained.[65] This was done, in part, to stop "forum shopping" whereby a person could go to a country where he or she would get a "quickie" divorce, perhaps against the wishes of the other party. The only protection that will exist, by contrast, in the case of civil partnership is the judgment of the Minister in deciding whether or not to make an order recognising the class of relationship. So, again, everything depends on the Minister's judgment. It is worth noting, however, that any dissolution recognised abroad is treated as an Irish dissolution and it is possible to apply to the Irish courts to have the reliefs reviewed – for example to secure better maintenance.

Fourth, while the Bill provides for recognition of foreign dissolutions, it does not provide for recognition of foreign annulments or judicial separations. This is a serious omission.

Finally, there is another real problem with section 5. Some rights do not depend on being married or being divorced. Instead, some rights depend on being widowed, that is to say being a surviving spouse. It will be important that civil partners have the same rights. But here the problem with s.5 arises. It gives an entitlement to have an existing foreign legal relationship treated as a civil partnership from 21 days after the making of an order. It also gives an entitlement to recognise any dissolution from 21 days after the making of an order. But it does not appear to recognise surviving members of foreign legal relationships from 21 days on.

To take an example. A same sex couple marry in Canada but one of the parties dies before the making of an order by the Minister recognising Canadian marriage for same sex couples. It is unclear that the surviving civil partner is recognised for the purposes of rights contingent on being a surviving civil partner.

Declarations as to civil partnership status

Section 4 of the Bill allows applications to court for declarations as to civil partnership status. It is similar to section 29 of the Family Law Act 1995 which allows applications to court for declarations as to marital status. But there are differences.

First, it is not possible to apply to court for declarations as to the validity of a dissolution or annulment of a civil partnership or a judicial separation obtained abroad.[66] As already stated, recognition of foreign dissolutions will depend on the making of a ministerial order under s.5. And the Bill is entirely silent on the recognition of foreign separations or annulments.

Second, where declarations are sought as to marital status, s.29 of the 1995 Act makes specific provision for the involvement of the Attorney General in the proceedings in certain circumstances and for the findings to be binding on the State where he or she is involved. By

[65] See also Council Regulation No. 2201/2003 (EC), the "Brussels IIa" Regulation.
[66] See s.29(1)(d) and (e) of the Family Law Act 1995.

contrast, s.4 of the Bill makes no specific provision for involvement of the Attorney General or for the findings to be binding on the State where so involved.

Shared Home Protection – Part 4

Provision equivalent to the Family Home Protection Act 1976

Part 4 of the Bill replicates the provisions of the Family Home Protection Act 1976, as amended, which applies to married couples. In essence, that Act generally prohibits the sale of the family home by a spouse without the written consent of the other spouse.

However, there are some differences.

First, there is a difference in language. Part 4 of the Bill refers to the "shared" home rather than the "family" home, underlining the non-recognition of the children of a civil partnership.

Second, the Family Home Protection Act 1976 (in this part referred to as the 1976 Act) allows the court to dispense with the consent of the spouse if it is being unreasonably withheld having regard to all the circumstances including "the respective needs and resources of the spouses *and of the dependent children (if any) of the family*."[67]

By contrast, the Bill does not contain the italicised words.[68] Therefore there is no explicit mention of the dependent children. However, this omission is probably not as serious as it appears – since the court must still have regard to "*all the circumstances*." It is very hard to see how a dependent child could not be regarded as a relevant circumstance.

Further, s.206 of the Bill provides that in making an order under the Bill, the courts "shall have regard to any other person with an interest in the matter." Again, there is no mention of dependent children being such persons. Nonetheless it is very hard to see how they could not be so regarded.

But the omission of the term dependent child creates an element of doubt where there should be absolutely none. And from a political perspective it is alarming that such children are considered in many contexts in the Bill to be quite literally unmentionable. Indeed, it is worth reflecting upon how this omission must have come about. The Bill largely copies and pastes provisions of Irish family law word for word. But in this case – and many others that follow – the references to dependent children were excised. The removal of rights and protections for children was clearly a deliberate and conscious decision.

[67] See s.4(2) of the 1976 Act. Note that the definition of "dependent child of the family" is the same as that set out in the next part of this opinion.
[68] See s.29(2) of the Bill.

Third, the Family Home Protection Act 1976 obliges the court to dispense with the consent of a spouse guilty of desertion.[69] By contrast, the Bill does not limit the discretion of the judge in this way to decide whether consent is being unreasonably withheld.[70] While this is sensible, it is notable that the concept of desertion does exist in other parts of the Bill, for example those on maintenance.

Fourth, the Bill requires a certificate from a consultant psychiatrist before the court dispenses with consent on grounds of incapacity to give consent.[71] By contrast, under the 1976 Act no such certificate is required to dispense with consent on grounds of incapacity.[72] While this is sensible, it would have been more sensible still to have the same rule apply in the case of marriage.

Fifth, under the 1976 Act neither spouse may dispose of household chattels (e.g. televisions, furniture etc.) without court permission, if matrimonial proceedings have been commenced until they have been determined. Matrimonial proceedings are defined to include a very broad range of proceedings including proceedings under the Guardianship of Infants Act 1964 as well as certain maintenance proceedings.[73]

By contrast, under the Bill this protection only applies in the context of dissolution proceedings.[74] So, for example, this protection would not arise if one civil partner sought access, as civil partners may do under the Guardianship of Infants Act 1964. However, it remains the case that a civil partner in such a situation can *apply* to have the household chattels protected under s.34(1) of the Bill, just as a spouse can under s.9(1) of the 1976 Act. The difference is that this protection is not automatic for civil partners when certain proceedings have been commenced.

Protection of tenancies

Two pieces of legislation in Ireland allow a person to succeed to the tenancy of his or her deceased spouse. These are the Residential Tenancies Act 2004 and the Housing (Private Rented Dwellings) Act 1982.[75] Each of these pieces of legislation applies to different kinds of tenancies. The 2004 Act is by far the more important.

The Bill extends the protections of the 1982 and 2004 Acts to civil partners.[76]

---

[69] See s.4(4) of the 1976 Act. The concept of desertion does, however, feature elsewhere in the Bill. See e.g. s.44(2) on desertion.
[70] See s.29 of the Bill.
[71] See s.29(4) of the Bill.
[72] See s.4(4) of the 1976 Act.
[73] See ss.9(2) and (3) of the 1976 Act.
[74] See s.34(2) of the Bill.
[75] See s.39 of the Residential Tenancies Act 2004 and s.9 of the Housing (Private Rented Dwellings) Act 1982.
[76] See ss.39 and 40 of the Bill.

However, the Bill does not extend similar protections to a child upon the death of his non-biological civil partner parent. As it happens, the 1982 Act appears to protect *some* such children because the definition of member of the family includes a child living with a person in loco parentis for not less than *six* years.[77] But the 2004 Act only protects a biological child, a fostered or adopted child or a *step child*. So, uniquely, the non-biological child of a civil partner would not be protected under the 2004 Act – even though a step child, whose relationship to the parent is also non-biological, *is* protected.[78] Since a step-child is protected, it is clear that the problem is not the lack of a biological relationship. Rather, it appears to be discrimination between (opposite sex) marriage and (same sex) civil partnership to the detriment of children of civil partners. While it is true that the European Court of Human Rights has not required the same rights to be given to civil partners as to married couples, it may be more difficult to justify such differential treatment in this case for three reasons.

First, the Court has not given the same margin of discretion to States when children are thereby affected. So, for example, even though there is no general obligation to treat co-habiting and married couples alike, in *Johnston v Ireland* it was held that disadvantages suffered by children born out of wedlock in Ireland prior to the Status of Children Act 1987 (which abolished the disadvantages consequent upon illegitimacy) were contrary to Article 8 of the European Convention of Human Rights. The Court stated that:

> "'"respect" for family life, understood as including the ties between near relatives, implies an obligation for the State to act in a manner calculated to allow these ties to develop normally... And in the present case the normal development of the natural family ties between the first and second applicants and their daughter requires, in the Court's opinion, that she should be placed, legally and socially, in a position akin to that of a legitimate child."[79]

Of course, in that case there was a biological relationship between the parents and the child. But in *X, Y and Z v UK* the Court appeared to recognise that family life could exist between a female to male transsexual, his partner and his partner's child conceived by artificial insemination.[80] Following this case, the High Court in Ireland in *McD v L* recognised a lesbian couple and the child of one of them conceived by artificial insemination as a de facto family. Hedigan J noted the recognition of a family in X Y and Z v UK and commented that there was nothing within Irish law to suggest that a family composed of two women and a child have lesser rights than a *de facto* family composed of an unmarried man and woman and a child being raised in that relationship.[81] It would seem to follow that such a child

[77] See s.7(2) of the 1982 Act.
[78] See s.39(3) of the 2004 Act.
[79] Johnston v Ireland, *Application no. 9697/82, Judgment of 18 December 1986, at para 74.*
[80] *X, Y & Z v United Kingdom* [1997] 24 EHRR 143
[81] [2008] IEHC 96.

should also therefore be placed, legally and socially, in a position akin to that of a legitimate child. But the Bill does not do this.

Second, it should be borne in mind that it is not simply that a child of a civil partner is in a worse position than a child of a married couple. The child of a civil partner is in a worse position than a child of *one* of the spouses. The non-biological relationship between that child and the *other* spouse is recognised by Irish law in this context, but not similarly if the couple are civil partners. This is so even if that other spouse has played no role in the parenting of the child – and even if the non-biological civil partner has played a major role in the parenting of the child. It is difficult to see how this could comply with Article 14 of the European Convention of Human Rights.[82]

Third, it is hard to see how Ireland could justify the discrimination and the interference in family life inherent in the failure to extend protection to the non-biological child of a civil partner under the 2004 Act in circumstances where such protection is granted to the non-biological child of a civil partner (albeit in limited circumstances) under the 1982 Act. If Ireland is willing to extend protection in one context, how can it justify denying protection in another – very similar – context? Both Acts, after all, deal with the right to succeed to a tenancy.

Maintenance and attachment of earnings (Parts 5, 6 and 7)

Parts 5, 6 and 7 of the Bill largely reproduce the provisions of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, called in this part of the opinion the 1976 Act.

However, there are significant differences.

First, s.5(1)(a) of the 1976 Act allows for an award of maintenance to a spouse where it appears that the other spouse has failed to provide "such maintenance for the applicant spouse and *any dependent children of the family as is proper in the circumstances*."

A dependent child of the family is a dependent child of –

- both spouses (including by adoption) or in relation to whom both spouses are in loco parentis, or
- of *either* spouse (including by adoption) or in relation to whom *either* spouse is in loco parentis, where the other spouse, being aware that he is not the parent of the child, has treated the child as a member of the family.[83]

[82] See in this regard see Salgueiro de Silva Mouta v Portugal (1999) 31 EHRR 1055 where a refusal to grant custody based solely on sexual orientation was found contrary to Articles 8 and 14 ECHR and Application no. 43546/02, E.B. v France (Unreported, 22 January 2008).
[83] See s.3 of the 1976 Act as amended by s16 of the Status of Children Act 1987.

(The term has essentially the same meaning under the Family Home Protection Act 1976, the Family Law Act 1995 and the Family Law (Divorce) Act 1996.)

So under the 1976 Act it is possible for one spouse to seek maintenance for him or herself and for his or her children, even if they are not the children of both spouses, so long as the other spouse is in loco parentis and has treated the child as a member of the family while knowing that the child is not his or hers. This is critically important. It shows that, when it comes to maintenance, Irish *marriage* law does impose obligations on the non-biological parent.

The situation is very different under the Bill. In s.44(1) there is no mention of maintenance being sought for the dependent children of the family. Instead, the only reference is to maintenance for the civil partner.[84] On the face of it, it appears therefore that no maintenance can be sought from a civil partner in respect of a non-biological child. It is also clear that the problem, as far as Irish law is concerned, is *not* a reluctance to impose maintenance obligations on non-biological parents. The problem appears to be with imposing such obligations in the context of a civil partnership, that is to say in the context of a *same sex* relationship.

However, there *may* be some scope for fudging this in practice. Like the 1976 Act, under the Bill the court in deciding whether to make a maintenance order and in deciding its amount must have regard to all the circumstances of the case, including the financial responsibilities of each civil partner as a parent towards any dependent children.[85]

What does this mean? Read literally, it appears to mean that:

- for married couples maintenance can be sought by a spouse in his or her own right and for dependent children of the family. But in setting the amount of maintenance regard can be had to the needs of any dependent children of each parent;
- for civil partners, maintenance can only be awarded in respect of the civil partner only – and not in respect of any dependent children. But in setting the amount of maintenance regard can be had to the needs of any dependent child of each parent.[86]

It *may* be that the courts will, in the interests of the child and having regard to its rights, blur the distinction so that maintenance can in effect be sought both in respect of the civil partner and any child.[87] Such an interpretation would be consistent with the willingness of the High

[84] See also s.47 as regards maintenance agreements and s.8 of the 1976 Act regarding same for children.
[85] See s.5(4) of the 1976 Act, as amended, and s.44(3)(b) of the Bill.
[86] This appears to refer to the relationship of the biological parent to his or her child.
[87] Note in this regard s.45(3) of the Bill which appears to envisage that not all of the maintenance order need be for the support of the maintenance creditor. This suggests that some may be for the support of others.

Court in *McD v L* to recognise a same sex couple and their child as a de facto family.[88] But it would be dangerous to assume that the courts would do this: the Bill does not clearly require or even clearly permit such an interpretation. Indeed, on a literal interpretation, it appears not to permit this.

So far we have looked at whether a civil partner can seek maintenance purely in his or her own right or also on behalf of any dependent children. But suppose the civil partner who would seek maintenance is dead or has deserted? This brings us to the *second* key difference with maintenance for married people.

S.5(1)(b) of the 1976 Act provides that where a spouse is dead or has deserted (or in certain other circumstances) any person can apply for maintenance in respect of a dependent child of the family. But there is no equivalent provision in the Bill. And there is no scope for any fudging: It is clearly the case that where a civil partner has died or deserted, *nobody* else can seek maintenance against the non-biological civil partner parent of a child. And this in circumstances where *anybody* can apply for maintenance against a non-biological parent in marriage law in respect of a non-biological child. Again, the issue here appears not to be the non-biological relationship. Rather, it appears to be straightforward discrimination between (opposite sex) marriage and (same sex) civil partnership to the detriment of children of civil partners.

For the first two of the three reasons already outlined under protection of tenancies (above) it is difficult to see how this could comply with Articles 8 and 14 of the European Convention of Human Rights. Also, given that protection is granted to the non-biological child in some circumstances, such as under the 1982 Act on protection of tenancies, it is hard to see why protection should not be granted to the non-biological child of a civil partner as regards maintenance.

(It should, of course, be mentioned that it will be possible for any person to obtain maintenance against the *biological* civil partner parent. That can be done under s.5A of the 1976 Act, as inserted by the Status of Children Act 1987. So, the non-biological parent, or any other person, could apply for maintenance in respect of the child against the biological parent. The problem arises where it is the non-biological parent against whom maintenance is sought.)

Third, as with marriage, it is possible to seek an attachment of earnings order against a civil partner, that is to say an order requiring an employer to deduct maintenance from an employee's wage. Where one has been made, an employer can apply to court to determine if certain payments are earnings. The employer is not liable to make these payments pending the determination of the application to court (or an appeal of it). Under marriage law, if the employer abandons the application or appeal, he is liable unless the court directs otherwise.[89]

[88] [2008] IEHC 96.
[89] See s.15 of the 1976 Act, and in particular s.15(2).

But under the Bill the court has no power to direct otherwise.[90] This is not a particularly significant omission.

Fourth, consistent with the non-recognition of children of civil partners, there is no provision in the Bill for orders regarding the birth and funeral expenses of a dependent child.[91] By contrast, such orders are provided for in the 1976 Act.

Fifth, a number of orders available under the Family Law Act 1995 for married couples are not provided for. These are:

- orders to set aside transactions (e.g. of property) that could reduce maintenance claims, pending the determination of those claims;[92]
- secured maintenance orders;[93]
- lump sum maintenance orders.[94]

These are useful orders and can be of real assistance. It is interesting to note that equivalent orders are available in the context of dissolution. Perhaps the view was taken that if maintenance is not being paid, a civil partner should simply seek a dissolution. But Irish marriage law offers no similar encouragement to divorce.

Succession (Part 8)

The Bill generally provides for succession rights for civil partners in the same way as married couples.

However, there are exceptions.

First, where a married person dies intestate and has children, the surviving spouse is entitled to two thirds of the estate and the remainder is to be divided equally among the children.[95] Any children of the deceased cannot erode that two thirds entitlement. But where a civil partner dies intestate and has children, while the default is that the surviving civil partner is entitled to two thirds of the estate and the remainder is to be divided equally among the children, a child can apply to court for a greater amount by reducing the two thirds share of the surviving civil partner if the court believes that it would be unjust not to do so having regard to all the circumstances.[96] This might be thought reasonable – but, if so, the same ought to apply to the child of a surviving spouse.

[90] See s.55 of the Bill, and in particular s.55(2) and (3).
[91] See s.21A of the 1976 Act, as amended.
[92] See s.35 of the Family Law Act 1995.
[93] See s.41 of the Family Law Act 1995.
[94] See s.42 of the Family Law Act 1995.
[95] See s.67 of the Succession Act 1965.
[96] See s.70 of the Bill, inserting s.67A into the Succession Act.

Second, where a married person dies testate and has children, the surviving spouse is entitled to one third of the estate regardless of the provisions of the will.[97] The children cannot erode that one third entitlement. Where a civil partner dies testate, the surviving civil partner is also entitled to one third of the estate regardless of the provisions of the will. But a court, on the application of a child, can have this one third share reduced if it would be unjust not to do so.[98] Again, it may well be fair to give the court this power. But the same power should apply as regards the child of a surviving spouse.

Third, and most important, is the failure to make any provision for succession rights of the non-biological child of a deceased civil partner parent. Such a child:

- has no right to a share of the estate of an intestate civil partner; and
- cannot challenge the will of a testate civil partner.

The situation of the child is therefore analogous to that of an "illegitimate" child before the Status of Children Act 1987. Of course, it is not that the Bill makes this situation worse. It is simply that it does not make it better. It may be that this is contrary to Article 8 of the European Convention on Human Rights, for the same reasons as the treatment of "illegitimate" children under Irish succession law was found contrary to Article 8 ECHR.[99]

Fourth, s.46 of the 1965 Act makes provision for insolvency. S.46(4) states that nothing in that section shall affect the legal right of a spouse. The Bill should, but does not, clarify that the legal right of a civil partner is equally protected.[100]

Fifth, s.63 of the 1965 Act allows advancements made to a child during his or her life to be taken into account in order to fulfil his or her share upon the death of a parent. S.63(6) makes clear that this includes a marriage portion. It should be clarified that this also includes payments upon entering a civil partnership. Even without this clarification, however, such payments are probably covered.

Domestic Violence (Part 9)

Part 9 of the Bill makes the same provision for civil partners as for spouses under the Domestic Violence Act 1996 by making amendments to the 1996 Act.

However, there are some areas where rights have not been equalised.

[97] See s.111(2) of the 1965 Act.
[98] See ss.78 and 83 of the Bill.
[99] See further the first reason given under the section on protection of tenancies.
[100] The redefinition of legal right in s.66 of the Bill does not appear to achieve this since the words "of a spouse" remain in s.46(4).

Section 9 of the 1996 Act provides that where an application is heard for an order under the 1996 Act, the court may without the institution of separate proceedings make orders under certain family law legislation.

In the following cases, orders can be made without the initiation of separate proceedings as regards married couples but not civil partners:

- an order discharging, varying or terminating maintenance;
- an interim maintenance order.[101]

This is anomalous as these orders are provided for under the Bill.[102] So there seems to be no good reason why separate proceedings should be initiated to seek them. There are also other orders that can be made simultaneously for married people, but for which no equivalent exists for civil partners (e.g. an order to pay birth and funeral expenses of a child.)

Importantly, a civil partner will be able to seek a barring or other order under the 1996 Act not only where there is a risk to his or her safety, but also where there is a risk to the safety of any dependent person.[103] A dependent person means, in outline, any child of the applicant or the respondent or in relation to whom either is in loco parentis.[104] Therefore, it will be possible for a person to apply for a barring order against his or her a civil partner because of a danger posed by that partner to a child. This is so even if the applicant is not the biological or adopted parent, provided he or she is in loco parentis.

However, it may not be the other civil partner who is responsible for domestic violence. For example, it could be an adult child of a spouse or civil partner who is responsible. At present, a parent may apply for a barring order in respect of an adult child.[105] But a non-biological civil partner parent will not be able to do so.[106]

Miscellaneous matters (Part 10)

Part 10 of the Bill deals with miscellaneous matters. Some comments will be made on some of the more notable provisions before taking an overview of what is not provided for – and how that should be rectified.

Ethics and conflicts of interest

[101] See s.92 of the Bill.
[102] See s.45 and 46 of the Bill.
[103] See e.g. s.2(2) as regards safety orders, s.3(2)(a) of the 1996 Act as regards barring orders, s.4(1) as regards interim barring orders, s.5(1) as regards protection orders.
[104] For fuller details in this regard see the definition of dependent person in s.1(1) of the 1996 Act.
[105] Eligibility for safety orders is more liberal. See in particular s.2(1)(a)(iv) of the 1996 Act.
[106] Nor is a person entitled to do so in respect of a child of his or her spouse.

S.94(1) makes a general provision to ensure that for the purpose of determining matters concerning ethics and conflict of interest, in any law a reference to a "connected person" or a "connected relative" includes a person's civil partner and the child of that civil partner who is ordinarily resident with him or her. Similarly, a declaration that must be made in respect of a spouse must be made in respect of a civil partner.

It is extraordinary that the relationship of a civil partner with the child of the other civil partner is recognised in this context but not in other - far more important - contexts such as maintenance and succession.

S.94(2) and Part 1 of the Schedule amend 27 different enactments to reflect the above principle. This suggests that at least a partial trawl of the statute book has been performed. However, as a precaution, s.94(2) is stated to be without prejudice to the generality of s.94(1). Therefore, even enactments that are not specifically amended by Part 1 of the Schedule are nonetheless amended by the general principle of s.94(1). As discussed below, such an approach could be usefully deployed elsewhere.

However, it is only where the terms "connected relative" or "connected person" are used that the ordinarily resident child of a person's civil partner will be covered. There are instances where obligations are placed in respect of a child of a spouse without using the terms connected relative or connected person and, as a result, these will not be extended to the child of a person's civil partner. Ryan gives the example of s.15 of the Ethics in Government Act 1995.[107]

Mental Health

The Mental Health Act 2001 is amended to give civil partners the same rights as spouses, for example as regards applying for involuntary admission.[108]

It is worth noting that other discriminatory provisions against same sex couples are not dealt with. Under the 2001 Act "spouse" is defined to include not only married people, but also people of the *opposite* sex cohabiting for three years or more.[109] No similar provision is made for persons of the *same* sex. This appears to violate Article 14 of the European Convention on Human Rights.[110] It is all the more surprising that it is not addressed as discrimination against same sex couples (who are not in civil partnerships) in the field of domestic violence,[111] civil liability,[112] and residential tenancies[113] has been addressed by the

[107] See Ryan, Civil Partnership, Your Questions Answered, GLEN, 2009.
[108] See s.95 of the Bill.
[109] See s.2(1) of the Mental Health Act 2001.
[110] See Karner v Austria (2003) 38 EHRR 24 and Ghaidan v Godin-Mendoza [2004] 2 AC 557.
[111] See s.203 of the Bill.
[112] See s.201 of the Bill.
[113] See s.200 of the Bill.

Bill. The omission of mental health may therefore simply be an oversight. However, as explained below, there are other similar oversights.

Other instances of discrimination against same sex couples that are not remedied

The Bill also does not remedy discrimination against same sex couples in a number of other areas. For example:

- in disputes as to property legal aid can be granted to a couple if they have lived together as husband and wife. The Bill does not extend this to same sex cohabitees. Also, legal aid can be granted regarding disputes over property where there have been agreements to marry. This is not extended to agreements to enter into civil partnerships; [114]
- eligibility for certain health services under s.4 of the Health Act 2008;
- naturalisation under s.4 of the Irish Nationality and Citizenship Act 2001;
- s.18(c) of the Defence (Amendment) Act 2007 which defines "couple" to include a man and woman who are cohabiting, but does not include same sex couples in the definition.[115]

Provisions based on living together as husband and wife are also very common throughout the tax and social welfare codes. A full trawl of the statute book to resolve this problem systematically is clearly required. This is all the more important given that in some areas the Bill has resolved this problem. This may give rise to an inference that it was not intended to resolve the problem in other areas. That, in turn, may make it more difficult to argue for an interpretation of these provisions so that they would apply equally to same and opposite sex couples.[116]

Pensions

In a positive move s.96(1) provides:

> "A benefit under a pension scheme that is provided for the spouse of a person is deemed to provide equally for the civil partner of a person."

[114] See s.28(9)(c)(ii)(II) of the Civil Legal Aid Act 1995.
[115] This has not been dealt with in other contexts also such as conflict of interest provisions e.g. the reference to "cohabiting as husband and wife" in Schedule 1, para 9 to the Pharmacy Act 2007 or the means testing provisions of ss.2 and 3 of the Local Authority (Higher Education) Grants Act 1992.
[116] See s.2 of the European Convention on Human Rights Act, 2003. See also Ghaidan v Godin-Mendoza [2004] 2 AC 557 where such an interpretation was adopted. But see also Dublin City Council v Gallagher, Unreported, High Court, 11 November 2008 where it was held that the obligation to interpret in the light of the European Convention on Human Rights was more limited.

This principle applies to both private and public sector pensions – but not social welfare pensions.[117] But social welfare issues are to be dealt with by separate legislation the Government has stated.

It also applies as of commencement. Retrospective payment therefore cannot be sought for the period pre-commencement. That is perhaps to be expected. What is positive is that as of commencement if a surviving spouse would be entitled to a survivor's pension, so too will a surviving civil partner.

However, it may be that, in exchange for lower contributions, a person may have sought a scheme which does not provide for surviving spouses. That would be a rational thing for a gay or lesbian to have done. But such persons will not now be able to have their civil partners benefit since no benefit is provided under the scheme for a surviving spouse.

Finally, it is worth noting that Part 2 of the Schedule makes amendments to ensure equality as regards pensions, particularly by amending legislation laying down rules for public sector pensions. But the list is not comprehensive. For example, the Army Pensions Act 1968 is omitted. However, while it would be desirable to amend that Act directly, s.96(1) indirectly amends that Act to ensure equality.

Criminal Damage

The Criminal Damage Act 1991, as amended, means that a person who is charged with certain offences under that Act cannot use as a defence that he or she owned the property if the property was a family home and the person charged was the subject of a barring order or protection order under the Domestic Violence Act 1996 or is excluded from the home by another order of a court.[118]

S.99 of the Bill ensures that this defence cannot be used by a civil partner in similar circumstances with regard to a shared home under the Bill.

Equality

s.100 amends the Employment Equality Act to ensure that discrimination on grounds of civil status is prohibited just as discrimination on grounds of marital status is. Protection is extended both to those in a civil partnership and to those whose civil partnership has been dissolved or has ended on death. No express reference is made to separated civil partners, but the general prohibition against discrimination on grounds that a person is separated in the Act should cover this point.

[117] See ss.96(3) and 107 of the Bill.
[118] See s.1 of the 1991 Act, as amended by the Family Law (Divorce) Act 1996.

The Equal Status Act - which protects against discrimination in the provision of goods services and accommodation – is amended to similar effect.[119]

A biological parent is already protected from discrimination because of the prohibition on discrimination on grounds of family status. Whether the non-biological parent civil partner will be protected depends on whether he or she can show that he or she is acting *in loco parentis*.[120]

The provisions of the Equal Status Act 2000 will be particularly important to ensure equality in areas not governed by legislation like fertility treatment and equal treatment when a partner is in hospital.

Powers of Attorney

s.102 makes similar provision for civil partners as for spouses under the Powers of Attorney Act 1996.

Civil Liability

The Civil Liability Act 1961, as amended, allows dependants to sue in respect of wrongful death.

s.103 of the Bill extends the definition of a dependant to cover civil partners. Part 4 of the Schedule to the Bill makes amendments to ensure that civil partners whose relationships have been dissolved are covered.

Finally, as before, no provision is made for a child to be able to sue for wrongful death of his or her non-biological civil parent. By contrast, step children have this right.[121] For the first two reasons given in the section on protection of tenancies, this may well violate the European Convention on Human Rights.

Determination of questions in relation to property

s.104 allows applications to court to determine questions in relation to the title or possession of property arising between civil partners. It is similar to s.36 of the Family Law Act, 1995.

However, there are some differences.

[119] See s.101 of the Bill.
[120] See the definition of "family status" in s.2 of the 1998 and 2000 Acts.
[121] See s.47(1) of the 1961 Act as amended by s.1 of the Civil Liability (Amendment) Act 1996.

First, whereas people who are divorced can apply under s.36 of the Family Law Act 1995, people whose civil partnerships have been dissolved cannot.[122]

Second, people whose marriages have been annulled abroad can apply to court if that annulment is recognised in Ireland.[123] But by contrast there is no provision for recognition of foreign annulments under the Bill, so it may not be possible for such persons to apply under s.104.[124]

Third, a three year time limit is in place under marriage law for the bringing of such applications from the date of annulment or dissolution.[125] By contrast, no such time limit is laid down in the Bill.

Immigration and citizenship

The Bill makes some changes to equalise the position of civil partners in the field of immigration, such as changes to the Aliens Act 1935[126] and the Refugee Act 1996.[127]

The amendment to the Refugee Act ensures that a civil partner can get the benefit of family reunification. But, again, no provision is made for the non-biological child of the relationship.

Likewise the amendment to the Aliens Act prevents an aliens order being made in respect of a civil partner of a diplomat. However, even though the child of diplomatic staff cannot be the subject of an aliens order, the non-biological child of a civil partner is not similarly protected. Strangely, it appears that the non-biological child of a civil partner *head of a diplomatic mission* cannot be subject to an aliens order since the Aliens Act has always prohibited such orders in respect of members of his or her household, a term that does not appear to require biological connection.[128]

There are other omissions also.

[122] See s.36(8)(cc) and (e) of the Family Law Act 1995. Cf s.104(8) of the Bill.
[123] See s.36(8)(d) of the Family Law Act 1995.
[124] If the courts decided to recognise the foreign annulment it may be possible to bring an application under s.104(8)(b). However, it seems unlikely that it is intended that the courts should have discretion to recognise foreign annulments of civil partnerships.
[125] See s.36(7) of the Family Law Act 1995.
[126] See Part 5 of the Schedule at item 2. This merely prevents aliens orders being made in respect of the civil partners of diplomats etc. as it is in respect of their children.
[127] See Part 5 of the Schedule at item
[128] See s.5(4) of the Aliens Act 1935.

For example, the position of a civil partner is not equalised with that of a spouse for the purpose citizenship.[129] Nor is the position of the non-biological child recognised in this context.

Also, the rights of non-EU spouses of EU nationals have not been extended to civil partners. They should still be able to enter the State - but they may have to pay and wait longer.[130]

It should also be noted that the Immigration Residence and Protection Bill 2008 is currently going through the Dail. That Bill will need to be amended to extend the definition of family and dependant to include civil partners every time those terms occur – and not only in the context of ss. 36 (long term residence) and 50 (family reunification for those granted protection) as the Scheme envisaged.[131] This is an important issue since the Bill also provides for family reunification for those granted *temporary* protection and allows regulations to be drawn up on family reunification for ordinary immigrants, the terms of which will need to cover civil partners.[132] Again, provision should be made for the non-biological child also – but there is no indication that this is intended.

The Immigration, Residence and Protection Bill, as initiated, also imposed a number of restrictions on the right of a non-national to come to Ireland to marry and the Scheme proposed their extension to civil partners. While this provides for equality, the provisions of the Bill, as initiated, appear to breach Article 12 ECHR since they enabled the Minister to refuse to allow persons with non-renewable residence permissions or protection application entry permissions to marry for reasons other than being solely marriages of convenience, such as because it might affect an immigration decision to be taken.[133] The Bill, as passed by Committee, remains unsatisfactory in this regard – and should be amended to ensure compliance with Article 12 ECHR and to apply equally to civil partners.

In reality, many practices of the Department of Justice Equality and Law Reform in the field of immigration are non-statutory. Increasingly in recent years same sex cohabiting couples have been treated equally with opposite sex cohabiting couples. It will be important not only that this continues, but also that civil partners will be treated equally with spouses.

[129] The Bill does not extend s.15A of the Irish Nationality and Citizenship Act 1956, as amended, to civil partners.
[130] This is because they are categorised as "permitted" family members rather than "qualifying family members" under SI 656 of 2006.
[131] See Head 28 of the Scheme.
[132] That is to say non EEA nationals who come to the State but who do not seek protection of any kind. References here are to the Bill as initiated.
[133] See s.123 of the Bill as initiated, and as regards Article 12, R (Baiai) v. Secretary of State for the Home Department [2008] UKHL 53. See also s.126 of the Bill, as amended following Dail Committee stage.

Other areas

The Schedule to the Bill makes amendments to a number of provisions of legislation to equalise the position of civil partners to married people. The range of legislation amended is far wider than that envisaged by the Scheme.

But some areas are left out - and the position of non-biological children is not similarly equalised.

Tax and Social Welfare

The Bill does not deal with tax and social welfare matters. This will be left to separate legislation.

By contrast, in Britain social welfare was dealt with by the Civil Partnership Act 2004.[134] Tax, however, was left to the Finance Act 2005.[135]

It is worth noting that the UK Finance Act 2005 merely empowered the Secretary of State to make regulations amending any primary legislation to provide for equal treatment as between married persons and civil partners. By contrast, it is constitutionally suspect in Ireland to amend primary legislation by secondary legislation – although not clearly unconstitutional.[136] Therefore, this work of equalising the tax code will largely have to be done in primary legislation in Ireland.

It remains to be seen what steps will be taken to recognise the relationship between a child and a non-biological civil parent in the provisions on tax and social welfare. Given the approach of the Bill, it is likely that no such provision will be made.

Other areas where equalisation has not occurred

Other areas where civil partners have not been afforded the same rights as spouses include:

- the Criminal Justice (Theft and Fraud Offences) Act 2001;[137]
- the Data Protection Act 1988;[138]
- the Diplomatic Relations and Immunities Act 1967.[139] This is particularly anomalous given the equalisation of provisions regarding diplomats in the Aliens Act 1935, as mentioned above;
- the Land Act, 2005;[140]

[134] See s.254 and Schedule 24 to the Act.
[135] See s.103 of the Finance Act, 2005.
[136] See Harvey v Minister for Social Welfare [1990] 2 I.R. 232. The consequences of the ruling of the Supreme Court in this case are, however, not entirely clear.
[137] See s.19(4) of the 2001 Act.
[138] See s.27(2) of the 1988 Act.
[139] References to spouse occur throughout the Act.

- the Parental Leave Act 1998;[141]
- the Passports Act 2008;[142]
- the Proceeds of Crime Act 1996.[143]

It is also notable that the common law doctrine of marital privilege has not been extended to civil partners.

The Family Law Act 1981 lays down detailed rules regarding property of engaged couples and gifts to or between engaged couples.[144] These have not been extended to persons engaged to be civil partners.

I have not conducted a systematic trawl of the statute book and there may well be other omissions. However, it is clear from the limited survey that I have conducted that either a complete trawl of the statute book was not done by the drafters of the Bill or a decision was taken not to remove discrimination in some areas.

This may cause difficulties in the future. If the policy of the Bill were to extend equal rights to civil partners on a universal basis, then any future legislation conferring rights, or indeed imposing obligations, on spouses would be likely to be extended to civil partners effectively by default. By contrast, as this is not the policy of the Bill, there will be uncertainty about the future extension of rights to civil partners. Equal rights may therefore only be granted on a haphazard basis.

Methods of ensuring equality

It is disappointing that the Bill does not entirely equalise the rights of civil partners, even as regards issues not involving children. This may possibly be an oversight.

There should in any event be no constitutional impediment to equalisation.[145] The courts have made clear in a series of cases dealing with the tax and social welfare codes as well as certain farm payment schemes that Article 41.3.1 prohibits less favourable treatment of married couples than cohabiting couples.[146] Nowhere in these cases is it suggested that a married couple must be treated *better* than a cohabiting couple. All that these cases demand

---

[140] See s.5 of the 2005 Act.
[141] See s.13 of the 1996 Act regarding force majeure leave. Note that force majeure leave should be available in respect of a non-biological child, but parental leave under the Act will not be.
[142] See s.10 of the 2008 Act.
[143] References to "spouse" occur throughout the Act, as amended.
[144] See ss.3 to 5 and the provision for applications to court in ss.6 and 7 of the Family Law Act 1981.
[145] See
[146] Murphy v AG [1982] 1 IR 241; Muckley v Ireland [1985] IR 472; Hyland v Minister for Social Welfare [1989] 1 IR 624; Greene v Minister for Agriculture [1990] 2 IR 17; MacMathuna v Ireland [1989] 1 IR 504.

is that married couples be treated no less favourably – that, in the words of the Supreme Court, the married state not be penalised.[147]

As the Law Reform Commission has concluded from these cases:

> "It seems probable that this line of authority would not prevent the legislature increasing the rights of cohabitees to bring them on a par with those of a married couple, as it only appears to prevent married couples being treated less favourably than cohabiting couples are."[148]

Dunne J in *Zappone and Gilligan v Revenue Commissioners* was clearly also of this view. She stated:

> "It is noteworthy that at the moment, (and some reference has been made to this in the course of submissions) the topic of the rights and duties of co-habitees is very much in the news. Undoubtedly people in the position of the plaintiffs, be they same sex couples or heterosexual couples, can suffer great difficulty or hardship in the event of the death or serious illness of their partners. Dr. Zappone herself spoke eloquently on this difficulty in the course of her evidence. *It is to be hoped that the legislative changes to ameliorate these difficulties will not be long in coming. Ultimately, it is for the legislature to determine the extent to which such changes should be made*." [149] [Emphasis added]

Regarding primary legislation, the best way of ensuring equalisation of rights is by a comprehensive trawl of the statute book and direct amendment. And it is important to acknowledge that this has been done to a far greater extent in the Bill than in the Scheme.

Another way of dealing with this matter is through indirect amendment. The Bill itself does this as we have seen in the fields of pensions and conflicts of interest by laying down general principles that override any other statutory provision or rule of law. In the event that the Government does not do a statutory trawl, a simple method of equalising rights would be to insert a general clause that would, for example, interpret spouse to include civil partner or marry to include registration of a civil partnership. The Government may have some anxiety that this could confer rights or responsibilities with regard to children in certain statutory contexts. If so, the answer - however regrettable - would be specifically to exempt such statutory provisions.

Another, more restricted, possibility would be to insert a section of the Bill amending the Interpretation Act 2005 to state that in all enactments passed after the date of commencement of the section, the term spouse would include civil partner and the term marry would include registering a civil partnership unless contrary intention appeared. Ideally, the same could be done to interpret child to include non-biological child of a civil partner etc. This would ensure that equality was the default for the future – but would not ensure equalisation in the statute book to date.

---

[147] Muckley v Ireland [1985] IR 472.

[148] Law Reform Commission, Consultation Paper on Rights and Duties of Cohabitees , April 2004, LRC CP32-2004 at p.9.

[149] [2006] IEHC 404

Another way of ensuring equalisation in the statutebook to date would be to state the general policy and principle that the rights of spouses and civil partners should be the same and to give the minister a power to amend *primary* legislation by secondary legislation to this effect. This was done in the UK Act and in the Labour Party's Civil Unions Bill.[150] There are some doubts about the constitutionality of such an approach in Ireland, however, although it would be wrong to conclude that such an approach is clearly unconstitutional.[151]

One thing there is no doubt about is the constitutionality of a provision giving general power to amend *secondary* legislation to extend rights to civil partners. This is important since terms such as spouse, marry and so on appear extensively in secondary legislation. Giving the Minister a power in this Bill to make amendments to secondary legislation would provide a convenient single statutory authority to equalise all of these provisions. The UK Act has such a clause, but the Bill does not.[152]

A particular problem also arises with regard to implementation of EU law provisions relating to spouses or marriage. Such is the thoroughness of the UK Act that it provides that where EU law provisions concerning spouses or marriage are being implemented by way of regulation, those provisions may be extended to civil partners also.[153] That way there is no doubt about the validity of regulations extending rights to civil partners and no question of having to pass primary legislation to confer similar rights on civil partners. After all, if primary legislation had to be passed every time, equal rights for civil partners would be very much delayed. Indeed, equality for civil partners regarding those matters might even be denied since it might be thought more trouble that it was worth to put them in primary legislation. The Bill does not, however, grant such a power.

Separation, Annulment and Divorce

Separation

Unlike marriage law, no provision has been made for judicial separation. Civil partners can, of course, voluntarily separate and draw up separation agreements.

The failure to provide for judicial separation may not matter hugely given the more liberal terms on which dissolution is available under the Bill.

Annulment

[150] See e.g. ss.255 and 259 of the UK Act.
[151] The difficulties stem in particular from Harvey v Minister for Social Welfare [1990] 2 I.R. 232.
[152] See s.259 of the UK Act and, for example, the Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005 (S.I. 2003/2114)
[153] See s.260 of the UK Act.

Here there are improvements on the Scheme. In particular, an annulment can be granted where there is no free consent, as opposed to merely where there is no informed consent as the Scheme had stated.[154]

Unlike marriage law, inability to form and sustain a caring relationship is not a ground for seeking an annulment under the Bill. This ground developed at a time in Ireland when there was no divorce, and its absence from the Bill may be sensible enough – but, if so, the same change should be made in the context of marriage law. Nor is impotence a ground, but this may be appropriate.

Dissolution

Part 12 of the Bill provides for dissolution. It replicates in large measure the provisions of the Family Law (Divorce) Act.

However, there are differences.

First, there is the obvious difference of language. The Bill provides for "dissolution", not "divorce".

Second, whereas a divorce can only be granted if a couple has been living apart for four of the previous five years, a dissolution can be granted if the couple are living apart for two of the previous three years.[155] This is not equal treatment, but it may be sensible treatment - requiring four years living apart out of the previous five seems unduly onerous. Also, it partly helps to make up for the lack of judicial separation in the Bill. Judicial separation in marriage law can be sought sooner than divorce, the precise length of time depending upon the ground upon which judicial separation is sought.

Third, in order to obtain a divorce in Ireland it is also necessary to show that there is no reasonable prospect of reconciliation and to this end solicitors must discuss the possibility of engaging in mediation.[156] There are no similar requirements under the Bill.

Fourth, in order to obtain a divorce in Ireland, the court must be satisfied that proper provision has been made for any dependent member of the family, a term which includes non-biological children.[157] By contrast, the Bill does not refer to proper provision being made for any children. It may possibly be that the courts could exercise discretion to decline a dissolution in these circumstances, but this is not certain.[158]

[154] See s.105(c) of the Bill.
[155] See Article 41.3.2.i of the Constitution and s.108 of the Bill.
[156] See Article 41.3.2.ii of the Constitution and ss.6 and 7 of the Family Law (Divorce) Act.
[157] See s.5 of the Family Law (Divorce) Act 1996 and the definition of dependent member of the family in s.2 of the 1996 Act.
[158] This could perhaps be justified by reference to s.206 of the Bill.

Fifth, the Bill provides for a broad range of orders equivalent to those available on divorce, including:

- maintenance pending suit orders,[159]
- periodical payments and lump sum orders,[160]
- property adjustment orders,[161]
- miscellaneous ancillary orders,[162]
- financial compensation orders,[163]
- pension adjustment orders,[164]
- orders for provision for a spouse out of the estate of the other spouse,[165] and
- orders for the sale of property.[166]

With the exception of the last two, in *marriage* law not only can a spouse apply for these orders, so too can any person acting on behalf of a dependent member of the family – and it is *not* necessary in these cases for there to be a biological relationship, so these orders could be sought on behalf of, for example, a step child. With the exception of the first of the above orders and orders for provision out of the estate of the other spouse, applications can be made at the time of the divorce or at any time thereafter. Most of these orders can also be varied at any time.[167]

So, for example, in marriage law, if A and B are divorced, and A subsequently dies, the dependent child of A could apply for a periodical payments order against B provided essentially that B was in loco parentis. But under the Bill there is a critical difference: such an application cannot be made on behalf of a child against a civil partner parent.

Of course, other legal protections will apply as between a child and its *biological* civil partner parent to secure, for example, maintenance.[168] But there will be *no* protection for a non-biological child against the former civil partner.

[159] See s.12 of the 1996 Act.
[160] See s.13 of the 1996 Act.
[161] See s.14 of the 1996 Act.
[162] See s.15 of the 1996 Act.
[163] See s.16 of the 1996 Act.
[164] See s.17 of the 1996 Act.
[165] See s.18 of the 1996 Act.
[166] See s.19 of the 1996 Act.
[167] See s.22 of the 1996 Act.
[168] See e.g. s.5A of the Family Law (Maintenance of Spouses and Children) Act 1976.

In deciding whether to make any of the above orders in favour of a dependent member of the family and in determining the provisions of such an order, the 1996 Act requires the court to consider issues such as the financial needs of the member of the family.

By contrast, the Bill lays down no such requirement. S.127(2)(l) does, however, state that the court should have regard to the rights of any child to whom either of the civil partners owes an obligation of support - although it does not refer to their needs. S.127(2)(b) does oblige the court to have regard to "the financial needs, obligations and responsibilities that each of the civil partners has... whether in the case of the registration of a new civil partnership or marriage or otherwise." This could be used to cover the needs of any children. But nothing here clearly recognises any responsibility of the non-biological civil partner to a child. Finally, s.206 of the Bill obliges the court to have regard to the rights of any other person with an interest in the matter. While s.206 does not mention children, it would be hard to see how they could be deemed not to have an interest.

In short, the above provisions provide scope for a court in making the above orders in favour of a civil partner to ensure that proper provision is made for any children. And, again, such an approach would be consistent with the recognition of a same sex couple and their child as a de facto family in the recent High Court case *McD v L*.[169] But in circumstances where references to such children have been generally removed from the Bill, this cannot be a foregone conclusion and there is considerable doubt in an areas where there should be none.

Further, this assumes that there is a civil partner willing to act to ensure proper provisions for the child. But, as we have just seen, that may not be. For example, after the dissolution one of the civil partners may die. If that happens, there would be *nobody* who could bring an action against the surviving civil partner under the equivalent provisions of the Bill to ensure proper provision for a child through, for example, a periodical payments order. As already stated, it will be possible in any event to seek maintenance on behalf of a biological child, but not on behalf of a non-biological child. Again, it is hard to see how this could be consistent with Articles 8 and 14 ECHR.[170]

Sixth, under the Family Law (Divorce) Act 1996, a property adjustment order, an order granting a spouse the right to occupy the family home or an order for the sale of property cannot be made against the other spouse if he is living in that property with a new spouse.[171]

So, if I divorce my wife and remarry, my ex-wife cannot seek a property adjustment order, an order seeking to occupy the family home or an order for the sale of the property if I live in that property with my new wife. But the Bill does not amend the 1996 Act to ensure the

[169] [2008] IEHC 96.
[170] See in this regard the first two reasons given in the section on protected tenancies of this opinion.
[171] See ss.14(7), 15(3) and 19(6) of the 1996 Act. The Bill does not amend these provisions to extend protection to civil partners.

same protection if, instead of remarrying a person of the opposite sex, I decide to register a civil partnership with a person of the same sex.

Other provisions regarding children

Adoption

In Ireland a single person can be considered for adopting a child, including a single gay or lesbian person. But an unmarried couple cannot.[172] Therefore, while a single gay or lesbian can be considered for adopting a child, a same sex couple cannot. The Bill does not change this anomalous situation. Civil partners therefore will not be able to be considered for adopting.

It is worth noting that the refusal to allow a single person to adopt on grounds of sexual orientation is contrary to the European Convention on Human Rights.[173] Also, the House of Lords has recently found the prohibition on adoption by unmarried couples in Northern Ireland contrary to the European Convention on Human Rights.[174] The ineligibility of civil partners to be considered jointly for adopting a child may equally be contrary to the Convention.

By contrast, in England and Wales a number of changes have been made to address this anomaly. First, the right of an unmarried couple to be considered for adoption – including therefore a same sex couple – was provided for by s.50 of the Adoption and Children Act, 2002. Second, the UK Act made specific provision to allow civil partners to adopt, just as married couples can.[175]

Guardianship, custody and access

The Bill makes no provision to ensure that a civil partner can get guardianship or custody of a non-biological child while the biological civil partner parent is alive.

[172] See s.10 of the Adoption Act 1991.
[173] See in this regard see Salgueiro de Silva Mouta v Portugal (1999) 31 EHRR 1055 where a refusal to grant custody based solely on sexual orientation was found contrary to Articles 8 and 14 ECHR and Application no. 43546/02, E.B. v France (Unreported, 22 January 2008).
[174] In re G (Adoption: Unmarried Couple) [2008] 3 WLR 76.
[175] See s.79 of the UK Act.

The biological civil partner can, however, appoint the non-biological civil partner as a guardian in his or her will.[176] If the biological civil partner dies without doing so, the non-biological civil partner can apply to court to be appointed a guardian. If there is already another biological parent who is a guardian, the non-biological civil partner may be appointed joint guardian.[177]

The most that the non-biological civil partner can get during the lifetime of the biological civil partner is access.[178]

Surrogacy and IVF treatment

The Bill makes no provision regarding surrogacy and IVF treatment. Indeed, there is no Irish statutory regulation of these areas.

Two provisions of the recent UK Human Fertilisation and Embryology Act 2008 should be considered for inclusion in the Bill. First, that Act introduces a new concept of parenthood for a mother's female civil partner. The basic rule is that where a child is conceived by IVF during a civil partnership, both civil partners will be deemed parents. Similarly, that Act makes provision with regard to parenthood in respect of children born during a surrogacy arrangement, which puts same sex couples in the same position as married couples.[179] This means that same sex couples will no longer have to adopt children conceived by IVF or through a surrogacy arrangement.

Nothing further occurs.

BRIAN BARRINGTON BL
22 AUGUST 2009

[176] See s.7 of the Guardianship of Infants Act 1964.
[177] See s.8 of the Guardianship of Infants Act 1964.
[178] See s.11B of the Guardianship of Infants Act 1964.
[179] See in particular s.42 of the 2008 Act.