



Options Paper

Presented by the Working Group on Domestic Partnership

to the

Tánaiste and Minister for Justice, Equality and Law Reform,
Mr. Michael McDowell, T.D.

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Foreword

In March 2006 the Minister for Justice, Equality and Law Reform, Mr Michael McDowell, T.D., established the Working Group on Domestic Partnership to prepare this Options Paper. The preparation of the Options Paper coincides with wide public debate on the question of according legal status to cohabitants in general and to same-sex couples in particular.

This public debate reflects huge changes in Irish society over recent decades. Increasing numbers of people now reside in domestic arrangements which are not founded on marriage or which do not conform to traditional family forms. Many people in such relationships require and seek greater legal recognition and protection.

In accordance with the Working Group's terms of reference, the Options Paper considers the categories of partnerships and relationships outside of marriage to which legal recognition might be accorded, consistent with Constitutional provisions. It identifies options as to how and to what extent legal recognition could be given to those alternative forms of partnership, including partnerships entered into outside the State, and looks at models in place in other countries.

The Options Paper focuses on three distinct types of cohabiting relationships: opposite-sex couples, same-sex couples and non-conjugal relationships. A range of options is presented for each. The Working Group hopes that the Options Paper will contribute to ongoing public debate and that it will assist in the future formulation of legislative proposals in this area.

The Working Group is grateful to the many people who participated in the process leading to the preparation of this Paper. The expertise, experience and opinions offered in presentations and submissions by organisations and individuals contributed enormously to the deliberations of the Working Group and guided the drafting of the Options Paper.

As Chairperson, I also wish particularly to thank my colleagues on the Working Group and the secretariat for their commitment, expertise and generosity, without which this task could not have been completed to the level that it has been, and in such a short period of time.

Anne Colley
Chairperson

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Introduction

- I. Background
- II. Definition of Domestic Partnership
- III. Key Principles
- IV. Consultation
- V. Relevant Initiatives in the Area of Domestic Partnership
- VI. Outline of Options Paper

I. Background

1.01 The Working Group on Domestic Partnership was established by Mr Michael McDowell T.D., Minister for Justice, Equality and Law Reform in late March 2006. In establishing the Working Group, the Minister set down the following challenging task:

“The Group is charged with preparing an Options Paper on Domestic Partnership for presentation to the Minister for Justice, Equality and Law Reform by 20 October 2006, within the following terms of reference:

- (i) to consider the categories of partnerships and relationships outside of marriage to which legal effect and recognition might be accorded, consistent with Constitutional provisions, and
- (ii) to identify options as to how and to what extent legal recognition could be given to those alternative forms of partnership, including partnerships entered into outside the State.

The Group is to take into account models in place in other countries.”

1.02 The composition of the Working Group was diverse with members from the Departments of Justice, Equality and Law Reform; Finance; Social and Family Affairs; Health and Children; the Office of the Attorney General; the Equality Authority; the Gay and Lesbian Equality Network (GLEN); the Family Lawyers Association and others with family law and socio-economic expertise and perspectives. Details of the members of the Working Group are at Appendix 1.

1.03 The Working Group met on twenty occasions. Written and oral presentations were made to the Group by a wide range of experts on many issues. The presentations made are listed at Appendix 2. The Working Group met with the Law

Reform Commission, who were in the course of finalising their report on the rights and duties of cohabitants.

1.04 Many of the issues raised were very complex and the Working Group had limited time available to complete its task. While the Working Group attempted to address these issues comprehensively, this Options Paper should not be taken to represent a complete account of all aspects of the issues included within its pages.

1.05 A complete understanding of the nature of cohabitation in all its forms in Ireland would require detailed lengthy study. Equally, the international comparative analysis presented reflects the best information immediately available to the Working Group without undertaking in-depth research. In addition, the Options Paper should not be assumed to indicate any definitive legal or constitutional position, nor did the Group seek specific legal advice on this aspect of its work.

1.06 The Working Group is in general agreement on the approach set out. While there might have been individual preferences on the detail of the options, the Working Group considers that the approach taken represents a workable framework for consideration. The members of the Working Group participated in a personal capacity and views expressed in this Report do not necessarily represent the official policy of their employers or representative bodies.

II. Definition of Domestic Partnership

1.07 The first element of the terms of reference required the Group to consider the potential range of domestic partnerships and relationships which may be given legal recognition. The Working Group found it useful for the purposes of

its work to categorise the range of domestic partnerships into three distinct cohabiting groups:

- Opposite-sex couples
- Same-sex couples
- Non-conjugal relationships

1.08 Over time, those who cohabit tend to develop a mutual dependency. It may benefit those in such relationships, and society, to provide a legal framework of recognition, some of which will resemble some of the attributes of marriage in law but in other respects differ substantially from marriage. A cohabiting opposite-sex couple may want to stay outside the legal marital relationship but may nevertheless want to create some mutually enforceable rights and obligations in their dealings with each other and with society in general. On the other hand gay and lesbian couples are excluded from marriage and cannot make a full legal and social commitment to each other. There may also be gay and lesbian couples who do not want to marry but, just like opposite-sex couples, may want to create mutually enforceable rights and obligations towards each other and to be recognised within society. Then there is the case of cohabitants with no sexual dimension to the relationship, but whose relationship may often be accompanied by social and economic interdependencies for the persons involved.

1.09 In considering each of these forms of domestic partnership, the Working Group examined options which might give legal recognition to them. While not mandated to make recommendations, the Working Group sought to produce feasible options for the Minister to assist him in developing proposals for legislative reform.

III. Key Principles

1.10 The Working Group identified a number of key principles to inform its work. These were equality,

diversity, recognition, autonomy, privacy and the welfare of children. The Working Group recognises that none of these principles are absolute and are balanced in practice by the common good.

1.11 The principle of equality involves treating persons in similar situations similarly, unless differentiation is objectively justified.

1.12 The principle of diversity encompasses recognition of the social reality of the diverse range of caring/interdependent adult personal relationships that are formed, including among others, married couples, cohabiting couples, relatives or friends sharing a household, care recipients and caregivers, conjugal and non-conjugal relationships, opposite-sex and same-sex relationships and a broad diversity of family types. The principle of diversity is concerned with aligning state policy with and identifying and responding to the particular needs arising from different relationships.

1.13 The principle of recognition is about acknowledging the existence, legality or validity, of particular relationships through a formal approval or through giving legal status whereby the relationship is treated as worthy of consideration and protection. Recognition is about the status and standing of a group in society and how society values and affirms any particular group.

1.14 The principle of autonomy encompasses the rights and the capacity of an individual to freely choose the form that one's personal relationships will take rather than have decisions made for them.

1.15 The principle of privacy encompasses the right to a sphere of private intimacy and autonomy that allows one to establish and nurture human relationships without interference and penalty.

1.16 The principle of welfare of children acknowledges that both domestic law and international instruments, including the UN Convention on the Rights of the Child, require that the child's welfare is the paramount consideration in all decisions taken concerning the child.

IV. Public Consultation

1.17 One of the Group's first actions was to invite submissions from the public which elicited a large response from individuals and groups representing a broad spectrum of opinion. The submissions received fell into two broad categories. In the first category were 182 separate submissions expressing differing views of which 51 were from groups and organisations and 131 were from individuals. In the second category were approximately 4000 similarly framed submissions from individuals who opposed change in this area. An outline of the range of topics discussed in the submissions can be found in Appendix 3.

1.18 Each member of the Working Group was circulated with a copy of every submission made. The Working Group greatly appreciated the time and effort many put into drafting submissions. The experiences described and ideas proposed provided a great wealth of material for the Working Group.

1.19 It is clear to the Working Group from many of the submissions made that the absence of some form of legal recognition leads to considerable inequities for some of the family types now prevalent in our society. Eliminating those inequities involves dealing with the question of status and recognition and a wide range of policy areas including: Property, Next of Kin rights, Taxation, Social Welfare, Pensions, Dependency, Succession, Health and the Welfare of Children.

1.20 Many submissions focussed on options the Group might consider. The option of opening up marriage to same-sex couples was proposed by some. This is supported by several arguments including on the grounds of equality. Many others argued strongly for no change in the current situation with regard to marriage, basing their argument on the Constitution, religion and the common good. Between these views, many submissions offered a wide range of proposals from minimal or incremental approaches to substantial change short of the full marriage option. These included a statutory civil registration scheme entitling cohabitants to register their partnership and avail of most of the rights and duties of marriage. Some submissions proposed civil registration for same-sex couples only or, for both same and opposite-sex couples. Others proposed a presumptive scheme, to provide a more limited set of rights and duties, either on its own or in conjunction with a civil registration scheme, to cater for those couples who are not willing for whatever reason to enter into a formal registration scheme.

1.21 The Working Group jointly organised a conference entitled "The Legal Status of Cohabitants and Same Sex Couples" with the Equality Authority and GLEN that took place on 26 May 2006, at which the Minister for Justice, Equality and Law Reform gave the opening address. The conference made a significant contribution to public debate and analysis of the issues in relation to cohabiting couples. Eminent speakers brought both national and international experience and expertise to the debate on the policy in the area. The Conference proceedings and papers have been published and are available from GLEN.¹

¹ www.glen.ie

V. Relevant Initiatives in the Area of Domestic Partnership

- 1.22** There have been a number of significant initiatives in relation to the legal status of non-traditional relationships over the last ten years, eight of them in the last six years alone. Those elements of the various reports and other initiatives that are of particular importance, from the perspective of the Working Group's remit, are highlighted. Given the limited time available, the Working Group used these publications extensively to inform its work. The Working Group was guided in particular by the Law Reform Commission's 2004 *Consultation Paper on the Rights and Duties of Cohabitees* which usefully sets out many of the relevant issues.²
- 1.23** In **1996** the **Constitution Review Group (CRG)** published its report. In the context of its overall review of the Constitution the CRG had occasion to consider the constitutional provisions relating to the family, specifically Article 41. In discussing Article 41 the CRG noted that, as enacted, the Constitution recognised only one form of family, the family based on (heterosexual) marriage with children. However, in light of the various demographic, social and cultural changes which had occurred in Ireland since the adoption of the Constitution, the CRG argued that Article 41 would require significant amendment in order to take account of these changes. In its conclusions the CRG recommended the amendment of the Constitution to include a revised Article 41. This amended Article would include, *inter alia*, continued recognition of the family as the basic unit group of society, a restatement of the State's commitment to protecting the institution of marriage, along with the proviso that this did not prevent the Oireachtas from legislating in the interests of non-traditional relationships, and the inclusion of an individual right to respect for one's family life.
- 1.24** In **2000** the **Equality Authority** published a report on the partnership rights of same-sex couples. The report is significant for detailing the catalogue of disadvantage and discrimination that same-sex couples experience due to the fact that their relationships do not receive legal recognition/protection.
- 1.25** In a subsequent report in **2002**, ***Implementing Equality for Lesbians, Gays and Bisexuals***, the Equality Authority made a number of cross-sectoral recommendations for reform in order to overcome the historical inequalities experienced by the lesbian, gay and bisexual (LGB) community. Among the most significant recommendations of this report are for the introduction of formal recognition for same-sex relationships, including legal marriage and partnership registration schemes, and the general extension of the various rights and obligations afforded to married couples to both same-sex couples and unmarried heterosexual couples.
- 1.26** Prompted by the above report of the Equality Authority the **National Economic and Social Forum (NESF)** published a report in **2003** looking at the way in which the various policy recommendations made by the Equality Authority could be implemented. The most significant point of note in the report is the NESF's view that the absence of formal recognition for same-sex relationships is a significant barrier to the advancement of equality for the LGB community. Consequently, the report calls for legislation providing a variety of partnership rights to same-sex couples, similar to those enjoyed by married couples.
- 1.27** The consultation paper published by the **Law Reform Commission (LRC)** in **2004** is concerned with the legal status of cohabitants in conjugal relationships, and in this sense it does not purport to deal with other forms of long-term, cohabiting relationships. The main recommendation from the

² Law Reform Commission *Consultation Paper on the Rights and Duties of Cohabitees*, LRC-32-2004, Dublin, 2004.

paper is for the adoption of a presumptive scheme, whereby “qualified cohabitants” (individuals who have lived together for three years, or two years where there is a child of the relationship) will automatically be conferred with a bundle of rights and obligations, similar to some of those enjoyed by married couples. The report argues that such a scheme, provided it does not confer on cohabitants more extensive rights than those enjoyed by married couples, and excludes parties to a valid marriage from the definition of qualified cohabitant, would be both constitutionally sound and in accord with the State’s obligations under the European Convention on Human Rights (ECHR). The Law Reform Commission will publish its final report on this area of law on 1 December 2006.

1.28 As part of its overall programme of constitutional review the All Party Oireachtas Committee on the Constitution (the Committee) published its **Tenth Progress Report** in January 2006, in which it focused on the constitutional provisions relating to the family. Having highlighted the various demographic, social and cultural changes in relation to family/relationship formation that have occurred since the enactment of the Constitution, the Committee identified a number of key issues for consideration; the most pertinent of which, for present purposes at least, were: the definition of the family, the rights of cohabitants, and whether or not the constitutional definition of the family should be extended so as to encompass same-sex marriage. With regard to each of these issues the key recommendations of the Committee were as follows: (i) retention of the current constitutional definition of the family, (ii) legislative provision for the rights of heterosexual cohabitants, either in the form of a registration scheme or a presumptive scheme such as that proposed by the LRC, and (iii) legislative provision for the rights of same-sex cohabitants. Two additional points are of note in

relation to the last two recommendations. The Committee based such recommendations on the express belief that the Constitution does not prohibit the Government from extending a bundle of marriage-like benefits to unmarried same-sex and opposite-sex couples, so long as such rights do not exceed the rights extended to married couples. Finally, the Committee suggests in its report that there is nothing in the text of the Constitution to prohibit the courts from extending the definition of marriage to encompass same-sex marriage.³

1.29 A report published by the **Irish Human Rights Commission** (IHRC) in March 2006 contains a human rights audit of the Irish legal order as it relates to the issue of *de facto couples*.⁴ Having assessed present Irish law relating to intimate relationships in light of human rights standards the report finds the current Irish position to be wanting in a number of discrete respects. However, the report concludes that a constitutional amendment expanding the definition of the family is not necessitated by the State’s international human rights obligations, although the authors maintain that such a change might nonetheless be desirable. Instead, the report argues that appropriate legislative reform would be sufficient. In this regard the report leans in favour of an opt-in registration scheme, for both opposite-sex and same-sex couples, along with a presumptive scheme for other categories of cohabiting relationships.

1.30 The **Irish Council for Civil Liberties** (ICCL) report, titled ***Equality for All Families***, published in April 2006, is highly critical of the *status quo* in Ireland with respect to lesbian, gay, bisexual and transsexual relationships, from both a normative and human rights perspective. The report finds the current treatment of non-traditional relationships in Ireland to be deficient in light of international and regional human rights

³ The All-Party Oireachtas Committee on the Constitution *Tenth Progress Report: The Family*, Government Publications, 2006, pg. 123 reads “The Committee’s decision not to seek an extended definition of the family means that same-sex couples will not have constitutional protection for their family life, assuming, of course, that the courts rule that the word ‘marriage’ in Article 41 (which word, incidentally, is not defined by the Constitution) is confined to the traditional understanding of marriage

and does not extend to same-sex unions. It must be recognised that such a development, although perhaps unlikely, remains at least a distinct possibility and cannot be excluded from this particular debate”.

⁴ Ryan, F. and Walsh, J., *The Rights of De Facto Couples*, Irish Human Rights Commission, 2006.

standards. In its recommendations the report argues that if equality for all relationships is to be realised it will require an amendment to the Constitution, enshrining, *inter alia*, a general right to private and family life, and a gender neutral right to marry and found a family. In tandem with these constitutional changes the report argues for the introduction of a scheme for registered partnerships, and for a presumptive scheme with respect to certain types of relationships, both of which should confer most of the rights and obligations associated with marriage on relevant parties.

- 1.31 In December 2004 Senator David Norris introduced a **Private Members Bill** in the Seanad entitled Civil Partnership Bill, 2004. Section 3 sets out the definition of a civil partnership as a conjugal relationship between two people, regardless of gender or sexual orientation, over the age of 18, entered into and registered in accordance with the provisions of the Bill. Section 6 of the Bill provides that the parties to a civil partnership shall be regarded in law as having the same rights and entitlements as parties to a valid marriage. During the second stage of the debate on the Bill in the Seanad, 16 February 2005, Senator Norris agreed, following the intervention of the Minister for Justice, Equality and Law Reform in the debate, to adjourn debate on the Bill until, *inter alia*, the All Party Oireachtas Committee on the Constitution and the Law Reform Commission concluded their work and, where necessary, to revise the proposals contained in the Bill on foot of their respective reports. At the time of writing the status of the Bill has not changed, although Senator Norris furnished the Working Group with a proposed revised version of the Bill.

VI. Outline of Options Paper

- 1.32 Chapter 2 outlines the social context of opposite-sex cohabitation and highlights key issues for unmarried opposite-sex couples. Chapter 3 repeats this analysis for same-sex couples. Chapter 4 outlines the legal context. Chapter 5 describes the situation in a number of other jurisdictions which have legislated in this area. Chapters 6 and 7 contain detailed options for legal recognition of opposite-sex and same-sex cohabitation respectively. Chapter 8 deals with recognition in this jurisdiction of foreign registered relationships and same-sex marriages and Chapter 9 focuses on options for non-conjugal relationships.
- 1.33 Appendix 1 lists the membership of the Working Group and Appendix 2 lists the presentations made to the Group. Appendix 3 outlines the issues raised in the submissions received by the Group. Appendices 4 and 5 describe the demographic background and adoption perspectives.

2

Social Context: Opposite-Sex Couples

- I. Key Issues for Unmarried Opposite-Sex Couples
- II. Existing Legal Status
- III. Disadvantages vis-à-vis Marriage
- IV. Forms of Cohabitation

I. Key issues for unmarried opposite-sex couples

- 2.01** According to the 2002 Census, there were 77,600 family units consisting of cohabiting couples in Ireland in 2002, about 6 per cent of all private households and 8.4 per cent of all family units. This represents an increase of 46,300 from the number recorded in the 1996 Census. (The same figures show that the number of same-sex couples increased from around 150 in 1996 to almost 1,300 in 2002. Two thirds of these were male couples.)
- 2.02** To put the number of cohabiting couples in context a breakdown of all households in 2002 by composition is as follows:
- | | |
|--------------------------------------|-------|
| Households based on a married couple | 53.2% |
| One person households | 21.6% |
| Households headed by a lone parent | 11.7% |
| Non-family households | 7.1% |
| Households with a cohabiting couple | 6.0% |
| Other | 0.4% |
- 2.03** Of the 77,600 cohabiting couple family units, 47,900 have no children. 29,700 have children. 51,725 children (4 per cent of all children) live in family units with cohabiting couples. By comparison, over 1.1 million children live in a family with a husband and wife and over 230,000 live in a family headed by a lone parent. The data available do not permit us to analyse the motives of people who cohabit. In 2002, it was still a minority if a rapidly increasing phenomenon. The 2006 census data will be crucial to see if the rate of growth in cohabitation, witnessed between 1996 and 2002 has been maintained. There has been little quantitative sociological study of the phenomenon of cohabitation in Ireland. For some, cohabitation is a precursor to marriage. For others it is an alternative. Still more may cohabit because marriage is not an option as one or other of the couple is still legally married to another person.

II. Existing legal status

- 2.04** The family as defined in Article 41 of the Constitution is the family based on marriage. In general, the law does not give recognition to unmarried cohabiting couples and treats them as individuals. However, in recent years, in addition to any protections that might be available under the Equality Acts, some statutes have applied treatment to cohabiting couples similar to that granted to married couples.
- 2.05 Legislative Treatment Afforded to Cohabiting Couples Social Welfare Acts**
- The Social Welfare Acts treat cohabiting opposite-sex couples as married couples for most social welfare purposes. The exceptions are those payments which are specific to marriage, such as widow(er)'s pensions and widowed parent grant. This is in response to the judgment in the *Hyland* case.⁵
- 2.05.1 Civil Liability (Amendment) Act 1996**
- Section 1 broadens the definition of 'dependant' to include, in respect of a deceased person whose death is caused by a wrongful act, a person who was not married to the deceased but who, until the date of the deceased's death, had been living with the deceased as husband or wife for a continuous period of not less than three years.
- 2.05.2 Domestic Violence Act 1996**
- The Act extended the categories of persons who may seek the protection of the law against domestic violence to include cohabitants under certain conditions.
- 2.05.3 Non-Fatal Offences against the Person Act 1997**
- Section 1 of the Act states that for the purposes of the Act "member of the family" in relation to a person means the spouse, a child (including step-child or adopted child), grandchild, parent, grandparent, step-parent, brother, sister, half-

⁵ *Hyland v Minister for Social Welfare* [1989] IR 624, [1990] ILRM 213.

brother, half-sister, uncle, aunt, nephew or niece of the person or *any person cohabiting or residing with him or her.*

2.05.4 Parental Leave Act 1998

Under section 13 of the Parental Leave Act 1998 an employee is entitled to “*force majeure*” leave where, for urgent reasons owing to injury or an illness of a person, the presence of the employee is indispensable. The categories of persons covered include “*the spouse of the employee or a person with whom the employee is living as husband and wife.*”

2.05.5 Residential Tenancies Act 2004

Section 39 of the Residential Tenancies Act 2004 deems a “Part 4” tenancy to be terminated on the death of the tenant. The tenancy is not terminated where a family member who resided with the dead tenant opts to become tenant. Family member includes (i) a spouse of the tenant, (ii) *a person who was not a spouse of the tenant but who cohabited with the tenant as husband and wife in the dwelling for a period of at least 6 months ending on the date of the tenant's death*, (iii) a child, stepchild or foster child of the tenant, or a person adopted by the tenant under the Adoption Acts 1952 to 1998, being in each case aged 18 years or more, or (iv) a parent of the tenant.

2.05.6 European Communities (Free Movement of Persons) Regulations 2006

The main changes being introduced by the Regulations include the facilitation of the admission of partners of European Union citizens *who are in a durable relationship, which is duly attested*. The permission granted to such partners for the purposes of admission and residence in the State does not involve the recognition of such partnerships for other purposes.

2.05.7 Public Service Spouses' and Children's Pension Schemes

At present, only legal spouses can receive a survivor's pension under the Public Service Spouses' and Children's Pension Scheme. The Government agreed in September 2004 that a Working Group be established to examine the feasibility of implementing four specific recommendations of the Commission on Public Service Pensions in relation to Public Service Spouses' and Children's Pension Schemes. These included a recommendation that Public Service spouses' and children's schemes *should be modified to allow payment of a survivor's pension to a financially dependent partner in certain circumstances and a system for the nomination of partners put in place*. The Working Group, which is made up of representatives of Public Service employers and Trade Unions has not yet reported.

III. Disadvantages vis-à-vis marriage

2.06 Opposite-sex couples who live together without being married fare less well than married couples in a variety of areas.

2.06.1 Taxation law

Taxation Law provides a range of benefits and exemptions for married couples that are unavailable to cohabiting couples. The differences in income tax have narrowed in recent years with the introduction of individualisation. However, the ability to share unused personal tax credits and tax bands are not available to cohabiting couples. Married persons are exempt from Capital Acquisitions Tax (CAT), i.e. gift and inheritance tax, in respect of transfers between spouses. Non-marital partners, by contrast, do not enjoy the exemption, exposing surviving partners to potentially significant CAT bills. Similarly, non-marital couples cannot benefit from the

exemptions in respect of capital gains tax and stamp duty that are available to spouses.

- 2.06.2** However, section 151 of the Finance Act 2000 provides relief for non-marital partners and others in the case of the gift or inheritance of the shared home, subject to conditions related to residing there for three years prior to and six years after the death, and not being the owner of another property.

2.06.3 Family Property

Individuals have the right, subject to certain limited exceptions, to acquire and dispose of real or personal property as they see fit. One of the main disadvantages of this system, in relation to family property, is its inability to cater for the practical inequalities that arise whenever a man and a woman decide to cohabit without marrying. In some circumstances, though by no means all, one party, usually the woman, relinquishes at least some of her earning capacity, in order to care for her family. Because of her work within the home, her ability to acquire property or to earn enough to fund such an acquisition in her own right is impeded, while her partner's powers of acquisition and earning are increased. In many cases the woman receives no share in any property acquired by her partner during the relationship.

- 2.06.4** The legislature has, by means of the *Succession Act 1965*, the *Family Home Protection Act 1976*, the *Bankruptcy Act 1988*, the *Family Law Act 1995* and the *Family Law (Divorce) Act 1996* improved the position of non-owning spouses in respect of the family home. These provisions do not apply to non-marital cohabitants.

2.06.5 Financial support

Non-marital couples, in contrast to married couples, do not enjoy any right to apply to a court for financial support for the dependent partner on relationship breakdown.

2.06.6 Death and succession.

The Succession Act entitles a surviving spouse to a proportion of the deceased spouse's estate, whether or not a will exists. If there is no will, the surviving spouse is entitled to the whole estate if there are no children, and to two-thirds of the estate if there are children. Even if there is a will, the surviving spouse is entitled to half of the estate if there are no children and to one-third if there are children. The spouse also has a right to take out a grant of representation for the estate.

- 2.06.7** If there is no will the surviving spouse may exercise a right to appropriate the deceased spouse's family home and the contents of the house, in satisfaction (or part satisfaction) of his or her legal right share.
- 2.06.8** In this regard, the term 'spouse' is confined to a person lawfully married to the deceased at the time of death. Such a spouse could be separated from the deceased, although provision may be made in a separation agreement and on judicial separation for the extinguishment of the spouse's right to succeed.
- 2.06.9** This entitlement does not, however, extend to divorced persons; the parties in question must be legally married at the time of death. Such a party may, however, seek to have provision made for him or her on the death of a former spouse under legislation on divorce, provided that the court is satisfied that proper provision was not made for the survivor during the deceased's lifetime.
- 2.06.10** Rights under the Succession Act do not extend to non-marital partners; that is, persons who have never been married to each other. In the latter case, a deceased partner has full rights to deal with his or her estate as he or she sees fit. There is no obligation in law to provide for the surviving partner.

- 2.06.11** A non-marital partner may, of course, make a will providing for the surviving partner. If, however, the testator was a party to a valid and subsisting marriage, he or she would effectively be obliged to make provision for the surviving spouse at the expense of the surviving non-marital partner. The legal rights of the spouse take precedence over devises, bequests and shares on intestacy, so long as no agreement or court order exists to the contrary.
- 2.06.12** In the case of intestacy, serious difficulties arise for non-marital partners. If a non-marital partner dies having failed to make a will, or has created a will that is deemed to be invalid, the deceased's estate (or the portion that is not dealt with by will) falls to be distributed in accordance with the rules on intestacy set out in Part VI of the Succession Act 1965. Where a non-marital cohabiting partner dies without making a will, the surviving partner is effectively left without any resources. The latter will not be entitled to any portion of the deceased's estate. In this regard it is worth noting that the non-marital partner is in a worse position than that of the children of the deceased, who, on intestacy, are entitled to equal shares in respect of at least one-third of the deceased's estate (and all of the estate if the deceased has no surviving spouse). Neither would the non-marital partner be entitled to extract a grant of representation to the deceased's estate.
- 2.06.13** Certain reliefs may be available if property is held by two parties in a joint tenancy. In such a case, on the death of one party, the survivor is deemed to take the entire property. By contrast, if the property is held subject to a tenancy in common, the proportion of the property belonging to a deceased owner will pass under his or her will to the beneficiaries named in that will, or under the rules on intestacy.

IV. Forms of Cohabitation

2.07 Needs of Cohabiting Couples.

The Working Group received very few submissions dealing with specific concerns of cohabiting opposite-sex couples, or indeed of people living together in non-conjugal relationships. The evidence of the motivation of persons who cohabit remains limited. The Law Reform Commission Consultation Paper identified a number of different motives, which a couple may have in choosing to live together outside marriage.⁶ These may be grouped into three categories: those who may eventually marry; those opposed to marriage and those unable to marry.

- 2.07.1** The Law Reform Commission Consultation Paper notes that persons' motives for cohabitation may change over time. They quote John Mee as saying: "People's motives may change over time. Consider the case of a couple who move in together at an early stage in their relationship, seeing their cohabitation as a trial period before a possible marriage. If, for some reason (probably the reluctance of one partner) they never actually marry, they will not necessarily separate. Many of the cases in this area involve relationships which drift on for many years, even after it has become apparent that the originally envisaged marriage will never take place. Such a relationship begins as a "trial marriage" and ends, in effect, as an alternative to marriage".⁷

2.08 Cohabitants who are already married.

The Law Reform Commission Consultation Paper commented that, "although neither the 1996 nor the 2002 Census provided any statistics on the marital status of those cohabiting in non-marital relationships, anecdotal evidence gleaned by the Commission from its consultations with various individuals and bodies would seem to suggest that many cohabitants are married to third

⁶ Law Reform Commission *Consultation Paper on the Rights and Duties of Cohabitees*, LRC, Dublin, 2004, para. 2.12.

⁷ Law Reform Commission *Consultation Paper on the Rights and Duties of Cohabitees*, LRC, Dublin, 2004, para. 2.12.

parties.”⁸ Nevertheless they excluded from the scope of their recommendations *de facto* couples where one or both of the parties remain validly married to other persons. The Law Reform Commission was of the view that if the State by its laws were to recognise and improve the position of a cohabitant who is already married to someone else, those laws would undermine the institution of marriage.⁹

- 2.08.1** The Irish Human Rights Commission Report commented in this regard that, “It is certainly fair to conclude that the recognition of an extra-marital union, and an attempt to equate it with an existing marital union, may undermine the position of marriage in an unconstitutional manner.”¹⁰
- 2.08.2** The Working Group is of the view that, while persons in extra-marital partnerships may be vulnerable, they cannot have legal status for their second relationship while they remain married to someone else.

2.09 Cohabitants who do not wish to marry

It is not clear if any State created institution, which regulated the rights and duties of a couple to each other, would be acceptable to those ideologically opposed to civil marriage. It has been suggested in the Law Reform Commission Consultation Paper that such cohabitants simply do not wish their rights and obligations to be legally regulated. They have deliberately eschewed the institution of marriage, as they did not intend their relationship to give rise to such a result. There is a libertarian argument that “there ought to be a corner of freedom for such couples to which they can escape and avoid family law.”¹¹ Nevertheless, the State may consider that even in

such relationships an imbalance of resources and power may exist that renders persons vulnerable on break-up, and that minimum legal obligations be implied in such relationships.

- 2.09.1** Some people may be reluctant to commit to another permanent relationship because of the emotional scars they carry from the break-up of an earlier marriage. Equally they may be in straitened financial circumstances due to the cost of separation and/or divorce and the continuing commitments to the first family. In such a scenario, the risk of the partner in the second relationship being particularly vulnerable in the event of break-up would be high.
- 2.09.2** In the absence of conclusive research on the motivation, duration and structure of conjugal cohabitation, it is difficult to identify what institutional innovations would be appropriate to the needs of cohabitants.

⁸ Law Reform Commission (2004) *Consultation Paper on the Rights and Duties of Cohabitees*, LRC Dublin, 2004, para. 1.18.

⁹ Law Reform Commission (2004) *Consultation Paper on the Rights and Duties of Cohabitees*, LRC Dublin, 2004, para. 1.19.

¹⁰ Walsh, J. and Ryan, F. *The Rights of De Facto Couples*, Irish Human Rights Commission, 2006, page 85 para. 4.2.4.

¹¹ Law Reform Commission Consultation Paper, *The Rights and Duties of Cohabitees*, LRC Dublin, 2004, pg. 21.

3

Social Context: Same-Sex Couples

- I. Demographic Profile
- II. Key Issues of Concern for Lesbian, Gay and Bisexual People
- III. Direct Implications of Existing Legal Status
- IV. Legislative and Policy Developments

I. Demographic Profile

- 3.01** In the 2002 Census 1300 same-sex couples were identified as compared with 150 couples so identified in the 1996 Census. Two thirds of these were male couples. Research both nationally and internationally would suggest that these figures are an underestimate of the actual numbers of couples as a result of concerns that many lesbian and gay people continue to have about disclosing their sexuality to others due to fear of prejudice and discrimination.¹² Underestimation can also arise from the nature of the Census itself, which in common with other countries (such as the UK or the US) does not allow a person to record a partner not living in the household. Nor are any questions asked about sexual orientation, which might allow for some estimation of total numbers of lesbian, gay and bisexual people in the population.
- 3.02** Despite these constraints, census data in a range of countries indicate significant increases in the numbers of recorded same-sex couples. Census and other data sources also indicate a growing number of same-sex couples who are parenting children in a variety of family forms. While there is limited data on children living in same-sex households in Ireland, there is some evidence that, in common with countries such as the US, the numbers are substantial.¹³

II. Key Issues of Concern for Lesbian, Gay and Bisexual People

3.03 Progress and Issues of Concern

Considerable progress has been made in Ireland in addressing prejudice and discrimination against lesbian, gay and bisexual (LGB) people. This progress has raised expectations and created a society where it is somewhat easier for LGB people to live their lives openly and with greater security. LGB people increasingly expect to find

employment without fear of discrimination, to form relationships and have family life. An increasing number of LGB people are already parenting children and expect their status as parents to be recognised by the law.

- 3.03.1** Despite the considerable progress made however, LGB people continue to face significant challenges to participating on an equal basis in society. Many LGB people are still hesitant to 'come out' and make their sexuality known in Irish society, fearing negative consequences such as discrimination or social isolation if they do so. Lack of positive legal recognition of same-sex relationships can underpin these apprehensions, significantly contributing to the perception that same-sex relationships lack legitimacy, value and meaning.
- 3.03.2** Lack of legal recognition also has very practical and direct consequences for LGB families because they are excluded from the benefits and legally enforceable obligations that are available through civil marriage. This not only impacts on the financial resources available to support family life, but can also lead to separation and loss. Critical in this respect are the difficulties experienced by LGB people who do not have the option of establishing a legal connection with the child they are co-parenting.
- 3.03.3** These issues have been comprehensively explored in a range of policy and research publications, including reports of the Equality Authority and the National Economic and Social Forum (NESF). The NESF has noted that recognition of LGB relationship would have a profound impact on equality for LGB people and would contribute to a number of key objectives for advancing equality.¹⁴ These include:
- *Respect*: that is, maximising opportunities to value interdependence and mutual support in aspects of human welfare.
 - *Recognition*: that is the according of visibility and value to diversity;

¹² Barriers to obtaining an accurate count of LGB people in the population have been identified in a range of studies. See for example, Manus, S. *Sexual Orientation Research Phase 1: A Review of Methodological Approaches*. Edinburgh: Scottish Executive, 2003. Also Smith, D. and Gates, J. *Gay and Lesbian Families in the United States: Same Sex Unmarried Partner Households*. Washington DC: Human Rights Campaign, 2001.

¹³ Morley, C. *Somewhere I can be Myself: An Evaluation of LinC (Lesbians in Cork) (2001-2004)*, 2004.

¹⁴ National Economic and Social Forum. *Equality Policies for Lesbian, Gay and Bisexual People: Implementation Issues. Forum Report Number 27*, Dublin, 2003 pg. 60.

- *Resources:* Access to resources necessary for human welfare including education, employment, health, social welfare and other services and benefits.

3.03.4 There is now a growing body of research literature and other data sources which illustrate the inequalities experienced by LGB people across these areas and the inter-linkages between them in producing and reinforcing inequality. For example, lack of positive recognition of the legitimacy of lesbian and gay relationships has led to disrespect, which in turn has created the conditions for discrimination and exclusion from key resources. Examples of issues identified in this respect are summarised in the paragraphs that follow.

3.04 'Coming Out' and Relationships with Family of Origin and Other Personal Support Networks

For many lesbian and gay people, disclosure of their sexual orientation (or what has popularly been referred to as 'coming out') will be a gradual process depending on personal resources, the environment in which they live and their assessment of the reaction of others.

3.04.1 Given the stigma and low status that has been attached to same-sex relationships, a major fear for LGB people in choosing to disclose their sexual orientation is the effect this might have on their relationships with their family of origin, their friends and other key personal support networks. For example, 'Belong To', a dedicated youth project for lesbian, gay, bisexual and transgender (LGBT) young people funded by the Department of Education and Science, has highlighted the fear and difficulties still experienced by its young service users in disclosing their sexuality to parents, family and friends.¹⁵

3.04.2 In Northern Ireland, a recent report commissioned by the Department of Education on the needs of

lesbian, gay, bisexual and transgender youth found that almost three quarters of the young people surveyed did not feel they could tell their parents when they first realised they were gay.¹⁶

3.04.3 Parents of young LGB people, (as noted by Parents Support, an organisation established by the parents of LGB people to provide support to parents) often seek to support their child with limited knowledge or information to counter assumptions of negative consequences for their child. A critical issue for many parents, in the absence of positive recognition of lesbian and gay relationships, can be the fear that their child will face harassment, discrimination and future isolation.¹⁷

3.04.4 Young LGB people also have a significant fear of disclosing their sexuality to their peers for fear of bullying and harassment. The extent and seriousness of homophobic bullying in schools has been highlighted in recent research funded by the Department of Education and Science.¹⁸ There is also a sense from young people that homophobic bullying may be particularly effective and powerful because victims are unwilling to seek help as this would force them to discuss why they are being bullied.

3.05 Older LGB People

Although there is no specific research in Ireland on the circumstances of older LGB people, research from the UK has highlighted the particular problems faced by older people as a result of severe inequalities in the past. For example, Age Concern in the UK has noted that older LGB people have lived a significant part of their lives in times where intimate gay relationships were criminalised. This can have a profound effect both on their preparedness to 'come out' to others and on the way they view institutions and service providers, who may be

¹⁵ Submission by 'BelongTo' to the Joint Oireachtas Committee on Health and Children: Sub-Committee on the High Level of Suicide in Irish Society, 2005.

¹⁶ Youth Net, *ShOut: Research into the Needs of Young People in Northern Ireland who identify as Lesbian, Gay, Bisexual and/or Transgender*, Belfast, YouthNet, 2004.

¹⁷ Parents Support has produced a booklet "If Your Child is Lesbian or Gay" to support parents of LGB people.

¹⁸ Norman J., Galvin, M. and McNamara, G. *Straight Talk: Researching Gay and Lesbian Issues in the School Curriculum*. Dublin City University: Centre for Educational Evaluation, 2006.

perceived as indifferent or hostile to their sexuality unless proven otherwise.

- 3.05.1** Lack of recognition, or indeed negative legal recognition of same-sex relationships also has significant implications for the capacity of older LGB people to form or support family life. Research in the US for example, has shown older LGB people are more likely to live alone and less likely to have a life partner, 'significant other' or children than is the case for the general older population. This can translate into a lack of traditional support networks that may not be replaced by the strength of strong close friendships. It is perhaps not surprising in this context that a significantly higher proportion of older LGB people (compared to the general older population) reported having no one to call on in time of crisis or difficulty.¹⁹

3.06 Same-Sex Families and Their Children

There is some evidence that a significant number of lesbian and gay people are having and raising children. LGB groups such as Gay and Lesbian Equality Network and Lesbians in Cork (Linc) have identified a range of different family formations through the course of their work. Circumstances can vary markedly within and between each of these situations and include scenarios such as lesbian or gay people who have adopted children as single applicants, to lesbian couples jointly parenting a child conceived by one partner through donor insemination, usually through a clinic outside this country as it appears that this service is not currently made available to same-sex couples in Ireland.

- 3.06.1** Some lesbian and gay families are also formed when one of the partners who was previously married brings children from that marriage into their same-sex relationship creating a step-family situation similar to other, heterosexual, step-family arrangements. However, in this case there is no option for the couple to marry.

- 3.06.2** In some cases, lesbian couples have a child conceived through artificial insemination with a known donor, where it is agreed that the father will have a limited connection with the child or where the father takes on a co-parenting role.
- 3.06.3** Lesbian or gay couples who are currently fostering children also form a small but significant group.
- 3.06.4** However, there are two major legal obstacles facing lesbian and gay families in these situations. The first is that since joint adoption is restricted to married couples, same-sex couples who have children cannot provide those children with the protection that this legal relationship ensures. The second obstacle is that under present legislation, it is only possible for someone with a biological connection with a child to apply for legal guardianship of that child.²⁰ This means that even though a couple might have gone through all of the planning and preparation for a child, and jointly and equally parent and commit to that child through adoption or biological parenthood by one partner, there is no mechanism to allow the non-biological/non-adoptive parent to take on any of the rights and responsibilities attaching to the parental role.
- 3.06.5** These limitations pose many problems for lesbian and gay parents and their children. For example: children are excluded from the protection and legal obligations of their non-biological parent towards them in terms of inheritance, maintenance and other benefits. In the event of the dissolution of a relationship or in the event of the death of the legal parent, children can be separated from their second parent (who has no legal connection to the children but who may have co-parented the child from birth).
- 3.06.6** Lack of recognition also means that lesbian and gay couples who have jointly fostered a child and who subsequently become eligible to apply for

¹⁹ Age Concern *Older Lesbians, Gay Men and Bisexuals: Facts and Figures, 2006*. Available at www.ageconcern.org.uk

²⁰ Although recent developments in the area of adoption suggest that guardianship in some form may be made available to long-term foster carers in some instances, it is not clear how this will apply to unmarried couples, heterosexual or same-sex. See Department of Health and Children. *Adoption Legislation: 2003 Consultation and Proposals for Change*. Dublin, 2005. Available at www.dohc.ie

adoption have to make an arbitrary decision as to which partner will apply for adoption and who will relinquish any legal connection to the child. Thus the child, who had two foster parents, is only entitled to one adoptive parent.

3.06.7 There is also a fear that sexual orientation can be used as a reason for denying custody or access to lesbians or gay men upon the breakdown of a previous heterosexual relationship through which the child was conceived. It would appear that under current legislation the fact that a parent has entered into a same-sex union should have no bearing on that person's right to apply to the court for custody or access/visiting rights.²¹ However, many lesbians and gay people perceive this could be raised as an issue, or they might refrain from taking a custody case for fear of public disclosure of their sexuality.

3.06.8 Legal constraints on adoption and guardianship also present more day-to-day difficulties for LGB parents because the second parent has no legal connection with the child. These issues have been illustrated in recent research undertaken in the Cork area covering a range of areas including:

- **Health.** Where the second parent is not entitled to make medical decisions regarding the child. An example of the difficulties encountered in this situation is that of a lesbian couple, where the biological mother was seriously ill after birth and where her partner could not sign for vaccinations for the child.
- **Education.** An example here is the case of a non-biological stay at home mother of two children who was not allowed register her child for "junior infants" class and was informed that only her partner, the legal parent, could sign the registration forms as they involved consent for medical treatment. Correspondence from the school is addressed solely to the legal parent and the couple are concerned about how their child's

family will be respected when one of her parents is not acknowledged.

- **Barriers to travel.** An example of barriers to travel illustrated by A. O'Connell is the case of a non-biological mother who wanted to take her child abroad for holidays. She sought legal advice about her status should anything happen to her child while they were abroad, such as that the child might suffer an accident and need to be admitted to hospital. She was informed that she should carry a sworn affidavit from the legal mother giving her permission to travel with the child, but that in most jurisdictions this would not actually give her the legal status to consent to medical treatment.²²

3.07 Relationships Within the Wider Society

Harassment and violence directed towards lesbian and gay people because of their sexual orientation is perhaps the most direct and serious impact of the legacy of stigma and discrimination. Recent reports of the Garda²³ and gay community organisations²⁴ document significant and pervasive levels of violence and harassment leading to fear among LGB people about showing any signs of affection or other markers of their sexual orientation publicly.

3.07.1 Violence and harassment have been found to have a significant impact on the mental health of LGB people. The capacity of people to cope with hate crime has also been linked to how open people are about their sexuality with others. For example, people who are open or "out" about their sexuality are more likely to report a violent incident. Also, while "coming out" does not 'prepare' lesbians and gay men for experiences of harassment and violence, it does provide them with the tools that they can use in coping: supportive social networks, community resources and less self blaming interpretations of the experience.²⁵

21 Mee, J. and Ronayne K. (2000). *Partnership Rights of Same Sex Couples*. Dublin: Equality Authority, 2000 p.10.

22 O'Connell, A. (Forthcoming). PhD Thesis on Lesbian Family Formation in Ireland, Cork.

23 A Review of Research on Victimisation of the Gay and Lesbian Community in Ireland, Sarma, 2005.

24 LGBT Hate Crime Report, JOHNNY 2006.

25 Dillon B. and Collins, E. *Mental Health: Lesbians and Gay Men*. Dublin: Gay HIV Strategies and Northern Area Health Board, 2004.

III. Direct Implications of Existing Legal Status

- 3.08** Same-sex couples do not have the option of taking on the benefits and legally enforceable obligations available through civil marriage. Their legal situation, therefore, with the exception of the absence of the choice of marriage, is broadly equivalent to that of opposite-sex unmarried cohabitants. The inequalities arising from this exclusion and the implications for resources available to support LGB couples and families have been comprehensively documented in the Equality Authority study *Partnership Rights of Same Sex Couples*.²⁶ These inequalities arise in a whole range of areas including:
- Pensions and workplace benefits;
 - Provision for joint adoption;
 - Access to housing and succession of tenancy;
 - Succession rights;
 - Property rights upon breakdown of relationship;
 - Cohabitation contracts regulating property entitlements;
 - Taxation, including differential treatment vis-à-vis married couples in relation to income and capital taxes.
- 3.09** Other areas where inequalities arise include:
- Immigration, where until recently, only married families have been recognised in immigration regulations for the purposes of family reunification.
 - Social welfare, where same-sex couples benefit from lack of recognition in welfare payments such as unemployment assistance (by being assessed as individuals), but lose in relation to other schemes.
 - Rights of partners in emergency situations, where there is a lack of formal clarity relating to same-sex partners as next-of-kin.
 - Protection against domestic violence, where same-sex partners are not entitled to apply for barring orders.

- Capacity to make funeral and other arrangements upon death.

- 3.10** There has been some recognition of same-sex couples in legislative change where *de facto* couples more generally have been recognised (see Chapter 2 part II on unmarried opposite-sex cohabitants). This has included recognition in provisions for *force majeure* leave (following amendments to the Parental Leave Act 1998) and in provisions for recognition of unmarried couples under the EU Free Movement Directive. However, a number of measures extending recognition to *de facto* couples, insofar as they are confined to opposite-sex non-marital couples, have opened up new inequalities between same-sex and opposite-sex cohabitants. These are noted in a recent report published by the Irish Human Rights Commission and include:²⁷
- Domestic Violence 1996 section 3;
 - Civil Liability (Amendment) Act, 1996, section 1;
 - Parental Leave Act 1998, section 13;
 - Residential Tenancies Act 2004, section 39.²⁸
- 3.11** These measures accord certain rights to spouses, and additionally to persons living together as “husband and wife”, a formula of words which Mee and Ronayne suggest do not encompass same-sex couples. The difficulty with such a conclusion, Walsh and Ryan²⁹ note, is that it serves to create a second tier of differentiation in law. On the one hand, Irish law differentiates between persons who are married and those who are not. On the other hand, even where legislation does accord recognition to families not based on marriage, such recognition is reserved to opposite-sex couples. This approach, it is noted, is particularly problematic given that, in general, opposite-sex parties are free to marry, while same-sex couples are not.

26 Mee, J. and Ronayne K. *Partnership Rights of Same Sex Couples*. Dublin: Equality Authority, Dublin 2000.

27 Ryan, F. and Walsh, J., *The Rights of De Facto Couples*, Irish Human Rights Commission, 2006.

28 Walsh J. and F. Ryan *The Rights of De Facto Couples*. Dublin: Irish Human Rights Commission, pg. 93, 2006.

30 Walsh J. and F. Ryan *The Rights of De Facto Couples*. Dublin: Irish Human Rights Commission, 2006, pg. 93.

IV. Legislative and Policy Developments

3.12 Legislative Change

Despite the continuing gaps in legal recognition just described, the past two decades marks an unprecedented era of positive change and progress for lesbian, gay and bisexual (LGB) people. In Ireland change has been particularly rapid, and in many areas, such as measures to address discrimination, the country has been to the forefront internationally.

- 3.12.1** In 1993, the Irish Government abolished legislation³⁰ which had criminalised sexual relationships between men.³¹ In legislating for equality in this area, the then Minister for Justice, Maire Geoghegan Quinn, T.D., stated in the debate in the Oireachtas that: “In other areas of public concern and debate in this country we have come to appreciate the need to recognise, respect and value difference”.
- 3.12.2** Discrimination against and exclusion of LGB people had already been recognised before the reform of the criminal law when sexual orientation had been included as a category of protection under the Incitement to Hatred Act (November 1989) and in the Unfair Dismissals (Amendment) Act, April 1993. Discrimination in the public service on the grounds of sexual orientation or HIV status had also been banned in 1988 (Department of Finance Circular 21/88, June 22, 1988).
- 3.12.3** Thereafter, significant legislative reform to promote inclusion and equality for LGB people has included:
- Employment Equality Acts 1998 and 2004, which prohibit discrimination in employment on the basis of, inter alia, sexual orientation.³²
 - Equal Status Acts 2002 - 2004, which extend anti-discrimination protection into the provision of goods, services, accommodation and education.

- Refugee Act 1996, allowed the granting of refugee status on the basis of a fear of persecution arising from one's sexual orientation. Ireland was one of the first countries in the world to provide protection on this basis in its refugee and asylum laws.
- Amendments to the Parental Leave Act 1998 which has allowed for the extension of '*force majeure*' leave to include provision for same-sex couples (2006).

3.12.4 These legislative changes, as noted, propelled Ireland into the forefront internationally in terms of legal protections against discrimination and exclusion. Ireland has also played a central role in having these protections extended throughout the EU. For example, Ireland played a central role in promoting the adoption of Article 13, the anti-discrimination clause of the Treaty of Amsterdam (1997) which includes sexual orientation as a protected ground.³³

3.13 Current Policy Developments

The 2004 Law Reform Commission *Consultation Paper on the Rights and Duties of Cohabitees* (referred to in Chapter 1 of this paper) is of relevance both to same-sex couples and to opposite-sex cohabiting couples. It recommended the inclusion of both opposite-sex and same-sex couples in the proposed presumptive scheme.

3.13.1 Also significant with regard to children is the Report of the Commission on Assisted Human Reproduction (2005) which recommended, inter alia, that assisted human reproduction (AHR) services should be available without discrimination on the grounds of gender, marital status or sexual orientation, subject to consideration of the best interests of any children that may be born.³⁴ The report also makes significant recommendations regarding the assigning of parentage.

³⁰ Offences Against the Persons Act 1861 and Criminal Law Amendment Act 1885.

³¹ An important impetus for this change had been the success of the case taken by David Norris to the European Court of Human Rights, the Court finding that the legislation contravened the European Convention on Human Rights.

³² Section 37 is perceived as an obstacle to full equality for LGB people employed in religious institutions.

³³ The need for a non-discrimination clause in the Treaty was identified as a priority in the Government's White Paper on Foreign Policy (Department of Foreign Affairs, 1996).

³⁴ Report of the Commission on Assisted Human Reproduction, Government Publications, 2005, pg. 34.

- 3.13.2** The 2005 report of the Department of Health and Children *Adoption Legislation: 2003 Consultation and Proposals for Change* is also important. The report makes no proposals regarding unmarried cohabitants in relation to adoption and guardianship, stating that such provision should “await a change in the rights of cohabiting couples”. However, the report does make a set of recommendations that reflect the changing structure of family life that are also relevant to the situation of LGB people just described. For example, ‘special’ guardianship is put forward as being helpful in situations where:
- “A natural parent marries and his/her new spouse can receive rights without either natural parent having to relinquish his/her natural rights.
 - To give security and permanence of a forever home to a foster child without the need for an

expensive and adversarial High Court action, which is off-putting to many people even if it is considered to be in the best interests of the child.

- Where a custodial parent remarries following divorce.
- Where one partner in a non-marital relationship is the natural or adoptive parent of the child” (p. 75).

- 3.13.3** Based on these, the report recommended that “provision be made allowing a step parent or long-term foster carer(s) (i.e. where the child has been with the foster parent for at least five continuous years) to apply to the Circuit or District Court for a guardianship order, taking account of the views of the child and having obtained all relevant consents”.³⁵

³⁵ The Childcare (Amendment) Bill 2006, which provides for a foster parent or relative who has a child in their care for a period of 5 years, the child having been placed with them by the Health Service Executive, to apply for a court order for increased autonomy in relation to that child, is currently awaiting second stage in the Dáil.

4

Consideration of Certain Legal Principles

4.01 Task of the Working Group

The Working Group was asked to consider the categories of partnerships and relationships outside of marriage to which legal effect and recognition might be accorded, consistent with Constitutional provisions. In doing so the Group confined itself to an examination of Article 41 of the Irish Constitution, which is the main provision in the Constitution pertaining to relationships and the family. There are other Articles in the Constitution which were not here given full consideration but may be relevant, such as the equality guarantee, the personal rights guarantee and the right to private property.³⁶

4.02 The Constitutional Position

Article 41 of the Irish Constitution provides, in relevant part, as follows:

“41.1.1° The State recognises the family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

41.1.2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

41.3.1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”

- 4.02.1 While the Constitution does not define what marriage is, judicial interpretation has set the parameters within which State regulation must operate. The definition of the family was refined in *The State (Nicolaou) v An Bórd Uchtála*³⁷ in which the applicant argued that the Adoption Act, 1952 made no provision for consultation of the father of a non-marital child and was unconstitutional as it violated the rights of the family under Article 41. The Supreme Court held in that case that it was “quite clear ... that the

family referred to in [Article 41] is the family which is founded on the institution of marriage”. The Court thus rejected the view that non-marital relationships had any constitutional status, *per se*, although it subsequently accepted that individual parties to such relationships, in particular unmarried mothers and non-marital children, did have certain personal rights similar to those enjoyed by members of the constitutionally protected family.³⁸

- 4.02.2 The meaning for the State of guarding with special care the institution of marriage arose in the landmark case of *Murphy v Attorney General*.³⁹ The applicants successfully argued that the Income Tax Act 1967 was unconstitutional insofar as it placed a greater tax burden on a double-income married couple as compared with a double-income unmarried cohabiting couple, and thus constituted an attack on the institution of marriage contrary to Article 41.3.1°. The Supreme Court pronounced that the pledge to “guard with special care the institution of marriage is a guarantee that this institution in all its constitutional connotations ... will be given special protection so that it will continue to fulfil its function as the basis of the family and as a permanent, indissoluble union of man and woman”. The Court went on to hold that “the nature and potentially progressive extent of the burden created by the Income Tax Act is such that, in the opinion of the Court, it is a breach of the pledge by the State to guard with special care the institution of marriage and to protect it against attack”.

- 4.02.3 This position was followed in the subsequent case of *Muckley v Ireland*,⁴⁰ and again in the case of *Hyland v Minister for Social Welfare*.⁴¹ In the latter case the Supreme Court held that section 12(4) of the Social Welfare (No.2) Act 1985, which granted lesser benefits to a married couple and their child living together as compared with an unmarried couple with a child living together, penalised the

36 Articles 40.1, 40.3.1 and 40.3.2 of Bunreacht na hÉireann.

37 [1966] IR 567.

38 *G v An Bórd Uchtála* [1980] IR 32.

39 [1982] IR 241.

40 [1985] IR 472.

41 [1990] ILRM 213.

married state and was thus unconstitutional having regard to Article 41.3.1°.

- 4.02.4** Cumulatively, these cases are taken to have established the proposition that the Oireachtas, when legislating for non-marital couples, cannot confer on such couples more extensive rights than those enjoyed by married couples.
- 4.02.5** The definition of marriage for the purposes of the Constitution has also been judicially interpreted. There appears to be judicial consensus that, for the purposes of the Constitution, marriage is understood “as the voluntary union of one man and one woman to the exclusion of all others for life”.⁴² This view was approved by McKechnie J in the case of *Foy v An t-Ard Chláraitheoir*,⁴³ where he added that it referred to a biological man and woman, thus excluding individuals who have undergone gender reassignment from marrying a person of the same biological sex. This case has been referred back to the High Court for rehearing on a specific point concerning the European Convention on Human Rights Act 2003.
- 4.02.6** Again, this approach was restated by Murray J in the Supreme Court the case of *DT v CT*,⁴⁴ where he stated “Of course society, as always, evolves and continues to evolve and there are a far greater number of committed partnerships established outside marriage than was heretofore the case. Nonetheless marriage itself remains a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution”.

4.03 The Legislative Position

The common law and the Constitution as interpreted to date prevent same-sex marriage. The common law position has been enshrined in the Civil Registration Act 2004, the marriage provisions of which have not yet been commenced.

- 4.03.1** The European Court of Human Rights has found that Article 12, in its protection of the right to marry, only applies to the marriage of a man and a woman. Article 8 provides for an expansive definition of family which may be of benefit to couples who are not married.⁴⁵ In recent years there has been a stricter level of scrutiny applied by the Court to legislative measures that discriminate on the grounds of sexual orientation. Following the enactment of the European Convention on Human Rights Act 2003 the principles established under the Convention with respect to non-traditional relationships may contribute to piecemeal change with respect to the rights of parties to such relationships.

⁴² *B v R* [1995] 1 ILRM 491 per Costello J; it should be noted that the above statement was made prior to the fifteenth amendment to the Constitution, hence the inclusion of the words “for life”.

⁴³ [2002] IEHC (9 July 2002).

⁴⁴ [2001] 3 ILRM 321.

⁴⁵ *Keegan v Ireland* (1994) 18 EHRR 342.

5

Domestic Partnerships: Other Jurisdictions

- I. Introduction
- II. Marriage for Same-Sex Partners
- III. Registration for Cohabiting Partners
- IV. Unregistered Cohabitation
- V. Options Providing for Non-Conjugal Partnerships or Relationships

I. Introduction

- 5.01** The purpose of this chapter is to describe how a number of other jurisdictions have legislated for various forms of relationships. Given the short timeframe in which the Group had to complete its work a sample of the countries' schemes considered are presented and only the principal features of these schemes are described.
- 5.02** In recent years, recognition of the rights of unmarried couples, including same-sex couples, has become a public concern in most Western democracies. Depending on their history, culture and their existing legislation, countries have chosen to address this concern in their own ways.
- 5.03** State recognition and regulation of domestic partnerships can take a variety of forms. In recent decades a number of models have arisen, including: the extension of marriage to encompass previously excluded groups, the creation of opt-in schemes, such as partnership registration, or through presumptive schemes where parties to a relationship (having satisfied certain criteria) have a bundle of rights and responsibilities conferred on them by operation of the law.

II. Marriage for Same-Sex Partners

- 5.04** Table 5.1 outlines the changes which have occurred in European countries over the past 30 years in relation to giving legal recognition to same-sex couples from the first legislative recognition of un-registered same-sex partners to the introduction of same-sex marriage in some countries.

Table 5.1 Legislative Recognition of Same-Sex Partner in EU Member States

Country	First legislative recognition of not-registered same-sex partners	Introduction of a form of registered partnership	Joint or second parent adoption by same-sex partner(s) allowed	Opening up of civil marriage to same-sex couples
Netherlands	1979	1998	2001	2001
Spain	1994	Regionally (beginning 1998)	2005 (opened up in some regions before the introduction of marriage as early as 2000)	2005
Belgium	1996	2000	2006	2003
Sweden	1988	1995	2003	Being considered
Denmark	1986	1989	1999	-
Germany	2001	2001	2005	-
United Kingdom	2000	2005	2005 (the Adoption and Children Act 2002 came into force on 30 December 2005)	-
France	1993	1999	-	-
Finland	Before 2002	2002	-	-
Luxembourg	-	2004	-	-
Hungary	1996	Announced	-	-
Slovenia	-	Adopted 2005 (expected to come into force 2006)	-	-
Czech Republic	-	Adopted	-	-
Austria	1998	-	-	-
Portugal	2001	-	-	-
Ireland	1995	-	-	-
Italy	-	-	-	-
Poland	-	-	-	-
Malta	-	-	-	-
Slovakia	-	-	-	-
Latvia	-	-	-	-
Romania	-	-	-	-
Estonia	-	-	-	-
Lithuania	-	-	-	-
Bulgaria	-	-	-	-
Greece	-	-	-	-
Cyprus	-	-	-	-

C. Waaldijk & M Bonini-Baraldi 'Sexual Orientation Discrimination In the European Union: International Laws and the Employment Equality Directive', Asher Press, 2006 pg 83

- 5.04.1** In addition, legislative changes have occurred in relation to the laws applying to same-sex couples in many other non-EU countries including in the United States of America and Australia.
- 5.04.2** In 2001 the **Netherlands** introduced marriage for same-sex partners, which confers the same rights and responsibilities as opposite-sex marriage (except that a married same-sex couple cannot adopt a child from abroad).
- 5.04.3** In 2003, **Belgium** became the second country in the world to introduce marriage for same-sex couples. Same-sex marriage in Belgium confers the same rights and responsibilities as opposite-sex marriage.
- 5.04.4** Initially, Belgian international private law provided that non-Belgian same-sex couples could only be married in Belgium if it was legally recognised in their own country. However, this law changed in 2004 and Belgian residents with a foreign partner or two same-sex foreigners living in Belgium may marry, even if their own country does not recognise the union.
- 5.04.5** Initially adoption by same-sex partners was not permitted in Belgium and as birth within a same-sex marriage did not imply parentage, the same-sex spouse of the biological parent could not become the legal parent. Amending provisions enabling same-sex couples to adopt and legal co-parenting by same-sex couples were introduced in April 2006.
- 5.04.6** In 2005 **Spain** introduced marriage for same-sex couples following Parliament's approval of legislation. Same-sex married partners have all the same rights and responsibilities as opposite-sex married partners including the right to jointly adopt.
- 5.04.7** In 2005, the Federal Government in **Canada** introduced the Civil Marriage Act. The legislation extends equal access to civil marriage to same-sex couples. The Act includes amendments to eight federal laws to put same-sex couples in the same legal position as opposite-sex couples for the purposes of contracting a civil marriage and obtaining a divorce. Court decisions, starting in 2003, had already legalised same-sex marriage in eight out of ten provinces and one of three territories, whose residents comprised about 90% of Canada's population. Before passage of the Act, more than 3,000 same-sex couples had already married in these areas.
- 5.04.8** **South Africa's** Constitutional Court in December 2005 recognised the marriage of two Pretoria women and gave Parliament a year to extend legal marital rights to same-sex couples. On August 24, 2006, South Africa's cabinet approved for submission to the Parliament two alternative draft bills, one of which would create civil unions only for same-sex couples, the other of which would create civil unions for both same-sex and opposite-sex couples. In either case, the drafts provided would not legalise same-sex marriage, but would confer on civil unions all of the rights associated with marriage. The deadline imposed by the South African Constitutional Court will expire on 2 December 2006.⁴⁶

III. Registration for Cohabiting Partners

5.05 Same-Sex Couples Only

In 1989 **Denmark** introduced the Registered Partnership Act, which provides for a civil registration scheme open to same-sex couples only. It grants the same range of protections, responsibilities and benefits as marriage and the one page Act states that all legislation referring to "marriage" or "spouse" be read to include registered same-sex partner. Registered partners

⁴⁶ The South African National Assembly Adopted the Civil Union Bill on 14 November 2006. The Bill will have to be passed by the lower House of Provinces before it is adopted as law.

can adopt the other partner's child but a registered couple cannot adopt other children.

- 5.05.1 Norway** provided for registered civil partnerships for same-sex couples in 1993. Registered couples are provided with almost the full range of protections, responsibilities and benefits as married couples including arrangements for the breakdown of the relationship. The exception is that registered partners cannot adopt children together. However, one of the registered partners may adopt the other partner's child by way of a statutory amendment which came into force in January 2002.
- 5.05.2 Sweden** introduced the 1994 Registered Partnership Act for same-sex couples only. It extends the full range of protections, responsibilities and benefits as marriage to registered partners including arrangements for the breakdown of relationships. Same-sex registered partners can jointly adopt and 'in vitro' fertilisation for lesbian couples was allowed in 2005.
- 5.05.3 Iceland** introduced registered civil partnerships for same-sex couples in 1996. Registered couples are granted almost the same range of protections, responsibilities, and benefits as married couples. Joint custody is permitted where one partner already has custody of the child. Registered partners can adopt the other partner's child unless the child is adopted from a foreign country. There is no provision for joint adoption for registered same-sex partners.
- 5.05.4** In **Finland** Act 950 of 2001 provided for a registration scheme available only to same-sex couples. The Act grants registered couples similar rights and responsibilities as married partners including similar registration and dissolution provisions. In addition, joint custody of a child of one of the partners and immigration rights for foreign partners are allowed.
- 5.05.5** The 2001 Life Partnership Act introduced in **Germany** is available to same-sex couples only. Registered Partners can change their last name and qualify for the same inheritance tax exemptions as married couples. The Act allows for joint custody of a child of whom one partner already has custody, and allows partners to adopt each others' children. It grants recognition of next-of-kin rights, joint eligibility for some social security benefits, tenancy rights, immigration concession for foreign partners and continuing maintenance payment obligations in some circumstances.
- 5.05.6** In 2004 **Switzerland** provided registration for same-sex couples only. Registered couples have the same rights as heterosexual couples in terms of pension, insurance and tax but the legislation does not cover the right to take a partner's name, adopt or undergo fertility treatment.
- 5.05.7** In 2004 the **United Kingdom** introduced the Civil Partnership Act which is available to same-sex partners only. It provides for all the rights and responsibilities of marriage to be afforded to same-sex registered partners except for some minor differences relating to grounds for divorce, and the extension of paternity in relation to assisted human reproduction. Adoption by same-sex couples was permitted under the Adoption and Children's Act 2002 which came into force on 30 December 2005.
- 5.05.8** Registration for same-sex couples introduced in **Slovenia** on 22 June 2005 covers property ownership, obligation to support weaker partner and gives some inheritance rights. It does not cover social security or give next-of-kin status.
- 5.06 Registration for Same-Sex and Opposite-Sex Couples**
In 2004 **Luxembourg** introduced registered partnership for same-sex and opposite-sex couples. Partners register at the local registry

office as with civil marriages. Registering a partnership provides the registered couple with the same fiscal rights as married couples and same rights in relation to welfare benefits.

- 5.06.1 Tasmania** introduced the Relationships Act 2003 which provides for the recognition and registration of two types of relationship - significant and caring. The Act also provides a legislative framework to assist in resolving property and maintenance disputes on the breakdown of a personal relationship. A significant relationship is a relationship between two adults who have a relationship as a couple, are not married, not related and both live in Tasmania. A caring relationship is a relationship between two adults, whether or not related by family, one of whom provides the other with domestic support and personal care. They must not be married to one another, not in an existing significant or caring relationship, not receiving payment for the care of the other (with the exception of the carer allowance under the Social Security Act 1991) and both parties must live in Tasmania.
- 5.06.2 The Netherlands** introduced registration for same and opposite-sex couples in 1998. Registered couples are entitled to the same rights and responsibilities as married partners except for the presumption of paternity, and registered couples cannot adopt children.
- 5.06.3 The 1999 French Civil Solidarity Pact Act** allows for any two domestic partners of same or opposite-sex to register their partnership. Partners commit to mutual and material help and are jointly responsible for household debts by signing a Pact of Civil Solidarity at the District Court. Dissolution is by death or marriage or, after 3 months delay, at the request of either partner. Joint taxation and welfare benefits are available after 3 years of partnership. It is available to non-

French nationals. It does not provide for joint custody and registered partners cannot adopt partners children or jointly adopt unrelated children.

- 5.06.4 In Canada** one example of a scheme is the **Alberta Adult Interdependent Relationships Act 2003** which addresses the legal needs of people involved in committed, unmarried relationships, including some platonic relationships. Adult interdependent partnerships are relationships of at least three years duration or immediate where there is a child of the relationship. Partners may also register a written adult interdependent partnership agreement to benefit from legal recognition of a relationship shorter than three years.

IV. Unregistered Cohabitation

- 5.07** In many countries limited rights for opposite-sex cohabiting couples have been available for some time. In some cases this was done on an incremental basis with legislative reform. In other cases an automatically applicable presumptive scheme was introduced and in one case through a presumptive scheme that only applies when a couple submit a request for the rights granted by the scheme. In many jurisdictions the extension to same-sex couples of the rights granted by these methods of unregistered cohabitation has only occurred in more recent years.
- 5.07.1 In Austria** following the decision of the European Court of Human Rights in the case of *Kaerner v Austria* [2003], cohabiting same-sex partners are entitled to the same rights as unmarried cohabiting opposite-sex partners.
- 5.07.2 In 2003 Croatia** passed a law on same-sex civil union, (no. 01-081-03-2597/2, 14 July) which grants same-sex partners of at least 3 years the

same rights as unmarried cohabiting opposite-sex couples, including inheritance and financial support.

- 5.07.3** In **France** same and opposite-sex couples have very limited rights in such areas as tenancy, immigration and health insurance.
- 5.07.4** In 1996 **Hungary** amended the Civil Code to recognise all couples living together in an economic and sexual relationship. Such couples are given some specified rights and benefits. These rights and benefits are not automatically given but must be applied for in each case, however registration of the partnership is not required.
- 5.07.5** From 1979 onwards in the **Netherlands** same-sex cohabiting partners were increasingly granted the same rights as opposite-sex cohabiting couples in such areas as rent law, social security, income tax, immigration rules, state pension, death duties etc.
- 5.07.6** In 2001 **Portugal** extended the same rights accorded to opposite-sex cohabiting couples to same-sex couples living in a *de facto* union for more than 2 years (“common economy”). The rights include household arrangements, same property regime as married partners, same work benefits if they are civil servants (e.g. location transfer), fiscal status and welfare benefits. These rights are very limited and do not cover most of the rights and benefits associated with marriage.
- 5.07.7** The 1998 Homosexual Cohabitants Act introduced in **Sweden** is a limited tenancy and property Act. Sweden also has a separate and more limited Domestic Partnership Act for both unmarried/unregistered heterosexual and homosexual couples. The Cohabitees Act 2003 applies to same-sex and opposite-sex couples who live together on a permanent basis and who have a joint household, i.e. they share chores and

expenses and have joint financial affairs. The Act contains provision on the joint home and household goods (excluding cars and money) and in doing so provides a measure of protection to cohabitants when their relationship ends. However, the protection provided by the Act is more limited than that which results from marriage (available to opposite-sex couples) and registered partnership (available to same-sex couples). Cohabitants have no right to inherit from one another and are under no obligation to financially support one another.

- 5.07.8** In the **United Kingdom** cohabiting partners have some recognition in law and enjoy a variety of rights including protection from domestic violence, compensation for a partner's fatal accident, tenancy and immigration rights.
- 5.07.9** In **Canada**, the **Alberta** Adult Interdependent Relationship Act 2003 introduced a presumptive scheme for adult interdependent partnerships of at least 3 years duration or immediately where there is a child of the relationship. (See section 5.06.4 for further details)

V. Options Providing for Non-Conjugal Partnerships or Relationships

- 5.08** The **French** Civil Solidarity Pact Act 1999 also applies to non-conjugal partnerships. (See section 5.06.3 for further details).
- 5.08.1** Most **Australian** States have introduced legislation regulating the rights and obligations of those in so-called “*de facto*” relationships. Such legislation typically confers a wide discretion on the court to make orders adjusting property rights in accordance with what is considered “just and equitable” having regard to the contributions (both financial and non-financial) made by the parties to the acquisition, conservation or improvement of the property, the financial

resources and the contributions to the welfare of the other party or of the family.

- 5.08.2** A distinction is drawn between married and unmarried couples. The Court's powers applicable on the breakdown of *de facto* relationships are less wide-ranging than those operative on divorce, as the court does not take account of the parties' future needs. It is essentially involved in a retrospective evaluation of the parties' past contributions. Consistent with this policy, orders for future maintenance are tightly controlled and can only be made in limited circumstances.
- 5.08.3** In 1999, **New South Wales** widened the scope of its *de facto* relationship legislation so that it also applies to regulate "domestic relationships" between two unmarried adults where one or both provide domestic support and personal care for the other, but where there is no sexual intimacy.
- 5.08.4** The **Tasmania** Relationships Act 2003 also applies to non-conjugal partners in a caring relationship. (See section 5.06.1 for further details).
- 5.08.5** With effect from 1 February 2002, *de facto* relationships in **New Zealand** are treated on the same basis as married couples for the purposes of property division on separation or death under the provisions of the Property (Relationship) Act. In most cases, the relationship must have lasted for at least three years. While there is provision for parties to a *de facto* relationship to contract out of the statutory regime, where they do not, the legislation equates the rights and obligations of unmarried couples (both opposite-sex and same-sex) to those of married couples. The court may therefore make orders adjusting the property rights of the parties at its discretion whether or not the couple is married.
- 5.08.6** In **Canada**, the Alberta Adult Interdependent Relationship Act 2003 also applies to non-conjugal relationships. (See section 5.06.4 for further details)
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6

Options for Opposite-Sex Partnerships and Possible Consequences of Legal Recognition

- I. Introduction
- II. Contractual Arrangements
- III. Presumptive Scheme
- IV. Limited Civil Partnership
- V. Full Civil Partnership
- VI. Legislative Review and Reform

I. Introduction

- 6.01** For opposite-sex couples, the option of civil marriage is provided by the State as the means for couples to regulate the myriad range of rights and responsibilities arising from their relationship while also bestowing legal recognition and status on that relationship and on any children of that relationship. In some states, other options are also available to opposite-sex couples including various forms of civil registration which extend all (e.g. New Zealand), almost all (Netherlands) or some (Luxembourg) of the package of marriage rights and responsibilities to registered partnerships. Many states have so-called presumptive schemes in place (Austria, Australia, Canada, France, Hungary, the Netherlands, Portugal, Spain, Sweden, the UK and the United States), sometimes in tandem with registration schemes (Alberta, Canada) with the legal consequences for the partners varying from state to state.
- 6.02** There has been little quantitative sociological study of the phenomenon of cohabitation in Ireland. For some, cohabitation is a precursor to marriage. For others it is an alternative. Still more may cohabit because marriage is not an option as one or other of the couple is still legally married to another person.
- 6.03** In general, with the exception of some recent statutes, the law does not give recognition to unmarried cohabiting couples. As a result, cohabiting unmarried partners do not have the degree of legally enforceable rights and duties to each other or the level of benefits from the State that are available to married couples.
- 6.04** Unlike marriage, on the break-up of a cohabiting relationship one of the partners is frequently vulnerable to potentially serious consequences including homelessness and loss of income without recourse to the protection of the law. Children in such relationships bring another dynamic to that relationship and, even though there are protective measures in place, the economic vulnerability of the primary carer may impact on the children. The vulnerability of one partner on the break-up of the relationship is compounded if the vulnerable partner is the primary carer of the children. Notwithstanding that children have existing statutory rights irrespective of their parents' status (whether married or cohabiting), for example in relation to maintenance and access, practical difficulties arise for children on the break-up of their parents' relationship.
- 6.05** Having regard to its terms of reference, the Working Group considered the following five options for opposite-sex partnerships, each of which is explored in detail in parts II to VI of this chapter :
- contractual arrangements
 - presumptive scheme
 - limited civil partnership (a registration scheme)
 - full civil partnership (a registration scheme)
 - legislative review and reform
- 6.06** These options are not mutually exclusive. The Working Group believes that a combination of a number of options is required to adequately address the range of issues of concern to cohabiting couples taking into account their different circumstances and preferences.
- 6.07** Given that significant issues of concern with respect to opposite-sex partners arise in relation to property and financial affairs, which may be regulated by means of contracts enforceable in the courts, the Working Group is of the view that contractual arrangements currently offer an important option for cohabiting couples to regulate matters. The Working Group recognises that many couples will never make such contracts
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for diverse reasons (for example: their being unaware of the legal consequences of unregulated relationship; unwillingness of one or both to make any formal commitment; one or other party being already married; intended transient nature of the relationship). As a result, vulnerable partners in unregulated relationships enjoy little, if any, legislative protection at present and the consequences, financial and otherwise, at the end of a long relationship owing to death or break-up may be catastrophic. In view of this the Working Group agrees with the Law Reform Commission proposal, in its April 2004 *Consultation Paper on the Rights and Duties of Cohabitees*, for a presumptive scheme while at the same time encouraging cohabitants to regulate their property and financial affairs by means of co-ownership agreements and contracts. Co-ownership agreements are commonly made as a matter of course when property is jointly purchased in other jurisdictions and this practice should be encouraged in this jurisdiction.

- 6.08** In its focus on this category the Working Group was mindful of the fact that, unlike other domestic partnerships, opposite-sex couples already have available to them the choice of civil marriage, with all its attendant rights and obligations, including constitutional protection. Even where the option of marriage is not currently available because one of the partners remains married to someone else, this can be remedied by obtaining a divorce, which the State now makes available. In this context, and taking account of the constitutional protection afforded to marriage, the Working Group formed the view that a registration scheme which accords the full set of legal consequences attached to marriage (which the Group has termed “Full Civil Partnership”) would be both unnecessary and vulnerable to constitutional challenge.
- 6.09** Unlike full civil partnership, the option of limited civil partnership described in part IV of this chapter, which would entail a registration scheme according some of the legal consequences of marriage to the couple, would offer an alternative to marriage for cohabiting couples who do not wish to make the full marriage commitment to each other for whatever reason. limited civil partnership, as presented, offers all of the rights and responsibilities that would flow from a presumptive scheme with some additional benefits consequent on the formal registration of the partnership. However, the rights and responsibilities associated with the presumptive scheme and limited civil partnership are restricted owing to the fact that civil marriage is an available option for opposite-sex couples.
- 6.10** While the Working Group found some research data on cohabitation, it mostly related to experience outside this State, with some recent, but not comprehensive nor long term, research emerging on the situation in Ireland. The Group therefore also suggests the commissioning of a comprehensive study of cohabitation in Ireland with a view to informing a review of the relevant legislation to identify where reforms may be required.
- 6.11** The Working Group considered the position of extra-marital cohabiting couples (i.e. where one of the couple is married to another person). While it is not possible to accord legal status to these second relationships, issues of vulnerability may arise which may be addressed as part of any future legislative review and reform.
- 6.12** In examining options for opposite-sex couples the Working Group was also very mindful of the implications for children in such cohabiting relationships, whether they be children of both partners, of one of them or of neither (i.e. fostered children). The Working Group noted that existing legislative provisions require the child's
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welfare to be the first and paramount consideration. As legislative provisions already exist for guardianship and custody of, access to and maintenance for children, irrespective of the marital status of their parents, the Working Group has not put forward child related proposals in these respects.

6.13 The Working Group examined a number of issues regarding the relationship between cohabiting couples and their children as set out below:

- The Working Group considered the question of extending a right to apply for guardianship to a registered partner who has no biological connection with their partner's child. This was believed to raise a number of potential legal difficulties. The Department of Health and Children in a 2005 report *Adoption Legislation: 2003 Consultation and Proposals for Change* deferred making proposals regarding unmarried cohabitants in relation to adoption and guardianship, stating that such provision should “await a change in the rights of cohabiting couples”.⁴⁷
- The Working Group also considered the issue of presumption of paternity, as provided for in section 46 of the Status of Children Act 1987 and whether it should be extended to include civil partners.
- The Group considered other issues relating to children and the possibility of new rights for children with respect to non-biological parents.

6.14 These are complex areas. The Working Group considered that a comprehensive review of existing law would be required to inform policy decisions in this area. Such a review is beyond the scope of the Working Group's Terms of Reference.

II. Contractual Arrangements

6.15 The contractual approach leaves the cohabiting couple free to choose to regulate some aspects of their relationship by way of contract governed by contract law, enforceable through the courts, such as jointly owned property or financial assets. It is currently open to opposite-sex couples to regulate areas of their relationship by means of a private contractual arrangement, most notably in property and financial matters.

6.16 Legal Consequences:

Contracts which relate only to assets, finance and such practical matters (e.g. the joint ownership of a house or shared bank account) may be recognised and enforced by the courts, for example, by way of co-ownership agreements whereby two (or more) people own property (in common) concurrently and which set out the beneficial interests of the parties, and provide the mechanisms for exiting such agreements. Cohabiting couples or individuals entering such contracts should be independently advised.

6.16.1 In the case of *Ennis v. Butterly*⁴⁸ the High Court ruled that cohabitation contracts are incapable of being enforced under Irish Law where such contracts are based on a requirement that the couple live as man and wife, as such contracts are seen as undermining the special position of marriage under the Constitution. It is unclear to what extent the decision in the *Ennis v Butterly* ruling would apply to contractual agreements which are not based on a requirement to live as husband and wife.⁴⁹ The agreement in that case was not a written contract or deed. Kelly J. considered that the terms of the agreement, the consideration for which was cohabitation, were incapable of being enforced. However, he went on to state that it would be contrary to the Constitution to confer legal rights on persons in non-marital unions akin to those who are

⁴⁷ Department of Health and Children: *Adoption Legislation: 2003 Consultation and Proposals for Change*, Government Publications 2005, pg. 19

⁴⁸ [1997] 1 ILRM 28 (HC).

⁴⁹ Law Reform Commission: *The Rights and Duties of Cohabitees*, LRC Dublin, 2004 para. 3.23, pgs. 38 - 39.

married. It could be argued that this statement is *obiter dictum* as the decision was founded on the agreement '*to live as a wife might*'. Kelly J. found it to be an attempt to enforce a contract the consideration for which was '*wifely services being rendered on the part of a mistress*'. Current law on the right to spousal maintenance does not, of course, require cohabitation or the performance of spousal duties.

- 6.16.2 Without a joint ownership agreement or a valid will, the non-owning cohabiting partner may have no legal claim on a property on the death of the owning partner regardless of the period of time they resided in the property together. If a property is purchased by them, in-common, rather than as joint tenants, and no will is made, the share of the property held by the deceased will revert to the estate under succession law, usually to the family of the deceased, who could force a sale to realise their share of the property.

6.17 Comment

Cohabiting couples in conjugal relationships may regulate their affairs by contract in particular in relation to property and other assets. Contractual arrangements may include a wide area of property and financial matters including ownership of a property, shares in a property, payment of the mortgage, consequences of non-payment, the option to buy out the property, contributions to the household outgoings, liability for household expenses and clarification of the rights of each party to reside in the property. If the agreement is not predicated on '*a mistress providing wifely duties*' it is hard to see how this would be unenforceable. Couples may regulate any aspect of their relationship by executing a deed, including for example financial provision by one to the other. Of course, there would be obvious tax consequences with either of these approaches.

- 6.17.1 The Working Group is of the opinion that the benefits of making a will and the consequences of not doing so should be highlighted to encourage people, especially cohabitants, to ensure their assets are distributed on death in accordance with their wishes.
- 6.17.2 While it is a positive step for any cohabiting couple to regulate their shared assets, it should be noted that this option will not always provide the required protection for the vulnerable dependent party for whom future provision may not be made. Children of cohabitants, where those cohabitants have chosen to regulate their relationship by means of a contract, will continue to have rights against both parents in terms of care and maintenance. Any provisions affecting those rights in relation to either existing or future children would be open to review by a court and could be unenforceable if included in a contractual agreement. However, cohabiting couples who have children should be encouraged to consider making a statutory declaration under the Guardianship of Infants Act 1964 appointing the father as a guardian of his child.
- 6.17.3 The Group is of the opinion that the contractual option, which may be combined with other options including a presumptive or limited civil partnership scheme, would offer cohabiting opposite-sex couples the possibility of regulating their relationship to suit their circumstances and give them a measure of legal protection and recognition.

III. Option of a Presumptive Scheme

- 6.18 In proposing the presumptive scheme the Working Group followed generally, but not entirely, the approach elaborated by the Law Reform Commission in its April 2004 *Consultation Paper on the Rights and Duties of Cohabitees*. The presumptive scheme is designed to protect

the vulnerable dependent partner in a relationship in the absence of any other formal recognition of that relationship. It would apply at the end of a relationship either through the death of one of the partners or the breakdown of the relationship. At the end of the relationship it would be open to either partner to make an application to court for relief under the provisions of the presumptive scheme with each case being considered on its own merits.

- 6.19** Persons in cohabiting relationships would need to be aware of the existence and legal consequences of a presumptive scheme. It would be essential that the introduction of a presumptive scheme would be preceded by a widespread information campaign to ensure cohabiting couples were informed of their new legal situation and of the need to prove a joint contrary intention if they do not wish the provisions of the scheme to apply to them. It should be noted that any agreement entered into by a cohabiting couple to show a contrary intention would be governed by the same legal protections that apply to contracts, particularly in relation to free and informed consent.
- 6.20** Under the Law Reform Commission scheme, as proposed in 2004, qualified cohabitants are persons who, although not married to each other (or to anyone else), live together in a marriage like relationship for a continuous period of three years, or where there is a child of the relationship for two years. In the event that civil registration of cohabiting relationships is introduced in the State, a person registered under a civil registration scheme would not qualify under the proposed presumptive scheme. In a significant point of departure from the approach taken by the Law Reform Commission in its Consultation Paper, the Working Group suggests that, where there is a child of a cohabiting relationship, the presumptive scheme should take effect immediately on the birth of that child.

- 6.21** The legal consequences of a presumptive scheme would be to impose certain rights and duties on qualified cohabitants in a wide range of areas including property, succession, maintenance, social welfare, taxation, pensions and health care. The legal consequences are narrower than those in part IV of this Chapter. In the Working Group's approach, couples who register their union under a limited civil partnership scheme, thereby making a public commitment, would benefit from and be subject to a wider range of rights and duties towards each other.

- 6.22** Under a presumptive scheme, couples living together for a specified period would automatically acquire rights and responsibilities towards each other unless they can prove an intention to exclude themselves from such a scheme. In addition, cohabitants would be free to regulate their property and financial business by means of a contractual agreement as outlined in chapter 6, part II above.

- 6.23** The Working Group is of the view that persons who qualify under the proposed presumptive scheme would have the following set of rights and duties:

6.23.1 Property Rights

- Qualified cohabitants should be entitled to apply to court for the right to reside in the couple's home, to the exclusion of the other partner, in exceptional circumstances.

6.23.2 Succession Rights

- The establishment of a discretionary relief allowing a bereaved qualified cohabitant to apply to the Court to argue that proper provision has not been made for him or her in the deceased's will, or on intestacy. This would be similar to an application under s.117 of the Succession Act 1965 (such applications must be made within 6 months of the first taking out of representations to the deceased estate).

- The amendment of Order 79 of the Rules of the Superior Courts to allow a qualified cohabitant to extract a grant of administration intestate, or a grant of administration with will annexed, to the estate of their deceased partner at the discretion of the Probate Office and on production of such proofs as may be required. A qualified cohabitant should be placed above siblings of the deceased in the list of persons entitled to extract such grant.

6.23.3 Maintenance Rights

- The extension to the Courts of a discretionary power to award compensatory maintenance to one of the partners in exceptional circumstances where it considers it just and equitable to do so. A limitation period of one year from the date of the break-up of a relationship should apply to this.
- Where there are children of the relationship and in a context where there is no ongoing maintenance for the custodial parent, the Court should also take into account the child rearing costs incurred by the custodial parent when making a maintenance order under the Family Law (Maintenance of Spouses and Children) Act 1976.

6.23.4 Social Welfare

- The retention of the current arrangements for cohabitants under the social welfare code.

6.23.5 Pensions

- There should be no change to the current law regarding private sector pensions, as many schemes already give discretion to trustees to benefit cohabitants.
- The amendment of public service spouses and children schemes to allow for the payment of a survivor's pension to a financially dependent partner in circumstances where there is no legal spouse and where a person nominates a cohabiting partner as a beneficiary.

- The Working Group believes, and is in agreement with the Law Reform Commission, that pension adjustment orders, which are currently available on marital breakdown, should not apply to qualified cohabitants on the break-up of their relationship.

6.23.6 Taxation

- The Working Group is not proposing any change to the treatment of qualified cohabiting couples for income tax purposes nor does it favour any change to the law governing capital gains tax.
- The Working Group does not propose extending to unregistered cohabitants the benefits in relation to capital acquisition tax and stamp duty, which the Group suggests in part IV of this Chapter should accrue to registered limited civil partners.

6.23.7 Health and Other Miscellaneous Issues

- The inclusion of cohabitants within the category of persons, mentioned in the Medical Council Guidelines, with whom a doctor should confer when treating a seriously ill patient who is unable to communicate or understand.
- The Powers of Attorney Act 1996 should not be amended to include qualified cohabitants as mandatory notice parties for the purposes of an enduring power of attorney. (Cohabitants can currently be appointed attorneys but are not within the relevant category of persons who must be notified if the enduring power is to be activated and registered in the High Court.)
- The extension of section 47(1)(c) of the Civil Liability Act 1961 (as amended) which deals with civil actions for wrongful death, to include qualified cohabitants within the definition of dependents.
- Access to medical information and records is governed by the contract between a patient and their medical practitioner, and the Data Protection Acts 1988-2003, the Freedom of Information Acts

1997 and 2003, and by discovery in court proceedings. The Medical Council guidelines state that information must not be disclosed to any person without the consent of the patient. The Working Group is of the view that there should be no change to the present position as regards access to medical records, which provisions apply equally to spouses.

6.23.8 Child Issues

- Adoption: The Working Group is of the view that the eligibility that married couples have to jointly adopt should not be extended to qualified cohabiting couples. However, while the eligibility to be considered for adoption should not be extended to qualified cohabitants as a couple, it should be noted that single people are eligible to be considered for adoption. Accordingly, it is possible for one of the partners in a cohabiting relationship to apply to adopt a child under the current rules.

6.23.9 Immigration

- Immigration rights would not automatically apply to persons qualified as cohabitants under the presumptive scheme. Immigration rules are currently provided for in specific legislative and administrative procedures and these should continue to apply to foreign nationals who come within the scope of a presumptive scheme.

6.23.10 Testifying against a partner

- Section 3 of the Evidence (Amendment) Act 1853 provides that a spouse cannot be compelled to give evidence in a civil case of any communication made to the other spouse during the course of their marriage. Section 22 of the Criminal Evidence Act 1992 provides that the spouse of an accused is generally not compellable to give evidence in a criminal case at the suit of the prosecution. There are however a number of exceptions to this general rule such as sexual offences, violence or threat of violence,

when the crime is perpetrated against the spouse or child of the spouse or a crime committed against any person under the age of 17. The Group does not recommend that qualified cohabitants would come under the scope of the 1853 or 1992 Act.

6.23.11 Debts

- Responsibility for a partner's debts would not be extended to qualified cohabitants.

6.24 Comment

The presumptive scheme, as envisaged by the Working Group, addresses the difficulty of balancing individual autonomy with the need to protect vulnerable dependent people. Unless there is evidence of a contrary intention of both parties, couples deemed to be qualifying cohabitants might assume obligations towards each other at the end of the relationship (e.g. in respect of property and pensions) which they never intended should flow from their cohabitation. The Working Group is of the view that the proofs necessary to show a contrary intention of both parties would need to be clearly demonstrated.

- 6.24.1 These provisions differ from the proposed Law Reform Commission scheme for a number of reasons. In particular a higher level of evidential proof is considered necessary to properly administer some of the provisions excluded from this proposal, but which are included in the Law Reform Commission scheme. In addition, couples should be free to choose to register their relationship and make a public commitment, which includes signing up to a limited range of rights and responsibilities that go beyond the provisions of the presumptive scheme. Such a registration scheme would be made available under the terms set out in Part IV of this Chapter. Not all cohabiting couples will want to make a public commitment that will extend rights and

responsibilities beyond those contained in the presumptive scheme, whereas other couples will wish to register their partnership without automatically acquiring all the rights and responsibilities that come with marriage. Setting the presumptive scheme as the base line offering protection for vulnerable dependent partners combined with limited registered civil partnership is a pragmatic and realistic approach to offering cohabiting couples protection while providing a means for public recognition of the relationship for those who want it. Implementing either option on its own would leave a considerable gap in the level of protection offered to cohabiting couples.

- 6.24.2** The Working Group's model of the presumptive scheme, in conjunction with limited civil partnership would allow couples to register their relationship at any time and, failing to do so, the presumptive scheme would apply after three years, or immediately where there is a child of the relationship.
- 6.24.3** The current social welfare code treats cohabitants as couples once that relationship has been verified by the Department of Social and Family Affairs, while the proposed presumptive scheme would not take effect until the requisite period has elapsed. The introduction of a presumptive scheme would not change the operation of the social welfare code.

IV. Option of Registering a Limited Civil Partnership

- 6.25** Limited civil partnership entails the State introducing a statutory civil registration scheme, which extends a certain status and a limited selection of the rights and duties of marriage to cohabiting couples who choose to register their partnership. The parties must not be married or in

an existing registered partnership and must not come within the prohibited degrees of relationship.⁵⁰ Limited civil partnership must be an exclusive union between two people aged 18 years or more.

- 6.26** The Working Group's rationale for putting forward the limited civil partnership option for cohabiting opposite-sex couples flows from the requirement in its terms of reference to consider the categories of partnerships outside of marriage to which legal effect and recognition might be accorded. A limited civil partnership scheme would provide legal recognition and status for those cohabiting opposite-sex couples unwilling to enter into or opposed to marriage. It would provide some protection for vulnerable persons in cohabiting relationships at the end of the relationship on break-up or death.
- 6.27** The legal consequences of registering a limited civil partnership for the parties extend to those limited elements of family law required to protect vulnerable interdependent parties as set out in the presumptive scheme in part III of this chapter with some additional provisions. Effectively this is an opt-in version of the presumptive scheme, but with some further elements. The limited civil partnership scheme also allows cohabiting partners who register to make a public commitment towards each other.
- 6.28** The following measures apply in a limited civil partnership scheme to give effect to the requisite set of rights and duties (The proposals in italics are additional to the presumptive scheme measures presented in part III of this Chapter):
- 6.28.1 Property Rights**
- Limited civil partners (registered partners) should be entitled to apply to court for the right to reside in the couple's home, to the exclusion of the other partner, in exceptional circumstances.

⁵⁰ Prohibited degrees of relationship for marriage are listed in the Marriage Acts 1537, 1835, 1907 & 1921 and include various Blood Relationships and Relationships by Marriage.

- *Registered partners should be entitled to make an application to court, following the dissolution of the partnership, for a property adjustment order in exceptional circumstances, and to apply for the right to reside in the home until the property adjustment application is decided.*
- *In considering whether a property adjustment order should be granted by a court, the following factors would be relevant: the financial and non-financial contributions made directly or indirectly by or on behalf of the parties in the relationship to the acquisition; conservation or improvement of any of the property of the parties, or to the financial resources of the parties; and the contributions made by either of the parties to the relationship to the welfare of the other party to the relationship, or to the welfare of the family. A registered partner must issue any such proceedings within one year from the date of dissolution of the relationship.*
- *The extension of the provisions of the Family Home Protection Act 1976 with respect to the domestic residence of a couple who have registered a limited civil partnership.*

6.28.2 Succession Rights

- The establishment of a discretionary relief allowing a bereaved registered partner to apply to the Court to argue that proper provision has not been made for him or her in the deceased's will, or on intestacy. This would be similar to an application under s.117 of the Succession Act 1965 (such applications must be made within 6 months of the first taking out of representations to the deceased estate).
- The consequential amendment of Order 79 of the Rules of the Superior Courts to allow a limited civil partner to extract a grant of administration intestate, or a grant of administration with will annexed, to the estate of their deceased partner

at the discretion of the Probate Office and on production of such proofs as may be required. A registered partner should be placed above siblings of the deceased in the list of persons entitled to extract such grant.

6.28.3 Maintenance Rights

- The extension to the Courts of a discretionary power to award compensatory maintenance to one of the partners in exceptional circumstances where it considers it just and equitable to do so. A limitation period of one year from the date of the break-up of a relationship should apply to this.
- Where there are children of the relationship and in a context where there is no ongoing maintenance for the custodial parent, the Court should also take into account the child rearing costs incurred by the custodial parent when making a maintenance order under the Family Law (Maintenance of Spouses and Children) Act 1976.

6.28.4 Social Welfare

- The retention of the current arrangements for registered partners under the social welfare code.

6.28.5 Pensions

- There should be no change to the current law regarding private sector pensions, as many schemes already give discretion to trustees to benefit cohabitants.
- The amendment of public service spouses and children schemes to allow for the payment of a survivor's pension to a financially dependent partner in circumstances where there is no legal spouse and where a person nominates a limited civil partner as a beneficiary.
- The Working Group believes, and is in agreement with the Law Reform Commission, that pension

adjustment orders, which are currently available on marital breakdown, should not apply to limited civil partners on the break-up of their relationship.

6.28.6 Taxation

- The Working Group is not proposing any change to the treatment of registered partners for income tax purposes nor does it favour any change to the law governing capital gains tax.
- *Registered partners would be placed in Group Threshold I for Capital Acquisitions Tax.⁵¹ Cohabiting couples are already exempt from CAT in respect of the principal residence they shared with, and either inherited or received by way of a gift from, their partner, under certain conditions.*
- *The entitlement of registered partners to the same relief as 'related' persons for the purposes of stamp duty (50% relief).*
- *The above two reliefs should be subject to anti-avoidance and appropriate clawback provisions.*

6.28.7 Health and Other Miscellaneous Issues

- The inclusion of registered partners within the category of persons, mentioned in the Medical Council Guidelines, with whom a doctor should confer when treating a seriously ill patient who is unable to communicate or understand.
- The Powers of Attorney Act 1996 should not be amended to include registered partners as mandatory notice parties for the purposes of an enduring power of attorney. (Cohabitants can currently be appointed attorneys but are not within the relevant category of persons who must be notified if the enduring power is to be activated and registered in the High Court.)
- The extension of section 47(1)(c) of the Civil Liability Act 1961 (as amended) which deals with

civil actions for wrongful death, to include limited civil partners within the definition of dependents.

- Access to medical information and records is governed by the contract between a patient and their medical practitioner, and the Data Protection Acts 1988-2003, the Freedom of Information Acts 1997 and 2003, and by discovery in court proceedings. The Medical Council guidelines state that information must not be disclosed to any person without the consent of the patient. The Working Group is of the view that there should be no change to the present position as regards access to medical records, which provisions apply equally to spouses.

6.28.8 Child Issues

- Adoption: The Working Group is of the view that the eligibility that married couples have to jointly adopt should not be extended to registered partners. However, while the eligibility to be considered for adoption should not be extended to registered partners as a couple, it should be noted that single people are eligible to be considered for adoption. Accordingly, it would be possible for one of the partners in a limited civil partnership to apply to adopt a child under the current rules.

6.28.9 Immigration (resident permit, citizenship)

- *A limited civil partnership can be offered as proof of a durable relationship for immigration purposes under the EC Free Movements of Persons Directive.⁵²*

6.28.10 Testifying against a partner

- Section 3 of the Evidence (Amendment) Act 1853 provides that a spouse cannot be compelled to give evidence in a civil case of any communication made to the other spouse during the course of their marriage. Section 22 of the Criminal Evidence Act 1992 provides that the spouse of an accused is generally not

51 This would mean that a registered partner would be entitled to receive aggregated benefits from their partner up to a maximum amount of €478,155. (This is the current threshold amount which is increased annually by reference to the consumer price index.)

52 Council Directive 2004/38/EC.

compellable to give evidence in a criminal case at the suit of the prosecution. There are however a number of exceptions to this general rule such as sexual offences, violence or threat of violence, when the crime is perpetrated against the spouse or child of the spouse or a crime committed against any person under the age of 17. The Group does not recommend that registered partners should come under the scope of the 1853 or 1992 Act.

6.28.11 Debts

- Responsibility for a partner's debts would not be extended to registered partners.

6.28.12 Domestic Violence

- *Couples registered under a limited civil partnership scheme would be treated as spouses for the purposes of domestic violence legislation.*

6.28.13 Dissolution

There are two aspects to the dissolution of a limited civil partnership. One is establishing when the relationship ceases to exist, and the second is the financial or property settlement, if any, following the break-up of the relationship. The Working Group proposes that an immediate dissolution of the relationship would take effect if both parties agree. If there is no such agreement, the dissolution would take effect after three months from notice being given by one party to the other and the registration of such notice. This three month period is for the partners to reflect and allow them to consider and if possible reach agreement, or begin the process of reaching agreement on a settlement. This timeframe reflects the restricted nature of limited civil partnership. The Courts should not be involved in making decisions on whether there has been a dissolution of the relationship or not, only in determining the material relief after dissolution. An application to court for relief must be brought within one year from the date of dissolution.

6.29 Comment

The more comprehensive a scheme of limited civil partnership is, i.e. the closer to marriage in the rights and duties flowing from it, the more open to constitutional challenge it becomes. If the responsibilities of limited civil partnership are less than those of marriage and full civil partnership then the rights associated with it must also be less.

6.29.1 The Working Group suggests that the limited civil partnership scheme has merit as it allows cohabiting couples to choose to sign up to a range of rights and duties towards each other with immediate effect. Alongside this a presumptive scheme is, in effect, a safeguard measure to protect vulnerable unregistered partners when a relationship ends.

6.29.2 The fundamental difficulty with limited civil partnership is deciding where to strike the balance of rights and responsibilities along the continuum of legal consequences, from the full set of family law provisions to the presumptive model set which acts as a base-line to protect vulnerable partners at the end of the relationship.

6.29.3 The option of limited civil partnership offered in conjunction with a presumptive scheme maintains a level of protection for the vulnerable dependent partner where a relationship has not been registered. This would allow couples register their relationship at any time and failing to do so could result in the presumptive scheme taking effect after three years or immediately where the couple have children.

6.29.4 The Group believes that limited civil partnership as outlined above is sufficiently different from marriage that its vulnerability to constitutional challenge is reduced.

IV. Option of Full Civil Partnership

- 6.30** Full civil partnership entails the State introducing a civil registration scheme which extends the full range of rights and duties of marriage to cohabiting couples who choose to register their partnership. The parties must not be married or in an existing registered partnership and must not come within the prohibited degrees of relationship. Full civil partnership must be an exclusive union between two people aged 18 years or more. The notification and other formalities before registration are the same as those for civil marriage. The partnership must be formally registered in the same way as civil marriage. Full civil partnership can only end on death or dissolution by a court and dissolution would be subject to the same requirements as divorce.
- 6.31** The legal consequences for the parties extend to all the elements of marriage and family law including both public and private law and parental responsibilities. The legal rights and responsibilities of registered partnerships are the same as those of civil marriage but without the benefit of constitutional protection.
- 6.32 Comment**
Full civil partnership would have the benefit of according status and recognition to cohabiting couples. However, full civil partnership is already available to opposite-sex couples in the form of civil marriage. There are no obvious additional benefits to introducing an alternative to marriage in the form of a civil registration scheme for cohabiting opposite-sex couples, apart from offering a marriage-identical commitment without the marriage title to those couples who may object to marriage *per se*. Introducing an alternative which is equivalent or closely analogous to marriage for opposite-sex couples is vulnerable to constitutional challenge on the

ground that it constitutes an attack on the institution of marriage by providing a competing institution.

- 6.32.1** Ostensibly there may be public policy reasons for making an option not called marriage available to opposite-sex couples because it introduces the possibility of greater legal certainty and protection for those not willing to marry. Nevertheless, the Working Group is not convinced that there are many cohabiting opposite-sex couples who are unwilling to marry but may be willing to enter a registration scheme which has all the attendant obligations of marriage.
- 6.32.2** The Working Group is particularly conscious of children's welfare and their rights within a family unit not based on marriage. Children retain rights as against their parents regardless of the type of family unit. However, the Group recognises that a civil partnership scheme would confer on such a family a formal status not currently available, which would have psychological and social status advantages.
- 6.32.3** Notwithstanding the private benefit to a couple of introducing such a scheme, the fact that it may be seen as an attack on the constitutional position of marriage means that it is unlikely to be proposed as a viable legislative option.

VI. Legislative Review and Reform

- 6.33** The Working Group also suggests the commissioning of a comprehensive study of cohabitation in Ireland with a view to informing a review of relevant legislation, to identify where reforms may be required to address issues relating to cohabiting opposite-sex couples, including those issues outlined in Chapter 2. This may be an efficient and effective manner in which to deal with many of the issues facing cohabiting couples and could inform and address

any issues not addressed by the previous options set out in this report.

- 6.34** Incremental legislative changes have been made over the past twenty years to address issues relating to cohabiting opposite-sex couples. This process of legislative change should in the future include a process of proofing all new family legislation for its impact on cohabitants, where this is relevant.
- 6.35** Legislative review and reform could address many issues which came to the attention of the Working Group during the course of its work. In particular, significant issues arose in relation to

the situation of the many children now in non-marital families, including legal guardianship and adoption. Another issue relates to transsexuals who are unable to marry in the gender with which they identify. There are also issues of vulnerability for cohabiting couples where one of them is married to another person. However, the option of legislative review and reform is not put forward as an option alternative to the other options outlined in this paper but should be considered in tandem with them.

7

Options For Same-Sex Partnerships and Possible Consequences of Legal Recognition

- I. Introduction
- II. Marriage
- III. Full Civil Partnership

I. Introduction

- 7.01** Same-sex couples have no opportunity to attain formal state or societal accreditation for their relationships with the legal recognition, status and social acceptance that flows from these. Unlike for opposite-sex couples, a wide range of the benefits, protections and duties towards one another, consequent on a committed relationship, cannot be attained in a same-sex relationship.
- 7.02** Opposite-sex couples have the right to choose to marry, thereby formalising their relationship in the eyes of the State and society, to take on all the attendant obligations of marriage towards each other and to benefit from the protection of family law. This recognition, status and protection has the full support of the Constitution. Same-sex couples lack recognition and status and their relationships have little protection before the law, except to a very limited degree by way of private contract arrangements and some very limited provisions in capital taxation law.
- 7.03** Lack of state recognition has important implications for the status and standing of same-sex families and for lesbian, gay and bisexual people more generally, contributing to a perception that their relationships lack value and meaning and are unequal to others. It also has direct consequences for same-sex families, because they are excluded from the protections and legally enforceable obligations that are available to opposite-sex families through civil marriage. These legal exclusions not only impact on the financial resources available to support family life, but can contribute to separation and loss for the individuals involved. Especially important in this respect are the difficulties experienced by same-sex couples co-parenting children who do not have the opportunity for establishing a joint legal connection with these children.
- 7.04** Irish society has changed hugely in recent decades in terms of attitude to and understanding of homosexuality. There has been considerable policy and legislative development at national and European level in the area of recognition and also in the prohibition of discrimination. This includes the Employment Equality Acts 1998 and 2004, the Equal Status Acts 2000-2004, the equality infrastructure established under this legislation, Article 13 of the Treaty establishing the European Community, the Framework Employment Directive and developing case-law on the interpretation of the European Convention on Human Rights. While there has been a significant and favourable progression in Government policy, much more remains to be done and the Working Group is part of this progression. According to An Taoiseach Bertie Ahern, T.D.:
- “Our sexual orientation is not an incidental attribute. It is an essential part of who and what we are. All citizens, regardless of sexual orientation, stand equal in the eyes of the law. Sexual orientation cannot, and must not, be the basis of a second-class citizenship. Our laws have changed, and will continue to change to reflect this principle.”***⁵³
- 7.05** It can certainly be argued that the achievement of this equality of citizenship requires the provision of an option for same-sex couples to choose to make a legally binding commitment in an institution which has all the features and consequences of civil marriage, and which has the benefit of constitutional protection.
- 7.06** To address this issue, five jurisdictions (Netherlands, Belgium, Canada, Spain, Massachusetts USA) have to date extended the right to marry to same-sex couples conferring all, or virtually all, the rights and responsibilities of marriage. In both Canada and Massachusetts the

53 Speech by An Taoiseach, Bertie Ahern T.D. at the official opening of the new offices of the Gay and Lesbian Equality Network (GLEN), April 2006.

extension of marriage to same-sex couples came about as a result of court judgments in equality cases. Similarly, South Africa's Supreme Court has placed a deadline of 2 December 2006 for the granting of marriage rights to gay and lesbian people. A number of other countries have introduced new forms of civil registration for same-sex couples extending to them the full set of marriage rights and duties.⁵⁴

- 7.07** In choosing to either open-up marriage or introduce civil registration, each country is faced with its own unique legal, political and social environment. In Ireland our own set of legal, political and social considerations arise in addressing this issue.
- 7.08** The Irish Constitution does not define marriage. However, it has consistently been interpreted as having been founded on the understanding that marriage is the union of one man and one woman. Judicial interpretation can evolve with societal change. In view of existing and recent case law, the Group believes that extending civil marriage to same-sex couples is likely to be vulnerable to constitutional challenge. The first case to be heard on this specific issue came before the High Court in October 2006 and a judgment is awaited.⁵⁵
- 7.09** The option of civil registration, as in the UK, offers same-sex couples the opportunity to formally register their relationship in the same manner as civil marriage for opposite-sex couples, under the same conditions and with the same consequences with respect to their respective rights and duties towards each other, and with respect to the State and its laws.
- 7.10** In common with opposite-sex couples, not all same-sex couples would choose to marry or enter into a full civil partnership even if these options were available. In some jurisdictions more limited forms of civil partnership have been

introduced which, in some instances, exist in tandem with similar limited forms of civil registration for opposite-sex couples.⁵⁶

- 7.11** In view of its terms of reference, the Working Group examined, for same-sex couples, the same set of options presented with respect to opposite-sex couples in Chapter 6 in addition to marriage. The Working Group concluded that the primary options for consideration for same-sex couples are marriage and full civil partnership and each of these are explored in greater detail in part II and part III of this Chapter. In addition, the arguments for and against each of the options of limited civil partnership and the presumptive scheme as outlined in chapter 6, for opposite-sex couples, are equally valid for same-sex couples.
- 7.12** The Group believes that the option of limited civil partnership for same-sex couples does not address status and equality issues for same-sex couples. While conferring some status on same-sex couples the limited civil partnership option poses the difficulty of determining what set of rights and responsibilities should be excluded as compared with marriage, and whether conditions for dissolution less onerous than for divorce, should be applied.
- 7.13** The Group suggests that, in any legislative review undertaken as proposed in Chapter 6 part VI, particular attention be paid to the identification of provisions made for cohabiting opposite-sex couples, that have not been extended to cohabiting same-sex couples, to facilitate legislative reform to bring about equal treatment under the law. Even if marriage or full civil partnership is introduced for same-sex couples, the differences in treatment in legislation between unmarried opposite-sex and same-sex couples, which exist at present, would remain.⁵⁷
- 7.14** The Working Group considered the particular issue of adoption for same-sex couples in the context

⁵⁴ Denmark, Sweden, UK, Norway (with the exception of the right to foreign adoptions), Iceland (with the exception of the right to adopt).

⁵⁵ *Zappone and Gilligan v The Revenue Commissioners, Ireland and the Attorney General*. The basis of the case is that the plaintiffs sought, inter alia, a declaration that the State recognise their marriage in Canada (British Columbia) and in the alternative that the plaintiffs have a right to marry each other in the State.

⁵⁶ Luxembourg, Netherlands, France, Australia (Tasmania), Canada (Alberta).

⁵⁷ The Department of Social And Family Affairs is currently conducting an equality review of the social welfare code on all nine equality grounds including sexual orientation.

of the relevant international instruments such as the United Nations Convention on the Rights of the Child and the Hague Convention on Protection of Children and Co-operation in respect of Inter-Country Adoptions, as well as domestic law. In particular, the Group was conscious of the right of the child to know and be brought up by its biological parents in so far as is possible and that the welfare of the child is paramount at all times. The question of adoption was examined by the Working Group for a number of reasons including the variety of approaches taken in other jurisdictions which have legislated for marriage or civil partnerships for same-sex couples, and it arose in submissions made to the Working Group.

7.15 For many same-sex couples in Ireland the issue of adoption centres around the adoption of the biological child of one of the partners (conceived for example through assisted human reproduction or through other arrangements) and the need to ensure that that child has a legal claim on both partners. The Group was nevertheless conscious of the existing rights that a child and the other biological parent have to a continuing relationship.

7.16 Adoption for same-sex couples breaks down into two categories. The first is the adoption of a partner's child. The second is stranger adoptions, effectively foreign adoptions. In neither category are same-sex couples, in common with unmarried opposite-sex couples, permitted to adopt children as a couple. A single person may apply to adopt regardless of sexual orientation. Same-sex couples may, and do, foster children. The Group noted that access for same-sex couples to joint adoption was restricted in many of the countries that gave legal recognition to same-sex partnerships, and proposes that the reasons for this distinction should be examined further.

7.17 Given that the welfare of the child is paramount, in principle, same-sex couples who are married or in a full civil partnership should be eligible for consideration to adopt any child who is eligible for adoption. It should be noted that, rather than confer a right to adopt, this would allow registered same-sex couples the right to be considered for adoption, subject to the existing rigorous assessment process for prospective married couples and single adopters already in place under the Adoption Acts. This would necessitate a change in the legislation to allow registered same-sex couples to be considered.

II. Marriage

7.18 Civil Marriage for same-sex couples would be the same as that currently available to persons of opposite-sex.

7.19 Legal Consequences

All rights and responsibilities attaching to civil marriage would apply with the exception of the automatic presumption of paternity.

7.20 Comment

The introduction of civil marriage for same-sex couples would achieve equality of status with opposite-sex couples and such recognition that would underpin a wider equality for gay and lesbian people. Civil marriage offers legal certainty and predictability in terms of the consequences for each partner. It would be administratively straightforward as the registration arrangements already in place for marriage would apply and would also be straightforward in terms of recognition.

7.20.1 Introducing civil marriage for same-sex couples is likely to be vulnerable to constitutional challenge given the special position marriage is afforded in the Constitution and the interpretation of the

definition of marriage in constitutional actions before the Courts that marriage is the voluntary and permanent union of one man and one woman. However, as indicated above, the first case on extending the definition of marriage to include same-sex couples was heard recently by the High Court and a judgment is awaited.⁵⁸

III. Option of Full Civil Partnership

7.21 Full civil partnership entails the State introducing a civil registration scheme, which extends the full range of rights and duties of marriage to same-sex couples who choose to register their partnership. The parties must not be married or in an existing registered partnership and must not come within the prohibited degrees of relationship. Full civil partnership must be an exclusive union between two people aged 18 years or more. The notification and other formalities before registration are the same as those for civil marriage. The partnership must be formally registered in the same way as civil marriage. All the legal provisions available on the breakdown of marriage apply to the breakdown of full civil partnership. Full civil partnership can only end on death or dissolution by a court and dissolution is subject to the same requirements as divorce. While there is no constitutional impediment to a less onerous dissolution regime than divorce for full civil partnerships, the Working Group is of the view that the two institutions, i.e. marriage and full civil partnership which are equivalent in terms of the consequent rights and duties, should be subject to the same dissolution requirements.

7.22 Legal Consequences

The legal consequences for the parties would extend to all the elements of marriage and family law including both public and private law and parental responsibilities. The introduction of full

civil partnership for same-sex couples would ensure equivalent treatment under the social welfare and tax codes. The same treatment the State affords to married couples would be afforded to full civil partners so that husband or wife in relevant legislation would be read to include a full civil partner. The legal rights and responsibilities of registered partnerships would be the same as those of civil marriage. Full civil partnership would put same-sex couples on an equal footing with opposite-sex married partners, with the notable exceptions of not ascribing a marital identity and not offering the protection the Constitution affords to marriage and family life.

7.23 Comment

Full civil partnership falls short of full equality for same-sex couples as it excludes such families from the protection given to the family in the Constitution. While there is a consensus on the granting of as full recognition as possible to same-sex couples, in the absence of civil marriage the full civil partnership option is seen by the Group as one which would address the majority of the issues encountered by same-sex couples.

7.23.1 Full civil partnership for same-sex couples, in contrast with opposite-sex couples, is viewed by the Group as a distinct institution separate from, and not competing with marriage. The Group believes that full civil partnership for same-sex couples does not suffer the same constitutional vulnerability as full civil partnership for opposite-sex couples.

7.23.2 Introducing a full civil partnership scheme in Ireland would achieve equivalence in this area with Northern Ireland where the Civil Partnership Act is in force since December 2005.

⁵⁸ *Zappone and Gilligan V The Revenue Commissioners, Ireland and the Attorney General*. The basis of the case is that the plaintiffs sought, inter alia, a declaration that the State recognise their marriage in Canada (British Columbia) and in the alternative that the plaintiffs have a right to marry each other in the State.

7.23.3 The introduction of full civil partnership will have consequences for cohabiting same-sex couples including under the social welfare code, tax code and pensions schemes.

7.23.4 Under existing law, where an occupational pension scheme provides benefits for dependants, such provision already covers same-sex and opposite-sex couples.⁵⁹ Also where occupational pension schemes provide benefits for dependants in the case of married couples only (which is allowable under the law), the introduction of full civil partnership for same-sex couples will have potential implications for the funding of such schemes as it would increase the liabilities of the scheme to some extent.

⁵⁹ Section 22 of Social Welfare (Miscellaneous Provisions) Act, 2004 which amended the Pensions Act, 1990 by inserting a new Part VII which implements Council Directives 2000/43 EC and 2000/78 EC.



Recognition of Foreign Registered Relationships and Same-Sex Marriages

- 8.01** It is not envisaged that opposite-sex full civil partners coming from abroad would have their relationships recognised here, unless full civil partnership is available to opposite-sex couples as an option in this jurisdiction. If those partners wish to assume rights and obligations to each other under Irish law, then it is open to them to marry in this country. Similar arguments would apply to same-sex civil partners coming from abroad in the event that marriage is an option for them in this country.
- 8.02** At present, judgment of the High Court is awaited in the case of *Zappone and Gilligan v The Revenue Commissioners*, which concerns the recognition by Irish courts of a same-sex marriage entered into in Canada.⁶⁰ In the event that same-sex couples become entitled to marry in this country, then it is most likely that same-sex marriages validly entered into abroad on the same conditions (e.g. that neither is married to any other person) would be recognised here.
- 8.03** If a scheme of full civil partnership for same-sex couples only is introduced, then rules of recognition should allow for those same-sex couples who have validly married abroad to be treated as civil partners under Irish law. Further, any same-sex couple who have entered into a partnership bearing the attributes of full civil partnership in this country should be treated as if they have entered into such an arrangement in this jurisdiction. In this regard it is worth noting that the Civil Partnership Act 2004 in the United Kingdom provides for the recognition of “overseas relationships” which are entered into according to the law of that country where general conditions were complied with. Where the parties had the capacity to enter into that relationship under the law in the foreign jurisdiction and complied with all the formalities there they would be treated as having entered into a civil partnership under the law of the United Kingdom.
- 8.04** If the partnership entered into abroad (either by same-sex or opposite-sex couples) is of limited scope then it is difficult to justify Irish recognition of such schemes. It would of course be open to those partners to avail of the rights arising under the Irish presumptive scheme or to register their limited domestic partnership here.
- 8.05** Even if no action is taken to regulate or recognise these relationships under Irish law, many complex legal issues already arise from the introduction of civil partnerships and same-sex marriages abroad, for example, same-sex couples from this jurisdiction can travel to the United Kingdom to enter into civil partnerships.
- 8.06** At present two distinct areas of recognition arise for consideration. The first relates to whether the status of a civil partnership would be recognised as a matter of public law in the State. It is likely that this would not be the case in the event that there is no equivalent institution in this country. It has been argued that this may not prevent Irish law giving recognition to a civil partnership entered into abroad, as was the case with divorce. However, the Irish Constitution specifically envisaged recognition of divorces granted abroad in certain circumstances (see Article 41.3.3°).⁶¹
- 8.07** The second issue concerns whether the contract entered into between two parties in another jurisdiction could be enforced here and would fall to be determined in accordance with the ordinary rules of conflicts of law. At present there would seem to be no basis to refuse to recognise agreements entered into in this jurisdiction between two people by deed whereby financial arrangements are put in place (and where cohabitation is not the consideration). Therefore, it would appear to be the case that there would also be no impediment to recognising contractual arrangements entered into abroad.

⁶⁰ *Zappone and Gilligan v The Revenue Commissioners, Ireland and the Attorney General*. The basis of the case is that the plaintiffs sought, inter alia, a declaration that the State recognise their marriage in Canada (British Columbia) and in the alternative that the plaintiffs have a right to marry each other in the State.

⁶¹ See *McG. -v- W.* 2000 1 ILRM 107 where similar arguments based recognition of a foreign divorce granted on the grounds of residence.

- 8.08** The area is further complicated by the proposed introduction of rules for the recognition of the property consequences of registered partnerships under E.U. law. In this context the Working Group notes that the European Commission in its Green Paper on matrimonial property rights, which was presented in July 2006, specifically refers to the fact that in member states more and more couples are formed without a marriage bond. The Commission is considering introducing specific conflict rules for the break up of such relationships and for dealing with the property consequences of separation of *de facto* unions.
- 8.09** In this context the Group is of the view that the European Union is a useful forum for considering matters of recognition of "overseas relationships".
- 8.10** The Group is of the opinion that the complexities that will arise in the event that no action is taken to regulate cohabiting relationships is of itself a strong argument for the introduction of a framework of legislation to regulate these relationships. Then it will be relatively simple to accord recognition to equivalent relationships formed abroad.
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9

Options for Non-Conjugal Relationships and Possible Consequences of Legal Recognition

9.01 Introduction

In Ireland, people freely choose to reside alone or together with others. There are many forms of close personal relationships and this diversity is an accepted feature of our society. While family affinity and companionship are the main considerations behind cohabitation, financial circumstances are also relevant. Simply put, many people cannot afford to live alone even if this would be their first preference. Equally, many people reside in care relationships.

- 9.01.1 The law's traditional focus was on married families and this is reflected in the Constitution. More recently the policy focus has shifted to encompass other forms of marriage-like cohabitation but, in the main, non-conjugal relationships have no state recognition.
- 9.01.2 The terms of reference of the Working Group extend to those different kinds of relationships which often create social and economic dependencies for those involved. Previous chapters deal with cohabiting couples in conjugal relationships. However, individuals in other non-conjugal cohabiting relationships may also need legal protection and recognition for what is *de facto* a relationship based on a community of property or income, in other words, an interdependent relationship.
- 9.01.3 The Working Group has noted that non-conjugal relationships include those between relatives (e.g. adult children remaining at, or returning home to reside with parents, sibling adults, adults with grandchildren) and between non-relatives, including disabled people and their carers. The information the Working Group had about such households is not extensive. The 2002 Census shows that the number of persons living in such households was as follows:-

Table 9.1

Category	Number of Households (000's)	Number of persons (000's)
Non-family households containing no related persons	53	153
Non-family households containing related persons	39	93

- 9.01.4 The Census distinguishes between "family units" and "non-family households". For further information see Appendix 4, Table 1.
- 9.01.5 There is very little research in Ireland or elsewhere on non-conjugal relationships. The Group was made aware of the 2001 report of the Canadian Law Commission "Beyond Conjuality" on close personal adult relationships, which examined such relationships and made proposals for organising them legally. The few submissions to the Working Group of relevance to this category raised specific issues of concern in relation to carers, pensions and employment law, while others either favoured or were against the inclusion of cohabiting relatives in a domestic partnership scheme.
- 9.01.6 In the absence of research material, and in view of the dearth of submissions made, the Working Group found it difficult to consider in any depth the nature of the diverse relationships in this category and the options for and consequences of according legal recognition. Similarly, the Law Reform Commission expressed the view in their *Consultation Paper on the Rights and Duties of Cohabitees* that "it is not possible to devise a single scheme for the determination of legal rights and duties that can operate fairly and evenly across a spectrum of relationships ranging from on the one hand 'marriage like' relationships to

familial or platonic relationships on the other". The Working Group is of the same view.

- 9.01.7 Rather than propose options which have not been properly analysed for such a non-homogeneous category, in view of time constraints and the lack of good information, the Working Group suggests that a comprehensive study of cohabitation in Ireland is required, which would include non-conjugal domestic relationships in all their diverse forms. As suggested in Chapter 6, part VI, fuller information on the extent and characteristics of cohabitation in Ireland, clearly outlining issues requiring attention, would inform a review of legislation to identify where reforms may be required, separate from and in addition to the implementation of options contained in this paper.

9.02 Other Jurisdictions

Few other countries have statutory schemes in place that include non-conjugal partnerships. The following information is included in the Options Paper for reference purposes only. Further details on other jurisdictions are included in Chapter 5.

- 9.02.1 A number of other jurisdictions have introduced statutory arrangements to extend certain rights and duties to non-conjugal partners who make a joint decision to opt into the scheme. These include Belgium (Statutory Cohabitation Contract open to all unmarried adult couples regardless of sex or whether they are related) and France (Civil Solidarity Pact similar to Belgium but relatives are excluded). In both schemes the partners bind themselves by making a contract before a notary public (Belgium) or local court (France), which is then registered.
- 9.02.2 Australia has a number of models in place including, in New South Wales which widened the scope of its *de facto* relationship legislation to

regulate "domestic relationships" between two interdependent unmarried adults in a non-intimate relationship.

- 9.02.3 Tasmania, under the Relationships Act 2003, provides for the recognition and registration of two types of relationships - significant (between two unmarried and unrelated adults) and caring (where one or each of the partners provides the other with domestic support or personal care). Under the Tasmania legislation, once a relationship is registered, the parties are taken to be in a personal relationship and are subject to associated rights and obligations, including in relation to property and maintenance in the event of the breakdown of the relationship.
- 9.02.4 Another model can be found in Alberta, Canada, in the Adult Interdependent Relationships Act 2002, which is a mix of an opt-in registration and a presumptive scheme for opposite-sex and same-sex relationships. A person is the adult interdependent partner of another person if (a) they have lived together in a relationship of interdependence of not less than 3 years (or of some permanence if there is a child of the relationship) or (b) they have entered into an adult interdependent partner agreement.

9.03 Comment

There are some parallels between the opt-in schemes in Belgium and France and the contractual arrangements already available in Ireland to non-conjugal partners, who are free to regulate their property and other financial affairs in whatever manner meets their particular circumstances. Contractual arrangements may be freely made by those in non-conjugal relationships to regulate many aspects of their interdependency, including joint ownership of property, joint tenancy, succession and power of attorney. A vulnerable partner may be exposed by the unwillingness of the other partner to make

such a contract, and a presumptive scheme has an attraction in this regard as described in Chapters 6 and 7.

9.03.1 The law recognises non-conjugal relationships already in some areas such as: the Non-Fatal Offences Act 1997 (which provides for the offence of coercion by violence or intimidation against a person or a member of the family of that person - “member of the family” is broadly defined to include such family members as nephews and nieces as well as persons cohabiting or residing together); the Force Majeure provisions (time-off from work for emergency family reasons) in the Parental Leave Act 1998 as amended; and Capital Acquisitions Tax relief in the tax code with respect to private residences.

9.03.2 It should be noted that some non-conjugal relationships have been found by the European Court of Human Rights to attract protection, in certain circumstances, under Article 8 of the Convention with respect to the family and private life.

9.03.3 The Working Group is of the view that the pragmatic approach of further legislative review and reform to address specific issues is the appropriate way to proceed.

Appendices

Appendix 1: List of Members of the Working Group on Domestic Partnership

Appendix 2: List of Presentations Given to the Working Group on Domestic Partnership

Appendix 3: Issues Raised in the Submissions Received by the Working Group on Domestic Partnership

Appendix 4: Demographic Background

Appendix 5: Note on Adoption

Appendix 1

List of Members of the Working Group on Domestic Partnership

Anne Colley, Chairperson, Solicitor and Outgoing Chair of the Legal Aid Board

Eilis Barry, Legal Advisor and Head of Legal Section, Equality Authority / Alternate **Laurence Bond**, Head of Research, Equality Authority

Dervla Browne S.C., Outgoing Chairperson of the Family Lawyers Association

Eoin Collins, Director of Policy Change, Gay and Lesbian Equality Network

Helen Faughnan, Principal Officer, Family Affairs Unit, Department of Social and Family Affairs

Kieran Feely, Registrar-General, General Register Office / Alternate **Pat Patterson**, Assistant Registrar General, General Register Office

Joe Gavin, Assistant Principal Officer, Office of the Minister for Children

Dr. Finola Kennedy, Economist

John Kenny, Principal Officer, Civil Law Reform Division, Department of Justice, Equality and Law Reform

Niall McCutcheon, Principal Officer, Diversity and Equality Law Division, Department of Justice, Equality and Law Reform

Christine O'Rourke, Advisory Counsel, Attorney General's Office

Dr. Vincent Palmer, Principal Officer, Department of Finance / Alternate **Joe Cullen**, Assistant Principal Officer, Department of Finance

Secretariat to the Working Group

Catherine Territt, Assistant Principal Officer, Civil Law Reform Division, Department of Justice, Equality and Law Reform (to 8 June 2006)

Antoinette Doran, Administrative Officer, Civil Law Reform Division, Department of Justice, Equality, Law Reform

Appendix 2

List of Presentations Given to the Working Group on Domestic Partnership

Prof. Robert Wintemute, Professor of Human Rights Law, King's College, University of London: *'Same-Sex Couples, Unmarried Different-Sex Couples, and Non-Couple Cohabitants: Will Ireland Lead or Follow'*, 18 May 2006

Dr. Vincent Palmer, Principal Officer, Department of Finance and Member of the Working Group: *'Tax Treatment of Couples'*, 22 June 2006

Helen Faughnan, Principal Officer, Department of Social and Family Affairs and Member of the Working Group: *'Note on the Social Welfare System for the Working Group on Domestic Partnership'*, 22 June 2006

Kieran Feely, Registrar-General, General Register Office: *'Briefing Note on Health Issues'*, 22 June 2006

Paul O'Connell, Legal Researcher, *'Legal Research Commissioned by the Working Group on Domestic Partnership'*, 6 July 2006

Eoin Collins, Director of Policy Change, Gay and Lesbian Equality Network: *'Lesbian and Gay Parenting'*, 13 July 2006

Muriel Walls, McCann Fitzgerald Solicitors: *'Presentation to the Working Group on Domestic Partnership, Issues: Children; The Family Home; Maintenance; Succession; Pension and Life Assurance'*, 27 July 2006

Liz Canavan, Principal Officer, Office of the Minister for Children: *'Domestic Partnership Working Group: Issues Paper - Office of the Minister for Children'*, 7 September 2006

Dervla Browne, S.C., Chairperson of the Family Lawyers Association and Member of the Working Group on Domestic Partnership: *'Giving Rights to Cohabitees - A Review of the Joint Oireachtas Committee Report and the Law Reform Commission Paper'*, Circulated to the Working Group on 12 September 2006

Appendix 3

Issues Raised in the Submissions Received by the Working Group on Domestic Partnership

The following is a general outline of the issues raised in the submissions received by the Working Group on Domestic Partnership. The intention is to give a flavour of the topics covered rather than a comprehensive account of all submissions made.

Submissions from Representative Groups/Organisations

1. Improved Rights for Cohabitants Generally

Many of the submissions calling for equal rights for cohabitants in general, regardless of sexual orientation, stressed the need to recognise and afford rights to all families. These called for legislative change to recognise the diverse nature of personal relationships and to ensure that human rights are protected by recognising this family diversity. Some of the submissions requested less onerous conditions than marriage for civil partnerships and easier dissolution. Others focused on a presumptive scheme. Submissions raised the need to alleviate hardship by recognising a range of rights for cohabiting couples, including: next-of-kin; immigration; tax; succession; maintenance; fertility treatment; adoption; pensions; property and workplace entitlements. In addition, the need to identify provisions in primary and secondary legislation that may discriminate between married and unmarried couples was highlighted.

2. Limited Rights

Some submissions called for a limited change in rights for unmarried cohabiting couples where practical issues arise. They suggested providing legal protection for such relationships in the area of fiscal rights, tenancy rights, inheritance and taxation rights. They are generally not in favour of creating another institution offering an alternative to marriage, but support a presumptive scheme or an incremental approach to offer legal protection to cohabiting couples.

3. Rights for Same-Sex Couples

Some submissions dealing exclusively with rights for same-sex couples called for the opening up of marriage for same-sex couples, others called for a model of civil partnership that has the same rights and responsibilities as marriage akin to the model introduced in the UK. Specific issues arising from the lack of recognition for same-sex couples included: next-of-kin rights; fertility treatments; adoption; guardianship; custody and access; rights of a non-biological partner who is co-parenting a child; visitation rights for hospital and prison; decision making rights for a partner; taxation; welfare benefits; pensions; inheritance; property rights; local authority housing and issues relating to transgender persons.

4. No Change

Submissions calling for no change in the current recognition of domestic partnerships based their arguments on three main grounds: religion; the constitution and the protection of marriage. A common theme was that any change that recognises a family form outside of marriage would have no social or moral justification, be unconstitutional and an attack on the institution of marriage. Some submissions accepted the need to deal with financial issues relating to unmarried families and dependent relationships, but felt this should be achieved without the creation of any new legal entities. Specific issues included: a call for

no recognition of foreign civil partnerships or same-sex marriages; same-sex couples should not be allowed to adopt; values in schools should not be undermined by lobbying for change on behalf of same-sex couples; and a call for the Government to stop spending resources in support of same-sex organisations.

5. Children's Rights

The majority of submissions received on this issue emphasised the need to consider children's rights when formulating proposals. In particular, submissions referred to the need to consider the subgroup of lone parents, immigrant families, access to children by unmarried fathers and the effect of property related issues on the children of unmarried families.

6. Immigration Rights

The issue of immigration was raised in relation to the situations faced by Irish citizens and legal residents in unmarried relationships with non-EU citizens. In particular, submissions commented on family reunification and recognition of unmarried relationships including civil unions entered into abroad.

7. Domestic Violence

Submissions covering the issue of domestic violence called for new categories of relationships to be included in domestic violence legislation and the Domestic Violence Acts to be amended to give cohabiting couples better access to protection from Domestic Violence.

8. Rights of Parents/Carers

The issue of parents and carers having this work recognised and their rights protected was raised. The need to have the preferences of dependents taken into account within the framework of any recognised partnerships was raised. Recognition of different types of relationship could potentially leave carers, who may be paid by their partner for the work they do, worse off financially and it was suggested that any changes made should not reduce carer's rights or entitlements.

9. Employment Equality

The provision whereby discrimination on the religious ground may be excluded from protection under Section 37(1) of the Employment Equality Act 1998 with regard to Lesbian, Gay, Bisexual and Transgender teachers was raised.

Submissions Received from Individuals

1. Improving Rights for Cohabitants Generally

Some submissions called for a referendum on the definition of the family so as to recognise cohabiting couples regardless of their sexual orientation. Others suggested that as long as rights and responsibilities afforded to cohabitants do not exceed those of married couples there would be no constitutional difficulty in affording such rights and responsibilities to cohabitants. A number of submissions asked that all legislation that affects married couples be identified and made neutral to allow such legislation to encompass unmarried cohabitants. Many submissions raised the issues of: immigration rights; guardianship and adoption; next-of-kin; taxation; security in old age or incapacity so that the other partner is provided for; property rights; children's rights and maintenance.

2. Limited Rights

Many of the submissions received that were calling for a limited change in rights for cohabiting couples referred to rights for same-sex couples only, noting that opposite-sex couples already have the right to marry. Most submissions made it clear that they did not want marriage undermined but support the introduction of legal rights to provide for and protect cohabitants. These rights include: property; financial; next-of-kin; taxation and pensions rights as well as protection for a vulnerable partner on the break-up of a relationship.

3. Rights for Same-Sex Couples

Submissions on rights for same-sex couples generally were grounded on equality arguments. Many commented that the Constitution does not define marriage and thus is not a barrier to the introduction of same-sex marriage or civil partnership with all of the rights and responsibilities of marriage. Submissions focused on a number of issues including children of same-sex couples and called for these children to have the same rights as children of married couples. These rights include: the right to inherit from non-biological parents; the right to have parental responsibility of non-biological parents recognised and to have both parents named on the child's birth certificate. Many of the submissions received were from people in long-term same-sex relationships and focused on real issues they face including: pension rights; recognition of foreign civil partnerships/same-sex marriage; taxation; next-of-kin; adoption; fertility treatment; immigration; rights when a partner is hospitalised and social welfare benefits.

4. No Change

Submissions calling for no change made arguments on religious, constitutional, moral and financial grounds. Many stated that the recognition of any type of relationship other than that of a male/female marriage would lower societal morale, set a bad example for the younger generation, have financial consequences for the State in terms of taxation and pension costs, cause difficulties for immigration controls, lead to bigamous relationships and would undermine marriage. Other submissions stated that children's interests are best served in the confines of the traditional family, and recognition of partnerships outside of marriage would be contrary to the findings of the All Party Oireachtas Committee on the Constitution; that any legislation introduced to recognise partnerships would undermine the financial and social status of families, and that women and children would suffer most from the loss of family stability.

5. Issues Relating to Children

Submissions called for equal access for both parents to children and access for grandparents.

6. Immigration Rights

Submissions raised immigration issues facing same-sex couples, the recognition of a fiancée for immigration purposes, and entry into the country for grandparents of an Irish born child.

7. Death of a Partner

The issue of a cohabiting partner being unable to register the death of their partner regardless of the duration of the relationship was presented.

8. Rights for Cohabiting Siblings

Issues raised in relation to siblings living together included pensions and property, and a need for recognition of the real commitment many siblings make to look after each other.

9. Issues Affecting Transsexuals

Issues raised include the recognition in law of a newly acquired gender, such as on the birth certificate and other legal documents, equal rights with heterosexual couples in terms of taxation and pensions for transsexuals in relationships, and recognition of the marriage of a transsexual person to a person of the opposite sex.

10. Stamp Duty

A cohabiting person who bought a property jointly with their partner is not entitled to stamp duty relief if the relationship ends and one partner buys the other out. This issue was raised in contrast to a divorced person who is entitled to relief in similar circumstances.

Appendix 4

Demographic Background

The Terms of Reference require the Working Group to consider the categories of partnerships and relationships outside of marriage to which legal effect and recognition might be accorded, consistent with Constitutional provisions.

This Chapter examines the demographic and social context and the quantitative evidence for the extent of partnerships and relationships outside of marriage. It relies heavily on the material contained in chapter 1 of the 10th Progress Report of the Oireachtas Committee on the Constitution: “*The Family*” (referred to below as the Family Report),⁶² and the historical analysis in “*Cottage to Crèche: Family Change in Ireland*”.⁶³ The data contained in the Family Report has been updated as appropriate by more recently published CSO data. The chapter also draws on the Working Paper Number WP2004-01 entitled “*Cohabitation in Ireland - Evidence from Survey Data*” in the University of Limerick Department of Sociology Working Paper Series, written by Brendan Halpin, Department of Sociology, University of Limerick and Cathal O’Donoghue, Department of Economics, NUI Galway (referred to below as Halpin and O’Donoghue).⁶⁴

The Family Report set out the demographic and socio-economic context of the Articles in the Constitution dealing with the family and presented the principal changes in family formation, marriage, births and other indicators of family life since 1937. The Report pointed out that the 1937 Constitution was embedded in the reality of a predominantly rural society. In 1937 the total population of the State was just under 3 million. In 2006 the population was over 4.2 million. In 1937 the total labour force was 1.3 million - 50 per cent (614,000) in agriculture, 17 per cent in industry and 33 per cent in services. In 2005 the total labour force was just over 2 million; of those in employment, less than 6 per cent (113,700) were in agriculture, 28 per cent in industry, including the construction industry and 66 per cent in services.

Principal demographic trends

The Family Report analysed the trends as follows:

In every decade from the 1920s to the 1960s there was a substantial level of net emigration, that is a substantial excess of those leaving the country compared with those entering the country. Emigration exerted a massive toll in that period. With improved economic conditions in the 1960s, the outward flow of migration slowed and was reversed in the 1970s, a decade which experienced net immigration, including an inflow from Northern Ireland, in the wake of the crisis which erupted in Northern Ireland in 1969. Emigration resumed in the 1980s and by 1986 the net outflow just matched the natural increase in population, which is the excess of births over deaths, in that year. Between 1991 and 2002 the trend was reversed once more as a flow of immigrants began to exceed emigrants. Since 2002, the trends apparent in the 1991 - 2002 period have all accelerated.

Preliminary 2006 Census results

The preliminary total for the population enumerated on census night 23 April 2006 was 4,234,925 persons, compared with 3,917,203 persons in April 2002, representing an increase of 317,722 persons or 8.1 per cent in four years.⁶⁵ The average annual rate of population increase in this four-year period was 2 per cent, which is the highest on record. This compares with 1.3 per cent for the previous intercensal period 1996-2002 and the previous high of 1.5 per cent which occurred between 1971 and 1979. The 2006 population was last exceeded in the census of 1861 when the recorded population was 4.4 million.

62 www.constitution.ie/reports/10th-Report-Family.pdf

63 *Cottage to Crèche: Family Change in Ireland*. Finola Kennedy IPA, 2001.

64 <http://www.ul.ie/sociology/pubs/>

65 <http://www.cso.ie/census/Census2006Results.htm>

The census total is a count of the number of persons actually in the State on census night. The change in population between two censuses reflects the effect of births and deaths and of movements of persons into and out of the State during the relevant period. Since the number of births and deaths are known from the vital statistics registration system the resulting residual is taken as a measure of net migration i.e. the difference between the inward and outward flows.

Just over 245,000 births were registered in the four-year period ended March 2006. Taken in conjunction with the 114,000 deaths that were registered during the same period this resulted in a natural increase in population of 131,000. Deducting this from the population increase of 318,000 gives a derived net immigration figure of 186,000 for the 2002-2006 period. The number of non-Irish nationals enumerated as part of the 2002 census was 222,000, representing 5.8 per cent of the usually resident population. While the corresponding figure for 2006 will have to await the publication of the Principal Demographic Results in April 2007, it can be tentatively estimated from the derived flow data on migration that the stock of non-Irish nationals is likely to be about 400,000.

Definition of the family for census purposes

The Family Report pointed out that *"The definition of the family used in the census at the time the Constitution was enacted, and for many subsequent decades, was closer to that of household."* A revised definition of 'family' for census purposes was introduced in 1979. The 1979 census was the first Irish census in which the population was classified by number and type of family unit as well as by household. The family unit was defined as i) a man and wife, ii) a man and his wife together with one or more single children of any age, or iii) one parent together with one or more single children of any age. In 1986 the family unit was extended to include cohabitants with the addition of 'or couple' to the category 'man and wife'.

The census definition of the family unit is both expansive and restrictive. It is expansive in that it includes couples who cohabit. It is restrictive in so far as it excludes some consanguineous units which are not conjugal units. For example, a grandparent and a grandchild, or two sisters living in one household, do not constitute a family in the census definition. On the other hand, adopted children, resident in the family household on the night of the census, have always been counted as family members in the census, even before there was legal adoption in the State.

Turning to the data, it emerges that between 1936 and 2002 the number of households in Ireland doubled, increasing from 647,000 in 1936 to 1,288,000 in 2002.⁶⁶ Over the period the average size of the household fell from 4.31 persons to 2.94 persons. The number of households rose in every category from one-person to five-person households, but the number of households with six or more persons fell by half. The most striking feature of the change in household composition is in the big increase in the share of one-person and two-person households and the decline in the share of the largest households. In 2002 the share of one-person and two-person households in total households had risen to just under 48 per cent from 26.5 per cent in 1936, that is a rise to close to one-half of all households from just over one-quarter in 1936. By contrast the share of households with six or more persons in total households fell from 28 per cent to 7 per cent over the period. The increase in one-person households reflects an increase both in young persons living separately from their families and an increase in elderly persons living alone.

In 1936 about one in twelve persons aged sixty-five years and over lived alone compared with more than one in four in 2002. Partly reflecting the longer life expectancy of females almost one in three females over sixty-five now live alone. The largest category of households consists of couples, whether married or single, with children. They comprise over one in three of all

⁶⁶ See Table 1: Number and distribution of households in the state, 1936 – 2002, page 21 of Family Report.

households. The next largest category of households is that of single persons comprising one in five households. Elderly persons living alone represent an important component of one-person households, amounting to 41 per cent of all one-person households and accounting for nearly twenty-six per cent of persons aged sixty-five years and over.

Family units

Turning to the most recent census data on family units in 2002, one quarter of family households with either a husband or wife or a cohabiting couple do not contain children. Over half of all family units contain a husband, wife and children, while the remaining households are lone parent households or cohabiting couples with children.

Of the 692,000 family units in which children are present, 73.5 per cent are composed of a husband, wife and children, while the other 26.5 per cent are composed of a lone mother with children (18.8 per cent), lone father with children (3.4 per cent) and a cohabiting couple with children (4.3 per cent). In 2002 a total of 325,305 children, or 22 per cent of children in family units, lived either in households where the adults were cohabiting or in lone parent households.⁶⁷

The following table shows the composition and number of private households in the State according to the Census 2002.

⁶⁷ See Table 3: Family units in private households, 2002, page 24 in Family Report.

Table 1: Number of Private Households in the State According to Census 2002

	Total Private Households	Total Persons
Composition	Number	Number
Cohabiting couple	41,751	83,502
Cohabiting couple with children (of any age)	27,188	101,627
Cohabiting couple with children (of any age) and other persons	2,445	12,514
Cohabiting couple with other persons	6,027	21,193
Total number of/in cohabiting households	77,411	218,836
Husband and wife	169,668	339,336
Husband and wife with children (of any age)	462,283	1,963,957
Husband and wife with children (of any age) and other persons	41,819	232,081
Husband and wife with other persons	11,138	36,429
Total number of/in husband and wife households	684,908	2,571,803
Lone father with children (of any age)	19,313	52,013
Lone father with children (of any age) and other persons	3,658	15,015
Lone mother with children (of any age)	111,878	311,801
Lone mother with children (of any age) and other persons	15,785	65,609
Total number of/in lone parent households	150,634	444,438
Total family units	912,953	3,235,077
Non-family households containing no related persons	53,019	152,854
Non-family households containing related persons	38,681	93,175
One-person households	277,573	277,573
Three or more family units with or without other persons	47	410
Two family units with or without other persons	5,685	32,227
Total private households	1,287,958	3,791,316

Marital Status

In 2002 the numbers of persons aged over 15 describing themselves as having each marital status was as follows:

Table 2: Marital Status

Single:	1,314,700
Cohabiting:	155,200
Married:	1,454,400
Separated:	98,700
Divorced:	35,100
Widowed:	186,900

Marriage

The number of marriages taking place each year indicates the number of marriage-based family units that are formed. The majority of marriages are first-time marriages, but a number are marriages in which one or both partners had been married previously and where marriage ended either through death or divorce. Table 3 shows the annual number of marriages and marriage rate since 1950. The marriage rates are per 1,000 of the estimated population. Data between 1997 and 2000 show that the number of marriages increased dramatically, from 15,631 in 1997 to 19,168 in 2000, with the marriage rate increasing correspondingly from 4.5 to 5.1. CSO data show that this, higher, marriage rate has been maintained, averaging 5.1 between 2000 and 2005. The current level of marriages is at its highest point since the start of the 1980s. Some of the increase in marriage since the late 1990s may be due to a postponement factor from earlier years, as the average age of marriage has risen. The number of second marriages averages 2,500 per year of which over 2,000 are marriages of divorced persons. This may be a significant factor in the increase in marriage numbers since 1997.

Table 3: Number of Births, Deaths and Marriages

Number of Births, Deaths and Marriages						
	Marriages		Births		Deaths	
Year	No.	Rates	No.	Rates	No.	Rates
1950	16,018	5.4	63,565	21.4	37,741	12.7
1960	15,465	5.5	60,735	21.5	32,660	11.5
1970	20,778	7.0	64,284	21.8	33,686	11.4
1980	21,792	6.4	74,064	21.8	33,472	9.8
1990	17,838	5.1	53,044	15.1	31,370	9.0
1995	15,604	4.3	48,787	13.5	32,259	9.0
1996	16,174	4.5	50,655	14.0	31,723	8.7
1997	15,631	4.3	52,775	14.4	31,581	8.6
1998	16,783	4.5	53,969	14.6	31,563	8.5
1999	18,526	5.0	53,924	14.4	32,608	8.7
2000	19,168	5.1	54,789	14.5	31,391	8.3
2001	19,246	5.0	57,854	15.0	30,212	7.9
2002	20,556	5.2	60,503	15.4	29,683	7.6
2003	20,302	5.1	61,529	15.5	29,074	7.3
2004	20,619	5.1	61,684	15.3	28,151	7.0
2005	20,723	5.0	61,042	14.8	27,441	6.6

Source: Central Statistics Office Cork

Separation and divorce

An indication of the relative extent of marital breakdown is provided by expressing the number of separated and divorced persons as a percentage of the total number of ever-married persons. In 2002 this proportion stood at 7.5 per cent compared with 5.4 per cent six years earlier. Limerick City (11.7 per cent) had the highest rate of marital breakdown in the country followed by Dublin City (10.6 per cent), while Cavan (4.9 per cent) and Galway County (5.1 per cent) had the lowest rates in 2002.

Divorce was unavailable in Ireland prior to its legalisation in 1996. Divorce is now incorporated into the Constitution following the referendum in 1995. The 1986 Census was the first census to provide information on the breakdown of marriage. Prior to 1986, some information on marital breakdown was published in Labour Force Survey Reports since 1983 and in the *Report of the Joint Oireachtas Committee on Marital Breakdown*. In 1986 there were 37,000 separated persons, including a number who had obtained divorces elsewhere. By 1996 the number had grown to 88,000 and by 2002 the number had reached 134,000. It is clear that the number separated and divorced is growing rapidly. Between 1996 and 2002 the number married increased by 7.2 per cent, the number widowed grew by 1.3 per cent and the number separated, including divorced, grew by 53 per cent (Census 2002). Within the overall separated category the number of persons recorded as divorced more than trebled, from 9,800 to 35,100, between 1996 and 2002, reflecting the legalisation of divorce in the state in 1996.

Lone-parent households

In 2002 there were 154,000 lone parent family units, of which 42 per cent were headed by a widowed person, 32 per cent by a separated/divorced person, and 24 per cent by a single person. Lone-parent families are not a new phenomenon. Because of the lower expectation of life in the early decades of the last century, many children grew up in one-parent households resulting from widowhood. Even though widowers are more likely to remarry than widows, in 1926, at the first census in the Free State, 8 per cent of fourteen-year-olds lived in households where the mother was dead and the father alive, so lone fathering is not an invention of the early twenty-first century. A second cause of lone parenthood is the break-up of existing marriages, which has been occurring with increasing frequency. Lone parenthood also arises because of births outside marriage. However, many births outside marriage are to cohabiting couples. Compared with other EU countries, births outside marriage are above average in Ireland. However, in a number of countries, particularly Scandinavian countries the proportion of births outside marriage is higher than in Ireland.

Births

Births rose to a twentieth-century peak of 74,000 in 1980 and then fell continuously by more than one-third to below 48,000 in 1994. Since then births have risen to 61,042 in 2005 when there were 10,800 more births than there had been in 1996. Of this increase, 4,300 were within marriage, and 6,500 were outside marriage.

An increase in permanent childlessness is becoming evident, as has already occurred in continental countries and in the United Kingdom.

Cohabitation

There were a total of 77,600 family units comprising cohabiting couples in 2002, an increase of 31,300 on six years earlier. Almost two-thirds of these were childless couples, with a total of 51,700 children in the remaining one-third of the units. The number of same-sex cohabiting couples was 1,300 in the 2002 census compared with 150 such couples in 1996. Two-thirds of these couples are male couples.

Cohabiting couples accounted for 8.4 per cent of all family units in 2002 compared with 3.9 per cent in 1996. Those without children accounted for one in five of all childless couples in 2002, while those with children represented 5.5 per cent of all couples with children. The number of children living with cohabiting parents increased from 23,000 in 1996 to 51,000 in 2002. Just over three-quarters of cohabiting couples without children were unions in which both partners were single, while a further 5.8 per cent were separated. The corresponding proportions for cohabiting couples with children were 58.8 per cent and 11.5 per cent respectively in 2002.

Halpin and O'Donoghue set out to answer the following questions about cohabitation.

- How much cohabitation is there?
- How has it grown?
- Who cohabits?
- What happens to cohabitees (sic)?
- How long do they stay in the state?
- Where do they end up?
- What is it doing to marriage?

Halpin and O'Donoghue did not base their study on census data. Instead they utilise two main data sources. The Labour Force Survey (evolved latterly into the Quarterly National Household Survey) is an EU-originated quarterly survey with a very large sample size, collecting household level information largely relevant to the labour market (questions on labour market activity, qualifications, household structure, and so on, constitute the core). It has particularly good claims to be representative, because of the elaborate sampling strategy, and its regular repetition provides very good information on trends over time. The European Community Household Panel survey (ECHP) is also an (almost) EU-wide survey, but differs in that, as a panel survey, it interviews the same people on an annual cycle. This has the enormous advantage of providing information on change at the individual level, and on trajectories. Their results appear to be consistent with what census data we have.

Cohabitation a growing phenomenon

Cohabitation has grown about two and a half to three times between 1994 and 2002. In 1994, according to their two data sources, just fewer than 2 per cent of women were cohabiting, but by 2001/2 the rate was closer to 5 or 6 per cent. Considering the facts that cohabitation is a feature of younger cohorts, and has a much shorter duration than marriage, these figures represent a very significant phenomenon.⁶⁸

Who cohabits?

Halpin and O'Donoghue conclude that cohabitation is predominantly a phenomenon of the 20–34 age groups, with the male distribution slightly older. They suggest two likely explanations for this pattern – cohort and lifecycle. Many social changes come in cohort-wise, that is the younger age-group take on changing social mores more quickly than the old, but also cohabitation is often a feature of the earlier part of the lifecycle, and of relatively short duration.

Cross-national comparison

Halpin and O'Donoghue made comparisons with similar survey results in England, Wales, Scotland and Northern Ireland.⁶⁹ Broadly, they see the similar, high, rates in the three Great Britain (GB) regions, with Northern Ireland being much lower.

68 See Table 1 “Percent women cohabiting”, page 3 Halpin and O'Donoghue.

69 See Table 4: Cohabitation in Britain, NI and the Republic, page 4 Halpin and O'Donoghue.

The Republic falls somewhere in the middle, with rates generally lower than Great Britain and particularly lower for older age groups. The latter detail is plausibly due to the timing in the growth in cohabitation, with near absence in the older cohorts who have predominantly formed their partnerships before cohabitation became relatively acceptable. Short duration of cohabitation also has an effect, but this also holds for GB; cohabitation has been acceptable longer in Britain.

Cohabitation and children

The relationship between partnership formation and children is of special interest with respect to cohabitation. Traditionally, one marries and then has children, but real experiences are more variable, and become even more so when cohabitation becomes common. Two mechanisms are of particular interest: cohabitations may result from extra-marital pregnancies, and the birth (or anticipated birth) of a child may prompt a cohabiting couple to marry.

First, cohabiting couples are far more likely than married couples to be childless, though less likely than the never-married. However, the proportion with one dependent child is very similar to that for married couples: clearly cohabitation does admit parenthood. But there is a much lower rate of larger families among cohabiting couples than among married couples: cohabiting couples are less than half as likely to have two or more children. Cohort and lifecycle are again likely parallel explanations here: couples with more children are likely to be older and therefore less likely to cohabit, but cohabitation may also be of relatively short duration, often turning into marriage, particularly when children are born.⁷⁰

Duration of cohabitation

The ECHP was a panel survey which interviewed the same people annually from 1994 to 2001. Approximately half the cohabitants in the panel were cohabiting throughout this period and these accounted for approximately 7 in 10 of those cohabiting in the final year. The other cohabitants in the panel were cohabiting for shorter periods.⁷¹

Figure 1 represents Halpin and O'Donoghue's findings on the duration of cohabitation of the sub-group who began cohabiting during the life of the panel. The issue addressed in this analysis is not duration of cohabitation of the current cohabiting population, but rather how long on average a couple starting to cohabit are likely to remain together. The median duration of the cohabitation spells observed to start in the Irish ECHP was a little over two years, i.e. 50 per cent of those couples who began cohabiting during the panel were still doing so 2 years later and 25 per cent were still cohabiting 6 years later. This is quite a short median duration, and is consistent with figures for Britain.

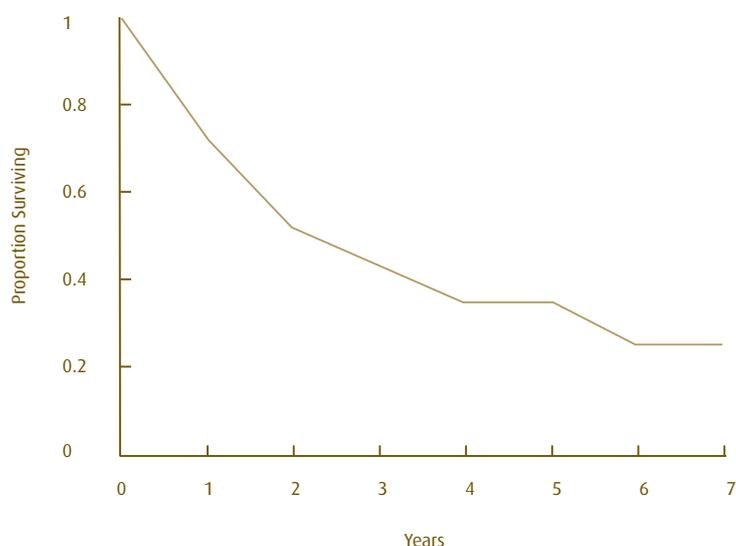
70 See Table 7: Presence of children, page 5 Halpin and O'Donoghue.

71 See Table 10, Ten most Common 'Careers', page 9, Halpin and O'Donoghue.

What happens to cohabiting couples?

Halpin and O'Donoghue find that about 20 per cent of cohabitants exit this status annually, with four out of five of them entering marriage, and one out of five terminations of cohabitation being dissolutions. They warn that this latter figure should be treated with caution as a possible underestimate. Conversely, Halpin and O'Donoghue found that forty per cent of new marriages come from cohabitation, and less than sixty per cent from traditional singlehood. In some ways this is a more dramatic finding than the growth in absolute rates of cohabitation, because it suggests that cohabitation (as a prelude to marriage) is close to becoming a majority practice.

Figure 1: Cohabitation Duration



Conclusions

For Halpin and O'Donoghue, a number of features emerge clearly. Cohabitation is increasingly common. It is predominantly a feature of younger people and is more common in urban areas. It can reasonably be expected that as the population ages, cohorts now cohabiting in their twenties and early thirties will increase the rate of cohabitation at older ages, and that younger cohorts again will find cohabitation even more acceptable. For all the growth in the rate of cohabitation, it is unclear to what extent cohabitation is an alternative to, rather than a precursor to marriage. However, it appears that more and more couples cohabit prior to marriage.

The demographic evidence is too sketchy at this stage to draw firm conclusions as to the duration of cohabitation, much less the motivation of those who cohabit. The detailed results of the 2006 Census, due next year, may shed more light on the rate at which cohabitation is increasing. It is suggested that further study is needed on the duration of cohabitation using CSO survey data, on the lines of the work of Halpin and O'Donoghue, combined with a deep analysis of census data.

Number of Lesbian, Gay and Bisexual (LGB) people and families

As stated above, the 2002 census reported the number of same-sex cohabiting couples as 1,300 in the 2002 census compared with 150 such couples in 1996. Two-thirds of these couples are male couples.

There are significant difficulties in recording the actual number of lesbian, gay and bisexual people in the population, their relationship status and household composition due to a range of factors, in particular:

- (a) Many LGB people continue to be concerned about disclosing their sexuality in official census and other data collection instruments.
- (b) The census in Ireland and other official surveys do not collect data on sexual orientation as such. In Ireland (and in other countries such as USA and the UK), the only means of recording sexual orientation is through stated relationship with other members of the household (category of “partner” included, and cross-referenced by gender). It is thus not possible to record relationships with persons not living in the household or to record sexual orientation regardless of relationship status.

In the context of these limitations, there has nevertheless been a substantial increase in the numbers of LGB people identifying themselves as same-sex partners in official data sources.

For example

- In the USA, 594,000 same-sex couples were recorded in the 2000 census representing almost 1 per cent of all couples, compared to 0.3 per cent in 1990. In New Zealand, the proportion of same-sex couples increased from 0.4 per cent of all couples in 1996 to 0.6 per cent in 2001. In Canada, 34,200 same-sex couples were counted in 2001 representing 0.5 per cent of all couples.⁷²
- In Ireland, as stated above, 1300 same-sex couples (almost 0.1 per cent of all couples) were recorded in the 2002 Census compared to 150 couples in the 1996 Census.⁷³ Men accounted for two-thirds of same-sex couples recorded in the Ireland Census. This contrasts with 55 per cent in Canada and a little over 51 per cent in the USA.

The constraints in data collection outlined however and the reluctance of some LGB people to identify themselves in the Census means that these numbers are likely to be a considerable under-estimate of the actual population.

In the UK for example, the British Government has estimated the number of lesbian gay or bisexual people to be between 5 per cent and 7 per cent of the population when framing employment equality regulations in 2003. These estimates are based on a range of data sources, including national survey data, and are largely estimates of those reporting ever having had a sexual partner of the same-sex. Survey measures of those who identify themselves as gay, lesbian or bisexual, or who report same-sex partners in a more recent period, such as in the last five years, generally suggest lower estimates of 2 to 4 per cent.

72 Source: Statistics Canada 2006.

73 CSO Census 2002 Principal Demographic Results.

Children in Same-Sex Households

1. International

There is increasing quantitative evidence that substantial numbers of LGB people are parenting children in a variety of forms. In the United States for example, 33 per cent of female same-sex householders and 22 per cent of male householders identified in the 2000 Census were living with their children under 18 years old (Simmons and O’Connell, 2003).⁷⁴ However, the US Census figures are likely to be a substantial under-estimate of the number of LGB parents and their children. The numbers for example, do not capture the children in same-sex headed households who did not identify their relationship. In this respect, there is some evidence that the more general reluctance of LGB people to disclose their sexuality in the census can be heightened for LGB parents who weigh up the potential for discrimination against their children as well as themselves.⁷⁵

2. Ireland

Although data is limited in Ireland, there is some evidence that the numbers of LGB people with children is significant and growing.⁷⁶ The capacity to draw a realistic picture of LGB people and families will require some focus on the barriers people face in disclosing their situation in the Census and other data collection processes. Some indication of these barriers should emerge from a study currently being undertaken jointly by the Equality Authority and the Equality Commission for Northern Ireland on factors limiting LGB people in taking cases under equality legislation in both jurisdictions.

The following is a brief summary of the main demographic changes since 1937

- The total number of households has risen, with the biggest increase occurring in one-person and two-person households and a decline in households with five or more persons. One in ten households in 1937 was a one-person household, compared with more than one in five today.
- In 1937 less than one in ten persons aged sixty-five years and over lived alone; today over one in four of the over sixty-fives live alone, with one in three women over 65 living alone.
- Of total family units in which children were present in 2002, just under three-quarters are composed of husband, wife and children, while over one-quarter are either lone parents with children or cohabiting couples with children.
- One of the few indicators which is closely similar then and now is the age of a woman at first marriage – just twenty-nine years in 1937 and slightly below twenty-nine years today.
- Both the marriage rate at 5.4 per 1,000, and the birth rate at 20.4 per 1,000, were higher in 1937 than they are today at 5.1 and 14.0 respectively.
- A striking feature with regard to marriage is the rise in marriage breakdown.

⁷⁴ Simmons, T. and O’Connell, M. Married Couples and Unmarried Partner Households: 2000. Washington DC: US Census Bureau, 2003.

⁷⁵ Smith, D. and J. Gates Gay and Lesbian Families in the United States: Same Sex Unmarried Partner Household. Washington DC, Human Rights Campaign, 2001.

⁷⁶ Morley, C. Somewhere I can be Myself: An Evaluation of Linc. 2001-2004.

- Three per cent of births took place outside marriage in 1937, compared with 32 per cent today.
- Average family size was between 3 and 4 children compared with 1.6 today.
- The nature of adoption has changed with a majority of adoptions being family adoptions, and an increasing number of adoptions of children from outside Ireland.
- The proportion of women who work full time in the home has declined, especially in the past decade and especially among younger women.

The rate of cohabitation in particular has grown rapidly since 1996. As stated above, cohabiting couples accounted for 8.4 per cent of all family units in 2002 (6 per cent of all households) compared with 3.9 per cent in 1996. Those without children accounted for one in five of all childless couples in 2002, while those with children represented 5.5 per cent of all couples with children. The number of children living with cohabiting parents increased from 23,000 in 1996 to 51,000 in 2002. Just over three-quarters of cohabiting couples without children were unions in which both partners were single, while a further 5.8 per cent were separated. The corresponding proportions for cohabiting couples with children were 58.8 per cent and 11.5 per cent respectively in 2002.

Appendix 5

Note on Adoption

Guiding Principles

Adoption is a service which is provided for children. Everybody recognises the principle that a child should grow up in the care of his or her family of origin and within that family environment, in an atmosphere of happiness, love and understanding. In terms of international adoption the key principle of the Hague Convention is that the aim of adoption is to find the best parents for the child, and not to find the best child for adoptive parents. Each State as a matter of priority is required to take appropriate measures to enable the child to remain in that care. Two other principles are also key - that the best interests of the child are paramount at all stages of the process and that intercountry adoption represents a subsidiary means of child-care which should only take place where the child cannot be cared for in a family within his or her own country. Adoption is not considered as a provision which is available for the exercise of any rights except those of the child in need of alternative care, when a range of other options have already been exhausted. Decisions made in relation to the best alternative must place the long term interests of the child as the paramount consideration.

At the time of writing the Working Group is aware that work is underway within the Office of the Minister for Children to bring forward legislation to give effect to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

History of Adoption

There was no legal adoption in Ireland at the time the Constitution was enacted. Legal adoption was introduced into Ireland with the passing of the Adoption Act 1952, which provided for the establishment of the Adoption Board, An Bórd Uchtála, with powers to make adoption orders. Prior to 1952 informal adoption, as well as fosterage, existed on a limited scale with adoptions being arranged through private adoption societies, usually affiliated to one of the Churches, most frequently the Catholic Church. The Adoption Act 1952, together with further Acts of 1964, 1974, 1976, 1988 and 1991, comprise the law governing adoption in Ireland. Since the passing of the 1952 Act, 40,000 adoption orders have been made, an average of 1,000 per year, with the annual number varying from a high point of almost 1,500 in 1967, to less than 300 in 2004.

The Adoption Act 1952 provided for the adoption of children born out of wedlock and for children both of whose parents were dead. The Act contained a condition which required that adopting parents 'were of the same religion as the child and his parents or, if the child is illegitimate, his mother'. In effect the measure prevented couples in a marriage where spouses were of different religions, from adopting a child. Subsequently, following a High Court case, this element of the Act was found to be unconstitutional in that it discriminated against those in so-called 'mixed marriages', that is marriages between persons of different faiths. A new Adoption Act in 1974 repealed the religious clause in the 1952 Act. Notwithstanding amending Acts, adoption procedures remain rooted in the 1952 Act and the nature of the adoption system derives from the attitudes and customs of the 1950s. Central to these attitudes was the supremacy of the marriage-based family, the constitutional cornerstone of society.

The status of "illegitimacy" (which has since been abolished) was central to adoption. Adoption was largely a method of providing homes with a father and a mother for children born outside of marriage while at the same time meeting the needs

of, in general, but not exclusively, infertile couples. Between 1952 and the Adoption Act 1988 children born within marriage could only be adopted if both their father and their mother were dead. At the high point of adoption in 1967 when almost 1,500 adoption orders were made, the number of orders was almost identical with the number of births outside marriage in that year. In 1973 when the allowance was introduced for an unmarried mother who kept her child, the number of adoptions was over 1,400, not very different from the 1967 level. Gradually the number of adoption orders began to decline and, significantly, of the adoption orders made, the share of orders made in respect of family adoptions rose dramatically. Family adoptions refer to adoptions made by birth mothers and their husbands, and by other relatives including grandparents, brothers, sisters, uncles and aunts. Over the recent past the total number of adoption orders made fell from 715 in 1987 to 266 in 2002 of which a majority were family adoptions. In 2002 there were also 399 orders made for eligibility and suitability to adopt outside the State, i.e. for foreign adoptions.

Concerns of the Adoption Board

The Adoption Board has expressed concern regarding the position of birth fathers in relation to adoption. The Board states in its *Report for 2002*: *“As noted in its 2000 and 2001 reports it remains the Board’s view that adoption is not always the ideal solution in step-parent situations and that some other legal means should be devised for establishing the rights of the birth mother’s husband without extinguishing those of the birth father...The Board again calls on the Minister to explore the possibility of introducing amending legislation to allow the Board to attach conditions to the making of an adoption order to ensure that a birth father can have continuing access to his child after the making of an adoption order.”*⁷⁷

Foreign adoptions

The Adoption Act 1991, sets out statutory procedures for the recognition of certain adoptions effected outside the State. The legislation contains a definition of a foreign adoption, and only adoptions which comply with the terms of the definition are entitled to recognition.

Among the main features of the definition is the requirement that the foreign adoption must be effected in accordance with the law of the foreign country concerned. Furthermore the adopted person must be under the age of 18 years at the date of the adoption, or, if the adoption was effected before 30 May 1991, under the age of 21 years.

The foreign adoption must have also essentially the same legal effect as an Irish adoption order in relation to the termination and creation of parental rights and duties and the adopters must not have made or received any improper payments in consideration of the adoption.

The legislation also provides for the recognition of a foreign adoption effected in favour of a person or a married couple who at the date of the adoption were domiciled or habitually resident in the foreign country, or were ordinarily resident there for at least one year immediately preceding the date of the adoption.

The legislation also provides for the recognition of a foreign adoption effected in a country other than the adopter's country of domicile, habitual residence or ordinary residence in any case where the adoption is recognised under the law of the latter country.

⁷⁷ *Report of An Bord Uchtála (The Adoption Board) for 2002*, Government Publications, Dublin 2002.

The 1991 Act lays down separate procedures for the recognition of adoptions effected abroad in favour of Irish residents. Special transitional arrangements apply to such adoptions which were effected before the enactment of the legislation. Broadly speaking, such an adoption qualifies for recognition provided the adopters satisfy the legal eligibility criteria to adopt under Irish law and the adoption complies with the terms of the definition of a foreign adoption referred to above.

Since the enactment of the legislation, Irish residents wishing to adopt children abroad must have their eligibility and suitability to adopt formally established in advance in order for such foreign adoptions to qualify for recognition. This adoption assessment, which must be undertaken by an adoption agency and approved by the Adoption Board, provides an important protection for the welfare of the child and ensures that children concerned in inter-country adoptions enjoy safeguards and standards equivalent to those existing in the case of national adoptions. This approach is in compliance with the U.N. Convention on the Rights of the Child.

Under the terms of the Adoption Act 1991 recognition of the adoption is withheld in any case where the adopters made or received improper payments or any other reward in consideration of the foreign adoption.

Adoptions in 2004

The total number of applications for Irish adoption orders received in 2004 was 286. Of these, 212 family adoption applications were received compared to 193 applications in 2003. The Board made 273 Irish adoption orders in 2004 compared to 263 in 2003. 185 adoption orders were made in respect of family adoptions, 177 of which were made in favour of the child's mother and her husband. Sixty-eight adoption orders were made in respect of children placed for adoption by Health Boards and registered adoption societies, and of this figure 22 were children who were in long-term foster care and were being adopted by their foster parents. The Board made 20 Irish adoption orders in 2004 in respect of children who were placed for adoption overseas, 16 of whom were from Guatemala, 2 from the Philippines and 2 from India. Prospective adoptive parents are granted simple adoption orders in Guatemala and, as such adoptions are not recognised under Irish law, the prospective adoptive parents apply to the Board for Irish adoption orders in respect of these children, either with the consent of the birth/natural parent(s) or through the High Court under the Adoption Act 1988. Couples adopting from India and the Philippines are granted guardianship by the relevant courts and then adopt the children under Irish law. The Board made nine Irish adoption orders during 2004 with the consent of the High Court under the provisions of the Adoption Act 1988.

The Board made one Irish adoption order during 2004 with the consent of the High Court under the provisions of the Adoption Act 1974, i.e. when the birth/natural mother placing her child for adoption failed to complete the necessary consent papers, after completing the initial consent to the placing of the child for adoption. The applicants can apply to the High Court under Section 3 of the Adoption Act 1974 for an order to dispense with her consent, thereby allowing the Adoption Board to make the adoption order.

Four-hundred and sixty-one Declarations of Eligibility and Suitability for inter-country adoptions were granted in 2004. Twenty one of these were for twins or two siblings.
