Irish Council for
Civil Liberties

The General Scheme of the Civil Partnership Bill: Legal Consequences and Human Rights Implications

With a foreword by The Honourable Justice Michael Kirby AC CMG
Justice of the High Court of Australia

Dr. Fergus Ryan, Head of the Department of Law, Dublin Institute of Technology
'Benchmarking' Civil Partnership: Comparing Civil Partnership with Marriage and Considering the Legal Position of Children

Muriel Walls, Solicitor, McCann FitzGerald
Dissolution and Provision for Qualified Cohabitants

Brian Barrington BL
Civil Partnerships in the United Kingdom and Ireland

Dr Simone Wong, Senior Lecturer, Kent Law School, University of Kent
The United Kingdom Perspective on Issues Relating to Cohabitation

ICCL Seminar Series, Volume 1 January 2009

Irish Council for
Civil Liberties

ICCL Seminar Series, Volume 1
January 2009

The General Scheme of the Civil Partnership Bill: Legal Consequences and Human Rights Implications

With a foreword by The Honourable Justice Michael Kirby AC CMG

ISBN : 978-0-9544557-1-2

Volume 1 of the ICCL Seminar Series brings together in an edited form papers first given at the ICCL Seminar *The General Scheme of the Civil Partnership Bill: Legal Consequences and Human Rights Implications* which took place on Friday, 18 July 2008 at the Equality Authority, Clonmel Street, Dublin 2. The volume also features an additional contribution by Dr Simone Wong.

Published by the Irish Council for Civil Liberties
9-13 Blackhall Place
Dublin 7
T: +353-1-7994504
E: info@iccl.ie
W: www.iccl.ie

CONTENTS

Foreword 1
The Honourable Justice Michael Kirby AC CMG,
Justice of the High Court of Australia

'Benchmarking' Civil Partnership: Comparing Civil Partnership with Marriage and Considering the Legal Position of Children 5
Dr. Fergus Ryan, Head of the Department of Law,
Dublin Institute of Technology

Dissolution and Provision for Qualified Cohabitants 19
Muriel Walls, Solicitor, McCann FitzGerald

Civil Partnerships in the United Kingdom and Ireland 41
Brian Barrington BL

The United Kingdom Perspective on Issues Relating to Cohabitation 73
Dr Simone Wong, Senior Lecturer, Kent Law School, University of Kent

Contributors 79

FOREWORD

The Honourable Justice Michael Kirby AC CMG

Attitudes to the legal recognition of same-sex relationships depend upon considerations such as age, religious affiliation, culture and geography. The Scandinavian countries seem to have no problem in legislating for full marriage. Yet Catholic Spain also took this step and the Zapatero Government, which was responsible, was later returned in a general election, despite much religious and political opposition.

When in 1998 the New Zealand Court of Appeal decided *Quilter v Attorney-General*[1], I remember siding intellectually with the majority of that Court at the time, denying any entitlement to a lesbian couple seeking to oblige a local marriage registrar to issue them a marriage licence. The marriage statute was expressed in gender neutral language. The applicants invoked the then recent *Bill of Rights Act* to argue for an interpretation of the law that ended the discrimination against them. The majority of the Court of Appeal, however, denied that there was any discrimination. In a strong dissent, Justice Ted Thomas concluded that there was undoubted and wrongful discrimination. He did not ultimately feel able to interpret the law in favour of the applicants. But he foreshadowed a time when the New Zealand Parliament would remove the discrimination which he found to exist. (The New Zealand Parliament has since enacted a law providing for civil partnerships for same-sex couples in most respects, save name, equivalent to marriage).

Back in 1998, I thought that Justice Thomas must have taken leave of his senses. Like the majority, I concluded that there was no discrimination. The relationships were not like. "Marriage" connoted a "voluntary union of one man and one woman, to the exclusion of all others", just as I have been taught at law school in the 1950s from the opinion of Lord Penzance in *Hyde v Hyde*[2].

My reaction to *Quilter*, looking back on it, was pretty amazing. By 1998 I had already myself been living in a stable, loving, permanent same-sex relationship with my partner Johan, then for 29 years (it is now approaching 40 years). This just goes to show how lawyers, in particular, are susceptible to inflexibility of thinking; how they sometimes take longer to get their minds around new concepts than other citizens

---

[1] [1998] 1 NZLR 523.
[2] (1866) LR 1 P & D 130 at 133.

do. Now, as I read *Quilter*, I can fully appreciate Ted Thomas' approach. It *is* discriminatory to deny a legal civil status to some citizens because of their sexual orientation: something they do not choose and cannot change. In the law, we need more leaders like Justice Thomas who will lift the scales of unquestioned habits and customs from our eyes. It is so easy for lawyers (but also for other citizens) to be indifferent to, or ignorant of, the shifting of the tectonic plates of society that presents a new dynamic to which the law should respond.

Gay marriage, as these pages point out, has now spread to several jurisdictions far from northern Europe. Civil partnership has been embraced in many other jurisdictions which baulk at the demand to assign the traditional word "marriage" to same-sex unions. In some countries, including my own, Australia, even civil unions seem, for the moment, to be a bridge too far. Under the previous conservative government, the Federal Parliament, on the brink of a national election in 2004, adopted an amendment to the federal *Marriage Act* to insert the *Hyde v Hyde* definition into the statute. This was an initiative, copied from laws adopted in the United State of America, designed to "wedge" the supporters of a more inclusive approach to the topic.

The wedge worked. The opposition Labor Party supported the government's change. Its resistance to gay "marriage" has not altered. When the Labor Party was returned to government in Australia, in November 2007, it affirmed the statutory definition of marriage. However, it promised to eliminate from the federal statute book hundreds of provisions that discriminated against same-sex couples in matters of a financial kind (pension rights, social security etc). In November 2008, substantially by unanimous vote, the Australian Federal Parliament enacted the reforms of the federal statute book[3]. One of the changes, to the *Judges Pensions Act* 1968 (Cth), came just in time before my pending retirement, to protect my partner in case I should pre-decease him.

No marriage or civil union legislation is on the horizon in Australia. Those who want to can register their relationship, rather like a dog licence. But the registration has few if any legal consequences. Ceremonies of celebration are, it seems, outside the scope of the law. An attempt by the legislature of the Australian Capital Territory to enact "civil unions" (even when re-named "civil partnerships") was overruled by the new federal Labor government, apparently as approximating too closely to marriage and thereby, somehow, as endangering that institution.

"Would you marry me?" I asked Johan by telephone from London in July 1999 when I attended my first conference on the subject at King's College School of Law[4]. He

---

[3] See, for example, *Same-Sex aRelationships (Equal Treatment in Commonwealth Law – Superannuation) Act* 2008 (Cth).

[4] See M D Kirby, "Same-Sex Relationships: Some Australian Legal Developments" in M D Kirby, *Through the World's Eye* (Federation, Sydney 2000) at 64.

had been born in the Netherlands. So he knew of the legal changes in the land of his birth to permit marriage. "It's far too early" was his reply – we were, after all, only in the thirtieth year of our relationship. Marriage is therefore not a vital public affirmation for us, given all that we have seen and gone through. But it is important for some other citizens, especially younger ones who cannot see why they should be treated as second class by the laws of their own country.

Weddings in churches are a different matter. Churches and other religious institutions should, of course, be allowed to observe their current understandings of their own doctrines. But marriage is a civil status, created and defined by the law. To it many legal consequences and some benefits attach. Civil partnership is a status, separate but equal, which goes part of the way, but risks leaving neither side very happy. The same-sex partners are then denied true equality which they know is now recognised in other civilised jurisdictions. The conservative traditionalists complain that civil partnership "mimics" marriage and therefore, in a mysterious but unexplained way, damages that institution for heterosexual couples who are now staying away from it in droves.

In many ways the civil society of Ireland is similar to that of Australia. It tends to be conservative in changing things long settled. Churches, with their often empty pews, still wield a large influence for want of any alternative exponent of accepted moral rules. Yet now the principles of fundamental human rights and the growing demand of all citizens for civil equality produce new forces for change that repair the shabby treatment of sexual minorities, a vulnerable group in society hitherto denied respect for their equality and human dignity.

The removal of financial discrimination in federal law in Australia and an enactment of civil partnership provisions in Ireland must be seen for what they are: steps on the path towards treating all citizens of a nation equally. The goal will not be achieved overnight. But one day it will be achieved. Be sure of that.

Three developments will stimulate the process of reform. First, courts will deliver enlightened decisions, drawing upon international equality jurisprudence invoked before them by individual citizens and by community organisations such as Councils for Civil Liberties that challenge the *status quo* and reveal discrimination for what it is.

Secondly, those on the receiving end of discrimination will stand up for their rights. They will no longer be willing to play the game of "don't ask, don't tell", in the hope of avoiding upset to those of their fellow citizens who still like to pretend that the binary heterosexual characteristic of long term adult human and sexual relationships is the only one that exists. In Australia, it was when we came to actually know Asian fellow citizens as human beings that the shabby façade of the White Australia Policy was seen for what it was and soon crumbled and disappeared.

Thirdly, elected politicians and officials will come to realise that, on the issue of same-sex rights, the public is often well in advance of the organised political parties and the churches and their self-styled guardians of "public morality". In Australia the

amendment to more than a hundred federal statutes in November 2008 followed a report of the Human Rights and Equal Opportunity Commission[5]. When first delivered in 2007 that report was sidelined by the then government as too controversial. The community, we were told, was not ready for it. But when the legislative reforms were introduced by the new government in 2008, even the politicians were surprised at how little opposition there was in society at large. The *Zeitgeist* had already changed. Society was in advance of the politicians. I would not be surprised if the same were true in Ireland.

I congratulate the Irish Council for Civil Liberties for publishing these papers on the Civil Partnership Bill. The papers demonstrate that a large intellectual movement is afoot that has reached Ireland, as it has Australia. When science and experience reveal the existence of a cohort of fellow citizens with a minority sexual orientation as an attribute of their nature, it is intolerable to just people, straight as well as gay, to discriminate unfairly against that minority. Civil libertarians realise that "[t]he law knows no finer hour" than when it protects minorities and assures them of a full and equal place in the civil society of the nation[6].

MICHAEL KIRBY
High Court of Australia
Canberra
Christmas 2008

[5] Australia, Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements*, Canberra, 2007.
[6] Cf *Falbo v United States* 320 US 549 at 561 (1944) per Murphy J.

'BENCHMARKING' CIVIL PARTNERSHIP: COMPARING CIVIL PARTNERSHIP WITH MARRIAGE AND CONSIDERING THE LEGAL POSITION OF CHILDREN

Fergus Ryan[1]

The publication of the General Scheme (Heads of Bill) of the Civil Partnership Bill 2008[2] marks a watershed in modern Irish law. The Bill proposes the most comprehensive reform of family law in a generation. It offers long overdue legal recognition and protection to same-sex couples as well as other non-traditional families. It definitively challenges the well-worn tradition of treating couples outside of marriage as strangers at law.[3] Both symbolically and practically, the proposed Bill is of particular significance to gay and lesbian couples in that it provides, for the first time, a comprehensive scheme for the recognition and support of same-sex relationships.

The ICCL has described this measure as a 'staging post' rather than a milestone.[4] Indeed, what the scheme proposes does not eliminate inequality so much as narrow the gap, though, in fairness, the gap has been significantly bridged. Like the Iarnród Éireann ads, it's fair to say, perhaps, that "we're not there but we're getting there".

---

[1] Head, Department of Law, Dublin Institute of Technology. Co-author with Judy Walsh of Walsh and Ryan, *The Rights of De Facto Couples* (Dublin: Irish Human Rights Commission, 2006). On this topic see also Ryan "From Stonewall(s) to Picket Fences: The Mainstreaming of Same-Sex Couples in Contemporary Legal Discourse" in Binchy and Doyle, (eds.), *Committed Relationships and the Law*, (Dublin: Four Courts Press, 2007).

[2] Published June 2008. See www.justice.ie

[3] On which see, for instance, *Ennis v. Butterly* [1996] 1 I.R. 426 and Staines "The Concept of 'the Family' under the Irish Constitution" 11 *Ir. Jur.* (n.s.) 223, Glennon, " 'The Family' - A Comparative Analysis of a Contextual Definition" [2002] 2 *I.J.F.L.* 17, Ryan, "Sexuality, Ideology and the Legal Construction of Family" [2000] 3 *I.J.F.L.* 2, Wills, "Protecting the Rights of Cohabitees - Recommendations for Reform" [2002] 3 *I.J.F.L.* 8, Ryan, "Recognising Family Diversity – Children, One Parent Families and the Law" [2006] 1 *I.J.F.L.* 3. A number of reports address this issue including Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals,* (Dublin: 2002) www.equality.ie, Ronayne and Mee, *Partnership Rights of Same-Sex Couples,* (Dublin: Equality Authority 2000) www.equality.ie, Ó Cinnéide, Equality Authority/Equality Commission for Northern Ireland, *Equivalence in Promoting Equality,* (Dublin/Belfast: 2005**)** www.equality.ie**,** All Party Oireachtas Committee on the Constitution, *10th Progress Report, The Family,* (Dublin: Government of Ireland, 2006) see: www.constitution.ie, Walsh and Ryan, *The Rights of De Facto Couples* (Dublin: Irish Human Rights Commission, 2006), Law Reform Commission, *The Rights and Duties of Cohabitants,* LRC-82-2006, (Dublin: Law Reform Commission, 2006), Working Group on Domestic Partnership, *Options Paper,* (Dublin: Department of Justice, Equality and Law Reform, 2006) (The Colley Report) and ICCL Working Group on Partnership Rights and Family Diversity, *Equality for All Families* (Dublin: ICCL, 2006).

[4] ICCL Press release, "Civil Partnership Scheme: More a Staging Post than a Milestone, says the ICCL" 24 June 2008, www.iccl.ie

The purpose of this paper (as the title suggests) is to benchmark civil partnership against marriage. It seeks to examine, in particular, the position of children who live with same-sex couples, and to consider whether the Bill is sufficiently mindful of their vulnerable legal status. At the outset, however, it is necessary to add a note of caution about the very process of comparison with marriage. Implicit in this process is the view that marriage is the 'holy grail', the ideal model against which any arrangements for same sex couples should be measured. While this may be so, it is arguably important not simply to consider whether the model proposed promotes equality with marriage but also whether the measures are sufficiently protective in their own right. In other words, it is important to question not only whether the Bill will provide equal treatment, but whether the benchmark itself – modern Irish marriage law – appropriately serves the interests of modern families.

Overview: The 2008 Scheme

The proposed Scheme of the 2008 Bill sets out two new models of recognition, a civil partnership registration scheme for same-sex couples and a presumptive scheme for cohabitants, both same sex and opposite sex. Muriel Walls' paper deals in more detail with the presumptive scheme for unmarried cohabitants and also with the remedies available on dissolution of a civil partnership, and as such, this paper will confine itself broadly to the issue of civil partnership and its comparability to marriage.

The cohabitation measures (which mirror the proposal of the Law Reform Commission on this topic)[5] propose a 'presumptive scheme', that is, one that is applied to all cohabitants without the need for any action on their part.[6] Cohabitants (including both same-sex and opposite-sex couples) will be recognised for a variety of purposes.[7] The Bill distinguishes between 'cohabitants' and 'qualified cohabitants'. All cohabitants (regardless of the precise duration of cohabitation) will be recognised as entitled to relief under the Domestic Violence Acts, the Civil Liability Acts, the Power of Attorney Act 1996 and the Residential Tenancies Act 2004. The formerly applicable distinctions made between same-sex and opposite-sex couples in some of the aforesaid legislation will be removed.

[5] Law Reform Commission, *The Rights and Duties of Cohabitants,* LRC-82-2006, (Dublin: Law Reform Commission, 2006) www.lawreform.ie

[6] General Scheme, Part 7

[7] It seems that the term 'cohabitant' also includes a civil partner but not a married person. According to Head 123, cohabitants are two people in an intimate relationship. The definition excludes persons who are married to each other or closely related, but it does not expressly exclude civil partners. As the rights and duties extended to civil partners are more comprehensive than those applicable to cohabitants this is perhaps of little relevance, though it is unclear why civil partners would also be deemed cohabitants. One possible implication is that this would subject civil partners to the requirements of Head 134, which mandates the solicitors acting for cohabitants to discuss alternatives to taking court action, such as mediation, as well as the possibility of reconciliation.

Separately, a special redress scheme will apply to 'qualified cohabitants', defined as cohabitants who have lived together for three years, two where there are children from the relationship.[8] A 'qualified cohabitant' may claim from the estate of a deceased partner, while economically dependent qualified cohabitants may claim maintenance, accommodation and pension rights when a relationship breaks down. Cohabitation agreements (which are currently unenforceable)[9] will also be recognised. These will allow cohabitants to opt out of the succession and financial redress provisions in the Bill, should both parties wish to do so.

The civil partnership scheme follows the registration model – requiring that the couple 'opt-in' by going through a public ceremony which to all intents and purposes is equivalent to that for civil marriage. This civil partnership registration scheme is confined to same-sex couples. Indeed, it is difficult to see what benefit there would be for an opposite-sex couple in choosing civil partnership over marriage. It is also arguable that offering opposite sex couples a choice between marriage and civil partnership may be deemed to undermine the special constitutional position of marriage. The same point is less easily sustained in respect of same-sex couples who are prevented from marrying in the first place.

At 172 pages long, the Bill is lengthy, intricate and, at times, quite technical. Indeed this is a notable difference between the government measure and earlier bills on this matter, namely the Civil Partnership Bill proposed by Senator David Norris, and the Labour Party's Civil Unions Bill 2006. The earlier bills simply stated that civil partnership would be equivalent to marriage in most respects. The Government Bill, by contrast, seeks to enumerate one by one the various rights and responsibilities that would apply. While far more laborious, it seems this approach was preferred for constitutional reasons, the logic being that a direct equation with marriage is more likely to provoke constitutional concerns.

The Government thus preferred to list explicitly the various consequences of civil partnership without seeking to compare it directly with marriage. A review of the proposal, however, reveals a union that (with important exceptions) is substantially equivalent to marriage. In fact, it is clear from the heavy borrowing from current marriage legislation, that civil partnership is based largely on the same blueprint.

Civil partnership will be open to people aged 18 or over[10] who are of sufficient mental competence. The parties must be of the same sex[11] and must not be close relatives.[12] At the time of the ceremony, neither party may be married or in

[8] Though these requirements may be overlooked where 'serious injustice' would otherwise arise.
[9] *Ennis v. Butterly* [1996] 1 I.R. 426
[10] General Scheme, Head 3 and Head 49
[11] *Ibid.*
[12] *Ibid.* – see Head 23 for full details.

another civil partnership.[13] A couple intending to celebrate a civil partnership face the same procedural hurdles as intending spouses.[14] In particular, they must give at least three months' notice of their intention to formalise their relationship.[15] Additionally, at least 5 days in advance of the ceremony, the couple must make a declaration in person that there are no impediments to their civil partnership.[16] Once they meet these requirements (which are substantive in nature) they will be issued with a civil partnership registration form, effectively a licence to 'partner' which is valid for six months.[17] On the day itself, before a registrar and at least two witnesses, the partners must declare publicly that they accept each other as civil partners and that they know of no impediment to their union.[18] The event may take place in a Registry Office, though it may also be celebrated in other approved venues.[19] Like marriage, it is a public event, open to all.[20] Written objections may be made to the civil partnership,[21] but only on the grounds that there is a legal impediment to the marriage.

Provision is made for the recognition of civil partnerships celebrated abroad,[22] provided they are exclusive and permanent in nature (subject to the possibility of dissolution), confined to couples of the same sex or of the opposite sex who are not close relatives, and broadly comparable in status to an Irish civil partnership. It is clear that a UK civil partnership would meet these requirements, though it is less certain whether institutions providing less protection – such as the French PACS – will fit the bill. It is also unclear whether a foreign same-sex marriage would be recognised as technically equivalent to a civil partnership – this may need to be clarified.[23]

The Proposed Rights and Duties of Civil Partners

The rights, duties and remedies that arise as a result of civil partnership are extensive. With some important exceptions, the legal entitlements of civil partners mirror those applicable to married couples. The Bill, for instance, proposes identical succession rules.[24] In particular, a civil partner will have the legal right to claim from the estate of a deceased partner, whether or not the latter made a will. This means that:

---

[13] *Ibid.*
[14] General Scheme, Part 2, Chapter 2
[15] *Ibid.* Head 8
[16] *Ibid.*
[17] *Ibid.* Head 9
[18] *Ibid.* Heads 10-11
[19] Head 12
[20] Head 11
[21] Head 13
[22] Head 52
[23] Notably, the corresponding UK legislation expressly provides that same-sex marriages celebrated abroad will be recognized as equivalent to civil partnership. The proposed Irish legislation, by contrast, leaves it to the Minister to determine which relationships will and will not be accorded recognition.
[24] Head 29

- Even where the deceased made a will, his partner will be able to assert a right to half of the deceased's estate, one-third if the deceased had children
- Where the deceased dies intestate (without making a will) the partner will be entitled to the entirety of the estate, two-thirds if the deceased had children.

In relation to pensions, civil partners will be placed in the same position as spouses.[25] In particular, if a pension scheme makes provision for spouses, like provision must be made for civil partners. Similarly, for immigration purposes, civil partners will be treated as members of each other's family, though this does not necessarily guarantee a right to residence.[26] Here it is important to note that even marriage does not guarantee residence for the spouse of an Irish citizen. Notably Head 28 also provides that measures similar to those proposed in section 123 of the Immigration, Residence and Protection Bill 2008 will apply to foreign nationals intending to enter into a civil partnership. Section 123 proposes to restrict the marriage of foreign nationals in Ireland where the prior permission of the Minister for Justice, Equality and Law Reform has not been obtained.[27]

Where the partners share a home (regardless of who *owns* it), a civil partner will not be able to sell, lease or mortgage the shared home, or offer it as security for a loan, without the prior written consent of the other civil partner.[28] In effect these measures match the Family Home Protection Act 1976, the impact of which has been thoroughly teased out in the courts, though the proposed Bill pointedly uses the phrase 'shared home' as opposed to 'family home' to describe the residence of the civil partners. Various other protective mechanisms provided by the 1976 Act are also extended to civil partners. These include measures directed at a partner who engages in conduct likely to lead to the loss of any interest in the shared home or which may render it unsuitable for habitation (provided this is done with the intention of depriving the other partner of the benefit of such accommodation). The Courts are also empowered to prevent the disposal of household items such as bedding, furniture and kitchenware where such disposal is likely to make the home difficult to live in.

The Bill also provides for 'maintenance' along the same lines as those applicable to married couples (see the Family Law (Maintenance of Spouses and Children) Act 1976).[29] This will allow each civil partner to claim financial support (if needed) from the other. If maintenance is granted, it may be collected directly from the salary of the liable partner. Again the maintenance régime mirrors that

[25] Head 26
[26] Head 28
[27] See the comments of the ICCL, IPRT and FLAC in their joint *Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights* (June 2008) at p.121.
[28] Part 3 Chapter 4
[29] Part 6 Chapter 3

applicable to spouses, with similar safeguards and conditions. In particular, the decision to grant maintenance (and the amount awarded) will depend on the resources and needs of the respective parties, such that partners with equal resources are unlikely to receive maintenance from each other.

Dissolving a Civil Partnership

A civil partnership may formally be 'dissolved' where the parties have lived apart from each other for at least two of the previous three years.[30] 'Living apart' requires more than mere physical separation, but presupposes a mental element that the partners intend to live separate lives.[31] The court must be satisfied that proper provision has been made for each partner.

Once a dissolution is granted, the couple may agree terms but may also avail of a variety of court-ordered remedies identical to those available following a divorce.[32] These include maintenance, lump sum payments, orders conferring a right to claim from a partner's pension and orders dividing property between the partners. These remedies are granted at the court's discretion[33], based mainly on the partners' respective resources and needs[34]. Theoretically, either partner may seek a fresh court order long after the dissolution, creating a potentially open-ended support obligation. In other words, as with marriage, there is no clean break on the dissolution of a civil partnership, though a person who enters into a further civil partnership or marriage will be precluded from making further claims against his former civil partner.[35]

Other Reforms

The Bill makes several other long overdue reforms, the broad import being that civil partnership will have largely the same impact as marriage. These include extending barring orders[36] and the right to sue for wrongful death[37] to civil partners. The Bill also proposes the removal of the currently applicable

[30] Head 57
[31] *M. McA. v. X.McA.* [2000] 2 I.L.R.M. 48, Binchy, (2000) 22 *D.U.L.J.* 216. According to *Santos v. Santos* [1972] 2 All E.R. 246, living apart is "a state of affairs…" that requires "…more than that the husband and wife are physically separated, that involves, considering attitudes of mind….". See also *Pulford v. Pulford* [1923] p. 18: "living apart is not the withdrawal from a place but from a state of things", and the Judicial Separation and Family Law Reform Act 1989, s. 2(3):" Spouses shall be treated as living apart from each other unless they are living with each other in the same *household*…" (emphasis added).
[32] Part 5, chapters 3-4.
[33] See Martin "Judicial Discretion in Family Law" (1998) 11 *I.L.T.* 168. Dewar, "Reducing Discretion in Family Law" (1997) Austral. Jo. of Family Law
[34] The criteria for awarding ancillary remedies are set out in the Bill, and largely replicate those applicable to ancillary orders on divorce, as set out in section 20 of the Family Law (Divorce) Act 1996.
[35] There is, however, an anomaly which will require the amendment of the Family Law (Divorce) Act 1996 to prevent a person who has entered into a civil partnership after divorce claiming from a former spouse.
[36] Head 31
[37] Head 25

discrimination between cohabitants of the same-sex and opposite-sex in the context of domestic violence, wrongful death and residential tenancies.[38]

For the purposes of equality legislation, discrimination on the basis of being a civil partner (or having been a party to a dissolved partnership) will be prohibited.[39] Civil partners will, for the purposes of the Employment Equality and Equal Status Acts, be deemed members of each other's families and 'near relatives' respectively.[40] The Bill does not, however, address the issue of discrimination against cohabitants, which theoretically may still be permitted.[41]

The Bill also directs itself to certain ethical matters. It stipulates that in relation to matters concerning ethics and conflicts of interest the partners will be regarded as if they were spouses. Thus, for instance, under the Ethics in Public Office Act 1995 a person making disclosures will need to include details of the income and property of a civil partner as well as those of a spouse. The civil partner – and notably the child of one's civil partner (if certain conditions are met) - will be treated as connected relatives for the purpose of various measures addressed to ethical issues and conflicts of interest.

Legislative Gaps 1: Miscellaneous

What are the gaps in the legislation? First, the Bill is silent in relation to some of the common law rules applicable to marriage. For instance, it does not directly address whether the marital privilege will be extended to civil partners. This common law privilege permits communications between spouses to be kept confidential, subject to specified exceptions. Arguably, similar principles should be applied to civil partners.[42]

While silent on the taxation and social welfare implications of a civil partnership, it is understood that these matters will be dealt with separately in the annual Finance and Social Welfare Bills respectively. It is understood (though it remains to be seen whether this will in fact be the case) that equality will be the hallmark of such measures. A report in the *Irish Independent*[43] contends that the costs of achieving equality in this context could be high, though a number of

[38] Part 7, chapter 3. Such discrimination infringes the European Convention on Human Rights – see Walsh and Ryan *(op. cit.)* at para. 4.2.5.
[39] Head 84. The ground of marital status has thus been renamed 'civil status'.
[40] Though in practice little turns on this, similar amendments might usefully be made to the Non-Fatal Offences Against the Person Act 1997 and the Parental Leave Acts 1998-2006 expressly to include 'civil partner' within the relevant definitions in the Acts (they do, however, already apply to cohabitants).
[41] Carolan, "Rights of Sexual Minorities in Ireland and Europe: Rhetoric versus Reality", 19 *Dickinson Journal of International Law* 387 (2001) at 399 observes that "…[d]iscrimination against someone based on cohabitation does not constitute marital status discrimination, because such a person is not being discriminated against by reason of being single, married, separated, divorced or widowed". The Bill would include civil partners but not cohabitants within the scope of protected persons.
[42] Subject to the same exceptions, such as those included in the Criminal Evidence Act 1992.
[43] Sheahan, "New civil unions will cost taxpayers over €25m", *Irish Independent,* July 14, 2008

factors suggest that the cost would in fact be minimal. First, the numbers involved are low (with respect, the *Independent* report appeared to confuse civil partnership with wider recognition for cohabitants). In relation to income tax, favourable tax treatment would only be relevant where there is a disparity in income, for instance, where one party is not working. This is probably less of an issue with a couple of the same-sex who are less likely to have children and possibly less likely to be earning different incomes. In relation to CAT, the reduction in the tax take would be minimal, as cohabiting couples already receive the principal private residence relief.[44] Ironically, in fact, recognition of same-sex couples will result in savings on the social welfare side. Such recognition will result in the non-claimant partner's income being taken into account in relation to unemployment assistance and other allowances. Equal treatment will also remove the anomaly whereby cohabiting same-sex partners can still receive a one-parent family payment, as the cohabitation rule currently only applies to opposite-sex couples. Indeed, as Ruth Colker has noted, the benefits of marital status diminish the less well off you are.[45] The somewhat uncomfortable truth then is that savings may be made by better off civil partners at the expense of the less well off.

Likewise, the Bill is silent in relation to health care. In fairness, there is no legislation on this point even in relation to married couples, the issue being one of medical ethics and thus governed by Medical Council guidelines. It is however, unfortunate that this issue is not explicitly addressed. Given that most hospitals in the State are denominational, there is an understandable concern that civil partners be formally recognised as each other's next-of-kin. Arguably, the proposed general ban on discrimination against civil partners may address this concern. The better view, however, may be that the matter needs to be addressed squarely so that ethos cannot be invoked to prevent partners from each other's company at a most vulnerable time.

Legislative Gaps 2: Children

By far the most serious gap in the legislation relates to same-sex couples with children. While the Bill is not entirely silent regarding children, it largely proceeds by reference to the couple as a self-contained unit. There is relatively scant regard for any children who may reside with them. While marriage legislation generally requires the courts to have regard to children in a family unit as well as the adults, the equivalent provisions in this Bill generally do not address the position of children. For instance, the protections afforded in respect of the shared home make no reference to the accommodation needs of dependent children as a relevant criterion. A dissolution may be obtained, moreover, without having regard to whether proper provision has been made for any dependent children. A child living with civil partners will not be able to claim

[44] Section 59C Taxes Consolidation Act 1997, as inserted by section 151 Finance Act 2000
[45] Colker, "Marriage", 3 *Yale Law Jo. of Law and Feminism* (1991) 321 at p. 326.

maintenance from the partner who is not her biological parent. Nor will the child have any legal right to claim from that partner's estate on death (unless the latter made a will in the child's favour). Even with civil partnership, the couple will not be able to adopt jointly,[46] while custody and guardianship rights will continue to be denied to the non-biological parent.

The failure to acknowledge the position of couples with children is intimately linked to the argument against affording full civil marriage to same-sex couples. A central plank in the challenge to full civil marriage for same-sex couples is the contention that marriage (it is said) exclusively provides a safe and stable environment in which to raise children.[47] Straight couples in the normal course of events can bear children whereas gay couples physically cannot. Thus, the contention has been put forward that marriage logically should be confined to opposite-sex couples.

The fundamental problem with this contention is that the civil law does not confine marriage solely to those with procreative capacity. Procreation, moreover, is not legally confined to marriage.[48] While the law may require consummation of a nuptial relationship, it does not invalidate a marriage where either party is infertile. Nor does it nullify a marriage where the parties intend or decide not to have children. As far back as 1947, in *Baxter v. Baxter*[49] Lord Jowitt L.C. rejected the proposition (at least insofar as the law is concerned) that the procreation of children is either *the,* or even *a* principal end of marriage. The sterility of a couple, he observed, was in itself irrelevant to the validity of the union. "It is indisputable," he remarked, in a flush of realism uncharacteristic of the time:

> [T]hat the institution of marriage is *not necessary for the procreation of children, nor does it appear to be a principal end of marriage* as understood in Christendom (emphasis added).[50]

While a marital family, he conceded, may well be the best place to bring up a child, this was "…not the same thing as saying that a marriage is not consummated unless children are procreated, or that the procreation of children

[46] While persons who are gay or lesbian may adopt as individuals, section 10 of the Adoption Act 1991 permits a joint adoption only in cases where the adopters are married to each other.
[47] Though this point has been strenuously contested: see for instance McKeown, Pratschke and Haase, *Family Well-being – what makes a difference*? (Shannon: Céifin Centre, 2003) who conclude that it is the quality of family relationships rather than the type of family in which children are reared that is most relevant to the well-being of children.
[48] Besides being practically impossible to do so, restricting the procreative rights of unmarried persons would probably infringe the constitutional right to privacy and possibly the right to bear children, and certainly would infringe the provisions of Article 8 of the European Convention on Human Rights.
[49] [1947] 2 All E.R. 886. See also *L. v. L. (orse. D.)* (1922) 38 T.L.R. 697 and Lord Stair's *Institutions,* (1832) I, tit. 4, para. 6.
[50] [1947] 2 All E.R. 886 at 890.

is the principal end of marriage".[51] Children, in other words, are a welcome but not a necessary feature of marriage. [52]

Older authority affirms this position. In *D-e v. A-g*[53] Dr. Lushington observed that:

> [M]ere incapability of conception is not a sufficient ground on which to found a decree of nullity.

Thus, as Veitch[54] observes:

> Of course procreation and child rearing are descriptive features of marriage but the fact that most people within formal marriage have sexual relations and usually produce children does not tell us what is the essence of marriage.

This view has been confirmed in Ireland in *M.M. v. P.M.*[55] In that case, McMahon J. ruled that while consummation required penetration, insemination is not a necessary pre-requisite. It is also the case that a married couple's constitutional rights are not predicated on their having children.[56] If this is so, what remaining relevance can gender feasibly have in legally determining civil marital capacity?

The link between childbirth and marriage becomes even more tenuous when one considers that approximately 12% of all family units in the State comprise non-marital couples, 1/3 of whom live with one-or more children.[57] When the existence of over 180,000 one-parent families (18% of all families in the State) is also considered, the argument that marriage should be privileged because of its function in child-rearing is diminished to vanishing point.

Furthermore, it is becoming increasingly evident that many gay couples do in fact live with children – either from previous relationships, through fostering, or

---

[51] *Ibid.*

[52] By the same token it is in fact possible to have children without consummating a marriage. See for instance *R.E.L. v. E.L.* [1949] 1 All E.R. 141. A childless couple may of course adopt as in *W. v. W.* [1952] 1 All E.R. 858, where the parties, whose marriage had not been consummated due to the incapacity of the wife, were deemed nonetheless to have approbated the marriage (i.e. accepted its validity) by reason of their adoption of two children. Modern science has also made it possible for a woman to bear children without ever having had intercourse. This *fecundatio ab extra* may well constitute an act approbating (that is, precluding the avoidance of) an otherwise voidable marriage but it nonetheless does not constitute consummation. (Although the birth of a child by artificial insemination did not give rise to approbation in either *R.E.L. op cit.* or *Slater v. Slater* [1953] P. 235).

[53] (1845) 1 Rob. Eccl 296.

[54] Veitch, "The Essence of Marriage – a Comment on the Homosexual Challenge" (1976) 5 *Anglo-American Law Review* 41 at p. 43

[55] [1986] I.L.R.M. 515

[56] *Murray v. Ireland* [1985] IR 53 (HC); [1991] ILRM 465 (SC)

[57] Census of Ireland, 2006. See www.cso.ie

donor insemination.[58] Abroad, gay couples are often the first call for the authorities when they wish to place children with particular special needs. There is certainly some merit in designing a family law system that distinguishes couples with children from those without. A blunt distinction between same-sex and opposite sex couples, however, would not cleanly achieve such a goal.

The Bill, however, is not entirely oblivious to children. In maintenance and dissolution cases the courts must take into account a civil partner's obligations towards his or her own biological children. In deciding the amount of maintenance to be awarded or in considering the remedies on dissolution, the courts are also required to take into account these obligations. While this falls far short of requiring support for the child by the non-biological partner, it may indirectly lead to such a result. As already noted above, for the purposes of ethics legislation the relationship between a child and his parent's civil partner will be recognised, which is indicative of the somewhat equivocal approach to the place of children.

Nonetheless, the legal rights of a child living with a same-sex couple remain weak. It is important to note, however, that absent significant legal reform, the introduction of same-sex marriage in and of itself would only address some of the issues raised in relation to children. While the extension of marriage would facilitate, for instance, joint adoption by the couple, it would not necessarily confer additional maintenance or succession rights on the child in respect of a spouse who is not his biological parent. Nor would the latter be entitled to guardianship by virtue of the marriage. In other words, the reforms required in this context arguably go beyond equating civil partnership with marriage and require instead a root and branch review of child law, in particular as it applies to step families and 'blended' unions.

Legislative Gaps 3: Dissolution, Separation and Annulment

The other major difficulty is that while the Bill replicates nearly all of the rights and obligations of marriage, the grounds for dissolution vary significantly. A married couple have to be separated for four years before they may divorce.[59] By contrast, civil partners will only have to wait two years. It is my view – though others may differ on this point – that two years is a much more reasonable threshold than the constitutionally required four year period for marriage. In this context, demanding equality at all costs may not be to the ultimate benefit of gay and lesbian couples. Nonetheless, the lower threshold for the dissolution of a civil partnership may be seen necessarily to imply that it is

[58] See for instance *McD v. L. and M.* [2008] IEHC 96, High Court, Hedigan J. April 16, 2008, a case concerning guardianship and custody arrangements in respect of a child born to a lesbian couple, fathered by a friend.

[59] Article 41.3.2 of the Constitution of Ireland 1937 and section 5 of the Family Law (Divorce) Act 1996.

not treated as seriously as marriage. A more charitable view may be that a longer waiting period might prevent civil partners from entering into a marriage, thus fettering the right to marry. With respect the same can be said for divorce.

The Bill also fails to extend to civil partners the terms of the Judicial Separation and Family Law Reform Act 1989. Though this may be of very little practical significance, it highlights a further difference in treatment between civil partnership and marriage. Judicial separation was introduced in 1989 as an Irish-style prototype for divorce. It offers access to the same remedies that would be available on divorce, the key difference being that judicial separation does not entitle one to remarry. Mirroring UK legislation, the grounds comprise a mix of fault and no fault bases for judicial separation, though in practice the most popular ground is that requiring the lack of a normal marriage relationship for at least one year. It is technically the case that exclusion from judicial separation means civil partners will have to wait one year more than the average married couple to obtain judicial relief: in this sense, the differentiation does appear somewhat unusual. It is fair to say that at least one of the grounds for judicial separation (adultery) would not be easily applied to same-sex relationships,[60] though it is unclear why it is not otherwise being extended to civil partnerships. One possible reason is that the period for dissolution, at 2 years, is already brief enough and the facility of judicial separation is unlikely to be necessary in this context. Presumably (though the Bill is silent on this point), civil partners will more than likely be able to enter into an enforceable separation agreement which largely has the same legal effect as a judicial separation.[61]

Of greater concern perhaps, are the grounds for annulment of a civil partnership, which are much narrower than those relating to marriage. In particular, while a civil partnership will be void where one of the parties is *unable* to give an informed consent, the *absence* of a full, free and informed consent is no barrier to its validity or at least the legislation is silent on this point. Theoretically this means that a partner who was forced into a civil partnership would have no remedy, though in practice it is difficult to countenance a judge not offering a common law remedy by analogy with the grounds for annulment of a marriage. The prohibited degrees of relationship for civil partnership are also much narrower, and include only the degrees of consanguinity (blood relationships) and not those of affinity (relationships through marriage and civil partnership). For instance, while a divorced man could not marry his former wife's mother, a 'divorced' civil partner apparently could. Various grounds of nullity relating to

[60] Adultery requires a single act of heterosexual sexual intercourse with a person other than one's spouse – it is difficult to see how this would be applied, for instance, to civil partnerships between two women. Arguably, however, this fact simply underlines the outdated nature of the adultery ground, and may militate in favour of its general abolition.

[61] See *P.O'D v. A.O'D.* [1998] 1 I.L.R.M. 543, which establishes that a separation agreement is in fact a bar to seeking a judicial separation: once the parties have a separation agreement, the courts regard the granting of a judicial separation as 'superfluous'.

sexual and psychological capacity[62] are not included – which may not be a bad thing[63] – though overall, the impression is that the threshold for entering a civil partnership is somewhat lower than that in place in relation to marriage.

Conclusion

Indeed, many contend that anything less than marriage implies a second class status. While I am reluctant to wade into the current debate on marriage and civil partnership, one cannot deny that marriage even today carries with it enormous symbolic power. O'Donovan for instance evokes "…the sacred character of marriage [that] calls on a past, understood and shared tradition and on an eternal future, a perpetuity".[64] Others refer to the elevated status that marriage confers. Lévi-Strauss[65] talks of the belittling diminutive language applied to the ageing French bachelor, who would often be described as *'un vieux jeune homme'* - an old young man, a Peter Pan figure who never quite grew up. The *hadiths* of Islam too stress the elevated realm of marriage: "the prayer of a married man is equal to seventy prayers of a single man".[66] Marriage is said then to have a transformative power - it alters the total social status of the individual. The person, to borrow from Weber's description of the status contract, "would become something different in quality or status from the quality he possessed before". Exclusion from marriage thus suggests a lack of capacity for transformation, always to be something/somebody 'less than'.

I would, however, caution that in this debate one does not lose a critical angle on marriage. Particularly, we should not delude ourselves that access to marriage and the remedies of family law will provide a universal panacea for all ills. In fact, family law is less than ideal in its operation. It is often complex, vague, highly discretionary and uncertain, practiced largely in secret, is costly, prone to lengthy delays and distinctly lacking in closure – all of these matters compound and in some cases exacerbate the already difficult situation of parties to a family breakdown. Indeed in some cases, resort to family law may make things worse not better. This being the case, the policy of the law seeks firmly to dissuade parties from litigating except as a last resort.[67] As such, it is important to be wary in asserting parity with marriage without querying whether the remedies available to married couples are in fact the most appropriate possible. For instance, in relation to the child or children of one but not both parties, even

[62] Including inability to consummate the marriage and inability to form and sustain a normal and caring marital relationship.
[63] See the comments in Ryan, "When Divorce is Away, Nullity's at Play: A New Ground of Annulment, its Dubious Past and its Uncertain Future", (1998) 1 *Trinity College Law Review* 15.
[64] O'Donovan, *Family Law Matters,* (Pluto Books, 1993) at p. 47.
[65] Lévi Strauss, "The Family" in Lévi Strauss, *The View from Afar,* (tr. Neugroschel and Hoss) (London: Penguin, 1987).
[66] Cited in Sherif, "Islamic Family Ideals and Their Relevance to American Muslim Families", in Pipes McAdoo (ed.), *Family Ethnicity: Strength in Diversity,* (Sage, 1999), at p. 206.
[67] See for instance sections 6-8 of the Family Law Divorce Act 1996, which require solicitors to advise clients contemplating divorce of the various alternatives to litigation.

marriage does not resolve all of the legal difficulties faced by that child, a point underlined above.

In substance, however, civil partnership delivers a significant majority of the rights and obligations that marriage confers. While important rights and duties are absent, those that have been extended to civil partners are substantial and beneficial and will make a significant difference to the currently vulnerable legal position of same-sex partners. Fears that the Bill would be a watered down measure or that gay couples would have been indiscriminately grouped with other cohabitants have not come to pass. Full equality undoubtedly demands equal access to civil marriage. This Bill, however, represents a robust and generally comprehensive step in the right direction.

* * *

THE CIVIL PARTNERSHIPS BILL: DISSOLUTION AND PROVISION FOR QUALIFIED COHABITANTS

Muriel Walls[1]

I. DISSOLUTION

Introduction

I was delighted to be asked to give a presentation on the dissolution of civil partnerships, and also on the legal rights and responsibilities of cohabitants, which is in a separate section.

Although my paper deals with dissolution, I would like to stress the registration aspect of civil partnership, as already there seems to be a misunderstanding with the public about how registration will take place. There has been talk of "writing away" for a certificate, or registering at your local post office or Garda station!

As other speakers here will deal more fully with the registration of civil partnerships, I will not dwell on it. However, civil partnership will be part and parcel of the Civil Registration Act 2004, which requires 3 months notice to given to the appropriate Registrar, and the performance of a ceremony by the Registrar in public with witnesses, just like a marriage ceremony. There will be a Certificate of Registration, and anyone can check the Register of Civil Partnerships, just as they can at present check the Register of Births, Deaths and Marriages.

So, the contract of civil partnership, just like the contract of marriage, is a very serious and important one, and should not be entered into lightly, as it brings with it the significant rights and responsibilities that marriage presently does.

Therefore, dissolution of a civil partnership is also a serious and important process that can only be done by the court. Already, there is some public misinformation about this, with one colleague speaking on national radio about "writing to the Registrar saying that you don't want to be civilly partnered anymore"!

By way of caution, this is a preliminary analysis. At every reading of the Bill other issues become apparent. This short paper does not purport to be a comprehensive guide but an overview on the dissolution aspect.

[1] McCann FitzGerald Solicitors, Riverside One, Sir John Rogerson's Quay, Dublin 2

1. Nullity

Although the law of nullity of marriage has not been placed on a statutory basis, the Civil Partnership Bill proposes to deal with this specifically at Head 49.

This provides that a decree of nullity will be granted in respect of a civil partnership where:

(a) Either or both parties were under age

(b) Either or both parties was a party to a valid marriage

(c) Either or both parties was already in a registered civil partnership, which had not yet been dissolved

(d) Either or both parties were unable to give an informed consent

(e) The parties are within the prohibited degrees of relationship

(f) The parties are of opposite sex.

The procedures whereby civil partners, whose partnership is annulled, may deal with the property aspects of their relationship, is provided under Head 53, and is identical to the provisions of Section 36 of the Family Law Act, 1995.

Section 36 deals with the determination of disputes between spouses in relation to property, and is a determinative procedure, whereby the court will look at the financial contribution of the spouses to the acquisition of property, and make a determination as to who is the beneficial owner, and in what shares and percentages.

These procedures are also available to engaged couples whose engagements are terminated. Very often a couple who are engaged to be married purchase property together and Section 36 is the procedure whereby they can have any disputes over property interests determined between them, in the event that the engagement is terminated.

There appears to be no engagement period for civil partners. Presumably, if a couple were living together, they could avail of the reliefs under the cohabitants section of the Bill, which is discussed in another section.

It is not a discretionary procedure, and does not allow the court to provide or transfer property in a manner it thinks just and equitable, it is purely determinative.

2. **Dissolution**

The court may grant a decree of dissolution of a civil partnership if it is satisfied that:

(a) At the date of the commencement of the proceedings, the civil partners have lived apart from one another for period(s) amounting to at least two years out of the previous three, and

(b) Such provision as the Court considers proper, having regard to the circumstances exists or will be made for the civil partners.

These grounds contrast with the grounds upon which a court may grant a decree of divorce, which are that:

a) the spouses must have lived apart for four years out of the previous five, and

b) **there must be no reasonable possibility of a reconciliation**

c) proper provision must not only exist for the spouses, **but also for dependent members of the family.**

In civil partnership, there is no mention of reconciliation or taking into account the needs of any **dependent member of the family**.

The term "lived apart" is not defined in the Civil Partnership Bill, and it is presumed that any statutory definitions in other family law legislation, in addition to the case law which expands on the meaning of this phrase, would guide the court on this issue.

At the present time, if a court is satisfied that a husband and wife have lived apart in separate households, albeit under the one roof, a decree of divorce can be granted on that basis. The courts require a high level of proof that there were in fact two separate households before they will be satisfied on this point, and will be reluctant to grant a decree of divorce if there is any sense that the spouses are not presenting a true and accurate picture of their separate lives under the one roof to avoid the criteria of the divorce legislation of four years living apart.

It is worth noting that the sections of the judicial separation and divorce legislation, which deal with the safeguards to ensure an applicant's awareness of alternatives to separation and divorce proceedings, and to assist attempts at reconciliation, are not mirrored in the Civil Partnership Bill.

These safeguards include a statutory responsibility on solicitors acting for applicants and/or respondents to discuss with their client:

- the possibility of a reconciliation, and to give them the names and addresses of suitably qualified persons,

- the possibility of engaging in mediation, and also

- the possibility and benefits of effecting a separation by means of a deed or agreement. These safeguards are also included in the Guardianship of Infants Act 1964, and must be complied with prior to any court application being made in relation to the welfare of children. They are also included in Head 134 when the Bill deals with the institution of proceedings in respect of cohabitation disputes.

It is hoped that this matter would be rectified at committee stage, and either a separate provision is inserted or Head 134 is extended to include dissolution of civil partnerships.

3. Proper Provision

As you will see, the court must be satisfied, prior to the granting of a decree of dissolution of a civil partnership, that proper provision exists or will be made for the civil partners. This is the same standard that the court uses in granting a decree of judicial separation or divorce, save that in the latter, reference is also made for properly providing for any dependent members of the family.

As civil partnership gives rise to similar rights and responsibilities, the court has the power to adjust them.

The rights and responsibilities of marriage have been set out in other papers. Broadly, the first responsibility of a married couple is to live together; to support and maintain each other; to support and maintain any children that they might have; to live together in the family home where the non-owning spouse has certain protections, and they must give a prior written consent to any sale of the property; a spouse is entitled to quiet enjoyment of that home and cannot be removed by the other spouse, except under the domestic violence legislation or by order of the court in separation or divorce

or by agreement; a spouse has a right to inherit a certain part of the estate of the other on death.

Under the Civil Partnership Bill, the court has power to make the following ancillary financial relief orders, to ensure that proper provision exists, or will be put in place by the Court:

(a) Maintenance by way of periodical payments

(b) Lump sum orders

(c) Property Adjustment Orders

(d) Occupation of the shared home

(e) A sale of the shared home

(f) Financial Compensation Order (Life assurance)

(g) Pension Adjustment Orders

(h) Inheritance rights

(i) Orders making provision out of the estate of a civil partner or blocking such provision

(j) Orders for the sale of property.

All of these ancillary financial relief orders are identical to those that the court may grant in the context of separation or divorce. The differences are that throughout the Bill it uses the phrase "shared home" in contrast to the use of the phrase "family home" throughout the separation and divorce legislation.

A shared home is defined as a dwelling in which registered civil partners ordinarily reside.

A family home is defined as a dwelling in which a married couple ordinarily reside.

Having regard to the similarity in the definitions, it seems a shame that the term "family home" is not used for the home of civil partners, for the sake of equality, consistency and expediency.

Head 70 of the Bill sets out the factors that a court must take into account in deciding whether or not proper provision has been made for the civil partners.

The statutory factors are very similar to those used by the court in separation and divorce, except that no reference is made to the needs of dependent members of the family, save that there is a specific reference to children in sub-section (l) which provides that the rights of other persons (other than the civil partners) including any child to whom either of the civil partners have an obligation to support, shall be taken into account.

In deciding whether to exercise the powers described above, the court must have regard to the following matters, amongst others:

a) income, earning capacity, property and other financial resources which each civil partner has or is likely to have in the foreseeable future;

b) financial needs, obligations and responsibilities which each civil partner has or is likely to have in the foreseeable future;

c) standard of living enjoyed by the couple before proceedings were instituted or before the separation occurred;

d) ages of each civil partner, the duration of the partnership and the length of time the couple lived together;

e) physical or mental disability of the civil partners;

f) accommodation needs of each civil partner;

g) effect on the earning capacity of each civil partner of the responsibility assumed by each while they lived together and the degree to which the future earning capacity of a civil partner is impaired for having given up the opportunity of paid employment to look after the home or care for the family;

h) conduct of each of the civil partners, if such that the court considers it would be repugnant to justice to disregard it;

i) the contributions which each of the civil partners has made or is likely in the foreseeable future to make to the welfare of the family including any contribution made by each to the income, earning capacity, property and financial resources of the other and any contribution by looking after the home or caring for the family;

j) the value to each of the civil partners of any benefit which the civil partners will forfeit;

k) the rights of any person other than the civil partners but including a person to whom either spouse is remarried;

l) the rights of any other person including any child to whom the civil partners have an obligation to support.

For those of you who are not familiar with the operation of the family law legislation, I will explain these ancillary relief provisions one by one.

A. Periodical Payments by way of maintenance

Marriage brings with it an obligation by both spouses to support and maintain the other. Contrary to public perception, this does not just mean that a husband must support his wife. The legislation is gender neutral and both spouses must support each other. The focus would be on the dependent spouse, who very often is the wife, particularly if there are dependent children.

In the context of marital breakdown therefore, the court has power to award maintenance by way of periodical payment to the dependent spouse for herself and for the dependent children if she is the primary carer.

Similarly, in the context of the Civil Partnership Bill, the court will have power to make a maintenance order in favour of a dependent civil partner.

The statutory factors, which are referred to above, will be taken into account by the court, and the factors relevant to maintenance will be:

(a) the income, earning capacity, and financial resources of the civil partners,

(b) the contribution that the civil partners have made to the welfare of the couple, including a contribution that either has made to the income and earning capacity of the other, and

(c) the effect on the earning capacity of each of the civil partners of responsibilities assumed during the period that they have lived together. The extent to which that capacity may have been impaired by reason of the civil partner relinquishing or foregoing opportunities for remunerative activity to look after the home,

These factors will be important in many relationships where one civil partner may prejudice his or her career or job opportunities in support of the other. Obvious examples are where a civil partner may go abroad to work and his/her partner accompanies them where they may be unable to work or not work in the same position that they had at home. In many cases, one civil partner may have a very demanding job or career, and the other partner supports their partner to the prejudice of his/her own career, and these factors will be taken into account.

B. Lump sum payments

In the context of separation or divorce, the court has power to make a lump sum payment in favour of a dependent spouse.

(i) Often, such a payment may be in lieu of maintenance i.e. a capital sum to allow that dependent spouse to have access to funds for a period of time while they retrain or re-establish their career.

(ii) Alternatively, a lump sum can be ordered to allow a spouse to establish a home, particularly in circumstances where the family home is to be retained by the other.

(iii) Lump sum orders can also be made in those cases involving significant assets where such a payment is required to achieve some degree of proportionality in the distribution of assets accumulated during the marriage, which each spouse has after the separation or divorce.

All of these scenarios are very likely in the context of the dissolution of the civil partnership. A civil partner could be awarded a lump sum in any of the situational examples given above.

C. Property Adjustment Order

In the context of separation or divorce, this provision allows the court to order one spouse to transfer his or her interest in the family home, or, indeed, any other property owned by him or her (and property means any form of asset) subject to or free from encumbrances.

Most Property Adjustment Orders that have been made in the past have related to the ownership of the family home.

There are a number of possible outcomes to the issue of the family home as follows:

- The wife and children remain in the family home and it continues to be registered in joint names.

- The husband and children remain in the family home and it continues to be registered in joint names.

- The husband transfers his interest in the family home to the wife and she pays the mortgage.

- The wife transfers her interest in the family home to the husband and he pays the mortgage.

- The husband transfers his interest in the family home to the wife and she makes a payment to him in respect of his interest, either at market value or at a discounted price.

- The wife transfers her interest in the family home to the husband and he makes a payment to her in respect of her interest, either at market value or at a discounted price.

- The family home is sold and the proceeds of sale are divided either equally between the husband and the wife, or in a weighted share in favour of the dependant spouse.

These provisions will apply equally to dissolution of a civil partnership where one civil partner may be ordered to transfer his/her interest in the shared home to the other, subject to or free from mortgage, with or without a payment in respect of the interest of the other civil partner, so that the court can be satisfied that the accommodation needs of both civil partners can be met.

In cases involving significant assets, Property Adjustment Orders can also be made over investment properties, apartments, commercial units, land, furniture and contents, art work etc.

D. Sale of the family home

In the context of separation or divorce, the court has power to make an order for the sale of the family home. This has happened in many cases where the net proceeds of the sale of the family home would allow both

spouses to purchase more modest properties for each of them. This was particularly so when property prices were at their highest.

It is likely that this provision will be used with great frequency in the context of the dissolution of a civil partnership especially if there are no dependent children. Inevitably, the single most valuable asset that a couple have is their home. When the relationship breaks down, unless the couple are very wealthy, the home will have to be sold. The court does have power to decide on the distribution of the net proceeds of sale, and may, in some cases, give a greater share to one civil partner than the other, having regard to their respective financial circumstances.

E. Order for occupation of the home

In the context of separation or divorce, the court has power to allow one spouse to reside in the family home for a period of time, be it contingent (depending on an event) or certain (a specific date). Obvious examples of this are allowing a wife to remain living in the family home until the youngest child reaches the age of 18 or finishes second level education. Another example would be to allow a dependent spouse to live in the family home for a certain period of 3/5 years.

Such orders are often made having regard to the needs of the dependent children of the marriage, particularly if they are at a particular stage in their education.

F. Financial Compensation Order (Life Assurance)

This is a rather oddly named provision, but in the context of separation or divorce, in short, it allows the court to order one spouse to assign the benefit of a life assurance policy to the other spouse, or to order that spouse to take out a new life assurance policy for an amount, and for a term of years to provide for the other spouse.

This provision is particularly useful to provide security for maintenance in the event of the death of the paying spouse.

An obvious example is where a husband is paying maintenance to his wife each month, not only for herself but for the dependent children, and paying their educational costs. The court can order him to take out a life assurance policy in such an amount, and for such a period of time, as would provide a capital sum to the wife in the event of his death, which would compensate her for the fact that she no longer receives the maintenance monthly, due to his demise.

In the context of civil partnership, such orders are likely to be made if one civil partner is in receipt of maintenance by way of periodical payment from the other.

It is unlikely to see circumstances in which such orders will be made if, in all other respects, the court is trying to achieve a clean break between the civil partners, in the context of the breakdown of their relationship, except if there were existing policies in place and it is prudent to keep them alive.

G. Pension Adjustment Orders

In the context of separation or divorce, the court has power to make pension adjustment orders, both in respect of the retirement benefits, and also in respect of the contingent benefit (i.e. the death-in-service benefit) of the spouses. This is not the time or place to introduce you to the complexities of the pension provisions in family law legislation, which are highly technical and difficult to interpret and implement. However, in principle, the court has power to do two things:

(1) Order that a part of the pension that a spouse/civil partner will receive at the end of working life is earmarked for the other spouse or civil partner. The method of apportioning the pension is by reference to the period of reckonable service and a percentage.

A normal order in the context of a long marriage would be an order for 50% of the pension over the period of the marriage, which may or may not coincide to the employment of the spouse, or his/her membership of the pension scheme.

(2) The court also has power to direct the trustees of the pension scheme to give all or part of a death-in-service benefit to a separated or divorced spouse or civil partner.

The usual example of this is where an employer provides a death-in-service payment of two times annual salary in the event of a death of an employee prior to retirement. The court can order part of this benefit to be allocated to a spouse or civil partner. Such an order is often made instead of a Financial Compensation Order.

These provisions are very valuable, particularly as the death-in-service benefit is often part and parcel of a normal employment contract; however, it does have the disadvantage that if the spouse or civil partner no longer remains in the employ of that particular company or institution, the benefit of the order lapses.

H. Inheritance/Provision from the estate

One of the fundamental rights of a married couple is to inherit part of the estate of the spouse on death. These inheritance rights are particularly enshrined in the Civil Partnership Bill at Head 29. Once a decree of dissolution of civil partnership has been made, the automatic rights of inheritance cease and are extinguished as the relationship has been dissolved by the court.

In separation and divorce there is a residual provision whereby one spouse can apply to the court for provision out of the estate of a deceased spouse. It is rare for such orders to be made, and they can only be made in circumstances where proper provision was not made for the applicant spouse during the lifetime of the other spouse. The relevant section allows the court to make an order blocking a spouse from making such an application at any time in the future. Invariably, these blocking orders (known as s.18(10) Orders) are made in the context of divorce.

Head 68 allows a dependent civil partner to make an application for provision out of the estate of a deceased civil partner, but it also allows the court to make a blocking order (pursuant to Head 68(10)) preventing either civil partner from making such an application.

I. Orders for sale of property

In the context of separation or divorce, the courts have general power to order a spouse to sell property to give effect to the orders the court has made to provide proper provision, and identical provisions are produced in the Civil Partnership Bill in respect of civil partners.

J. Interim Relief

It is important to understand that all these ancillary financial relief orders flow from the grant of the dissolution on a civil partnership. We know that an application cannot be made until a couple have lived apart for two years. So, what happens for this two year period?

- Emergency relief is available in respect of maintenance from the date of the commencement of the proceedings, to the date on which the case is actually heard.

- Chapter 3 of the Bill allows for stand alone applications for maintenance of a civil partner, which can be taken without having to make an application for dissolution.

- Separation Agreements. The Bill encourages civil partners to try to agree the terms on which they are to live apart by separation agreement, and in the event that this is done prior to the grant of a dissolution, the court must take the terms of that separation agreement (if still in force) into account in determining the financial relief to be made at the time of dissolution.

- The domestic violence legislation will be amended by the bill to include civil partners in being entitled to the same reliefs as spouses.

- In the marriage situation the couple can use the procedure of judicial separation to resolve all financial issues and wait for four years living apart to pass and then if they or one of them wish can apply for the divorce.

4. Children/Dependent Members of The Family

The Bill is, in one respect, entirely different from the legislation on separation on divorce in that it has systematically excluded the term "children" and "dependent members of the family" in the provision for a civil partner at the time of dissolution. The word "family" has also been studiously avoided.

This is regrettable and is undoubtedly going to lead to problems. Many civil partners have children. They either have these children from a previous marriage or relationship, or they have, as a couple, decided to have children.

The fact that there may be dependent children is not a factor that is specifically referred to in the Bill, nor will their needs be specifically taken into account, and the only serious reference to a child or children is in factor (L) of the statutory factors where it is specifically mentioned that the court must "have regard to the rights of other persons, including any child to whom either of the civil partners have an obligation to support". So, for example, if a civil partner is the natural parent of a child, his or her responsibility towards that child is a significant factor that would be taken into account by the court in determining the level of financial support that will be given to, or received by, a dependent civil partner.

In practical terms, civil partners who go their separate ways will have to use a mixed bag of existing statutory provisions to try to deal with the needs of children. The Guardianship of Infants Act 1964 will deal with the welfare of children, and a person who has been in loco parentis to a child may make an application to the court to have access to that child, but they are not entitled to guardianship.

The separation and divorce legislation specifically provides that if a spouse has acted in loco parentis, and has treated a child as a member of the family, he/she will be obliged to pay maintenance for that child.

This provision has not been carried over to the Civil Partnership Bill, and is undoubtedly going to give rise to significant problems, both in circumstances where perhaps a civil partner fails in his or her duty to a child that she/he has treated as their own, or disadvantages a civil partner who wishes to provide for a child of the relationship/partnership and is prevented from doing so insofar as there is no framework, or is discouraged from doing so by way of maintenance during his/her lifetime, or by providing for that child on death, because of high tax rates.

This is an area that simply will have to be analysed and campaigned on during the course of this legislation through the Houses of the Oireachtas.

5. Miscellaneous Problem Area and Questions

(1) The Bill is silent on whether there can be pre-registration contracts, which would presumable take the form of pre-nuptial agreements. The one exception is that civil partners will be entitled to waive or renounce their entitlement to inherit under the Succession Act 1965, but this entitlement is already available to spouses under that Act.

(2) The financial relief orders will normally be made at the grant of the dissolution of the civil partnership, but the bill also provides that they can be made at "any time thereafter". The same formula is used in the separation and divorce legislation.

This formula has already given rise to difficulties and concerns that spouses can never achieve clean break one from the other, and it is likely that similar issues will arise with civil partners.

(3) The Bill contains no financial provisions whatsoever, as financial arrangements must always be processed through a Finance Act. It is to be hoped that the same level of tax relief will be made available to civil partners as is currently enjoyed by spouses.

(4) Many of the sections of the Bill are designed to bring civil partnership into line with other pieces of legislation where spouses obtain protections or reliefs. For example, the Family Home Protection Act 1976 will extend to the shared home of civil partners. The Civil Liability Acts (1961-2004) will extend the class of persons who can make a claim in the event of a death to civil partners. The Powers of Attorney 1996 Act will be amended to include civil partners in the same category of spouses.

(5) Will family law jurisprudence be followed by the courts in dealing with the dissolution of civil partnerships? Or, will we have two lines of judicial thinking? The ancillary relief provisions are, by and large, the same, but will they be construed differently?

II. PROVISION FOR QUALIFIED COHABITANTS

Introduction

Part 7 of the Civil Partnership Bill has a completely distinct section dealing with qualified cohabitants. By and large, the provisions mirror the recommendations of the Law Reform Commission on the rights and duties of cohabitants. In my view, it would have been preferable to have this as a separate piece of legislation.

This section covers all cohabitants, be they opposite sex or same sex couples who live together as a couple in an intimate relationship, and who are not married to each other, or related to each other within a prohibited degree of relationship. It does not therefore cover married couples or siblings, or other close relatives. But it does not seem to exclude couples who are civilly partnered and that should not be the case.

There are some inconsistencies in this part of the Bill, which appears to have been carried over almost word for word from the Law Reform Commission's recommendations, which of course were made prior to the proposals in relation to civil partnership. These will be looked at later.The international trend for couples to cohabit rather than marry is becoming increasingly prevalent in Ireland. Many believe that one of the reasons that cohabitation is on the increase is a desire to avoid the legal consequences of marriage breakdown. However there are many pitfalls. Couples who cohabit, even for many years, acquire no rights against each other. There are no automatic property rights, rights of occupation in the property which is the home, financial support or inheritance rights for cohabitants.

The Law Reform Commission published its final report on 1st December 2006.

There is a great variety in the people who live together but they can probably be grouped into the following categories:

1. Casual cohabitants who drift into living with their partner

2. Living together as a forerunner to marriage/civil partnership

3. Conscientious objectors to marriage/civil partnership

4. Battle-scarred separated and divorced persons

5. Those who lived together because they could not marry (pre-divorce/civil partnership)

6. Those who believe that they are married to each other after a foreign divorce

The Commission recommended a twofold approach to the problem.

1. The Commission recommended that those who wish to live together should organise their affairs to provide for each other, any children that they might have, their home, succession, pension etc. and that they should be encouraged to reach a written agreement on some or all of these issues (the contract model).

2. The Commission recommended that for those who do not have an agreement and are the most vulnerable that they should be entitled to apply to the courts for relief in the event of the ending of the relationship either as a result of breakdown or death (the redress model).

The Commission's proposals include opposite-sex and same-sex cohabitants.

A qualifying cohabitant is defined firstly as a cohabitant, which means two adults (whether they are of the same sex or opposite sex) who live together as a couple in an intimate relationship, who are not married to each other or related to each other within a prohibitive degree of relationship. Cohabitant means one of two such adults. In order to be a qualifying cohabitant you must have lived together as a couple for three years, or where there is a child of the relationship, for a period of two years.

The court will take the following matters into account in deciding if the parties are qualified cohabitants:

- The duration of the relationship
- The nature and extent of common residence
- Whether or not a sexual relationship exists
- The degree of financial dependence or interdependence, and any arrangements for financial support between the cohabitants
- The joint purchase of an interest in property or land, or the joint acquisition of personal property
- The degree of commitment to a shared life
- The care and support of children
- The performance of household duties
- The reputation and public aspects of the relationship.

The court must be satisfied that there is economic dependency and look at the following factors:

- Rights and entitlements of any spouse/civil partner
- Rights and entitlements of any children
- Rights and entitlements of any former spouse/former civil partner
- Nature and duration of the relationship
- Size and nature of the estate
- Financial needs, obligations and responsibilities
- Contributions and sacrifices made to the other partner and any child
- Effect on the earning capacity
- Any physical or mental disability of the applicant, and
- Any other matter which the court may consider relevant

Co - Ownership Agreements

The Contract Model

The Law Reform Commission recommended that couples who do not wish to marry or now to be civilly partnered should be encouraged to regulate their arrangements in a written agreement. While such agreement should not go into the sexual relationship or other cohabitation arrangements, such as who does the housework, they should cover the property and financial matters in the event of a breakdown of the relationship, or in the event of death.

The Law Reform Commission included a draft Bill in their report published in December 2006 and this, by and large, has been inserted into the Civil Partnership Bill with some modification by reference to civil partnership, in addition to marriage.

Head 124 deals with the validity of certain agreements between cohabitants.

Because of the uncertainty of the legal status of such agreement, section 1 specifically provides that for the avoidance of doubt, and notwithstanding any rule of law to the contrary, cohabitants may enter into a cohabitant agreement.

The Bill further provides that such agreements between cohabitants should make provision for financial matters (and only such matters) to regulate their relationship while it is ongoing, or when it ends, either by death or otherwise.

The Bill further provides that a cohabitant agreement shall be valid and enforceable if it is in writing, signed by both cohabitants, and before the agreement is signed, each has received legal advice independently, or if advised together, have waived the right for independent legal advice. A cohabitant agreement will also be subject to the general law of contract, and nothing in a cohabitant agreement will affect the power of the court to make an order in respect of the rights of custody, maintenance or access to any children of the cohabitants. This is to ensure that at all times the court has power (if necessary) to review the arrangements for children.

As will be seen later, Chapter 4 of the Bill gives the court certain powers to grant relief and redress to certain qualified cohabitants, and the cohabitant agreement may exclude the operation of those provisions.

The Bill further provides that in exceptional circumstances a court may set aside a cohabitant agreement where its enforceability would cause serious injustice.

This measure is welcomed for at least two reasons.

1. It clarifies that such agreements are enforceable between cohabiting couples, and that they can therefore, arrange their affairs in a manner in which suits them, their needs, and their particular circumstances.

2. It encourages cohabitants who do not wish to marry or to be civilly partnered to take responsibility for their own financial affairs, to work out what is to happen in the event of the relationship ending, or in the event of death, and hopefully through this process enable responsible people to make provision for their partner.

The Law Reform Commission recommended that the rates of the gift and inheritance tax should be broadened considerably, and stamp duty be reduced to encourage cohabiting partners to provide for each other.

The Commission's recommendation was that cohabitants would have the same gift/inheritance tax threshold as between parents and children, and that the stamp duty rates available between family members (half the normal rate) would apply.

These provisions are not in the Civil Partnership Bill, but it is hoped that they will follow in the Finance Act.

The matters which should be included in a cohabitant agreement are the following:

- Who owns what portion of the home and who is to service the mortgage
- What financial support is available to a dependent partner
- What pension provision would be made for a dependent partner
- Whether life assurance policies should be taken out on the life of the other in the event of death
- The operation of joint bank accounts
- The ownership of any other assets acquired during the relationship
- The making of wills.

The Redress Model

At present, there are many couples who have lived together for a long number of years who are not married to each other, and in the event of a breakdown in the relationship, or in the event of death, are extremely vulnerable. The following are examples of vulnerable cohabitants:

Example 1

Lilly is a 68 year old woman who has just lost her "husband" of 25 years. It transpires that she was not in fact married, as she had married before as a teenager and got a divorce in Haiti, which is not recognised in Ireland. Her "husband" died of a heart attack, and did not make a will. Her home is registered in his sole name. As we speak, there are no legal avenues that Lilly can use to get relief.

Example 2

Tracey has lived with Jim for 12 years. They have two lovely children. Jim was married before but has never got around to getting a divorce. Their relationship ends acrimoniously. Jim says that of course he will provide for his children, but he certainly will not be giving anything to Tracey.

At present, Tracey's ability to seek financial support for herself is extremely limited, although the courts will provide for her children, and indirectly, perhaps make some provision for her.

Example 3

Damien was devastated when he and his wife separated after 20 years. His wife got the family home, and the children stayed with her and had little contact with him. A few years later he met Anne, and moved into her home. Everything was going well, and he used all of his savings in doing up her house, putting in double glazing, central heating and a conservatory, and re-designing the garden. The relationship has now broken down. Damien has no money, and his only redress is a complicated system to try to get back from Anne the money that he put into her house.

These examples will show you the vulnerability of certain people at the present time, and will also demonstrate how the provisions of the cohabitant's redress model will assist.

Head 129 allows the court, on application to it by a qualified cohabitant, to make provision for that person from the estate of a deceased cohabitant.

If the court is of the opinion that the deceased cohabitant failed to make adequate provision, or made no provision for a qualified cohabitant, in accordance with his or

her means, whether by will or otherwise, the court may make such provision for that qualified cohabitant out of the net estate, as the court considers just and equitable.

The court will have to take into account the factors that are referred to at the beginning of this paper, and in particular would take into account the legal rights of any surviving spouse, or civil partner, or children of the deceased. These provisions would certainly help Lilly in the fictitious scenario referred to above.

Head 130 allows the court to make the following relief orders to an economically dependent qualified cohabitant:

1) Property Adjustment Order (appears in similar terms to the separation, divorce and civil partnership legislation).

2) Compensatory Maintenance Orders. This can either be by periodical payments or a lump sum.

3) Pension Adjustment Order and pension splitting.

The factors that the court will take into account are referred to above, and differ somewhat from the factors which will guide the court in dissolution of civil partnership, separation or divorce. For example, the age of the parties is not specifically mentioned, nor is the length of their relationship or cohabitation, nor are their accommodation needs specifically mentioned. It is difficult to know therefore how the courts will deal with these applications, but it is likely that the relief will be less than what might be achieved if the parties were married to each other, or civilly partnered.

Head 134 specifically provides that before instituting any proceedings under the Act, that a solicitor for a cohabitant will discuss the possibility of reconciliation and mediation, and give the names and addresses of suitably qualified persons to provide this service.

As mentioned earlier, this section appears to be limited to proceedings between cohabitants, and should, for consistency, also refer to civil partnerships and the dissolution thereof, or for there to be a specific section to deal with this.

Head 137 provides for transitional provisions; namely, that qualified cohabitants will be able to apply for redress under Part 7 of the Bill where the relationship has come to an end (whether by death or otherwise) after the commencement of this part of the legislation. However, account may be taken of time prior to the commencement of the legislation in calculating the duration of the cohabitation relationship in the various definitions.

The Law Reform Commission had recommended that tax relief be available to cohabitants and/or the court orders which might provide for them in similar terms as set out previously in this paper.

There are a number of other miscellaneous sections which allow a claim to be made by a qualified cohabitant in the event that their partner is killed, by including a cohabitant within the class of husband or wife or civil partner. An amendment is also suggested to the Powers of Attorney Act, 1996 to include cohabitants as mandatory notice parties for the purposes of an enduring power of attorney. Alterations are also proposed in relation to the entitlement of a cohabitant to make application for relief under the domestic violence legislation.

The redress system should be seen as a sort of safety net for the most vulnerable people who have lived with their partner in a supportive or dependent relationship and who are financially vulnerable when that relationship ends.

The contract model allows a couple to contract out of the redress system in a cohabitation agreement, if that is what they wish to do.

It is to be hoped that those who sign cohabitation agreements will not simply use them to contract out of the redress system, but to use the agreement as, in effect, a road map for their relationship setting out clearly their rights and responsibilities.

* * *

CIVIL PARTNERSHIPS IN THE UK AND IRELAND

Brian Barrington BL[1]

The publication of the General Scheme of a Civil Partnership Bill marks a milestone in the history of the gay rights movement in Ireland. As the former Minister for Justice, Equality and Law Reform Brian Lenihan TD remarked:

> who would have thought when my distinguished predecessor, Maire Geoghegan-Quinn decriminalised homosexuality in 1994, that just 13 years on we would be discussing the legal recognition by the State of same sex partnerships. That is progress and we should build on it.[2]

But if Ireland is doing well by its own standards, it is less clear that it is doing so well by Europe's. Denmark, Spain, Belgium, the Netherlands and Norway have already legislated for same sex marriage. Others like Germany, the UK, the Czech Republic, Hungary, Switzerland, Sweden and Finland have legislated for civil partnerships.

This paper compares the provisions of the General Scheme of a Civil Partnership Bill ("the Scheme") on civil partnerships for same sex couples with the provisions of the UK Civil Partnership Act 2004 ("the UK Act"), which applies to same sex couples only. The UK Act legislates for all three of the UK's jurisdictions: England and Wales, Scotland and Northern Ireland. This paper refers to the provisions on England and Wales. But in almost all respects, similar provision is made in Northern Ireland and Scotland.

The provisions of Part 7 of the Scheme, which provide legal protection to cohabitees, whether heterosexual or homosexual, are beyond the scope of this paper.

There are two reasons why it is interesting to compare the UK Act to the Scheme. First, a comparison between the two provides useful information on the extent to which the Scheme provides for equality for civil partners in Ireland. Second, it is interesting to assess how change came about in England and Wales. This helps us to answer key questions such as whether acceptance of the Scheme would help or hinder further progress towards equality for same sex couples in Ireland.

---

[1] Brian Barrington is a barrister and has worked as a lawyer in Dublin, Brussels and Washington.
[2] Speech by the Minister for Justice, Equality & Law Reform at the launch of the GLEN Annual Report 2006, Royal College of Physicians, Kildare St, Dublin 2, 4 December 2007, available on www.justice.ie.

PART I - THE BACKGROUND

Our liberal neighbours?

It is commonly assumed that the UK is more liberal than Ireland when it comes to gay and lesbian rights. However, when the record is compared, the picture that emerges is mixed.

Male homosexual acts were decriminalised in England and Wales in 1967.[3] But in reality this was partial decriminalisation only.[4] The age of consent for homosexual acts – at 21 – was five years older than the age of consent for heterosexuals. Also, only acts in private were decriminalised – and it was expressly stipulated that an act could not be in private if more than two people took part or were present – even if located in a private home.[5] It was only in 2000 that an equal age of consent was introduced, and only then with the House of Commons having to use the Parliament Act to bypass opposition in the House of Lords, where the Labour Government did not have a majority.[6] The prohibition on homosexual acts with more than two persons present or participating was subsequently repealed in 2003.[7]

Ireland moved to decriminalise male homosexual acts far later than England and Wales - with the Criminal Law (Sexual Offences) Act of 1993. But what Ireland did later, it also did better. From the start an equal age of consent was provided for - at 17 years – and no requirements were put in place as regards privacy that were not also in place for heterosexuals.[8]

Ireland also outlawed discrimination on grounds of sexual orientation in unfair dismissals in 1993 and in employment in 1998.[9] By contrast, in England and Wales such discrimination in employment was only outlawed in 2003 when the UK was required to do so by EU law.[10]

Ireland outlawed discrimination in goods, accommodation and services in 2000.[11] England and Wales did so in 2007.[12] In England and Wales there was a

[3] As in Ireland, female homosexual acts were never criminalised in England and Wales.
[4] See s.1 of the Sexual Offences Act, 1967
[5] S.1(2)(a) of the Sexual Offences Act, 1967.
[6] S.1 of the Sexual Offences (Amendment) Act, 2000. Also, in 1994 the age of consent had been reduced from 21 to 18.
[7] Schedule 7 of the Sexual Offences Act, 2003.
[8] See s.2 Criminal Law (Sexual Offences) Act, 1993.
[9] See s.5 of the Unfair Dismissals (Amendment) Act, 1993 and the Employment Equality Act, 1998.
[10] See the The Employment Equality (Sexual Orientation) Regulations 2003 (S.I 2003 No. 1661) implementing Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment (OJ L 303, 2.12.2000, p. 16).
[11] See the Equal Status Act, 2000.
[12] The Equality Act (Sexual Orientation) Regulations 2007 (S.I. No. 1263 of 2007).

ban on service in the armed forces until 2000.[13] Ireland never had one. Ireland outlawed incitement to hatred on grounds of sexual orientation in 1989.[14] England and Wales did so only in 2008.[15] But whereas England and Wales made provision in statute for aggravated penalties for homophobic crimes, [16] Ireland has not.

Finally, in England and Wales s.28 of the Local Government Act, 1988 prohibited the promotion of homosexuality by local authorities.

This infamous section was only repealed in England and Wales in 2003, again despite stiff resistance from the Conservative Party and the House of Lords.[17]

Whereas in Ireland there was little political opposition to measures to promote gay and lesbian equality when a Government finally summoned up the courage to deal with these issues, in Britain there was often stiff opposition from the Conservative party – although this had abated by the time that UK Act was passed in 2004. It would be wrong to assume, however, that this means that Ireland is necessarily more liberal. It may simply be that there is a reluctance to air divisions on this issue publicly in Ireland. Further, as this Paper shows, England and Wales has pulled well ahead of Ireland on issues to do with same sex couples and children. It may be that Ireland will prove to be considerably more cautious in that area.

Overall, however, the general record of Ireland on the one hand and England and Wales on the other when it comes to legislation on gay rights is not terribly different. It would be wrong to assume, therefore, that what is *politically* deliverable in England and Wales is simply unattainable in Ireland. But it may be right to assume that what could not be delivered in Britain will not be easily won in Ireland. And, as is discussed below, there are different *legal* constraints on change in Ireland.

The prohibition on gay marriage: a common origin

Not only is the general record of Ireland and, on the other hand, England and Wales on gay rights broadly comparable, so too is the original source of the prohibition on same sex marriage.

[13] On 12 January 2000, the Secretary of State for Defence, Geoff Hoon MP, announced to the House of Commons the Government's new policy on homosexuals in the armed forces which was contained in a new Code of Social Conduct. See Hansard, 12 January 2000, cols 287-288.
[14] See Prohibition of Incitement to Hatred Act, 1989.
[15] See s.74 and Schedule 16 of the Criminal Justice and Immigration Act, 2008.
[16] See s.146 of the Criminal Justice Act, 2003.
[17] See s.122 of the Local Government Act, 2003.

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

> The voluntary union of one man and one woman, to the exclusion of all others.[18]

So, same sex couples were excluded from marrying. Not content with a common law prohibition on gay marriage, a statutory prohibition was also put in place in England and Wales by s.11(c) of the Matrimonial Causes Act, 1973, which is explicit that a purported marriage is void if the parties are not respectively male and female.

In Ireland the common law prohibition on same sex marriage was reinforced in a slightly different way. S.2(2)(e) of the Civil Registration Act 2004 makes it clear that there is an impediment to a marriage if both parties are of the same sex. The Act does not render such marriages void – it is assumed that common law continues to do so. But it does require parties to declare that there is no impediment to their marriage. If they do not make the declaration, their marriage is void. If they knowingly make it a false declaration, they commit a criminal offence.[19] While the 2004 Act therefore does not actually render same sex marriages void, it confirms the intention of the Oireachtas that they should be void and provides statutory support for the common law rule.

In short, in both England and Ireland it is clear from common law and confirmed by statute, either explicitly or implicitly, that same sex marriages are void.

Constitutional and political considerations

But there is one big difference between the jurisdictions of England and Wales and Ireland when it comes to issues of same sex marriage and civil partnerships. Ireland has a written constitution with specific provisions on the family – England and Wales does not.

The most relevant articles of the Irish Constitution are:

> *Article 41.1.2*
>
> 2° The State … 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.

[18] *Hyde v Hyde* (1866) L.R. 1 P and D 130 at 133, per Ld Penzance.
[19] See ss.51(3), 51(5) and 69(10)(i) of the 2004 Act.

Article 41.3.1

> 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.

These provisions need to be considered when addressing two key questions. First, does the Constitution *require* recognition of gay marriage or does it *permit* it? Second, does the Constitution *permit* civil partnerships or *limit* what they can provide for?

To begin the Supreme Court in *The State (Nicolaou) v An Bord Uchtála* made clear that the family referred to in Article 41 is "the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the laws for the time being in force in the State."[20]

But did the Constitution restrict what could be a valid marriage under the laws of the State? Costello J in the constitutional case *Murray v Ireland* implied that it did when, in a passage subsequently approved by the Supreme Court, he stated:

> The concept and nature of marriage, was derived from the Christian notion of a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship.[21]

Same sex marriage, by contrast, is unlikely to be said to be derived from a Christian notion of marriage, at least as it has been generally understood to date.

More explicitly in *D.T. v. C.T.* Murray J. referred to marriage as:

> A solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution and that it was in principle for life.[22]

In neither *Murray v Ireland* nor in *D.T. v C.T.* was the sex of the spouses in any way an issue. Nonetheless, these dicta are not encouraging for those who would wish to see same sex marriage constitutionally required or permitted. By contrast, issues to do with the sex of spouses were very much in issue in *Foy v Ard Claraitheoir,* a case which concerned the rights of transsexuals, including as regards marriage. McKechnie J stated:

---

[20] *State Nicolau v An Bord Uchtala* [1966] IR 567 at p.622.
[21] [1985] IR 532 at pp. 535 to 536. This quote was approved by the Supreme Court in *TF v Ireland* [1995] 1 IR 321, at p.373.
[22] [2002] 3 IR 334 at p.405.

> It seems to me that marriage as understood by the Constitution, by statute and by case law refers to the union of a biological man with a biological woman. Re-echoing *Hyde v. Hyde* Law Reports (1856) Mr. Justice Costello in *B v. R (1995) 1 I.L.R.M. 491* defined marriage as 'the voluntary and permanent union of one man and one woman to the exclusion of all others for life.[23]

The issue arose even more directly in *Zappone and Gilligan v Revenue Commissioners*. In that case a lesbian couple sought recognition of their Canadian marriage. Dunne J in the High Court rejected their claim, stating:

> The final point I wish to make in relation to the definition of marriage as understood within the Constitution is that I think one has to bear in mind all of the provisions of Article 41 and Article 42 in considering the definition of marriage. Read together, I find it very difficult to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words used, relate to a same sex couple.[24]

Dunne J found that the Constitution did not *require* recognition of same sex marriages. But it is written in terms that could also suggest that it does not *permit* them, even though that was not the issue before the High Court. The case is now being appealed to the Supreme Court. It is possible that on appeal the Supreme Court will take a different stance. Moreover, even if the Supreme Court finds that recognition of the plaintiffs' same sex marriage is not required by the Constitution, the Court may give a view on whether same sex marriage is constitutionally permitted. However, as the caselaw stands it may well be that same sex marriage is neither required nor permitted by the Irish Constitution.

A case remarkably similar to Zappone and Gilligan also arose in England and Wales. In *Wilkinson and Kitzinger v Attorney General* a lesbian couple argued that the failure to recognise their Canadian marriage was contrary to the Human Rights Act, 1998, which gives the European Convention on Human Rights limited effect in UK law.[25] Potter J found against them and concluded that the European Convention on Human Rights did not require recognition of same sex marriage.[26] The case is not being appealed. However, unlike Ireland, there is nothing that might *prevent* Parliament legislating for same sex marriage. Parliament is sovereign and may legislate as it pleases.

---

[23] [2002] WJSC-HC 5126 at pp.5255 to 5256.
[24] [2006] IEHC 404.
[25] It is broadly similar to the Irish European Convention on Human Rights Act, 2003.
[26] Unreported, Potter J, 31st July, 2006.

To the extent that the UK's Human Rights Act has had any effect, it has been to compel some limited recognition of the rights of same sex cohabiting couples, not to prevent it.[27]

Despite this, in the UK civil partnership was preferred to same sex marriage. The reasons for this were clearly political, not legal: civil partnership was easier to get through the House of Lords and for public opinion to accept. Same sex marriage, by contrast, might have necessitated use of the Parliament Act to override the Lords, something that the government is always slow to do. Further, for the churches and the conservative leaning media, ending discriminatory treatment against same sex couples was one thing; allowing them to marry was quite another. And so, it was civil partnership, not marriage, that was provided for in the UK and that the main gay and lesbian rights group, Stonewall, accepted from very early on.

What of the situation in Ireland? It is submitted that given:

- the uncertainty that same sex marriage would be constitutional;
- how difficult it would be to persuade political parties in the Oireachtas in favour of same sex marriage in circumstances where the political consensus is instead strongly in favour of civil partnership;
- the possibility that there may have to be a referendum**;**
- generally more conservative attitudes to the family and marriage in Ireland;
- the years if not decades of work that it would take to persuade a Government to hold such a referendum, never mind to persuade the public to vote in favour;
- the limited extent to which political parties campaign in referendums, even on issues that they strongly favour, as demonstrated by the Lisbon referendum; and
- the real need of same sex couples to have legal security for their relationships in the interim;

the case for accepting the concept of civil partnership in Ireland seems very strong indeed. Of course, the outcome of the Supreme Court decision in *Zappone and Gilligan* may alter this conclusion.

However, although these are good reasons for accepting civil partnership, it also has to be asked whether its acceptance now would preclude the achievement of

[27] The Human Rights Act, 1998, was invoked successfully so that protections to ensure that a surviving partner could succeed to a tenancy were interpreted to cover same sex couples: *Ghaidan v Godin Mendoza* [2004] UKHL 30. In *Secretary of State for Work and Pensions v. M* [2006] UKHL 11, M failed in her bid to have rules as to child support made in 1991 found contrary to the Human Rights Act 1998. The rules in question worked to the disadvantage of a lesbian couple as compared to a heterosexual couple in the same situation. But the House of Lords stated that had such rules been passed at the time of the judgment, they would have been contrary to the Human Rights Act.

same sex marriage later. It also has to be asked whether the Scheme is so weak that it should not be given credibility. These are questions returned to later in this paper.

But first another issue. Are civil partnerships constitutional – and are there constitutional limits on what civil partnerships may provide for?

One case in particular, *Ennis v Butterly,* suggests that there may be problems in this regard.

The plaintiff claimed that she had an agreement with her partner that, pending marriage, she would "live with him as a wife might and, in particular, discontinue her own business and live at home as a full-time housewife and home-maker."[28] She sued him for breach of this cohabitation agreement.

Kelly J approved an English case where it was held that cohabitation agreements were not enforceable.[29] He went on to say that he would lean more strongly against enforcement of cohabitation agreements in Ireland "having regard to the special position of marriage under the Constitution."

He relied on the dicta of Henchy J in *State (Nicolau) v An Bord Uchtala*:

> For the State to award equal constitutional protection to the family founded on marriage and the 'family' founded on an extramarital union would in effect be a disregard of the pledge which the State gives in Article 41, s. 3, sub-s. 1 to guard with special care the institution of marriage.

Kelly J then stated:

> Given the special place of marriage and the family under the Irish Constitution, it appears to me that the public policy of this State ordains that non-marital cohabitation does not and cannot have the same constitutional status as marriage. Moreover, the State has pledged to guard with special care the institution of marriage. But does this mean that agreements, the consideration for which is cohabitation, are incapable of being enforced? In my view it does since otherwise the pledge on the part of the State, of which this Court is one organ, to guard with special care the institution of marriage would be much diluted. To permit an express cohabitation contract (such as is pleaded here) to be enforced would give it a similar status in law as a marriage contract. It

[28] [1996] IR 426.
[29] *Windeler v. Whitehall* [1990] 2 F.L.R. 505.

> did not have such a status prior to the coming into effect of the Constitution, rather such contracts were regarded as illegal and unenforceable as a matter of public policy. Far from enhancing the position at law of such contracts the Constitution requires marriage to be guarded with special care. In my view, this reinforces the existing common law doctrines concerning the non-enforceability of cohabitation contracts. I am therefore of opinion that, as a matter of public policy, such agreements cannot be enforced.[30]

This could be used to argue that for the State to recognise civil partnerships, or at least civil partnerships with the same rights as marriage, would be unconstitutional.

However, there are a number of points which can be made in response.

First, arguably the comments of Kelly J were obiter. He had already indicated that he was satisfied that the contract could not be enforced as a matter of common law before he went on to consider the constitutional question.

Second, the case dealt with cohabitation agreements without any statutory basis, not proposed civil partnership laws. While both must comply with the Constitution, the policy considerations affecting each are different.[31]

Third, there are many constitutional rights which are afforded to married people and single people alike or to their respective children. For example, in *G v An Bord Uchtala* Henchy J made clear that an illegitimate child and a legitimate child had an equal constitutional right to education.[32] Clearly, therefore Henchy J did not envisage that rights could never be equal as between members of a family based on marriage and members of a family not based on marriage, even if in the case of a child in a family not based on marriage the rights were unenumerated personal rights under Article 40.3, not family rights under Article 41.

Fourth, the Courts have made clear in a series of cases dealing with the tax and social welfare codes as well as certain farm payment schemes that Article 41.3.1 prohibits less favourable treatment of married couples than cohabiting couples.[33] Nowhere in these cases is it suggested that a married couple must be treated *better* than a cohabiting couple. All that these cases demand is that married

---

[30] [1996] IR 426 at pp.438 to 439.
[31] Note that s.73 of the UK Act makes clear that agreements to enter into a civil partnership are not enforceable. The Scheme is silent on this issue.
[32] [1980] 1 IR 32 at p.87.
[33] *Murphy v AG* [1982] 1 IR 241; *Muckley v Ireland* [1985] IR 472; *Hyland v Minister for Social Welfare* [1989] 1 IR 624; *Greene v Minister for Agriculture* [1990] 2 IR 17; *MacMathuna v Ireland* [1989] 1 IR 504.

couples be treated no less favourably – that, in the words of the Supreme Court, the married state not be penalised.[34]

As the Law Reform Commission has concluded from these cases:

> It seems probable that this line of authority would not prevent the legislature increasing the rights of cohabitees to bring them on a par with those of a married couple, as it only appears to prevent married couples being treated less favourably than cohabiting couples are.[35]

It is submitted that this is the correct view. After all, how can the extension of rights to those who are not married be a failure to guard the rights of those who are? How, in particular, can this be so when the persons concerned, by reason of their sexual orientation, are excluded from getting married – and would be unlikely to enter an opposite sex marriage even if civil partnership were not available, and still less likely to do so successfully?

Fifth, given that it is constitutionally acceptable for those outside of marriage to have equal rights in some areas – as is clear from *G v An Bord Uchtala* – how are we to identify the rights which they are not to enjoy? For example, if, individually, it is acceptable for a cohabiting couple to be treated equally for *each* of tax, social welfare and other purposes, is it not also acceptable for them to be treated equally for *all* of these purposes?

In the absence of any clarity on these points, *Ennis v Butterly* does not seem to be a precedent as regards the constitutional limitations on possible civil partnership *laws*. As the Law Reform Commission has suggested, it could be confined to its particular facts and it may be the case that some partnership *agreements* may be enforced.

Further, it is notable that in the *Zappone and Gilligan* case, Dunne J did not suggest that there were constitutional limitations on the granting of equal rights by civil partnership laws. To the contrary, she stated that this was a matter for the legislature:

> It is noteworthy that at the moment, (and some reference has been made to this in the course of submissions) the topic of the rights and duties of co-habitees is very much in the news. Undoubtedly people in the position of the plaintiffs, be they same sex couples or heterosexual couples, can suffer great difficulty or hardship in the event of the death or serious

[34] *Muckley v Ireland* [1985] IR 472.
[35] Law Reform Commission, *Consultation Paper on Rights and Duties of Cohabitees*, April 2004, LRC CP32-2004 at p.9.

> illness of their partners. Dr. Zappone herself spoke eloquently on this difficulty in the course of her evidence. *It is to be hoped that the legislative changes to ameliorate these difficulties will not be long in coming. Ultimately, it is for the legislature to determine the extent to which such changes should be made.* [36] [Emphasis added]

Again, the outcome of the Supreme Court appeal in this case may possibly offer further clarification on this point.

What may be the case, however, is that in circumstances where there is a conflict between a civil partnership and a marriage, the marriage takes precedence. That may be reasonable when the marriage precedes the civil partnership. But it should not be immediately assumed that it is constitutionally required that the rights of a married partner override those of a former civil partner in circumstances where the civil partnership was first in time. Nor, for the reasons explained in the next Part, should it necessarily be assumed that a subsequent civil partner should be treated less favourably than a subsequent spouse would be in similar circumstances.

In practice, however, the family courts have not taken an ideological approach, for example, in maintenance disputes between separated spouses when assessing the financial commitments of one of them to his or her new partner. The same practical approach may be taken when conflicts arise between a civil partnership and a marriage, provided that the Scheme leaves scope for such a pragmatic approach.

The Government has not made clear what precisely it believes the constitutional restrictions on civil partnership laws to be. It will be important for those campaigning for the strongest possible civil partnership laws to engage, as far as possible, with the Government on this issue since this, in turn, will shape the civil partnership laws that the Oireachtas passes.

PART II - THE UK ACT AND THE SCHEME COMPARED

Having compared the track record of both jurisdictions on gay rights and the legal background affecting civil partnerships in each, it is worth comparing the detail of the UK Act to that of the Scheme. Not all aspects of the two are compared below – only the most important.

[36] [2006] IEHC 404.

Going to the chapel?

The UK Government were very clear throughout the passage of the UK Act that it did not provide for marriage but for an entirely new legal relationship.[37]

As if to underline this, there is a major difference between marriage and civil partnership in England and Wales. Marriages can be performed by religious bodies, such as the Church of England.[38] By contrast, civil partnerships under the UK Act are purely civil in nature and there is no provision for religious bodies to carry them out.[39] Similarly, in Ireland marriages can be performed by religious bodies but no provision is made in the Scheme for the performance of civil partnerships by religious bodies. Instead, civil partnerships may only be registered by a registrar.[40] Most religious bodies – both in England and Wales, and in Ireland - would not want to conduct civil partnerships. But should that stop any religious body that, now or in the future, might be happy to do so?

It is, of course, the case that marriage in a registry office is also secular in nature in both England and Wales, and in Ireland. But this misses the essential point: those getting married have the choice to opt for a secular marriage or one by a religious body. Those entering into civil partnerships – under the Scheme as under the UK Act - do not.

In England and Wales this was no accident: the UK Act expressly requires that a civil partnership may not take place in religious premises. Indeed, the Bill would have originally prohibited marriage in a disused church that had been converted into a hotel. Late in the Bill's passage, the Government softened its position in that regard, but it remains prohibited for a partnership to be conducted even in a disused or dormant church which has not been subsequently converted to another use.[41]

As the responsible Minister, Jacqui Smith MP, explained:

> It is worth while reiterating to the House that the Government have not changed our policy that civil partnership registration, like the registration of civil marriages, should be wholly secular. We believe that allowing the formation of civil partnerships to take place in

[37] See, for example, the Regulatory Impact Assessment for the UK Act under the heading "Executive Summary," http://www.berr.gov.uk/files/file23829.pdf.
[38] See, e.g. Part II of the Marriage Act, 1949, as amended, as regards marriage in the Church of England.
[39] See s.2 of the UK Act.
[40] See s.54 of the Civil Registration Act, 2004 as regards marriage and Head 11(1) of the Scheme as regards civil partnership.
[41] See s.6(2) of the UK Act, and Government amendment 21 to the Civil Partnership Bill, as passed at third reading in the House of Commons on 9 November 2004. See Hansard, 9 November, Col 787 et seq.

> religious premises would undermine the *public perception* of civil partnership as a secular registration procedure and should be avoided.[42] [Emphasis added]

As will be seen below, the UK Act gives civil partners virtually all the rights and responsibilities of marriage. The important thing was to ensure that it not appear too like marriage to the public and to keep it away from churches. The Anglican church was, of course, already bitterly divided on the issue of gay priests. The UK Act spared it a potential row in the future about allowing civil partnerships to be conducted on its premises. Same sex couples were to have the rights of marriage, but not the rites of marriage - and, unusually, enforced secularism suited some religious bodies rather well.

So if same sex couples could not register their partnerships in churches, where could they be registered? The UK Act left this to local authorities to decide.[43] For a time, that appeared problematic. For example, the London Borough of Bromley and Medway Council decided to refuse to perform civil partnerships, but reversed their positions apparently out of fear of legal action.[44] Lisburn City Council decided to deny those having civil partnerships access to the same room in the Council offices where marriages were performed. But again fearing legal action the Council reversed this policy.[45]

By contrast, the Scheme merely stipulates that a civil partnership may be registered at a place chosen by the parties to the civil partnership with the agreement of the registrar. It seems clear that the registrar must agree to registration in his or her office. The decision of the registrar to allow a partnership elsewhere must be determined "by reference" to matters specified by the Minister.[46] What those matters are will obviously be of central importance. What is already clear, however, is that the decision is not in the hands of local authorities and the problems initially encountered in the UK are unlikely to arise in Ireland.

Another issue that has arisen in England and Wales is the refusal of some registrars to perform civil partnerships. In *Ladele v London Borough of Islington* the plaintiff, a committed Christian, refused to perform such partnerships. The Council ultimately responded by initiating a disciplinary process against her. This was found by an Employment Tribunal to be both directly and indirectly discriminatory on grounds of religious opinion.[47] It has been reported that the case will be appealed. It is beyond the scope of this paper

[42] See Hansard, 9 November 2004, Col. 787.
[43] See ss.6(5) and 28 of the UK Act.
[44] See http://www.pinknews.co.uk/news/articles/2005-124.html and http://www.ukgaynews.org.uk/Archive/2005nov/1002.htm.
[45] http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4458814.stm.
[46] Head 12 of the Scheme.
[47] Judgment of the Employment Tribunal of 3 July 2008, Case no. 2203694/2007.

to do a detailed critique of this case. Suffice to say that the reasoning of the Tribunal is open to question. [48] It is possible that similar problems may arise in practice in Ireland.

There is also the issue of the ceremony itself. Under UK marriage law, a civil marriage is conducted when the two parties exchange spoken words.[49] By contrast, a civil partnership is simply registered when the second civil partner signs a civil partnership document.[50]

Irish marriage law requires the parties to make certain declarations. In particular, they must make a declaration that they accept each other as husband and wife.[51] Significantly, the Scheme allows a civil partnership to be effected, at the choice of the parties to the civil partnership, by similar written *or* spoken declarations. Like Irish marriage law, one of the required declarations is that the parties accept each other as civil partners.[52] On one level, such a matter may seem trivial. But measuring civil partnerships solely by what happens when they fail, or by the tax and other material advantages that they confer, misses what for many is the essential point of the exercise: the acceptance by each of his or her commitment to the other and the recognition of that relationship by society on equal terms.

This, however, is not to say that there should never be differences between the procedures for marriage and civil partnership. For example, UK marriage law requires that the address of those intending to be married be made public.[53] By contrast, the UK Act does not require this of civil partners.[54] This was done deliberately to protect the safety of those intending to enter into the civil partnership. The Scheme does not stipulate what information must be published in this regard – but rather leaves this to the Minister and the Ard-Claraitheoir.[55]

---

[48] For example the Tribunal at paragraph 58 concludes that Ms Ladele's refusal was on account of her religious beliefs rather than the sexual orientation of those seeking civil partnership. At a minimum, it was on account of both her religious belief *and* the sexual orientation of those seeking civil partnership. Further, it is difficult to justify the conclusion that the requirement to perform civil partnerships was directly discriminatory on grounds of religion. At most, it would appear to be indirectly discriminatory and therefore capable of justification. It is striking in this regard that the Tribunal gives little consideration to the fact that the registration of civil partnerships is a statutory duty of registration authorities.

[49] See ss.44 of the Marriage Act 1949.

[50] s.2 of the UK Act.

[51] S.51(7) of the Civil Registration Act, 2004.

[52] See Heads 11(4) and (6). When marrying in Ireland, the couple must accept each other as husband and wife.

[53] See s.27 of the Marriage Act 1949.

[54] See s.10(2) of the UK Act.

[55] See Head 8(8) of the Scheme.

Protecting the institution of civil partnership?

In Ireland and England and Wales marriage only ends on death, divorce or annulment. The same is true for civil partnership under the UK Act and the Scheme – only in both the term divorce is not used, but rather dissolution.

In England and Wales it is relatively easy to get into a marriage – and to get out of one. Civil partnership there is the same.

Fifteen days advance notice is generally required to marry or enter a civil partnership.[56] Divorce is available in five circumstances: adultery, unreasonable behaviour, two years desertion, two years separation (if there is consent) or five years separation (if there is no consent).[57] The same is true for dissolution – except that adultery is not recognised as a ground for dissolution. That is because of the technical definition of adultery, which is applicable to heterosexuals only.[58] Also, like divorce, a dissolution is generally not available in the first year of marriage. Further, before a divorce or dissolution is granted, the applicant's solicitor must certify whether the possibility of reconciliation has been considered.[59]

Unlike England and Wales, in Ireland it is relatively difficult to get married, and relatively difficult to get out of a marriage. Like marriage in Ireland, three months advance notification is generally required under the Scheme to enter a civil partnership.[60] But whereas a divorce can only be granted if a couple has been living apart for four of the previous five years, a dissolution can be granted if the couple are living apart for two of the previous three years.[61] This is not equal treatment, but it may be sensible treatment - requiring four years living apart out of the previous five seems unduly onerous. In order to obtain a divorce in Ireland it is also necessary to show that there is no reasonable prospect of reconciliation and to this end solicitors must discuss the possibility of engaging in mediation.[62] There are no similar requirements under the Scheme.

There are other differences also.

Like UK marriage law, the UK Act provides for judicial separation.[63] By contrast, no provision is made for judicial separation under the Scheme.[64] In

[56] See s.31 of the Marriage Act, 1949 and s.11 of the UK Act.
[57] See ss.1(2) and (2) of the Matrimonial Causes Act, 1973.
[58] See *Dennis v Dennis* [1955] 2 All ER 51 on the definition of adultery.
[59] See s.6 of the Matrimonial Causes Act, 1973 and, as regards civil partnerships, s.11 as to notice, s.41(1) prohibiting dissolution in the first year, s.42 on certification by a solicitor and s.44 on the grounds for dissolution.
[60] See s.32 of the Family Law Act, 1995, and now s.46 of the Civil Registration Act, 2004.
[61] See Article 41.3.2.i of the Constitution and Head 57 of the Scheme.
[62] See Article 41.3.2.ii of the Constitution and Head 57 of the Scheme and ss.6 and 7 of the Family Law (Divorce), Act.
[63] See s.56 of the UK Act.

practice, this may matter less given that dissolution is available under the Scheme after two years living apart. But it underlines a point: whereas under the UK Act exhaustive efforts have been made to ensure that the rights and responsibilities of marriage and civil partnership are the same in virtually every respect, the Scheme does not display a similar concern.

The UK Act codifies the same grounds for annulment as UK marriage law.[65] By contrast, the grounds for seeking an annulment under the Scheme are narrower than under Irish marriage law.[66] Under Irish marriage law, an annulment can be granted if there was no free and informed consent.

Under the Scheme the relevant ground is much narrower: an annulment can only be granted if the parties were unable to give informed consent, as attested by a medical practitioner. This would not appear to allow annulment in the case of forced civil partnerships.[67] There have been concerns that the grounds for an annulment in Ireland are in need of reform: but if that is the case this would be better dealt with by an overhaul that is equally applicable to marriage and civil partnership. In any event the grounds for annulment of a civil partnership should not be as narrow as the Scheme proposes.[68]

Importantly, whereas the UK Act provides for rules on the recognition of foreign dissolutions similar to those for foreign divorces, the Scheme is silent on the rules for the recognition of foreign dissolutions.[69] By contrast, Irish marriage law has detailed provisions on this.[70] This is an important omission which should be addressed in order to ensure certainty and to prevent unfairness to vulnerable civil partners. There is, however, a procedure for seeking a declaration as to the recognition of a foreign dissolution. Unlike UK marriage law, UK civil partnership law and Irish marriage law, there is no statutory provision made for the possible involvement of the Attorney General in such proceedings, reflecting again the lesser esteem in which civil partnerships appear to be held.[71]

In order to protect the marital relationship, communications between spouses are generally privileged both in Ireland and England and Wales.[72]

---

[64] Although foreign judicial separations can be recognised – see Head 50(1)(d) of the Scheme.
[65] See ss.49 and 50 of the UK Act.
[66] See Head 49.
[67] See Head 49(d).
[68] Note also that the rules on prohibited degrees of relationships are different in Irish marriage law to those under the Scheme. The Scheme prevents consanguinity but not affinity. Cf the Marriage Act 1835, as amended. The UK Act, like marriage law in England, has rules against affinity also. See Sched 1 of the UK Act.
[69] See Part 5,Chapter 3 of the UK Act.
[70] See the Domicile and Recognition of Foreign Divorces Act, 1986 and EC Regulation 2201/2003.
[71] See s.60 of the UK Act and, in Ireland, s.29 of the Family Law Act, 1995 and Head 50 of the Bill.
[72] Subject to exceptions – see, in Ireland, the Criminal Evidence Act, 1992.

The UK Act applies this to civil partners, but the Scheme does not.[73] Again, this oversight should be addressed.

Bigamy is a crime in both England and Wales and in Ireland. Neither the UK Act nor the Scheme extends bigamy to civil partnerships. However, the UK Act criminalises the giving of false information, and once the Scheme passes into law, a similar offence regarding the giving of false information in Irish marriage law will apply equally to civil partnerships.[74]

England v Ireland: Equality v Equality lite?

The UK Act and the Scheme provide similar rights for civil partners as married couples in many areas. Below, the most important of these are discussed.

Succession

Like the UK Act, the Scheme provides the same succession rights for civil partners as for spouses.[75]

There is, however, one important qualification in Head 29(14) of the Scheme. It states that the right of a civil partner to inherit is to be subject to the rights of a former spouse and must ensure that the rights of the children of the deceased are respected. [76]

First of all, this is confusing. A divorce ends marriage and therefore a former spouse will have no automatic right on the estate. Nor should any such claim generally be necessary since it is a constitutional requirement for the granting of a divorce that proper provision has been made for a spouse and any children.[77] However, under s.18 of the Family Law (Divorce) Act, 1996, a former spouse can make a claim for provision out of the estate and a court may so order if satisfied that proper provision had not been made. In deciding whether to make such an order, the Court is obliged to have regard to the rights of any person having an interest in the matter. Clearly, that will include a subsequent spouse or civil partner. If the rights referred to in Head 29(14) are those under s.18 of the Family Law (Divorce) Act, then at the very least this should be clearly specified. However, it is not. That leaves open the danger that a bequest could be interpreted as being a "right" of a former spouse thereby allowing the testator to circumvent the entitlement of the civil partner by bequeathing all his or her estate to a former spouse, even if proper provision had been made for that former spouse.

[73] See s.84 of the UK Act.
[74] See ss.31-33 of the UK Act and s.69(3) of the Civil Registration Act, 2004, which does not require specific amendment by the Scheme.
[75] See s.71 and Schedule 4 to the UK Act.
[76] See Head 29(14) of the Scheme.
[77] See Article 41.3.2.iii of the Constitution.

Second, the requirement seems discriminatory against former civil partners: head 29(14) does not give any entitlement to a former civil partner, but only to a former spouse. This is particularly hard to justify given that just as former spouses can apply for relief under s.18 of the Family Law (Divorce) Act, former civil partners can apply under Head 68 of the Scheme – which is substantively identical to s.18 of the Family Law (Divorce) Act.

Third, and above all, the rights of spouses are not similarly qualified by the rights of former spouses. Why, as a matter of policy, should things be any different for civil partners?

Head 29(14) also seems anomalous as regards children. Under s.117 of the Succession Act, 1965, any provision made for children cannot interfere with the legal share of a surviving spouse who is not the parent of the children concerned. It is unfair that a civil partner should have lesser rights than a surviving spouse. However, this is clearly intended: while the Scheme makes amendments to many sections of the Succession Act to protect civil partners, it does *not* amend s.117.

Of course, it may be that Head 29(14) and the failure to amend s.117 reflect the understanding of the Government as regards the superior constitutional position of the family based on marriage. This underlines the importance of the Government making clear what precisely it believes the constitutional position to be. Further, such a limitation on the rights of a civil partner may not be constitutionally necessary. Article 41.3.2.iii prohibits the granting of a divorce if proper provision is not made for the first family, clearly reflecting the intention of the Constitution to ensure that the first family be protected. S.18 of the Family Law (Divorce) Act 1996 is a way of compensating if, after the divorce, it appears that proper provision was not in fact made – to provide a way, after a divorce, of fulfilling the intent of Article 41.3.2.iii. Despite this, the succession rights of a later spouse are not expressed to be subject to any order made in favour of a former spouse or any order made in favour of the children. While accepting that a civil partnership is not a marriage, it is nonetheless hard to see why the position of a civil partner should be worse than that of a spouse in disputes with a former spouse or children of the first family.

In reality, the parties to a divorce or separation often agree to extinguish their rights under s.18 of the Family Law (Divorce) Act. This will be even more important where one of parties to the divorce may subsequently enter a civil partnership. Of course, while this will protect against claims by a former spouse, it will not protect against claims by children of the former marriage.

Family law

In England and Wales the same orders can be made following a divorce as following a dissolution.[78] Crucially, the Scheme also provides for the same orders as under divorce in Irish law. These include maintenance, property adjustment orders, sale of the home or other property, pension adjustment orders and orders regarding inheritance.[79] As is the case under Irish marriage law, an application can be made at any time to vary these. It seems likely therefore that, similar to Irish marriage law, Irish civil partnership law will not generally provide for "clean breaks."[80]

Marriage law in both jurisdictions provides that maintenance is also available while the civil partnership is subsisting under the UK Act and the Scheme.[81] The UK Act and the Scheme also provide the same protections against domestic violence as married couples and divorced couples have.[82]

The Scheme provides for the same protections of the family home as the Irish Family Home Protection Act, 1976 – only that the home is referred to as a shared home rather than a family home.[83]

But there is one important difference regarding all the orders that can be made by a court under Parts 3 to 7 of the Act. These include – but are not limited to - maintenance orders, lump sum orders, pension adjustment orders, orders for provision out of an estate and the variation of these orders. Head 138 provides that the court shall have regard to the rights of any person with an interest in the matter. That is perfectly proper.[84] It then goes on to say that this includes:

> any rights of any civil partner or former civil partner, and, *in particular*, shall have regard to the rights of a spouse (if any) or the rights (if any) of a former spouse (if any). [Emphasis added]

It is perfectly proper that regard be had to all these rights. However, the reference to the rights "in particular" of spouses and former spouses suggests that they should be given greater weight. Again, it is hard to see from an equality perspective why this should be. Nor can it be argued that this is necessary to ensure that the Scheme is constitutional. Under what is known as the double construction rule, the courts will prefer a constitutional interpretation

[78] See Schedule 5 of the UK Act and Part 2 of the Matrimonial Causes Act, 1973.
[79] See Part 5, Chapter 3 of the Scheme and Part III of the Family Law (Divorce) Act, 1996.
[80] See *D.T. v. C.T.* [2002] 3 I.R. 334.
[81] See Scheds 6 and 7 of the UK Act and Part 6 Chapters 3 to 5 of the Scheme.
[82] See Sched 9 of the UK Act and Part 3 Chapter 3 of the Scheme.
[83] As it is elsewhere in the Bill. The provisions equivalent to the 1976 Act are in Part 3, Chapter 4 of the Scheme.
[84] Indeed, other provisions of the Scheme say as much for the most important orders that can be made. See Head 70(2)(l).

over an unconstitutional one.[85] So if the words "in particular" were not in the Scheme, but the courts found that particular regard should be given to the rights of the spouse or former spouse, the courts would interpret such a hierarchy into Head 138. If they were not required, then the courts would not apply such a hierarchy. It is therefore unnecessary to include the words "in particular" to secure the constitutionality of the legislation. These words may therefore be taken as expressing the will of the Oireachtas that civil partners are to have a lesser status.

As regards children, see below.

Tax and Social Welfare

The UK Act equalises the position of civil partners and married persons in the social welfare code.[86] By contrast, the Scheme does not deal with social welfare at all – but it is to be dealt with in separate legislation.

The UK Act did not deal with tax matters. Instead, this was dealt with by the UK Finance Act, 2005.[87] Similarly, in Ireland this will be a matter for future finance legislation. It is standard for tax matters to be dealt with in this way.

It is worth nothing that the UK Finance Act, 2005 merely empowered the Secretary of State to make regulations amending any primary legislation to provide for equal treatment as between married persons and civil partners. By contrast, it is constitutionally suspect in Ireland to amend primary legislation by secondary legislation. Therefore, the work of equalising the tax code will largely have to be carried out by primary legislation in Ireland.

Recognition of foreign relationships

Both the UK Act and the Scheme make provision for recognising foreign relationships. But the UK Act does so in a better way. It allows foreign relationships to be recognised if they are specified in the Act or in regulations *or* if they satisfy certain general conditions.[88] By contrast, under the Scheme foreign relationships can only be recognised if the Minister has listed them in regulations. Therefore, there is no possibility under the Scheme for a court to recognise a relationship in a country that the Minister has not considered.

[85] See *East Donegal Cooperative v Attorney General* [1970] IR 317.
[86] See s.254 and Schedule 24 to the Act.
[87] See s.103 of the Finance Act, 2005.
[88] See ss. 212 to 214 of the UK Act.

Discrimination

The Scheme ensures protection against discrimination in employment, goods and services on grounds of civil partnership by amending the Employment Equality Act, 1998 and the Equal Status Act, 2000.[89]

The UK Act likewise ensures protection against discrimination for civil partners in employment.[90] Later regulations also protect against discrimination against civil partners, *as compared to married people*, in goods, facilities and services.[91] Unlike the Scheme, however, discrimination on grounds of civil partnership *per se* is not prohibited in the field of goods facilities and services. In this respect, the Scheme provides better protection.

Transsexuals

Ireland has not yet made provision in legislation for the right of transsexuals to have their true gender identity recognised. Whenever Ireland does, it will also be necessary to think through the consequences under civil partnership law.

The UK Gender Recognition Act, 2004 allows transsexual people to change their legal gender, but if they are married requires that before doing so they must get an annulment or, in some circumstances, a divorce. However, the UK Act allows such couples to enter a civil partnership immediately thereafter.[92] Of course, this difficulty would not arise if same sex marriage were recognised.

Pensions

Section 255 of the UK Act allows the making of regulations amending any primary legislation in order to make provision regarding the pension rights of surviving civil partners and dependents. A number of complex regulations were passed to this end, making amendments not only to general legislation on pensions but also specific legislation in areas such as on judicial pensions and church pensions.

In an important concession, the UK Government agreed that equal treatment for survivors would be made retrospective to 5 April 1988 for those with what are known as "contracted out" pensions, which opt out of the state second pension. That means that contributions made by a deceased civil partner after 5 April 1988 will count towards the entitlement of the surviving civil partner.[93]

[89] See Heads 84 and 85.
[90] See s.251 of the UK Act.
[91] See Regulation 2 of the the Equality Act (Sexual Orientation) Regulations 2007.
[92] See Sched 3 of the UK Act.
[93] The Civil Partnership (Contracted-out Occupational and Appropriate Personal Pension Schemes) (Surviving Civil Partners) Order 2005 (S.I. 2005 No. 2050).

Contracted out pensions are very common in England and Wales, so this was a very important step forward.

For purely private pensions, amendments to non-discrimination law ensured that civil partners could not be treated differently to married couples. Therefore, a surviving civil partner is entitled to a survivor's pension on the same terms as a surviving spouse. However, this change was introduced prospectively only in that it applied in respect of contributions made after 5 December 2005. As a result it will be many years before surviving civil partners will have to be paid out the same amount as surviving spouses in purely private pensions.[94]

Whereas regulations made under the UK Act are extremely detailed, Head 26 of the Scheme is vague. It merely states that it will "provide that where a contingent or survivor's benefit or pension is provided by an employer or by a pension scheme for the spouse of a person, equivalent benefits must be provided for a registered civil partner."[95] But, for example, there is no clarity on the key issue of retrospectivity. This matters: without retrospectivity, it may be generations before surviving civil partners benefit equally compared to surviving spouses. Also, there is no detail about the amendment of the state's own pension schemes. To take just one example, s.2 of the Army Pensions Act, 1968 provides for pensions for married persons, but not civil partners. Amendments, either in primary or secondary legislation, will also be necessary for the other types of public sector pensions (Garda, civil service, local government etc.) This is another example of where the hard homework of drafting good civil partnership legislation has yet to be done.

Immigration

The UK Act imposes the same rights on civil partners as married persons under UK law on immigration and nationality.[96]

Head 28 of the Scheme, by contrast, merely provides for limited rights. First, the civil partner of a person with long term residence will be entitled to the same benefits as a spouse will be. Second, the civil partner of a person granted protection in the State will be eligible for family reunification in the same way as a spouse will be.

This leaves clear omissions. For example, the position of a civil partner is not equalised with that of a spouse for the purpose of citizenship or the rights of non-EU spouses of EU nationals.

---

[94] See Regulation 25 of the Employment Equality (Sexual Orientation) Regulations, 2003, (S.I. 2003/1661), as amended by the Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005 (S.I. 2003/2114).
[95] See Head 26 of the Scheme.
[96] See Scheds 23 and 27 to the UK Act.

Some could argue that these omissions are not hugely significant. For example, non-EU civil partners of EU nationals will still be able get a visa - but they will have to pay and wait longer.[97]

Also it is not entirely clear whether the Bill is being amended to extend the definition of family and dependant to include civil partners every time those terms occur or only in the context of ss. 36 (long term residence) and 50 (family reunification for those granted protection). This is an important issue since the Bill also provides for family reunification for those granted *temporary* protection and allows regulations to be drawn up on family reunification for ordinary immigrants.[98] If the Bill is only being amended in the context of ss.36 and 50 and, as a consequence, family reunification for ordinary immigrants is excluded, then this would be a very serious problem in practice.

Housing

The UK Act provides for equal rights as regards housing. Schedule 8 of the UK Act amends 18 separate pieces of primary legislation affecting England and Wales to this end.

By contrast, the Scheme amends only two pieces of legislation: the Housing (Private Rented Dwellings) Act, 1982 and the Residential Tenancies Act, 2004.[99] While these are undoubtedly important amendments, it is notable that other issues are overlooked. For example, ss.3 and 4 of the Housing Act, 1988 allow the Minister to make regulations for grants for certain persons or their spouses. These provisions are not amended to include civil partners. It is beyond the scope of this paper to check all Irish housing legislation, but there may well be many other examples. Again, the same level of thoroughness and commitment to equality found in the UK Act is missing in the Scheme.

Powers to ensure equality through secondary legislation

Overall, the UK Act is a more impressive and thorough piece of legislation.

By contrast, even the brief survey done above finds many examples where the rights of spouses and civil partners have not been equalised. This reveals a fundamental policy difference between the UK Act and the Scheme. The UK Act is designed to give equal rights to civil partners. The Scheme, by contrast, is designed merely to give some – admittedly very important - rights to civil partners.

[97] See s.8 of the Irish Nationality and Citizenship Act, 1956, as amended and prospectively repealed, and s.15A of the same Act. Regarding non-EU civil partners of EU nationals see S.I. 656 of 2006.
[98] That is to say non EEA nationals who come to the State but who do not seek protection of any kind.
[99] See Head 48 of the Scheme.

Yet there is no clear reason why this should be. As argued above, there is no constitutional reason, why, for example, civil partners should not enjoy the same rights under the Housing Act, 1988 or under the Irish Nationality and Citizenship Acts – but again if the Government thinks otherwise, it should say so.

It may well be that the reason the Government has not acted more comprehensively is not, in fact, the Constitution but simply because not enough resources have been put in place to do a proper trawl of the statutebook. This matters in Ireland even more than in England and Wales. The UK Act allows the Secretary of State by regulation to amend primary legislation.[100] That way, any oversights in equalising rights could be subsequently rectified – and indeed many were. In Ireland it is generally thought constitutionally improper to allow secondary legislation to amend primary legislation. That being so, the case for doing a full trawl of legislation now is all the more important.

Another way of resolving this problem would be for the Scheme to have a section stating that, unless otherwise stated, the terms spouse, marry, married person etc, in legislation already passed should be interpreted to include civil partners or civil partnerships and thereafter to lay down clear exceptions wherever thought appropriate. That way, there could be transparency and debate about the rights that it was *not* intended to give to civil partners and certainty that all other rights in the statute book were being given to them.

Nor is this an issue merely about current rights. If there is no clear policy that there is a presumption that rights are to be equalised then, when new legislation is passed, it may be that those new rights for married persons will not be extended to civil partners. There is the danger that the rights which civil partners are to have may be limited to those specified in the Scheme and may not grow over time. A way of addressing this concern would be for the Scheme also to include a section providing that for all legislation passed after the date of enactment of the Scheme, unless otherwise stated, the word spouse shall be read as if it included civil partner and the word marriage shall be read as if it included a civil partnership etc.[101] To assuage political sensitivities such a clause could also contain a (legally unnecessary) provision that nothing in that clause should be interpreted to give a right to marry to same sex couples.

However, for political reasons the Government may be reluctant to go even that far. If that is so, then the only way to ensure equality in the current statute book, and to set the policy clearly for equality in the future, is to do a thorough trawl of

[100] See e.g. ss.255 and 259 of the UK Act.

[101] Prospective clauses with a presumption in favour of equality are not unusual. See for example Article 78 of the Fair Employment and Treatment (NI) Order, 1998 which put in place a presumption that acts done under statutory authority after the Order's enactment are subject to the prohibition on discrimination in the Order.

the statute book and amend every reference to spouse, marriage and so on in the Scheme.

A particular problem also arises with regard to implementation of EU law provisions on spouses or marriage. Such is the thoroughness of the UK Act that it provides that where EU law provisions concerning spouses or marriage are being implemented by way of regulation, those provisions may be extended to civil partners also.[102] That way there is no doubt about the validity of regulations extending rights to civil partners and no question of having to pass primary legislation to confer similar rights on civil partners. After all, if primary legislation had to be passed every time, equal rights for civil partners would be very much delayed. Indeed, equality for civil partners regarding those matters might even be denied since it might be thought more trouble that it was worth to put them in primary legislation.

It would also be helpful if the Scheme, like the UK Act, had a provision allowing the Minister to amend secondary legislation to provide for the rights of civil partners. That way, regulations could be amended under the authority of the Scheme instead of having to rely each time on the authority of the primary legislation under which the regulations were passed. In practice, such a clause has proved very convenient to enable regulations to be made quickly and easily amending a whole range of secondary legislation in England and Wales.[103]

The kids aren't alright

The biggest problem with the Scheme is the lack of provision regarding children. By contrast, a number of changes have been made in the UK to provide equal treatment for same sex couples. Significantly, these changes did not start with the UK Act, nor have they ended with it.

Adoption

In Ireland a single gay person can adopt. But an unmarried couple cannot. Therefore, while a single gay person can adopt, a gay couple cannot. The Scheme does not change this. It remains the case therefore that, insofar as gays and lesbians are concerned, Irish policy is to prefer single parent households to dual parent households.

By contrast, in England and Wales a number of changes have been made to address this anomaly. First, the right of an unmarried couple to adopt – including therefore a same sex couple – was provided for by s.50 of the

[102] See s.260 of the UK Act.
[103] See s.259 of the UK Act and, for example, the Civil Partnership Act, 2004 (Amendments to Subordinate Legislation) Order 2005 (S.I. 2003/2114).

Adoption and Children Act, 2002. This reform, which preceded the UK Act, went through Parliament with little difficulty. A possible reason for this is that the Act allows for adoption by couples, not just same sex couples. It is open to debate whether this way of addressing the problem would be more divisive or less divisive in Ireland. Second, the UK Act made specific provision to allow civil partners to adopt, just as married couples can.[104]

Maintenance

The UK Act ensures that maintenance orders can be made against the non-biological civil partner.[105] By contrast, the Scheme does not provide for this.

The Scheme does not even reflect the requirement of Irish divorce law that if a spouse has acted in *loco parentis*, he or she can be obliged to pay maintenance for that child.[106] This underlines the point that children may well be the ones who lose out because of the refusal of the Scheme to recognise the role of the non-biological civil partner.

It is hard to see that it is constitutionally required for children to be exposed to hardship in this way. Nor is it clear whether and how the Government - and advocates of family values - can justify this as a matter of policy. It is hardly right that children should bear the brunt of moral disapproval of same sex couples. The UN Convention on the Rights of the Child requires that the best interests of the child be a primary consideration in all matters affecting them. Yet the Scheme does not show much regard for their interests at all.

Guardianship and custody

The UK Act ensures that a non-biological civil partner can apply for a residence or contact order, like a step parent can under UK law.[107] The UK Act also allows the non-biological civil partner to apply for parental responsibility, again in the same way as a step parent can under UK law.[108] No similar provisions are found in the Scheme. Instead, the non-biological civil partner will have to apply for *access* to the child as a person who has been in *loco parentis*.[109] This provides for far more limited rights.

The UK Act also allows for the nomination of the non-biological civil partner to act as guardian upon the death of the civil partner. This is similar to UK law

[104] See s.79 of the UK Act.
[105] See s.78 of the UK Act.
[106] See the definition of a dependent member of the family in s.2 of the Family Law (Divorce) Act, 1996.
[107] See s.77 of the UK Act and s.10 of the Children Act, 1989.
[108] See s.75 of the UK Act and s.4A of the Children Act, 1989.
[109] See s.11B of the Guardianship of Infants Act, 1964, as amended by s.9 of the Children Act, 1997.

regarding step parents.[110] Guardianship can be acquired by the couple adopting the child under UK law also. By contrast, the Scheme does not address guardianship issues for the non-biological civil partner.

Again, this fails to recognise the reality that many same sex couples share parental responsibilities. Again too, it is hard to see how the resulting hardship to children can be justified, at least as a matter of policy.

Disregarding children in other contexts

The Scheme also disregards the best interests of children in many other contexts. For example, unlike Irish law as regards married people, a child will not have any legal right to claim from a non-biological civil partner's estate on death.

Also, unlike Irish divorce law, a dissolution may be obtained without proper provision being made for dependent children of civil partners.[111]

This is all the more anomalous when one considers that under Head 70 of the Scheme, a court in making orders upon a dissolution must consider the rights of any children that a civil partner has the right to support.[112] This does help mitigate the injustice of not having regard to whether proper provision was made in deciding to grant a dissolution. But it also highlights the absurdity of the position.

There are other contexts in which the needs of children can be taken into account. Specifically, in maintenance proceedings as between civil partners, the obligations of each civil partner to any children must be considered.[113] Also, the non-biological child is to be a connected person in legislation on ethics in public life.[114] Finally, Head 138 of the Scheme states that in making any order under Parts 3, 4, 5 and 6 of the Scheme a court shall have regard to the rights of others. This could include a non-biological child. But this is not sufficient to confer any new rights on that child. So it remains the case that, for example, such a child cannot challenge the will of a non-biological civil partner for failing to make proper provision for him or her.

[110] See s.76 of the UK Act and ss.5 and 6 of the Children Act, 1989.
[111] See Head 57 of the Scheme.
[112] See also Head 138 of the Scheme.
[113] See Head 98 of the Scheme.
[114] See Head 24 of the Scheme.

PART III - THE NEXT STEPS: THE HUMAN EMBRYOLOGY AND FERTILISATION BILL, 2008

While the UK Act went very far to equalise the position of civil partners as regards children, there are some areas which are only being addressed now.

The Human Embryology and Fertilisation Bill, 2008, deals with these. It has already gone through both the House of Commons and the House of Lords. At the time of writing, it remains only for the House of Commons to consider the amendments to the Bill made by the Lords and for the Bill to be given Royal Assent. This should happen by the end of November 2008.

The Bill makes three crucially important reforms which were not included in the UK Act.

First, at present under UK law, a woman may not be provided with IVF unless account has been taken of the welfare of the child "including the need of that child for a father."[115] The Bill will remove this requirement to consider the need for a father and replace it with a requirement to have regard to the need of the child for "supportive parenting."[116] While the law at present in the UK does not actually prohibit IVF treatment being given to lesbian couples, it certainly makes it more difficult. The Bill will change this.

By contrast, in Ireland there is no legislation governing IVF treatment. Often, in practice, lesbian couples are denied such treatment, although a refusal to grant such treatment to civil partners may be challengeable under the Equal Status Act, 2000, when amended by the Scheme.

Second, the Bill introduces a new concept of parenthood for a mother's female civil partner.[117] The basic rule is that where a child is conceived by IVF during a civil partnership, both civil partners will be deemed parents. In Ireland this will not be the case. Similarly, the Bill makes provision with regard to parenthood in respect of children born during a surrogacy arrangement, which puts same sex couples in the same position as married couples. This means that same sex couples will no longer have to adopt children conceived by IVF or a surrogacy arrangement. This is an area where there is no Irish legislation and where the role of the non-biological parent is scarcely recognised.

[115] See s.13(5) of the Human Embryology and Fertilisation Act, 1990.
[116] See Part I of the Bill (clause numbers subject to change due to legislative passage).
[117] See also Part II of the Bill (clause numbers subject to change due to legislative passage).

PART IV - THE GOOD FRIDAY AGREEMENT

This paper has described the provisions of the UK Act affecting England and Wales. There are substantively similar provisions in the UK Act affecting Northern Ireland. Also, the provisions described above of the Human Embryology and Fertilisation Bill, 2008, will apply to Northern Ireland. The main substantive difference between Northern Ireland and England and Wales is that the rights for same sex couples in the Adoption and Children Act, 2002 did not extend to Northern Ireland.

So civil partners in Strabane will have better rights than in Lifford. What does the Good Friday Agreement have to say about this? The section of the Agreement on Rights, Safeguards and Equality of Opportunity refers to a number of steps to improve the protection of human rights, including a commitment to what was to become the Human Rights Act, 1998, which partially implemented in the European Convention on Human Rights in UK law.

Paragraph 9 of this section is headed "Comparable Steps by the Irish Government" and states:

> The Irish Government will also take comparable steps to strengthen the protection of human rights in its jurisdiction. The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the European Convention on Human Rights will be further examined in this context. *The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland*.

The paragraph then goes on to list a number of matters that the Irish Government will "additionally" undertake such as the creation of a Human Rights Commission in the South with a mandate similar to that in the North and equality legislation. Of course, the Good Friday Agreement is not an international agreement. Rather, it is a political agreement reached at the conclusion of all-party talks involving also the British and Irish Governments in 1998.

But it is often overlooked that it is also an Annex to the British Irish Agreement, which is an international agreement, in which the Irish and British Government commit to support the implementation of the Good Friday Agreement.[118]

While paragraph 9 of the Good Friday Agreement therefore indirectly committed the Irish Government, as a matter of law, to providing the same level of human rights protections as the UK Government would provide through the Human Rights Act, 1998, it is difficult to argue that it also commits the Irish Government to the same standards for the protection of human rights generally as the UK from 1998 on.

However, whether or not as a matter of law Ireland is so committed, there are at least sound reasons of policy why Ireland should in practice so commit save where there are clear reasons not to do so. Paragraph 9 is consistent with a general principle that there should be equivalent levels of protection North and South. That makes sense given the possibility, provided for both in the Good Friday Agreement and the British Irish Agreement, that if majorities North and South voted for a United Ireland, that there would be one.[119] That being so, it would seem somewhat odd if, without good reason, those in the South were to enjoy a lesser standard of protection than those in the North, both within a possible single jurisdiction. For that reason – along with others - it is desirable that the Irish Government would review the shortcomings in the Scheme in the light of the Civil Partnership Act, 2004 as it affects Northern Ireland.

CONCLUSIONS

The Scheme is certainly a major step forward. While it does not provide for same sex marriage, and therefore full equality, it will provide for many of the most important rights of marriage. Others will be provided, it appears, in forthcoming tax and social welfare legislation.

When compared to the UK Act, certain points become clear about the Scheme.

First, like civil partnerships in the UK, civil partnerships under the Scheme are strictly secular affairs. Unlike in marriage in both Ireland and the UK, there is no possibility of having a civil partnership registered in a church as there is the possibility of having a marriage solemnised in one.

---

[118] See Article 2 of the British Irish Agreement, done at Belfast on 10 April 1998. That the Good Friday Agreement is an annex of the British Irish Agreement is overlooked because the British and Irish Governments clearly wanted it to be overlooked. Thus all British and Irish official copies of the deal reached in 1998 start with the Good Friday Agreement, in fact the Annex to the British Irish Agreement, before printing the British Irish Agreement itself. Given unionist antipathy to the Anglo-Irish Agreement of 1985, the intergovernmental bedrock upon which the Good Friday Agreement rests has never been emphasised – but equally has never been altered.

[119] See the section of the Good Friday Agreement headed "Constitutional Issues" and Article 1(iv) of the British Irish Agreement.

Second, unlike the UK Act the Scheme does not make a proper attempt to provide all the rights of married couples to civil partners.

In a number of areas, such as immigration and housing, there are rights of spouses which are not provided to civil partners. This paper argues, as the Law Reform Commission did in a different context, that there is no reason why such rights cannot be extended to civil partners. All that is required is a thorough trawl of the statutebook and amendments to each piece of legislation. Alternatively, there could be a clause making clear that in legislation, past and future, the word marriage is to be read as including civil partnership, the word spouse to be read as including civil partner and so on – with, if the Government insists, explicit exceptions set down also.

Third, unlike the UK Act, the Scheme is seriously defective on the issue of children. A non-biological civil partner will have few rights in relation to a child. Further – and harder for the Government to justify – the child will have few rights as against the non-biological civil partner. This could lead to real hardship for children.

Fourth, in some areas, particularly succession, a civil partner under the Scheme has a lesser status than a former spouse. For a number of reasons, this appears discriminatory and, further, it is argued in this paper that it is constitutionally unwarranted.

Does this mean that the Scheme should be rejected as insufficient? That would, it is submitted, be mistaken. Given current constitutional uncertainty about the permissibility of gay marriage and, moreover, the reluctance of Irish politicians to contemplate this at this time, it would be unwise to reject the concept of civil partnership. Further, in England and Wales the move to equalise the rights of same sex couples in law did not start with the UK Act – the first key steps were taken with the Adoption and Children Act, 2002. Nor did it end with it – the Human Embryology and Fertilisation Bill, 2008 essentially completes the process of equalisation of rights. The same may well be true for civil partnership legislation in Ireland.

Indeed, if anything the Scheme should ultimately speed up the process of change because it will give civil partners legal status and recognition. That will make the failure to provide for the children of civil partners appear more anomalous. For as long as same sex relationships have no legal status, the case for recognising the children of those relationships is less clear. The ability of same sex couples to prove the seriousness and stability of their relationship through a civil partnership makes it harder to deny them equal rights – and makes it more anomalous that the children of such relationships should have so few rights as against the non-biological parent.

Finally, underlying some of the defects of the Scheme appears to be the assumption that the Constitution requires a lesser status for civil partnerships – and lesser rights when the rights of civil partners clash with those of former spouses or their children. That is why clarity as to the constitutional position is so important – and the Government should be pressed to make clear its understanding in this regard. It may be that the Supreme Court appeal in *Zappone and Gilligan* will provide some clarity on whether civil partnerships may have the same rights and status as marriage. There are therefore risks in the Supreme Court appeal, but also opportunities. What is arguably unfortunate is that both the Scheme and the appeal are proceeding at the same time. If that means the Supreme Court delivers its ruling after the policy for civil partnership has been fixed, then the risks of a Supreme Court appeal will have been incurred without any attendant benefits for strengthening civil partnership laws. The original position of the Government had been to await the outcome of the Supreme Court appeal in Zappone and Gilligan. While that position left same sex couples with near total inequality now, it *may* – depending on the outcome of the appeal – have offered the prospect of better legislation later.

* * *

THE UNITED KINGDOM PERSPECTIVE ON ISSUES RELATING TO COHABITATION[1]

Dr. Simone Wong[2]

Introduction

With the passage of the Civil Partnership Act 2004, same-sex couples in the UK are now able to enter into civil partnerships which will provide them with rights and responsibilities similar to those accorded to spouses. There, however, remains the question of whether the law on cohabitation in England and Wales should also be reformed, particularly since the Family Law (Scotland) Act 2006 now provides some rights to cohabitants, albeit less extensive than those given to married couples and civil partners, in Scotland.

The position in the UK at present is that divorce legislation, and now the civil partnership legislation, give courts the power to make a wide range of orders on relationship breakdown including orders for periodical maintenance for a partner which adjusts income distribution, lump sum orders, property transfer orders, pension sharing orders and settlement of property orders which adjust capital assets as between the parties. This, however, is not the case for cohabiting couples, whether or not there are children of the relationship. Applications for similar orders where there are minor children of the relationship can be made for the benefit of the child,[3] but these have been traditionally restrictively interpreted by the courts. Although there has been some recent softening of the court's willingness to take the needs of the primary carer into account where there are adequate assets, there is certainly no overriding aim to achieve 'fairness' as between the cohabitants, nor any family law-guided redistribution of assets recognising non-financial contributions to the welfare of the family or redressing relationship-generated disadvantage.

The issue of legal reform of the area of cohabitation was reviewed by the Law Commission for England and Wales (LCEW) which led to the publication of the Cohabitation Report in July 2007.[4] For the purposes of the Briefing Seminar, this written contribution sets out some of the key areas of concern for the author

[1] The comments in this written contribution are the personal views of the author and should not be quoted without prior permission.
[2] Senior Lecturer, Kent Law School, University of Kent, Canterbury, Kent CT2 7NS, UK
[3] Children Act 1989, Sch 1.
[4] Law Commission for England and Wales, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).

in relation to cohabitation in the UK and the LCEW's proposals which have yet to be taken up by the British government.[5]

1. Scope of the LCEW's remit

At present, there is a patchwork of laws that apply to cohabitants in the UK. Cohabitants, for instance, do have limited options in seeking to protect their occupation of the dwelling-house, whether jointly owned with or solely owned by their partners,[6] or for the transfer of tenancies.[7] Financial provision for the children of cohabitants may also be secured through various statutes.[8] On the other hand, disputes over the ownership of assets (eg the family home, other real or personal property) have to be resolved by resorting to the common law, particularly contract law, property law, trusts law and proprietary estoppel. As can be seen, the law does not completely ignore cohabitants but this patchwork of laws fails to provide a sufficiently cohesive framework and fairness to cohabitants. In terms of legal reform, the LCEW's remit was limited to looking at the financial hardship that cohabitants might face at the end of their relationships and thus paid attention only to the following areas: capital provision where there is a dependent child or children; capital and income provision on relationship breakdown; intestate succession and inheritance; and lastly, provision of maintenance to cohabitants under the Inheritance (Provision for Family and Dependants) Act 1975. The proposals made by the LCEW are thus not intended to provide a wholesale review of the laws affecting cohabitants and leaves the law intact for areas such as taxation, insolvency, parental responsibility for children and social security.

2. The definition of eligible cohabitants

In its Cohabitation Report of 2007, the LCEW recommended a presumptive scheme for cohabitants as this would ensure a safety net of rights for eligible couples without the need for couples to expressly opt in. The question then is the definition to be adopted: the main concern here is the adoption of a marriage-like definition for all cohabitants. To do so may be insensitive to the appropriateness of assimilating cohabitation, whether heterosexual or same sex, with heterosexual marriage. In the course of the consultation process, it became clear to the LCEW that there were strong objections, both at a theoretical and a normative level, by a large proportion of respondents to the use of a marriage-like definition for cohabitants. The LCEW thus recommended a definition that was reflective of those views and one which emphasised "coupledom" as the essence of an eligible relationship. It is the existence of a stable and committed

[5] The British government has decided to await the outcome of the Scottish Executive's research findings on the Family Law (Scotland) Act 2006, particularly in relation to its costs and efficacy in resolving disputes between cohabitants, before deciding whether to bring into effect the scheme proposed by the English and Welsh Law Commission.
[6] See eg Family Law Act 1996, Part IV.
[7] See Family Law Act 1996, Sch 7.
[8] See eg Children Act 1989, Sch 1; Child Support Act 1991.

relationship of interdependence between the couple, whether opposite or same sex, rather than conjugality, that *a priori* makes the relationship eligible.

3. Criteria for eligibility

There was some debate in the UK about whether access to the law should be open to all cohabitants or only to some, and if so, which ones. Given that the key purpose of legal reform is to address the economic hardships faced by cohabitants at the end of the relationship, it did not seem logical to restrict access only to cohabitants who have children together. Consequently, the LCEW recommended that all cohabitants who have children together should be automatically eligible without having to satisfy any minimum duration requirement. For cohabitants without children and those who do not have children together but have or have had dependent children living with them whom they have treated as a child of their family, their relationship would only be eligible subject to a minimum duration requirement which the LCEW suggested be set between two and five years.[9] The minimum duration requirement, according to the LCEW, serves to distinguish the committed from the less or not committed relationships for the purposes of legal protection. However, given that the objective of the scheme is to address the economic vulnerability of cohabitants, eligibility of a cohabitant to be granted any remedies under the new regime should arguably be based on the merits of each case rather than the fulfilment of a specific period of cohabitation. The abandonment of a minimum duration requirement avoids the problems of arbitrariness in terms of fixing the length of that requirement.

4. Financial relief on separation

At present, with the exception of Scotland, the law in the UK does not provide the courts with the means or power to award any financial relief to cohabitants on separation. While the range of orders that the courts may make is clearly not as wide as those available on divorce or the dissolution of a civil partnership, the courts will, under the LCEW's proposed scheme, be able to make a range of orders including orders for lump sum payment, property adjustment, property transfer, settlement of property and pension sharing orders, to provide redress to the cohabitant who is left economically vulnerable on separation. The aim of the orders is to:

- reverse a benefit that the respondent has retained at the end of the relationship; and/or
- compensate the applicant of any economic disadvantage suffered which ought to be shared equally by the couple;

[9] Some statutes in the UK currently refer to a minimum duration requirement of two years for cohabitants. See eg the Inheritance (Provision for Family and Dependants) Act 1975.

as a result of the qualifying contributions, financial and non-financial, which the applicant has made during the relationship or may make in the future.

Here, there are at least two problems that can arise: firstly, the assessment of economic vulnerability is not needs-based. There is concern about the LCEW's overly restrictive view of needs, and that needs has been downplayed and subsumed under the economic disadvantage heading. There is further concern about the insufficient weight being given by the LCEW to the relationship between needs, and interdependency and economic vulnerability in intimate couple relationships: the LCEW's concerns that a needs-based approach would encourage dependency on the part of the economically vulnerable parties seems misguided as needs and economic vulnerability are closely interlinked. It would be difficult to deal with the latter without first grappling with the former. The second problem that arises is the quantification of the retained benefit or the economic disadvantage. The LCEW sets out a wide range of financial and non-financial contributions[10] that may be taken into account to determine whether a benefit has been retained or a disadvantage suffered. However, little explanation has been provided on how the courts are to deal with quantification. Thus, those drafting any new legislation must be mindful of the practical difficulties of quantification and ensure provisions are drafted in to provide guidance to the courts in order to avoid ambiguity and arbitrariness in the awards.

In the consultation period, the idea of introducing a form of community of property regime for cohabitants was canvassed by the LCEW. Research has since been undertaken by Elizabeth Cooke, Anne Barlow and Therese Callus[11] which seems to suggest that there is some equivocation about the adoption of a community of property system in the UK; there seemed to be greater support for such a system among couples with children. Moreover, the 'entitlement' principle that normally underpins community of property models is at odds with the needs-based or compensation-based discretion adopted within family law in the UK. In the light of these observations, the application of a community of property rule may be problematic. It may disadvantage cohabitants who are asset-rich but have low or negligible income resources. For any community of property scheme to be attractive in the UK, it will have to be one that balances the certainty of entitlement with the flexibility of needs-based or even compensation-based discretion.

5. Succession and Intestacy

Under the current law in the UK, a surviving cohabitant of the deceased is excluded from inheriting on intestacy but s/he may make an application under the Inheritance (Provision for Family and Dependants) Act 1975 (hereafter

[10] These can include eg homemaking and childcare contributions.
[11] E Cooke, A Barlow and T Callus, "Community of Property: A Regime for England and Wales?" (Bristol, Polity Press, 2006).

'Inheritance Act 1975') for reasonable provision from the deceased's estate. The LCEW did consider whether there was a case for reforming the intestacy rules but rejected the inclusion of surviving cohabitants within them. Instead, it recommended that the provisions of the Inheritance Act 1975 should continue to apply to cohabitants, subject to the definition of 'cohabitant' in the Act being amended to that used to define eligibility under any new statutory scheme for financial relief on separation. The LCEW also recommended relaxing the eligibility requirements for claiming family provision by allowing a surviving cohabitant to make a claim whatever the period of cohabitation before the deceased's death, where the couple have had a child together. In addition, the LCEW also felt that a surviving cohabitant should not be prejudiced where the couple had separated shortly before the deceased's death. In such cases, the LCEW's view was that the surviving cohabitant should still be permitted to make an application under the Inheritance Act 1995 if s/he had already made an application for financial relief on separation which had not yet been determined or if no such application has been made, s/he was still entitled to make one.

In terms of award, the current provisions of the Inheritance Act 1975 provide for 'reasonable financial provision' to the cohabitant for his/her maintenance,[12] having regard to a list of factors set out in the Act.[13] Given the existing wording of the provision, the award does not extend to meeting the applicant's needs. But to ensure consistency between claims for financial relief on separation under any new statutory scheme and for family provision on death, the LCEW has recommended that the 'reasonable financial provision' test in the 1975 Act be modified to enable some consideration of needs to be given. Thus the recommended re-wording is: "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, [*whether or not that provision is required*] for the applicant's maintenance". This recommendation is significant in that not only will it allow the courts to take into account the surviving cohabitant's needs in determining what reasonable family provision ought to be made, but also brings it closer in line with the family provision entitlement of surviving spouses and civil partners.[14]

6. Cohabitation agreements and Opt-out agreements

Similar issues surrounding the validity and enforceability of cohabitation contracts arise in the UK as in Ireland. These contracts traditionally have been controversial and their enforceability has been, and remains, doubtful on the grounds of public policy. However, there seems to be no good reason to retain this conservative view where the cohabitants choose to regulate their financial and property matters through a contract especially given the rise in cohabitation and its increasing public acceptability in the UK. Thus, the LCEW has recommended that any new statutory scheme should affirm the enforceability of

[12] Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(b).
[13] Inheritance (Provision for Family and Dependants) Act 1975, s 3.
[14] Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(a) and (b).

cohabitation contracts that govern the financial arrangements of a couple during their relationship or on separation. As a safeguard though, where the cohabitation contract governs post-separation arrangements, the LCEW recommends that the contract should only be enforceable where the couple have executed a valid opt-out agreement.

In order to ensure the freedom of autonomy of cohabitants to regulate their own relationship, the LCEW is mindful of the need to allow couples to opt out of the statutory scheme which may be made before or during the couple's relationship, or after it has ended. An opt-out agreement would disapply the statutory scheme and/or make further and positive provision for financial arrangements on separation. But to ensure the protection against exploitation of the partner who may be economically (and emotionally) more vulnerable, the LCEW has recommended procedural safeguards (qualifying criteria) such as: a formal requirement that the agreement be in writing, signed by both parties; and the normal principles of contract law would apply especially the requirement for the provision of valuable consideration to support the contract.[15]

The LCEW did consider the question of whether independent legal advice should be made a qualifying criterion for the enforceability of an opt-out agreement, but rejected doing so as it felt that that would prove expensive for many couples. In addition, the LCEW also considered that the qualifying criteria should only apply to opt-out agreements since they seek to disapply the statutory scheme, but not to other agreements (eg cohabitation contracts) as the normal rules of validity and formality, as the case may be, to contracts, property and trusts would apply to such agreements.

Notwithstanding the LCEW's views, it may be prudent of the drafters of any new legislation to ensure that procedural safeguards, such as the provision of independent legal advice, are set not only for opt-out agreements but also other agreements such as cohabitation agreements. Such a requirement will at least ensure that both parties are given an equal opportunity to be fully informed of the legal nature and effect of the agreements they are entering into, and will provide some measure of protection to those who are more vulnerable in the relationship.

[15] There were also recommendations from the LCEW regarding the courts' discretion to set aside an opt-out agreement on the grounds of manifest unfairness due to, eg changed circumstances since the agreement was made.

CONTRIBUTORS

Justice Michael Donald Kirby was appointed to the High Court of Australia in February 1996. At the time of his appointment he was President of the New South Wales Court of Appeal, having been appointed to that office in September 1984.

He was admitted to the New South Wales Bar in 1967. He was appointed a Deputy President of the Australian Conciliation and Arbitration Commission in 1975. He served as first Chairperson of the Australian Law Reform Commission from 1975 to 1984. In 1983 he became a judge of the Federal Court of Australia, serving on that Court until 1984.

He has held numerous national and international positions including as President of the Court of Appeal of Solomon Islands, as UN Special Representative in Cambodia and as President of the International Commission of Jurists. In 1991 he was appointed a Companion in the General Division of the Order of Australia.

Dr. Fergus Ryan, a graduate and former scholar of Trinity College, Dublin, is a lecturer in law at the Dublin Institute of Technology. Since 2003, he has served as acting Head of DIT's Department of Legal Studies. From 2002-5, Fergus served as a visiting lecturer at the School of Law, Trinity College, Dublin, teaching Family Law. He is currently a visiting lecturer at the Law Society of Ireland and at the Centre for Equality Studies at UCD, and is an external examiner at WIT and Dublin Business School.

Fergus's Ph.D. research concerned the application of relational contract theories to contract law and family law, with particular reference to legal doctrines of consent. He is the author of several books and chapters in books including *Constitutional Law* (Thomson Round Hall, 2001) and *Contract Law*, (Thomson Round Hall, 2006), and has published in several leading academic journals. He is co-author (with Dug Cubie) of *Immigration, Refugee and Citizenship Law in Ireland, Cases and Materials* (Thomson Round Hall, 2004) and was a co-contributor to Shannon (ed.) *Family Law Practitioner*, (Round Hall, 2000). Additionally, Fergus is the co-author of two reports commissioned by the Irish Human Rights Commission: Walsh and Ryan, *The Rights of De Facto Couples* (2006) and Ryan and Conroy, *Observations on the Criminal Law (Trafficking and Sexual Offences) Bill 2006* (2007). In 2002, he also authored a report on the Nullity of Marriage in Northern Ireland for the Northern Ireland Law Reform Advisory Committee.

Muriel Walls Educated at University College Dublin (BCL), Muriel qualified as a solicitor in 1977 and became a partner in the McCann Fitzgerald's Private Client Group in 1992. Muriel specialises in family law and she and her team of lawyers have been involved in many of the leading cases. She has written and lectured extensively on the subject. She is co-author of *The Law of Divorce in Ireland* and *The Irish Family Legislation Handbook,* both published by Jordans. Her experience also enables her seek early resolution to family disputes, especially those with a business element.

Muriel is a Fellow of the International Academy of Matrimonial Lawyers; a member and former Chair of the Family Lawyers Association; former Chair of the Law Society Committee on Family Law and Legal Aid; an associate of the Solicitors Family Law Association of England and Wales; a member of the International Academy of Collaborative Professionals; a Board member of the Family Support Agency and an accredited CEDR Mediator (Centre for Effective Dispute Resolution London).

Brian Barrington is a barrister and has worked as a lawyer in Dublin, Brussels and Washington.

In March 1999 he became a special adviser to Seamus Mallon as Deputy First Minister and then to Mark Durkan in the same capacity. Upon the suspension of devolved government in October 2002 he continued to serve Mr Durkan as party leader. Throughout all this time he advised on equality, human rights, policing, criminal justice, community relations, and constitutional and legal matters and participated in SDLP negotiating teams on these issues.

Dr. Simone Wong is a Senior Lecturer in Law at the University of Kent. She teaches Equity & Trusts as well as Banking Law. Her particular research interests include cohabitation and equitable doctrines, especially in relation to home-sharing. Her latest publications include: 'Cohabitation and the Law Commission's Project' (2006) 14/2 *Feminist Legal Studies* 145; 'Would you care to share your home?' (2007) 58(3) *Northern Ireland Legal Quarterly* 268; and (co-authored with Anne Bottomley) 'Shared households: a new paradigm for thinking about reform of domestic property relations' in A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (London: Glasshouse Press, 2006).

Irish Council for
Civil Liberties

9-13 Blackhall Place, Dublin 7.
Ph: 353-1-7994504
Email: info@iccl.ie
Web: www.iccl.ie

ISBN 978-0-9544557-1-2