

## Proposals

- 1. The introduction of the UN definition of the Family to replace the present constitutional definition.**
- 2. The introduction of a State Registered Union to correspond with the new definition of family.**

### The present position.

The only family recognised under the Irish Constitution is the family based on marriage. *"I am satisfied that no union or grouping of people is entitled to be designated a family for the purposes of (Art. 41) if it is founded on any relationship other than that of marriage"*<sup>1</sup>

Further interpretation concluded that it was specifically Christian marriage<sup>2</sup> which was intended. However society has moved on, and without alteration to the basic position we now recognise divorce, and same-sex marriage. As regards most aspects of Social Welfare no distinction is drawn between those who are married and those who are unmarried. Nonetheless, the constitutional family is the family based on marriage.

There were 1,218,370 families in the State on Census Night, April 24<sup>th</sup> 2016. The Central Statistics Office uses a broad definition of "Family." For census purposes, a family is defined as a couple with or without children, or a one parent family with one or more children.

The breakdown of these families is as follows:

▪ Married couple without children	278,934
▪ Married couple with children	568,317
▪ Cohabiting couple without children	76,715
▪ Cohabiting couple with children	75,587
▪ One parent mother with children	189,112
▪ One parent father with children	29,705

The CSO definition of family, while broader than the Constitutional definition, does not include unconventional households such as where people live together as a family, but where there is no 'family' or 'blood' connection between those who, in all other respects, behave as a family. As a result of the constitutional definition

- Grandparents have no rights in law over their grandchildren.
- The unmarried father has very few rights regarding his child without taking court action.<sup>3</sup>
- The best interests of the child are secondary to those of the married couple.<sup>4</sup>

All 152,302 cohabiting couples are in a legally precarious position, with few or no rights under law. Walsh J. in his Supreme Court judgement stated:-

"while it is quite true that un-married persons co-habiting together and the children of their union may often be referred to as a family and have many, if not

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<sup>1</sup> *State (Nicolaou) v An Bord Uchtála (1966) I.R. 567 at 622* Henchy J.

<sup>2</sup> *Murray and Murray v Ireland (1985) I.R. 532 at 535*

<sup>3</sup> *Section 12, Status of Children Act 1987*

<sup>4</sup> *See In Re JH (an infant) 1985 I.R. 375, See also NWHB v HW and CW (2001) 3 IR 622*

all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based on marriage.<sup>5</sup>

The constitutionally recognised family, the married family, is elevated above all other families. This does not reflect the widespread choice by people to live as cohabiting couples before marrying or without ever marrying. By designating the married family as the "fundamental unit group of Society"<sup>6</sup> the Constitution places the individual and all those who do not fall within the confines of the constitutional family in an inferior position.

Siblings or others, who behave as a family but cannot marry, are disadvantaged or left in a legal limbo in regard to matters such as inheritance of a shared home. The incident of two avowedly heterosexual men "marrying" for tax reasons illustrates the need for reform.

The current position is at variance with the European Convention on Human Rights—  
Article 8 - Right to respect for private and family life

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In the European Court of Human Rights Ireland was found to be in breach of Article 8 when it was held that "*the notion of the family in Article 8 was not confined solely to marriage-based relationships and might encompass other de facto family ties where the parties were living together outside of marriage*"<sup>7</sup>

## The Proposal

In order to give Constitutional recognition to the choices made by citizens as to how they wish to live their lives and to give Constitutional support to those elements of legislation which are at odds with judicial definitions of the family, it is proposed that the current inadequate definition of family be replaced with the UN definition.

**Any combination of two or more persons who are bound together by ties of mutual consent, birth and/or adoption or placement and who, together, assume responsibility for, inter alia, the care and maintenance of group members, the addition of new members through procreation or adoption, the socialisation of children and the social control of members.**

- UN Definition of the Family, 1994.

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<sup>5</sup> *State (Nicolaou) v An Bord Uchtála and Attorney General* [1966] I.R. 567 at 643 and 644

<sup>6</sup> *Article 41.1.1 Bunreacht na hÉireann*

<sup>7</sup> *Keegan v Ireland* (1994) 18 EHRR 342, 42

It is proposed to create a new legal framework of State Registered Union (SRU) based on the 1994 United Nations definition of the family. The SRU would recognise as a family those who declare themselves to be a family. (Basic standards as to age, consanguinity, consent etc. would apply.) Ceremonial and religious considerations are not, primarily, the concern of the State.

The intention is to give the legitimacy of State recognition to the valid choices that citizens make as to how they wish to live their lives. The duty of the State is to guard the common good. It is not to impose a particular perception of morality on its citizens. The fact that the strictures imposed by the 1937 Constitution, many of which are still in place, have been bypassed both by referendum and by common practice, means that it is time to give expression to the will of the people. The CSO figures are ample evidence of the need to change.

The long-term goal is to accord State recognition as a family to any union falling within the UN definition, where the parties seek State registration. The SRU would be incentivised and encouraged and will be a requirement where State support such as enhanced tax treatment and other supports are to be accrued. Those who choose not to enter the SRU would not be entitled to the benefits attaching to it. However, should a non-registered family unit fall assunder the practices of the SRU might form a benchmark.

Once the basic requirements as to consent, age etc. have been met, a contract is formed between the adult signatories. Full disclosure of assets is a requirement. Should a split occur the principle of equal distribution would apply unless there is a pre-declaration or extenuating circumstances. (There is a well-established precedent in Scottish Family Law in regard to the equitable distribution of 'matrimonial property'). The designation 'married' would be a matter of declaration by the parties.

Ireland has moved away from the Common Law definition of marriage as "*the voluntary and permanent union for life between one man and one woman to the exclusion of all others*".<sup>8</sup> By the introduction of divorce we accepted that marriage may not be permanent. By the acceptance of same-sex marriage we acknowledge that we have moved far from the original concept of those who framed the 1937 Constitution. Yet only those who marry can be designated a family. We can accept other arrangements for census enumeration and for social welfare purposes but still deny them recognition as a family.

This proposal has very considerable constitutional and legislative implications.

Paul Farrelly. BCL LLM



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<sup>8</sup> *Lord Penzance in Hyde v Hyde (1886)*