AN COINBHINSIÚN AR AN MBUNREACHT
THE CONVENTION ON THE CONSTITUTION

Third Report of the Convention on the Constitution

Amending the Constitution to provide for same-sex marriage

June, 2013

Table of Contents

1. Chairman's Introduction

Introduction

On the weekend of 13-14 April 2013, the Convention held its third plenary meeting to discuss issues in the terms of reference set out in the Resolution of the Houses of the Oireachtas (Appendix A).

Background

Membership of the Constitutional Convention comprises 66 citizens, 33 parliamentarians and an independent Chairman. The 66 citizens were selected randomly by a polling company using the electoral register and on the basis of groups representative of Irish society and generally balanced in terms of gender, age, region, social class and occupational status.

Political parties and groups in Dáil Éireann and Seanad Éireann nominated representatives on the basis of their relative strengths in the Oireachtas. Political parties represented in the Northern Ireland Assembly were invited to nominate one representative each.

The Convention has been asked to complete its work within 12 months of its first plenary meeting in January, 2013.

The Government has committed to responding to the various recommendations of the Constitutional Convention within four months of the publication of its reports and will arrange a full debate in the Houses of the Oireachtas in each case.

In the event that the Government accepts a recommendation that the Constitution be amended, it will include a timeframe for the holding of the referendum.

Third Plenary Meeting

The purpose of this meeting was to consider amending the Constitution to provide for same-sex marriage.

At the first plenary meeting of the Convention, I set out certain ground-rules for our work, including principles of fairness, equality and collegiality. From the outset at this meeting, I was very pleased that members of the Convention appeared to be especially conscious of their responsibilities as they considered an issue on which there were sincere and deeply-held views on both sides of the debate.

Great effort was made to ensure that this debate was conducted in a fair and respectful manner, without any of the rancour which can so often accompany any conversation about sensitive constitutional issues. The overwhelmingly positive feedback from the members after the event was that the proceedings were

conducted in an open and respectful manner. Members were also impressed with the quality of the briefing materials and the discussions at individual tables.

As we work through our year-long programme, the Convention continues to learn about the best way of conducting our business as we try to enhance the experience for Convention members and demonstrate that this model of participative democracy can achieve its ambitious objectives.

The Convention Steering Group received many requests from advocacy and civil society groups who wished to make presentations to the Convention but unfortunately we simply could not accommodate all of them in our crowded schedule. However, particularly conscious of the need for inclusivity at this meeting, we made arrangements for a livestream presentation of the proceedings in a separate auditorium in the hotel for those who wished to be associated with the event and I was pleased that over 100 people attended these sessions during the course of the weekend.

Over two days, the Convention considered a huge volume of submissions from members of the public and heard presentations from experienced academic and legal experts as well as from advocacy groups. It also held a panel discussion with some interest groups and commentators. An important feature of the Convention's working arrangements is that members also spent considerable time in small roundtable discussions, teasing out the detail of the issue. The outcome of these discussions was then reported back to the full Convention so that all members got the benefit of group deliberations at individual tables.

Recommendations

The result of the ballot was that a clear majority of Convention members favoured a change to the Constitution to provide for same-sex marriage and, if such change were to be made, a similar majority favoured a directive amendment (i.e. requiring the government to legislate) rather than a merely permissive one. The Convention further decided, again by a clear majority, that were the Constitution to be amended, legislation should be introduced accordingly to address the parentage, guardianship and upbringing of children in families headed by same-sex married parents.

A related issue regarding religious freedom and freedom of expression (*inter alia* in the context of faith-based schools), was raised but was not put on the ballot paper. This issue is explained further in this Report (see *section 4.5, 'Convention Discussion'*) and may be an issue which the Convention may choose to explore further in due course under clause (ix) of its Terms of Reference (see Appendix A).

A number of other issues also arose during the course of the discussion which did not feature in the final ballot paper. The Convention felt that it was important that

all views (including minority opinion) be heard in this debate and agreed to reflect the content of these discussions in the final report.

This Report will be laid in the library of the Houses of the Oireachtas and I look forward to the government response within 4 months.

Acknowledgments

I would first like to congratulate all members of the Convention for their hard work and obvious commitment to the task at hand. The quality of the discussions and the spirit in which they engaged with each other was the foundation for the success of the weekend.

I am grateful to those many members of the public who sent submissions to the Convention, as well as those who watched online, and to Maire Mullarkey BL who summarised key themes in the submissions.

I would like to thank the Academic and Legal Team, led by Prof. David Farrell, for assembling our advisory panel of experts and for their advice and support in advance of, and during, the meeting. The other members of the team are Dr. Jane Suiter, Dr. Clodagh Harris, Lia O'Hegarty and Dr. Eoin O'Malley. They were ably assisted in their work by two interns, Colm Byrne and Paul Deane.

The Convention members were deeply impressed by the presentations of Gerard Durcan SC together with Dr Sarah Fennell BL and Dr Eimear Browne BL, and Prof. Jim Sheehan, all of whom willingly shared an impressive depth of knowledge in clear and concise language. Their wisdom forms an important part of this report.

I would also like to thank the Irish Council of Civil Liberties (ICCL), the Gay and Lesbian Equality Network (GLEN), Marriage Equality, the Irish Catholic Bishops' Conference, the Evangelical Alliance and the Knights of St. Columbanus who all took the time to make detailed presentations to the Convention and give us the benefit of their views and experience. The members of the panel discussion, namely Colm O'Gorman (Amnesty International), Dr. Conor O'Mahony (UCC), David Quinn (Iona Institute), Michael Dwyer (Preserve Marriage) and Carol Coulter (former Legal Editor at the Irish Times) should also be commended for capturing the views of a broad spectrum of public opinion on the matter under consideration.

Tom Arnold
Chairman

2. **Convention Recommendations**

Following a lengthy discussion of the detail of the ballot paper below, including the consideration of a number of alternatives, the members of the Convention decided to confine the issues for ballot to those directly associated with the subject matter in the terms of reference i.e. the provision for same-sex marriage.

	Yes	**No**	**No opinion**
Should the Constitution be changed to allow for civil marriage for same sex couples?	**79**	**19**	**1**

If the Constitutional Convention votes in favour of change, what form should this amendment take?	**Mark X in ONE box**
The amendment should be permissive (e.g., 'the State may enact laws providing for same sex marriage')	**17**
The amendment should be directive (e.g., 'the State shall enact laws providing for same sex marriage')	**78**
No opinion	**1**

	Yes	**No**	**No opinion**
In the event of changed arrangements in relation to marriage, the State shall enact laws incorporating necessary changed arrangements in regard to the parentage, guardianship and upbringing of children.	**81**	**12**	**2**

Note:
On all the issues balloted, a strong majority emerged.

Thus, a strong majority favoured amendment of the Constitution to provide for same-sex marriage. A similarly strong majority favoured directive or mandatory wording in the event of such amendment going ahead.

Again a strong majority recommended legislation to accompany any such amendment, to provide specifically for changed arrangements in regard to the parentage, guardianship and upbringing of children. The reason for including this option on the ballot paper was that in the case of same-sex couples *in loco parentis* to children, at least one parent will not be a genetic parent and therefore the usual rules regarding custody, guardianship etc. would need to be reviewed and – according to the Convention's preference – adapted for this situation.

The Convention did not vote on ancillary questions relating to freedom of religion and freedom of expression: these items were not put on the ballot paper. In so far as they arose in Convention discussion they are highlighted in Section 4.5 below *('Convention discussion')*. There were a small number of spoiled votes on each of the questions on the ballot paper.

3. Convention Programme

Members of the Convention agreed to consider the matters in accordance with the schedule set out below. The Convention first heard from academic experts in law and social science (family therapy / psychology) respectively. It then heard from advocacy / civil society groups. Roundtable discussions and plenary sessions on the emerging themes completed the programme, to ensure that the members, having received sufficient information, had the opportunity to discuss every aspect of the subject.

Saturday

9.30 a.m.	Welcome by Tom Arnold, Chairman

Advisory panel presentations

9.40 a.m.	Presentations by Gerard Durcan SC, with Sarah Fennell BL and Eimear Browne BL on the core issues
10.20 a.m.	Q&A
10.35 a.m.	Presentation by Professor Jim Sheehan followed by Q&A
11.20 a.m.	Roundtable Discussion

Advocacy and other group presentations

1.15 p.m.	Presentations by representatives of the Gay and Lesbian Equality Network, the Irish Council of Civil Liberties and Marriage Equality *(Tiernan Brady, Muriel Walls, Stephen O'Hare, Moninne Griffith, Grainne Healy, Conor Pendergast, Clare O'Connell)*
1.45 p.m.	Presentations by Bishop Leo O'Reilly and Mrs. Breda McDonald of the Irish Catholic Bishops Conference, Sean Mullan (Evangelical Alliance Ireland) and Colm Hagen (Order of the Knights of St. Columbanus).
*2.*15 p.m.	Expert summary
2.30 p.m.	Roundtable Discussion
3.45 p.m.	Plenary session - participants to hear the emerging themes from the discussion at other tables
4.45 p.m.	Panel discussion/Q&A with Colm O'Gorman, *(Amnesty Ireland)*, Dr. Conor O'Mahony *(UCC),* David Quinn *(Iona Institute)*, Michael Dwyer *(Preserve Marriage)*, Carol Coulter *(former legal editor, The Irish Times)*
5.30 p.m.	Conclusion

Sunday

10.00 a.m.	Plenary session - review of draft ballot papers
10.30 a.m.	Roundtable discussion
*11.*30 a.m.	Final Q&A with advisory panel members
11.45 a.m.	***Break and voting on the matters for decision***
12.45 p.m.	Announcement of Results

4. Amending the Constitution to provide for same-sex marriage

4.1 Presentation by Gerard Durcan SC

THE CONSTITUTION AND SAME SEX MARRIAGE

The issue which arises for consideration by the Convention is whether the Constitution should expressly recognise a right of persons of the same sex to marry and give constitutional recognition and protection to a family arising from such a marriage. The starting point for such consideration must be the present position in regard to the recognition and protection of the Family and marriage.

THE PRESENT POSITION IN REGARD TO THE FAMILY AND MARRIAGE:

The Nature of the Family:
The Family under the Constitution is confined to the Family founded on marriage[1]. The Courts have accepted that both a married couple with children and a married couple without children are a Family for the purposes of the Constitution[2].

The Protection of the Family:
The Constitution recognises the Family as the fundamental unit group of society and acknowledges that the Family has significant and important rights which cannot be taken or given away[3]. The State, therefore, guarantees to protect the Family in its constitution and authority[4]. Further the Constitution recognises the right and duty of parents to educate and to rear their children[5]. The Constitution does not define who is a parent[6].

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[1] The State (Nicolaou) v. An Bord Uchtála [1966] IR 567, In Re J An Infant [1966] IR 295 and G. v. An Bord Uchtála [1980] IR 32. More recently in J. McD. V. P.L. and B.M. [2010] 2 IR 199 the Supreme Court held that it would be a breach of Article 41.3.1 of the Constitution if the State awarded equal protection to the family founded on an extra marital union as that awarded to the family founded on marriage

[2] Murray v. Ireland [1985] IR 532 per Costello J. at p.537, approved by the Supreme Court per Hamilton C.J. in T.F. v. Ireland [1995] 1 IR321 at pp 372-373.

[3] Article 41.1 which describes the Family as "possessing inalienable and imprescriptible rights, antecedent and superior to all positive law". The strength of the language used in Article 41 in acknowledging the prerogatives of the Family has been remarked upon by the Courts, see for example the comments of Hardiman J in North Western Health Board v. H.W. and C.W. [2001] 3 IR 622 at p.757

[4] Article 41.2 which recognises such protection "as the necessary basis of social order and as indispensable to the welfare of the Nation and the State".

[5] Article 42.1.

[6] The Guardianship of Infants Act 1964, as amended, deals with the rights of parents to the guardianship or custody of their children. Section 2 defines a "parent" as meaning the mother or father of a child. A "father" does not include a father who has not married the mother unless he has been appointed a guardian or in certain rare circumstances where the marriage has been declared a nullity. A "mother" is not defined other than to say the term includes a female adopter. The question of who is a mother, where a child is born on foot of a surrogacy arrangement, is the subject of a recent High Court decision in M.R. & Anor, v An tArd Chlaratheoir (2013) IEHC 91, 5th. March 2013 Abbott J.

Because of these constitutional protections the State can only interfere with the Family in exceptional circumstances[7] and a presumption arises under the Constitution that the welfare of a child is to be found within his or her Family[8].

The Nature of Marriage:

The relevant case law in regard to the nature of marriage indicates that the concept of marriage under the Constitution is derived from the Christian notion of partnership[9] and is confined to persons of the opposite sex[10]. It also indicates that Irish domestic law is grounded in the monogamous union of a man and woman[11] and a polygamous marriage, that is a marriage which permits a party thereto to have a number of spouses, is not consistent with the concept of marriage under the Constitution[12].

The Protection of Marriage:

Under the Constitution the State promises to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack[13]. As a result of this constitutional guarantee, the State cannot, by its laws or by its actions, treat persons in a less favourable way because they are married[14]. Further the guarantee permits the State to treat persons in a more favourable way because they are married[15].

The Right to Marry:

The right to marry is a personal right which is protected under the Constitution[16] but which can be regulated by law in accordance with the common good[17]. Such regulation has taken place and marriage is by law[18] prohibited in certain circumstances. One of these circumstances is that both parties to the intended marriage are of the same sex[19]. This prohibition is at present the subject of a

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[7] As set out in Article 42.5

[8] In Re J.H. [1985] IR 375 and North Western Health Board v. H.W. and C.W. [2001] 3 IR 622

[9] Murray v. Ireland [1985] IR 532 per Costello J. at p.535, approved by the Supreme Court in T.F. v. Ireland [1995] 1 IR 321 per Hamilton C.J. at p.373.

[10] Zappone and Gilligan v. The Revenue Commissioners and Others [2008] 2 IR 417 per Dunne J. at para 238, pp 504-505 where she refers to a number of previous authorities including Murray v. Ireland [1985] IR 532, T.F. v. Ireland [1995] 1 IR 321, D.T. v. C.T. (Divorce: Ample Resources) [2002] 3 IR 334 and Foy v. An tArd Chlaraitheoir, unreported High Court McKechnie J. 9th July 2002. At para.241, p.505 Ms. Justice Dunne says "The definition of marriage to date has always been understood as being opposite sex marriage."

[11] M (D). v. F (C) and AG [2011] IEHC 415 Unreported 27th May 2011, Clark J. at para 25, p. 14

[12] H (HA) v. A (SA) and Others [2010] IEHC 497 Unreported 4th November 2010, Dunne J. at p.70.

[13] Article 41.3.1. The Supreme Court, per Hamilton C.J. in T.F. v. Ireland [1995] 1 IR321 pointed out that the protection afforded to marriage was linked to its close association with the family.

[14] Murphy v. The Attorney General [1982] IR 241, Highland v. The Minister for Social Welfare [1989] IR 624 and Greene v. The Minister for Agriculture [1992] IR 17.

[15] O'B v. S [1984] IR 316

[16] Pursuant to Art.40.3.1

[17] O'Shea v Ireland 2007 2 IR 313 per Laffoy J. at para.31, pp.323-324.

[18] Section 2(2)(e) of the Civil Registration Act 2004

[19] Pursuant to s.2 (e) of the2004 Act the fact that both parties are of the same sex is an impediment to a marriage. Under s.58 of the Act a person may lodge an objection to a proposed marriage on the basis, inter alia, that there is an impediment to the marriage. If An tArd Chlaraitheoir decides that there is an impediment to a proposed marriage he shall take all reasonable steps to ensure that solemnisation of the

constitutional challenge in the courts[20].The prohibition enjoys a presumption that it is in accordance with the provisions of the Constitution[21].

THE PROPOSED POSITION IN REGARD TO THE FAMILY AND MARRIAGE:

The proposed change in the Constitution:
In broad terms what is proposed is that the Constitution should contain an express acceptance of the right of persons of the same sex to marry each other. The effect of this would be that such a marriage would be entitled to protection under the Constitution as would a Family and its members founded on such a marriage. However a number of significant questions arise as to how such change might be effected and incorporated into the Constitution, three of which I will briefly consider.

Same sex marriages in Ireland and abroad:
Should any change to the Constitution be on the basis that the same legal effects apply to same sex marriages which take place in this country and those which take place abroad? A number of countries already permit same sex marriage. It would be possible to change the constitution to allow the recognition of such marriages while continuing to prohibit such marriages in this country[22]. Equally it would be possible to effect a change which allowed same sex marriage in this country but refuse recognition to such marriages which take place abroad.

Permissive or Directive:
Should any change require the State to enact laws providing for same sex marriage or merely permit the State to do so? If the change is merely permissive then it will be a matter for the legislature to determine at any point in time whether such a law is desirable.

Arrangements for Children:
What arrangements should apply in regard to children who are being reared by a same sex couple who have married? The answer to this question raises the important issue of who is to be viewed as the "parents" of a child for the purposes of the Constitution. While the issue may arise in relation to some married couples of the opposite sex who have children[23], it will arise in all cases of married couples of

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marriage does not take place and if notwithstanding such steps the marriage is solemnised, the marriage shall not be registered. A party to a proposed marriage may appeal to the Circuit Family Court against any such decision of An tArd Chlaraitheoir.

[20] As part of the on-going litigation in Zappone and Gilligan v. The Revenue Commissioners and Others

[21] Zappone and Gilligan v. The Revenue Commissioners and Others [2008] 2 IR 417 per Dunne J. at para 244, p.506

[22] Prior to the amendment of Art.41.3.2 in 1995 to permit divorce the Constitution provided that while divorce in Ireland was prohibited divorces granted abroad could in certain circumstances be recognised in this jurisdiction.

[23] For example an infertile couple who have a child by way of a surrogacy arrangement. It has already arisen in M.R. & Anor, v An tArd Chlaratheoir (2013) IEHC 91, 5th. March 2013 Abbott J. which considered the question of who is, in law, the mother of twins who were born on foot of such an arrangement.

the same sex, given the absence of a biological link between at least one member of such a couple and the child.

Any constitutional change will have to address this issue or at least allow it to be addressed by way of legislation. In this regard a question may arise as to whether the Constitution should permit the State by its laws to provide for different arrangements in relation to the parentage and upbringing of children having regard to the circumstances in which they became members of a family.

CONCLUSION:

In this paper I have done no more than attempt to set out in very brief terms the present constitutional position in regard to the Family and Marriage and to consider a number of issues which arise in the context of suggested change. No doubt these issues, and others, will be teased out in greater detail at the Convention having regard to the contents of this and other papers which are being supplied to the members together with the arguments put forward by the interested parties.

4.2 Presentation by Dr Sarah Fennell BL

1. Introduction

As the present constitutional position in regard to the family and marriage has formed the subject-matter of another Paper presented to the Convention, this Paper does not seek to repeat the law in this respect. The Paper instead centres on considering whether an amendment to the existing constitutional provisions on marriage and the family,[24] to allow for the express recognition of same-sex marriage, may require the introduction of legislative change. The extent of any legislative change is dependent on the form of constitutional amendment, if passed. If the Constitution is amended simply to recognise foreign same-sex marriages, this would probably reduce the level of legislative change required.

In the event of constitutional amendment to permit same-sex marriage, it would appear that the area of children is one that will require to be addressed. With the introduction of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010, the legal rights and obligations of civil partners and spouses are in many respects quite similar. A particular area where there is a remaining difference in treatment of civil partners as distinct from spouses is in regard to the children of these relationships.

This Paper seeks to provide an overview of some of the areas that may require legislative change in the event of the passing of a constitutional amendment protecting same sex marriage. It does not set out to provide a definitive summary of all potential legislative changes required but identifies the following areas as relevant: adoption, parentage, guardianship, custody, access, maintenance, tax and inheritance. Equally, the Paper does not propose model legislative answers but rather explains the present legal position.

2. The Present Position in Regard to Children

<u>Adoption</u>

The first Irish adoption legislation was the Adoption Act, 1952. This Act was subsequently amended by the Adoption Acts of 1964, 1974, 1976, 1988, 1991, 1998 and most recently the Adoption Act, 2010.[25] The categories of persons that may be eligible and suitable to adopt a child under current Irish law are governed by section 33 (1) of the Adoption Act, 2010.
Section 33(1) provides:

> "(*a*) The Authority shall not make an adoption order, or recognise an intercountry adoption effected outside the State, unless—
>
> (i) the applicants are a married couple who are living together,

[24] See in particular, Articles 41 and 42 of the Constitution.
[25] With the passing of the Adoption Act, 2010, the previous Adoption Acts have been consolidated.

(ii) the applicant is the mother or father or a relative of the child, or

(iii) the applicant, notwithstanding that he or she does not fall within *subparagraph (ii)*, satisfies the Authority that, in the particular circumstances, the adoption is desirable and in the best interests of the child."

Same gender couples are excluded from adopting a child jointly under current legislation.[26] Should one partner in a same sex relationship apply to adopt, then pursuant to section 33(a)(iii), this applicant must satisfy the Adoption Authority that this is desirable in the *"particular circumstances"*. The restriction on joint adoption also applies to the recognition of inter-country adoption, with the result that should a foreign jurisdiction permit joint adoption by same-sex partners, the State will not recognise the foreign order.[27]

A constitutional amendment to allow for same sex marriage will require the area of adoption law to be considered to address issues such as whether a same sex couple is permitted to adopt and whether there is to be any legal distinction in the treatment of intra and inter-country same sex adoptions.

Parentage

The area of assisted reproductive technologies is unregulated in Irish law.[28] Pursuant to section 35(1) of the Status of Children Act, 1987 a child can obtain a declaration that a person is their father or mother. Section 38(1) of the same Act permits the Court to give a direction for the use of blood tests for the purpose of determining parentage. Section 37 defines blood test as *"…any test carried out under this Part and made with the object of ascertaining inheritable characteristics"*.

The law in regard to parentage has recently been the subject of a High Court judgment in the context of motherhood and gestational surrogacy.[29] The Court found the genetic mother to be the person with the necessary inheritable characteristics and accordingly, the mother at law. The recent judgment concerned commissioning parents who themselves provided the sperm and eggs.
The Supreme Court had previously held in another case[30] that the father, as a sperm donor, has rights as a natural father, as provided for in section 6A of the

[26] The Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 has not amended the Adoption Act, 2010 in respect of joint adoption by married couples only.
[27] If the application is by the person who has adopted the child, otherwise see s.33(1)(b) and s.90(3)(a) and (c) of the 2010 Act.

[28] The absence of regulation was highlighted by the Supreme Court in *R v. R* [2009] IESC 82 concerning the status of frozen embryos. Since the *R v. R* judgment, there have been other domestic cases in the area of assisted reproduction notably, *McD v. L & Anor*. [2009] IESC 81 (sperm donation) and most recently, *M.R. & Anor v. An tArd Chlaraitheoir & Ors* [2013] I.E.H.C. 91, 5th March 2013 (surrogacy).
[29] *M.R. & Anor v. An tArd Chlaraitheoir & Ors* [2013] I.E.H.C. 91, 5th March 2013.
[30] *McD v. L & Anor*. [2009] IESC 81.

Guardianship of Infants Act, 1964 (as amended) to apply be appointed guardian of a child.

The issue of legal parentage can also arise in a variety of other circumstances, for example, the eggs may be provided by the surrogate, or the egg and/or sperm may be donated by another third–party donor. While it is not suggested that assisted reproduction is limited to same sex marriages,[31] the physical reality is that procreation within a same-sex marriage will always necessarily require the involvement of at least one third party. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 does not address the legal parental relationship between a child and a non-biological parent.

A constitutional amendment to allow for same sex marriage will require the area of parentage to be considered to address the establishment of parental status within the marriage.

Guardianship

The term "guardianship" has been described as that *"…currently used to describe the rights and responsibilities associated with raising a child, giving rise to the main legislation in this area of family law, the Guardianship of Infants Act 1964. The general understanding is that it includes both responsibilities and rights and allows a guardian to make important decisions relating to the child. Guardianship is often associated with the right to decide where the child will live, the right to apply for a passport and the right to decide in what religion the child will be raised."*[32]

Married parents are joint guardians of their child.[33] The natural mother of a child is automatically the child's guardian.[34] Where the parents of the child are not married at the time of the child's birth but marry one another after the birth, the father can acquire guardianship status.[35] In circumstances where the mother and father were not married at the time of the child's birth and do not subsequently marry one another, the unmarried father has a number of options to be made a guardian: (i) a court application[36] (ii) agreement with the mother of the child to make a statutory declaration conferring guardianship status upon the father[37] and (iii) on the death of the natural mother or other guardian. By reason of biological connection with the

[31] This point is clear given that the recent surrogacy case referred to above at n.6 concerned a married opposite sex couple.

[32] This explanation was provided by the Law Reform Commission in its *Report on Legal Aspects of Family Relationships*, (LRC 101-2010), at para. [1.06].
[33] Section 6(1) of the Guardianship of Infants Act, 1964.
[34] The guardianship rights of the mother of a non-marital child have been explained in both constitutional and statutory terms – see the judgment of O'Higgins C.J. in *G v. An Bord Uchtála* [1980] I.R. 32.
[35] See the judgment of Henchy J. in *The Matter of J, an Infant* [1966] I.R. 295 in this respect.
[36] This court application is brought pursuant to section 6A of the Guardianship of Infants Act, 1964 as inserted by section 12 of the Status of Children Act, 1987.
[37] See the Guardianship of Children (Statutory Declarations) Regulations 1998 (S.I. 5/98).

child, an unmarried father may become a guardian by one or other of these mechanisms.

Where a person has no biological connection to a child, for example, where a same-sex couple is parenting a child but only one partner is biologically connected to that child, there is no provision in the Guardianship of Infants Act, 1964 for an application by the non-biological parent to legal guardianship. The Guardianship of Infants Act, 1964 was not amended by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010.

The mother and father, as guardians of a child, are entitled pursuant to section 7 of the Guardianship of Infants Act, 1964 to appoint testamentary guardians by will, with such appointment to take effect on their respective deaths. This has the effect that a same-sex partner could be appointed a testamentary guardian of a deceased partner's biological or adopted child. The testamentary guardian shall act jointly with the surviving parent so long as the surviving parent does not object. If there is an objection by the surviving parent, the testamentary guardian may apply to court for an order.[38]

A constitutional amendment to allow for same sex marriage will require the area of guardianship law to be considered to address parental rights. Same-sex marriages by their nature will involve situations where one party to a same sex marriage has no biological connection to the child but cares for the child on an ongoing basis with the biological parent.

Custody

The terms guardianship and custody are sometimes confused. It has been explained by the High Court that custody confers day to day care and control of the child to the custodian.[39]

Pursuant to section 10(2) of the Guardianship of Infants Act, 1964, a guardian is entitled to custody as against all other persons who are not also a guardian of the child. Married parents are entitled to shared custody as joint guardians. Section 11A of the Guardianship of Infants Act, 1964 as inserted by section 9 of Children Act, 1997, makes express provision for joint custody to a father and mother. A natural mother is automatically the child's custodian. A non-marital father who is not a guardian of the child, is entitled to apply for custody of the child.[40] If a child is adopted, the adoptive parents become the custodians of the child.

[38] The Court may make one of three Orders pursuant to section 7(5) of the Guardianship of Infants Act, 1964, namely (i) refuse to make an Order (in which case the surviving parent shall remain sole guardian) (ii) make an order that the testamentary guardian shall act jointly with the surviving parent or (iii) make an order that the testamentary guardian shall act as the guardian of the child to the exclusion, so far as the court thinks proper, of the surviving parent.
[39] *R.C. v. I.S.* [2003] 4 I.R. 431.
[40] Section 11(4) of the Guardianship of Infants Act, 1964.

Where a person has no biological connection to a child, for example, where a same-sex couple is parenting a child but only one partner is biologically connected to that child, there is no provision in the Guardianship of Infants Act, 1964 for an application by the non-biological parent to custody.

As with the operation of guardianship, a constitutional amendment to allow for same sex marriage will require the area of custody law to be considered to address non-biological parental rights.

Access

There is provision in section 11B of the Guardianship of Infants Act, 1964 (as amended) for access to a child by members of the extended family. This provision can include a partner of the biological child who was in *loco parentis* to the child. In contrast to applications for access by a non-marital father, the application under section 11B is a two stage process. Accordingly, the applicant must satisfy a leave stage prior to the hearing of the substantive application. In deciding whether to grant leave, the court will consider the applicant's connection with the child, the risk of disruption to the child's life which would harm the child and the wishes of the child's guardians.[41]

A constitutional amendment to allow for same sex marriage will require the area of access law to be considered to address non-biological parental rights.

Maintenance

Existing Irish legislation[42] does not limit the definition of a dependent child of the family to a child of both spouses for the purpose of maintenance obligations. The meaning of dependent child extends to cover a child of either spouse so that the spouse of the biological/adoptive/in *loco parentis* parent may be obliged to provide maintenance to the other spouse in circumstances where, being aware that he/she is not the parent, has treated the child as a member of the family. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 does not provide any corresponding statutory obligation on a civil partner to maintain the non-biological child of his/her partner.

A constitutional amendment to allow for same sex marriage will require the area of maintenance to be considered to address financial obligations on the part of a non-biological parent towards a child of the marriage.

[41] Section 11B(3) of the Guardianship of Infants Act, 1964 as inserted by section 9 of the Children Act, 1997.
[42] See for example, section 3(1) of the Family Law (Maintenance of Spouses and Children) Act, 1976, section 2(1) of the Family Law Act, 1995 and section 2(1) of the Family Law (Divorce) Act, 1996.

Tax

Legislation giving effect to the taxation changes arising from the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was enacted on 27th July 2011 (Finance (No.3) Act 2011). Similar tax provisions that apply to married couples are now available to civil partners.[43]

Inheritance

Both testate and intestate succession is governed by the Succession Act, 1965. Section 67 of the 1965 Act provides that if an intestate dies leaving a spouse and issue, the spouse shall take two-thirds of the estate and the remainder shall be distributed among the issue.[44] Section 117 of the 1965 Act confers a jurisdiction on the court, upon an application by or on behalf of a child of a testator, to order such provision to be made for the child out of the estate as the court thinks just, if it is of the opinion that *"the testator has failed in his moral duty to make proper provision for the child in accordance with his means whether by will or otherwise."*

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 did not extend the provisions of the Succession Act, 1965 to non-biological children of a deceased civil partner.

A constitutional amendment to allow for same sex marriage will require the area of succession law to be considered to address financial obligations on the part of a non-biological parent towards a child of the marriage.

3. Conclusion

This Paper serves merely to provide a general overview of the areas which are likely to require consideration by the legislature in the event of constitutional amendment to provide for same-sex marriage. It does not suggest legislative solutions but proposes some areas for consideration by the members of the Convention.

[43] See http://www.revenue.ie/en/personal/circumstances/civil-partnership.html

[44] Section 67(4) of the Succession Act, 1965 provides that if all the issue are in equal degree of relationship to the deceased the distribution shall be in equal shares among them; if they are not, it shall be *per stirpes.*

4.3 Presentation by Dr Eimear Brown BL

The aims of this paper are as follows:

1. To give an overview of some approaches to the question of the formalisation of same-sex relationships in some other countries;
2. To examine the position of the members of a same-sex couple regarding any children of the family, in states where legal recognition of the relationship is allowed.

As regards Aim 1, it should be noted that, in countries where the question of the legal recognition of same-sex unions has been considered, there appear to be three main approaches:

i. To permit marriage under the same conditions as apply to heterosexual couples;
ii. To permit registration of the same-sex relationship in a manner that is different from standard civil marriage;
iii. To prohibit marriage between persons of the same gender expressly.

Furthermore, there are still some countries where the question of same-sex marriage has yet to be addressed in a specific manner.

This paper does not attempt to provide a definitive summary of worldwide approaches to this question, but seeks to explain some of the models currently in use. The main focus of this paper will be on European countries. At the outset, it is worth noting that there is no one, uniform approach to this issue in Europe, even in specific regions with broadly similar approaches to family law and/or to questions where law and morality intersect.[45]

As regards the position of children, it is worth noting that children may be part of a same-sex family because they are the child from a previous relationship of one of the partners (in which case the parent's partner is in the position of step-parent), or because the couple decided to have a child as a result of some form of assisted reproduction. In the latter case, only one member of the couple (at most) will have a biological link to the child. There are two main forms of assisted reproduction that apply: sperm donation to a female recipient and surrogacy, in which a woman carries a child for a "commissioning" couple, one of whom may be the father of the child.

[45] It has been noted that even in Nordic countries (Norway, Sweden, Denmark, Finland and Iceland), which "have a shared tradition of trying to harmonise family law as they are neighbours, and their cultures and social conditions are very similar" there are differences. These countries broadly move in the direction of granting legal recognition to same-sex unions, but at a different pace from one another: see Lund-Andersen, "The Nordic Countries: Same Direction, Different Speeds" in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd ed, Intersentia, 2012), p3 at p3,

Obviously, the former scenario is of more relevance to a female couple and the latter to a male couple.

While sperm donation is by now relatively uncontroversial throughout Europe, surrogacy arrangements are less so. Surrogacy arrangements are expressly prohibited in some European countries.[46] Even in countries which permit surrogacy *per se*, any exchange of money tends to render a surrogacy agreement illegal.[47] There is no uniform approach to the question of surrogacy, and it would be a mistake to conflate the question of surrogacy with the issue of same-sex partnership as there is not necessarily any automatic link between the two issues (particularly since surrogacy is frequently commissioned by opposite-sex couples in many parts of the World).[48]

1. Countries in which same-sex couples can obtain a legal marriage

The first country to allow couples of the same gender to marry was the Netherlands, in 2001. Since then, a small but increasing number of other countries have followed suit (see the BBC's World map, which is appended to this paper).

Some European examples of same-sex marriage

In the Nordic countries (Norway, Sweden, Denmark, Finland and Iceland), legislation permitted the registration of same-sex *unions* from a fairly early stage (since 1989 in the case of Denmark). The majority of these states (Norway, Sweden, Iceland and Denmark[49]) now allow for gender-neutral *marriage*.[50] All of the Nordic states permit adoption by married same-sex couples, or by same-sex couples whose partnerships have been registered, though the circumstances may vary.[51] In the rest of Europe, it is arguably more difficult to discern a coherent approach to same-sex marriage, save to say that same-sex couples increasingly benefit from some level of legal protection.

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[46] See, for example, a 2007 review of the area by Nakash and Herdiman, "Surrogacy" Journal of Obstetrics and Gynaecology" 2007 Vol 27(3), pp246-251.

[47] E.g. in the Netherlands, commercial surrogacy is a criminal offence: see Nakash and Herdiman at p 249.

[48] Thanks are due to Andrea Mulligan, PhD candidate at Trinity College Dublin for her kind assistance regarding my questions on assisted reproduction. Any errors are entirely my own.

[49] See BBC map at the end of this piece.

[50] Finland was moving in the same direction and a government report of 2010 indicated that there would in fact be very little difference between the current partnership laws and same-sex marriage; allowing same-sex marriage would make very little difference, in legal terms, to the couples affected. However, a more conservative government was elected in 2011 and Finland has yet to legalise same-sex marriage: see Andersen, p 11.

[51] See Andersen, pp 5-6. For example, it is possible to adopt a partner's child as a step-parent. In Sweden and Iceland it is possible to adopt a child jointly. In some countries, however, there are restrictions on adopting a partner's child if that child was originally adopted from a country that does not permit adoption by same-sex partners.

Two examples of European countries which permit marriage are the Netherlands and Spain. In spite of divergent cultures, predominant religions, histories and legal systems, both the Netherlands and Spain permit marriage between people of the same gender on the same basis as marriage between persons of the opposite sex.

The Netherlands[52]

In the Netherlands, as in Belgium,[53] the rationale for introducing same-sex marriage was purely based upon the desire to eliminate discrimination. As early as 1990, the Dutch courts held that there was no good reason for failing to extend some of the protections of marriage to same-sex couples.[54] A registered partnership scheme with largely the same effects as marriage was created thereafter. This scheme continues to exist alongside same-sex marriage, which was introduced in 2001. Experts note that there is very little difference in reality between the legal effects of the registered partnership scheme and marriage, and that it is easy to convert a partnership into a marriage. The main difference is that partnerships are more easily dissolved (e.g. by way of contract).[55]

Adoption and Children

Initially, the only two differences between opposite-sex and same-sex marriage were (a) that inter-country adoption (where a couple in the Netherlands adopts a child from another country) was only possible for opposite-sex married couples, and (b) that the presumption of paternity did not apply to children born to a couple consisting of two women. The presumption of paternity, applied to a heterosexual married couple, would mean that the man was presumed to be the father of any child born to his wife during the marriage. By contrast, if a female member of a same-sex married couple gave birth to a child, her wife did not enjoy automatic parental responsibility. However, Dutch law was subsequently reformed to the effect that both women automatically receive joint parental authority over the child, unless a man has claimed the child as his before his/her birth.[56]

Assisted reproduction by way of IVF is open to women in both same-sex and opposite-sex relationships, regardless of marital status (or indeed whether or not the

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[52] For detailed information on the law in the Netherlands, see Waaldijk, "Major Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners in the Netherlands" (available on the website of the University of Leiden).

[53] Swennen and Eggermont, "Same-Sex Couples in Central Europe: Hop, Step and Jump" in in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd ed, Intersentia, 2012), p19, at p21. They note that in a decision of 20 October 2004, the Belgian Constitutional Court held that there was no pertinent difference between same-sex and opposite-sex couples.

[54] *Hoge Raad,* judgment of 19 October 1990.

[55] Waaldijk, at p 138.

[56] See Waaldijk, at p138.

woman is in a registered partnership). In other areas of child law, same-sex and opposite-sex partners are also treated in an identical fashion, e.g.:

- Where one partner is the parent of a child, the other partner can acquire parental authority/responsibility during the relationship;
- Where one partner is the parent of a child, the other partner can adopt and become the second parent, provided the relationship is of a certain minimum duration;
- Both partners may jointly foster children;
- One partner can adopt individually.[57]

The only restriction on same-sex adoption appears to relate to inter-country adoption (mentioned above).

Surrogacy is regarded somewhat differently. It has been suggested that "The Netherlands does not look very favourably upon surrogacy arrangements."[58] There is no special procedure to deal with transferring parental rights from the surrogate mother (and, if she has one, from her husband – who is presumed to be the father of the child unless he was unaware of the arrangement or objected to it) to the "commissioning" parents. The woman who gives birth to the child is regarded as the mother, regardless of whether or not the child shares her DNA.

Same-sex couples are not eligible for the state's (very strictly regulated) IVF surrogacy programme. As a consequence, where a male same-sex couple has a child via surrogate in the Netherlands,[59] the mother will usually be both surrogate and biological mother to the child. This may affect how parental rights are transferred, but that is as yet unclear.[60] While the commissioning parents and surrogate may draw up an agreement, there is actually no legal obligation on the surrogate to hand over the child, or on the commissioning parents to accept it. If the surrogate mother is married, both she and her husband must be divested of parental responsibility in order for the commissioning parents to adopt the child. If the surrogate mother is not married, then as a matter of law she is the child's sole parent and the sole person with parental responsibility. If she consents, one of the "commissioning" fathers can then recognise the child as his and then apply for sole parental responsibility of the child, to the exclusion of the surrogate mother.[61] Once that has happened, the child can be adopted by the father's partner, provided that all of the

[57] Waaldijk, at p 140.

[58] Vonk and Boele-Woelki, "Surrogacy and Same-Sex Couples in the Netherlands" in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd ed, Intersentia, 2012), p123 at p 124.

[59] The position is still more complicated where the surrogacy arrangement occurred in another country. There is insufficient time to explain that law here, but it is set out by Vonk and Boele-Woelki at pp132ff.

[60] Vonk and Boele-Woelki at p 127.

[61] Vonk and Boele-Woelki at p 130.

criteria for the adoption have been met and provided that he has taken care of the child alongside the child's father for a year.[62] Commercial surrogacy arrangements are prohibited by the Criminal Code.

Spain

Like its neighbour, Portugal, Spain permits marriages between two people of the same gender. The reform was instituted in spite of significant opposition from various sectors of society.[63] In 2005, Spain became the first predominantly Roman Catholic country to allow same-sex couples to marry by amending the Civil Code to allow marriage between persons of the same sex. This development was not preceded by any constitutional amendment. As with many documents of its type, the Spanish Constitution was silent on the matter of gender in marriage, and the socialist majority in the Spanish parliament therefore took the view that it was therefore open to them to legislate for same-sex marriage.[64]

Adoption and Children

Married same-sex couples are permitted to adopt jointly in Spain.[65] There is no distinction between intra- and inter-country adoption, but because some countries from whence children are adopted do not permit adoption by same-sex couples it sometimes arises that one member of the couple will adopt on an individual basis. Where a woman conceives via sperm donation carried out in a Spanish hospital, her wife may acquire parental responsibility.[66]

What happens in cases of marital breakdown? In 2011, the Spanish Supreme Court dealt with a case involving two women who had cohabited together.[67] During the period of their relationship, one of the two had a child by sperm donation (but during a period when the legislation discussed above, which would have allowed her partner to acquire parental responsibility, was not in force). Following the

[62] See Vonk and Boele-Woelki's helpful diagram of this rather confusing process at p 131.

[63] Gonzalez Beilfuss, "All or Nothing: The Dilemma of Southern Jurisdictions" in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd ed, Intersentia, 2012), p41, at p41.

[64] Gonzales Beilfuss, at p43.By contrast, in Portugal, the Constitutional Court *was* asked to consider this question. It concluded that the Portuguese Constitution did not require marriage to be open to same-sex couples, but nor did it preclude the legislature from providing for such a development: see Gonzales Beilfuss at p44.

[65] Indeed, unmarried couples may also adopt according to the Autonomous Statutes of some regions of Spain: Gonzales Beilfuss, at p 49.

[66] Gonzales Beilfuss, at pp49-50; this is done by way of a declaration prior to the birth of the child.

[67] STS 2676/2011, Civil Law Chamber, Decision of 12 May 2011. See Gonzales Beilfuss at p 50.

breakdown of the relationship, the biological mother attempted to prevent all contact between her former partner and the child, on the basis that there was no biological connection between the two. The Supreme Court took a different view, concluding that the two women and the child constituted a *de facto* family for the purposes of Article 8 of the European Convention on Human Rights, and that fact, along with a consideration of the child's best interests, allowed the Court to grant the ex-partner (i.e. the non-biological parent) the same rights as a legal mother.[68]

Outside Europe, a diverse range of approaches may be found to the issue of same-sex marriage, from the recognition of full legal marriage (e.g. Argentina) to outright bans on such unions (e.g. Nigeria). One country where diversity arises at internal level is the United States of America, where the Federal Supreme Court has lately heard cases directly relating to this issue.

[68] Note that the European Court of Human Rights has long recognised the existence of the *de facto* family; in fact, its definition of a family has always been based on the reality of the situation rather than the existence of legal bonds. This contrasts sharply with the case law of the Irish Supreme Court, which recognises no such construct as the *de facto* family: see, e.g., *JMcD v. PL and Anor* [2008] 1 IR 417. However, it was not until 2010 that the Court of Human Rights concluded that the *de facto* family included a same-sex couple: see *Schalk and Kopf v. Austria* (Application No 30141/04, 24 June 2010). In the same case, the ECtHR held that there was no obligation on states to extend the Article 12 right to marry to same-sex couples (although the Convention does not prevent such a development), This is in line with the Court's traditional approach of examining the existence or otherwise of a European consensus on certain matters, particularly those involving a potential consideration of moral and religious sensitivities at state level; however, the Court does sometimes allow its position on such points to evolve or change along with the prevailing European view, as the Court's jurisprudence on the rights of transsexuals demonstrates. See also the recent Grand Chamber judgment of *X and Others v. Austria* (Application no. 19010/07, 19 February 2013), in which a narrow majority held that Austria's less favourable treatment of homosexual, as opposed to heterosexual couples in the area of "second parent" adoption violated Article 14 (freedom from discrimination in the exercise of one's Convention rights) in conjunction with Article 8 (the right to family life).

United States of America[69]

Legal regularisation of same-sex relationships: varies dependent upon the State in question, but the issue is currently being examined by the United States Supreme Court

Hitherto, the question of whether a State wished to permit same-sex couples to marry was generally regarded as a non-federal issue; i.e. it was a matter for each individual state to decide itself. Nine states[70] plus Washington DC currently permit marriage between persons of the same gender; twelve others allow other types of partnership, the benefits of which mirror those of marriage to varying degrees.[71]

However, federal law had an impact in one key way: the federal Defence of Marriage Act 1996 ("Doma") defines marriage as being between a man and a woman for all federal purposes. Same-sex couples could not, therefore claim various federal benefits (e.g. the ability to file joint tax returns, government employees' insurance benefits); this was the position whether or not they were parties to a marriage that was legal in their own State. The United States Supreme Court is, at present, considering two important questions that will have a significant impact on the recognition or otherwise of same-sex marriage at federal level. The first case involves a challenge to the Californian ban on same-sex marriage ("Proposition 8", approved by referendum in 2008) on the basis that it is unconstitutional: *Hollingsworth v. Perry*.[72] The second case is a challenge the constitutionality of Doma itself by an 83-year-old lady who is refusing to pay over $350,000 in inheritance tax due following the death of her wife: *United States v. Windsor*. If she were accorded the same rights as a surviving spouse in a heterosexual couple, the tax would not be due. Doma has been declared unconstitutional by lower courts, but it is the Supreme Court ruling that will be definitive.[73]

The decision in the *Windsor* case is expected in June, but there is speculation that Doma will be struck down after some members of the Supreme Court appeared to take the view during the hearing that the definition of marriage was not a matter for the federal government.[74] However, if the Supreme Court takes the view that Doma

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[69] At the time of publication of this report, the Supreme Court of the United States issued rulings on the Defence of Marriage Act ('DOMA', United States v. Windsor: http://www.supremecourt.gov/opinions/12pdf/12-307_g2bh.pdf) and Proposition 8 (Hollingsworth v. Perry: http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf)

[70] The nine states are: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermot, Washington State and Washington DC.

[71] http://www.bbc.co.uk/news/world-us-canada-21947712.

[72] Proposition 8 was passed in the aftermath of a decision by the Supreme Court of California which permitted same-sex marriage.

[73] A good summary of the respective positions on same-sex marriage in the US can be found at: http://www.bbc.co.uk/news/world-us-canada-21943292.

[74] http://www.bbc.co.uk/news/world-us-canada-21947712.

is unconstitutional because the definition of marriage is a matter for each State, then that will not mean that there is a federal constitutional right to marry regardless of gender; rather, it will prevent the federal government discriminating against people in same-sex marriages, while protecting the right of each State to define marriage in a manner that excludes or prohibits same-sex marriage, depending upon the legality of the manner in which that exclusion or prohibition is established.

2. Countries in which same-sex couples can obtain legal recognition of their relationship, but not marriage

Some states permit the legal registration and recognition of same-sex relationships, without according the right to marry per se. These arrangements may be referred to broadly as "civil partnership arrangements". The extent to which they resemble marriage in terms of their legal consequences "varies according to national preference; so too does the question of whether it is a status open to heterosexual as well as same-sex couples."[75]

Some countries provide for civil partnership type arrangements between same-sex couples which accord the couples almost the same level of legal protection as marriage, while simultaneously retaining legal marriage as a separate legal construct reserved to couples of opposite-sex couples.[76] It has been noted that the reason for this attempt to create a system of registered civil partnership that is separate from, but more or less equal to marriage is a desire to avoid any constitutional difficulties that might be feared to arise from granting the right to marry to same-sex couples.[77] The fact that a religious definition of marriage may also preclude same-sex marriage is also a possible reason for the distinction.[78]

Separate but equal registered partnership: United Kingdom

Legal regularisation of same-sex relationships: civil partnership (but moving towards permitting marriage)

The **Civil Partnership Act 2004** allows same-sex couples to contract a civil partnership. A civil partnership can only be conducted through a civil ceremony, although this may be held in a religious building.

A civil partnership is defined in section 1 of the Act as "a relationship between two people of the same-sex ("civil partners") … which is formed when they register as

[75] Lowe and Douglas, *Bromley's Family Law* (10th ed, OUP, 2007) at p52.

[76] In their 2012 study, Swennen and Eggermont cite the examples of Germany, the UK, Austria and Ireland (see page 23).

[77] See Swennen and Eggermont at p 25; they cite, in particular, rulings by the Constitutional Courts in Germany and Austria and of the High Court in Ireland as support for this thesis.

[78] Swennen and Eggermont, p 26.

civil partners of each other." It can only be ended by "death, dissolution or annulment." It has been noted that, in spite of the difference in terminology, "the approach of the [UK Civil Partnership legislation] is almost entirely to equate both institutions [i.e. marriage and civil partnership], and on ecan thus apply the same view of civil partnership as being both a special kind of contract, and as providing a separate legal status, as applied to marriage…"[79]

The **Marriage (Same Sex Couples) Bill** would make it possible for homosexual couples to marry in registry offices, and on approved premises (e.g. hotels), or provided that the religious organisation concerned is in agreement, on religious premises, with the marriage being solemnised through a religious ceremony.[80] There seems to be little legal advantage in marriage over the existing civil partnership arrangements, except that the latter would grant equality in terms of the terminology used.

The Church of England and the Church of Wales are exempt under the Bill and the common law duty on both Churches to marry parishioners is not extended to same-sex couples. In order to be able to solemnise same-sex marriages, the Church of England would have to have a Bill to that effect put before Parliament; law reform would also be necessary to enable to Church of Wales to conduct such marriages.

Child Law Matters

Section 63 of the Civil Partnership Act 2004 requires a court, when dealing with an application for dissolution, nullity or separation, to consider if it should exercise its powers under the Children Act 1989. The Children Act 1989, as amended, deals with a range of legal matters relating to children, including questions of parental responsibility and the status of surrogate mothers. As in the Irish courts, in any cases involving a child, the child's welfare is the court's paramount consideration. The concept of welfare is an "evolving" one.[81]

The Civil Partnership Act 2004 allows civil partners to acquire parental responsibility (a concept akin to guardianship under Irish law) in their capacity as stepparents to a partner's children. The Act also allows civil partners to apply for residence and contact orders in respect of such children.[82] The Marriage (Same Sex Couples) Bill

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[79] Lowe and Douglas, *Bromley's Family Law* (10th ed, OUP, 2007) at p42.

[80] Explanatory Memorandum to the Bill.

[81] Cobb, "English Courts' Treatment of the Children of Same-Sex Couples", Family Court Review, Vol 48 No 3, July 2010, 482, at 483. Cobb references a speech of Baroness Hale in the case *Re J* [2005] UKHL 40, in which she said:

> Once upon a time it may have been assumed that there was only one way of bringing up children. Nowadays we know that there are many routes to a healthy and well adjusted adulthood. We are not so arrogant as to think that we know best.

[82] Aoife Daly, "Children in the Civil Partnership Scheme" http://humanrights.ie/children-and-the-law/cpcroca-2010-daly-on-children-in-the-civil-partnership-scheme/.

would, if passed, allows similar orders to be made upon separation etc. of the parties to a same-sex marriage.

A stepparent can adopt a child; this will not affect the rights of the parent who already has parental responsibility, though that person's consent is necessary. The adopting stepparent must satisfy the court that he/she is the partner of the parent of the person being adopted. (Note that a civil partner can acquire parental responsibility of his/her partner's children, and can also adopt them; however, an unmarried partner in a heterosexual or homosexual relationship may adopt his/her partner's children, but may not take the lesser step of acquiring parental responsibility.)

Same-sex partners in England and Wales may adopt children jointly, whether or not they are in a civil partnership (Adoption and Children Act 2002). Same-sex partners also have access to assisted reproduction, in which cases both partners may be registered as the child's parents.

Surrogacy is legally recognised in the UK, provided no more than reasonable expenses are paid to the surrogate. The Human Fertilisation and Embryology Act 2008 *inter alia* provides that same-sex couples maybe recognised as legal parents of children conceived through the use of donated sperm, eggs or embryos. (Prior to that Act coming into force, only heterosexual couples were permitted to have a child as a result of a surrogacy arrangement.) These provisions enable, for example, the civil partner of a woman who conceives a child via IVF treatment (regardless of where in the world that treatment took place) to be recognised as the child's legal parent. Indeed, if a female civil partner gives birth as a result of donor insemination, she is the child's mother and her civil partner is *automatically* the other parent, unless the civil partner did not consent to the treatment. Where a woman who is living in a same-sex relationship (but is not a civil partner) has a child via donor insemination at a UK licensed clinic, and both she and her partner complete the appropriate notices of consent to the partner appearing as a parent, then the partner will be so treated by the law. Furthermore, orders according parental responsibility may be made in favour of husbands and wives, civil partners, or two people living as partners in an enduring family relationship. So, in circumstances where the couple is male, it appears that the male partner may be registered as a legal parent of a child born to one of them via a surrogacy arrangement.

Same-Sex Couples and Children: Some Cases from England and Wales

A leading case regarding the position of children after the breakdown of a same-sex family is *Re G*[83]. Although the case does not concern the breakdown of a civil partnership per se, it is instructive insofar as the House of Lords treated the parties in effectively the same manner as they would a heterosexual couple with children whose relationship had broken down. In *Re G*, a lesbian couple, G and W, who were

[83] [2005] EWCA Civ 462, [2005] 2 FLR 957, [2006] 1 FCR 436 (first round of litigation); [2006] EWCA Civ 372, [2006] 2 FLR 614, [2006] 1 FCR 689 (Court of Appeal, second round of litigation); [2006] UKHL 43, [2006] 4 All ER 241 (House of Lords, second round of litigation).

living together (but who never became civil partners) decided to have children together. One of the women, G, was artificially inseminated by anonymous donor and gave birth to two children in 1999 and 2001 respectively. The relationship broke down in 2002, with both parties entering relationships with new partners.

The case came before the case twice. In the first round of litigation, the couple were given a shared residence order by the Court of Appeal. By analogy, the Court was of the view that a father in the position of W, who had demonstrated past and future commitment to the children, would have been granted such an order. Indeed, a welfare officer had indicated that unless W (the "non-biological mother", for want of a better description), was granted a parental responsibility order, G (the biological mother) would marginalise her from the children. W subsequently broke this court order by moving with the children and her new partner in secret to another part of the country. This gave rise to the second round of litigation. In this second round, both the court of first instance and the Court of Appeal transferred primary care to W, the non-biological parent. Thorpe J in the Court of Appeal referred to psychological parenting and its importance relative to the biological link, which he considered to be of lesser significance. He relied upon the example of a heterosexual couple where the woman was infertile; if the couple conceived a child using the husband's sperm and a donor's egg, but later split up "it would seem to me of little moment if the father in any ensuing dispute were to assert some enhanced position resulting from the biological connection." In the case of homosexual couples:

> …in the case of the male homosexual couple who enter into a surrogacy agreement in order to parent, I do not consider that a decisive distinction is to be drawn subsequently on the basis that one of the contenders for care supplied the sperm. I also instance the known example of a lesbian couple where in the use of IVF treatment, the eggs of one are implanted into the womb of another. These instances simply demonstrate that we have moved into a world where norms that seemed safe 20 or more years ago no longer run.

However, on a further appeal to the House of Lords, the appeal by G, the biological mother, was allowed. G sought to restore the orders made in the first round of litigation (orders she had initially broken, until her whereabouts had been discovered). A unanimous House of Lords held that the lower courts had given insufficient weight to the biological link between G and the children. The parents were to continue to have shared residency, but primary care was to be with G, the biological parent. Lord Nicholls said:

> Their welfare is the court's paramount consideration. In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents

> without compelling reason. Where such a reason exists the judge should spell this out explicitly.

Lord Scott held:

> I would simply say that in my opinion both Bracewell J and, in the Court of Appeal, Thorpe LJ failed to give the gestational, biological and psychological relationship between CG and the girls the weight that that relationship deserved. Mothers are special and, even after account is taken of CG's breach of the "residence" order … and her reprehensible attitude towards the important relationship between the girls and CW, their other parent, CG was, on the evidence, a good and loving mother.

The main judgment was given by Baroness Hale, who examined the meaning of "natural" parenthood, and concluded that one could become a "natural parent" in one of three ways: genetic parenthood (the provision of the genetic material to create the child); gestational parenthood (conceiving and bearing the child) and social and psychological parenthood ("the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting"). She took the view that the lower courts, in depriving the biological mother of primary residency, had been unduly influenced by the unusual nature of the case and held: "while it may well be in the best interests of children to change their living arrangements if one of their parents is frustrating their relationship with the other parent who is able to offer them a good and loving home, this is unlikely to be in their best interests while that relationship is in fact being maintained in accordance with the court's order."

The case appears to demonstrate that a blood link to the child is something of an advantage in a case where a same-sex relationship breaks down. It is difficult to see how that is any different from a situation where an opposite-sex relationship breaks down (where, e.g., a man is an active carer of his female partner's child), except for the obvious point that, as medical science stands, it is impossible for two parents of the same gender to both have a genetic link to the child. A note of caution is advisable, however: the main issue at play in the House of Lords was whether the lower courts' response to G breaking the orders from the initial set of proceedings (i.e., to remove primary custody from G and give it to W) was justified in all the circumstances. It appeared to be more of a punishment of G than an appropriate response to the welfare and needs of the children, so it was unsurprising that it was not upheld by the House of Lords. The case also demonstrates that the biological link is not the overriding factor: W, the non-biological parent, was still recognised the House of Lords as having parental rights and rights of residence in respect of the child. In mundane terms, this meant that the children stayed with W every other weekend and for significant portions of the school holidays; arguably a similar arrangement to what any parent with joint, but not primary, custody might expect in this jurisdiction.

What of cases where a child has more than two parents who are present? This could easily arise in situations where a woman agreed to act as a mother for a male same-sex couple, on condition she retained some rights regarding the child, or where a sperm donor father wished to maintain contact.[84] In such situations is it unsurprising that the expectations of those involved may well conflict.

An English case on the latter point is *Re D (No 2)*,[85] in which a married man answered an advertisement by a female couple seeking a sperm donor. The mother and her partner had parental responsibility; the father also sought parental responsibility. In the High Court, Black J granted him this responsibility on the basis that the acknowledgement of a father was important in assisting the child to understand where she had come from,[86] and because it was "considerably influenced by the reality that Mr. B is D's father … It is to be hoped that as society accepts alternative arrangements more readily … the impulse to hide or to marginalise a child's father so as not to call attention to an anomalous family will decline, although accommodating the emotional consequences of untraditional fatherhood and motherhood and of the sort of de facto, non-biological parenthood that is experienced by a step-parent or same-sex partner will inevitably remain discomfiting."

In *Re B*[87] the donor father was the brother of one half of a lesbian couple who wanted a child. The relationship between the parties broke down during the pregnancy. Once the child was born, the father sought contact and parental responsibility on the basis that they had agreed that he would have some level of involvement; the women were of the view that his role would be more distant. The trial judge noted that, in cases of assisted or unconventional conception, "time and again … depths of emotions are engaged and feelings released that come as a surprise and a shock not only to others but in particular to the participants themselves." Having regard to the definitions of parenthood set out in the *G* case, the judge concluded that a family is both psychological and biological; the couple intended to form a family with the child, but the child may want to know information about his origins. However, in the circumstances the judge considered

[84] In the Irish case involving this latter scenario, *JMcD v. PL and Anor*, the Supreme Court treated the father in much the same way as it would have treated any other non-marital father, upholding his claim in respect of access to the child. Unfortunately, the father abandoned his guardianship claim, so it is unclear how far the Court would have been prepared to go in that regard.

[85] [2006] EWHC 2 (Fam), [2006] 1 FCR 556. See Cobb at p 496 ff.

[86] As Cobb notes, the father had agreed never to contact the child's school, and not to contact any medical professional caring for the child without the prior consent of the female couple; it was partly on this basis that the Court agreed to give him parental responsibility against the wishes of the "mothers", and in spite of the evidence of a child psychiatrist who said that giving parental responsibility to a third person from outside the family could undermine the family unit.

[87] [2007] EWHC 1952 (Fam), [2008] 1 FLR 1015.

that granting parental responsibility would be going too far and could undermine the women's status as parents, which would not be in the child's best interests.

The English courts appear to be more open to granting applications for contact (in an Irish construct, "access") to children by donor fathers, as opposed to parental responsibility (which imports decision-making powers in the child's life). In both *Re D* and *Re B*, the fathers were granted contact with the child. Cobb concludes: "Thus whilst it seems to be in a child's best interests to know of and, in certain circumstances, to have contact with, a biological parent who is not part of the child's nuclear family, to extend that parties' right to include parental responsibility may be a step too far."[88]

Separate and unequal registered partnership: France

In several European countries, it is possible for same-sex couples to obtain a civil partnership arrangement that is both separate from marriage, and without many of the legal effects of marriage. Examples of such countries include Luxembourg, Switzerland and France.[89]

Legal regularisation of same-sex relationships in France: *pacte civile de solidarité* (PACS)

A PACS is not the same as marriage. Not confined to same-sex couples, it may be concluded by either heterosexual or homosexual couples, provided they are not related and not already married to someone else.[90] Partners have reciprocal obligations to one another, and there is an impact on property and tax law. In the absence of a will to the contrary, partners under this system do not have any automatic inheritance rights to the estate of their partners.

A PACS does not appear to create any rights in relation to or over children born of the relationship. France does not give same-sex couples access to assisted reproduction.[91]

Unlike the British model, the French model seems to "view [the PACS] primarily as registration of a contract between parties, rather than as registration of their relationship…" The parties are largely free to decide the terms and conditions of the arrangement.

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[88] At p 498 of his paper.

[89] Swennen and Eggermont, at p 30. NB except in Switzerland, it is also possible for opposite-sex couples to enter into the same arrangements.

[90] http://vosdroits.service-public.fr/particuliers/F1617.xhtml

[91] This is also true of some other European countries, including Italy.

There are current proposals before the French Parliament to legalise same-sex marriage: *Projet de loi ouvrant le mariage aux couples de personnes de même sexe*, *n° 344.* That Bill has been passed by the Assemblée Nationale (the lower house), and awaits debate by the Sénat in April this year.[92] This Bill would also allow same-sex couples to adopt.

3. Countries in which legal recognition of same-sex relationships is specifically banned

Some countries in their laws expressly prohibit legal recognition of same-sex relationships. Thus in Uganda, Parliament approved a constitutional amendment saying that marriage is between a man and a woman on 5 July 2005[93]; a further Bill which has yet to be passed would impose a similar ban[94]. In Nigeria,[95] a similar ban is imposed by legislation. In Hungary, where there is a registered partnership scheme, reportedly[96] there has been some discussion recently of amending the Hungarian Constitution to define marriage as being exclusively between a man and a woman, even though the application of such a definition to *common law* marriages (i.e. relationships based on cohabitation) was previously regarded as too narrow by the Hungarian Constitutional Court.[97] However, in the same judgment,[98] the Constitutional Court did confirm that the *institution* of marriage was itself confined to opposite-sex couples, and an early draft of the country's registered partnership scheme was struck down by the Constitutional Court on the basis that it too closely resembled the institution of marriage and therefore undermined the supremacy of that institution.[99]

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[92] http://articles.washingtonpost.com/2013-02-12/world/37051702_1_marriage-adoption-by-gay-couples-socialist-party

[93] http://www.hrw.org/news/2005/07/11/uganda-same-sex-marriage-ban-deepens-repression

[94] http://www.huffingtonpost.com/2012/12/02/uganda-anti-gay-bill-death-penalty_n_2227333.html

[95] http://www.independent.co.uk/news/world/africa/nigerias-senate-votes-to-ban-gay-marriage-6269724.html, *The Independent*, Wednesday 20 November 2011; http://www.punchng.com/news/same-sex-marriage-remains-prohibited-mark/, *The Punch*, 8 January 2013.

[96] http://www.thejournal.ie/hungary-constitutional-powers-828149-Mar2013/.

[97] Jagielska, "Eastern European Countries: From Penalisation to Cohabitation or Further?" in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd ed, Intersentia, 2012), p 55 at p 59.

[98] Ptk, 67585G, decision of 1995, discussed by Jagielska at p 59.

[99] Decision of 2008, discussed by Jagielska at p 60.

4. Countries in which legal recognition of same-sex relationships has yet to be addressed

Not all countries have moved to deal with the question of whether or not to legalise same-sex unions. For example, neither Italy nor Greece has any form of legal recognition for such relationships,[100] in spite of proposals for the institution of civil partnership arrangements and court challenges relating to their absence.[101]

In Italy, the Constitutional Court held in 2010 that marriage is the union between a man and a woman; the court did, however, recognise the need for some kind of legislation to protect the rights of same-sex couples.[102]

A form of registered partnership does exist in Greece, but is only open to opposite-sex couples. Two cases challenging this law on the basis that it is discriminatory in nature are pending before the European Court of Human Rights.[103] The Greek Orthodox Church is heavily opposed to same-sex marriage, while the government may be under international pressure to follow other parts of Europe in order to introduce some form of legal recognition for such relationships.[104]

A similar reluctance to grant legal recognition to same-sex relationships may be seen in several former Eastern bloc countries.[105]

Conclusions

A diversity of approach to the question of the recognition of same-sex relationships still exists at a global, and even at a more local European level. However, it is possible to comment decisively that there is a growing trend towards allowing some form of legal recognition of such relationships. Within that trend, there is a move

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[100] Gonzalez Beilfuss, "All or Nothing: The Dilemma of Southern Jurisdictions" in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd ed, Intersentia, 2012), p41, at p41.

[101] Golzales Beilfuss, at p51ff.

[102] Gonzales Beilfuss, at p 53.

[103] Those cases are: *Vallianatos v. Greece* (Application No 29381/09) and *CS v. Greece* (Application No 32684/09).

[104] http://www.huffingtonpost.com/2012/02/08/getting-married-in-greece_n_1262842.html. The Huffington Post indicates that pressure on the economy may lead to a change in the law.

[105] For more details, see Jagielska, "Eastern European Countries: From Penalisation to Cohabitation or Further?" in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd ed, Intersentia, 2012), p55.

towards permitting legal recognition of same-sex relationships on the same (or at least, a very similar) footing to marriage.

From http://www.bbc.co.uk/news/world-21321731

4.4 Presentation by Prof. Jim Sheehan

Child and Adolescent Development in the context of Lesbian and Gay Parenting: What to Make of the Evidence?

1. ***Introduction***

In this brief paper I offer a few remarks which are of relevance to some of the child- focussed questions at stake in the topic of same-sex marriage under consideration by the Constitutional Convention. These remarks, and the questions to which they respond, are made from the perspective of a mental health professional, a social worker and family therapist, whose attention has been focussed on the wellbeing of what I might broadly refer to as units of intimate belonging which are more usually defined as families, couples and marriages. This attention has not simply been focussed on the wellbeing of these units themselves but also on the wellbeing of the children, adolescents and adults as the elements which make up these units.

1.2 Our dialogue in the Constitutional Convention exists in an imaginative space that invites us to consider what might be the case for our society should the state make provision in some way for same-sex marriage. Out of the myriad of questions that arise from our theme I will confine myself to a few questions that I believe are central to the consideration of the theme. These questions are focussed on the well-being of children and adolescents and I summarise them as follows:

(1) What does the current state of professional knowledge tell us about the consequences for child and adolescent development of growing up in families headed by gay or lesbian parents?

(2) What does the current state of professional knowledge tell us about any deficits that might arise in child and adolescent development from growing up in a family where there isn't both a mother and a father present?

(3) And, finally, to what extent can we rely on scientific research findings that form the basis of professional knowledge to guide us in our thinking? Put differently, what are the limits of what we can expect from scientific research in the face of our questions regarding the desirability or otherwise of same-sex marriage when we adopt a child-focussed and adolescent-focussed lens?

1.3 These three questions are clearly related. In addressing them I will draw heavily on the American Psychological Association publication on Lesbian and Gay Parenting which includes an evaluative summary of research findings on lesbian mothers, gay fathers and their children in addition to an annotated bibliography of the literature cited in this summary. While the publication is

the outcome of the joint work of a number of committees of the American Psychological Association (Committee on Lesbian, Gay, and Bisexual Concerns; Committee on Children, Youth, and Families; Committee on Women in Psychology), the summary was drawn together for the Association by Charlotte Patterson who has authored or co-authored 16 of the 150 studies reviewed in the summary. The date of the most recent publication reviewed was 2005 and the language in which all the papers studied were published was English. However, the total volume of literature examined includes studies conducted in North America, Australia, the United Kingdom, Belgium, and the Netherlands. The summary is evaluative in the sense that it attempts to assess the contribution of each of the studies to an emerging picture of the area as a whole as well as to state as clearly as possible what this emerging picture looks like at a moment in time. I draw on this source because of the authority of the APA (American Psychological Association) with a range of human science disciplines in proposing what counts as professional knowledge in relevant areas at a moment in time. Such authority, of course, is never without contest. That said, I will begin this brief contribution with the first and third questions mentioned earlier and conclude with a consideration of the second question.

2. *Scientific Discourse, Lesbian and Gay Parenting, Irish Society*

2.1 It is worth noting that the place of scientific discourse in most Western societies has risen dramatically since 1937 when our Constitution was framed. If science entered into the re-making of our Constitution in 1937, which it certainly did, it did so chiefly as political science. Those sections of the Constitution dealing with marriage and the family were more likely to have been responsive to a mixture of relatively uncontested religious belief and cultural commitment than to any specific research findings from the human sciences. Yet, for all its gradual envelopment of every facet of Irish society, the impact of scientific discourse on our understanding of marriage and family life, child and adolescent development etc is of relatively recent origin. Despite the relatively recent origins of this impact, however, it still makes sense to us to enquire about the levels of scientific support attaching to any belief or assertion we might make about the area in question.

2.2 If we take the question of the impact of gay and lesbian parenting on child and adolescent development we can safely say that there is no significant body of scientific research relating to this question within an Irish context. This is hardly surprising given that the recognition of gay and lesbian parenting in Ireland does not have a long history. Having said this, however, the website Irishhealth.com announced in February 2013 the results of what they suggest is “the first study of gay parents in Ireland”. The study is reported as commissioned by LBGT Diversity and carried out by Dr Jane Pillinger and Paula Fagan. The study reported on the experiences of 153

LGBT people who are already parents to 272 children and 170 others who were attempting to become parents. The study reported upon the pathways to parenthood of the participants, their experience of maternity services, their view of their children's level of received bullying at school, as well as providing information about the number of children in the sample without a legal relationship to one of the parents responsible for their care on a day-to-day basis. The website report makes no reference to a likely publication date or professional arena in which the research might be published. This in no way takes from the immense value of the piece of work as the first study of its kind in Ireland.

2.3 When we move across the Irish sea in both directions we find a significantly greater body of research emerging from U.K. and North American contexts. Notwithstanding this immense disparity, the most recent summary of the research in this area by the American Psychological Association suggests that while research on lesbian and gay parents and their children is 'no longer new' (reported studies in the area go back to the 1970's) it is still "limited in extent". During the course of this evaluation the summary's author, Charlotte Patterson, names some of these 'limits in extent'. There remains, she suggests, a need for more longitudinal studies (ie. studies that follow a group of children and their lesbian and gay parents over a relatively prolonged period of time rather than just observing them at one specific moment in time) as well as more studies of gay male parents and their developing children. She remarks in her summary that some areas such as gender development have been understudied as have certain periods of life such as adolescence.

The APA summary also notes that some of the research has been critiqued for different methodological reasons. For example, much of the earlier studies utilized samples that were relatively small in size and not representative either of the general population of lesbian and gay parents or of the diversity within lesbian and gay parenting communities. Such deficits have been gradually overcome in later studies. Additionally, some studies have been critiqued because of shortcomings in their statistical analysis of data.

2.4 Of course, the fact that a research study has some flaws and shortcomings does not mean that it is of no value or that none of its findings are trustworthy. But what it does mean is that studies often require close inspection from a methodological point of view to ascertain which of their findings are reasonably reliable and which less so. This is why professionals put such value on publications that appear in journals displaying a peer-review process. Such process normally means that a study has been externally reviewed by one or more professionals familiar with the topic area and competent to evaluate the deployment of the methodology within the study.

2.5 With the above said let me contrast two summary statements relating to the impact of gay and lesbian parenting on child and adolescent development on the way to making my own evaluation of the literature. The first is a summary statement of Her Honour Justice Elizabeth Dunne in 2006 in the context of an application in the Irish High Court by a lesbian couple to have their same-sex marriage from another jurisdiction recognised in Ireland. The second is the summary evaluative statement of Charlotte Patterson in the American Psychological Association publication already mentioned.

In the course of her judgement the Irish High Court judge noted as follows:

> "The phenomenon of parenting by same-sex couples is one of relatively recent history. The studies that have taken place are consequently of recent origin. Most of the studies have been cross sectional studies involving small samples and frequently quite young children. I have to say based on all the evidence I have heard on this topic that I am not convinced such firm conclusions (that children fare just as well in gay and lesbian-headed households) can be drawn at this point in time".

Contrast, for a moment, the above summary with that of Patterson in her summary for the American Psychological Association. Notwithstanding the various flaws and shortcomings in some of the body of literature reviewed, she noted the following:

> "In summary, there is no evidence to suggest that lesbian women or gay men are unfit to be parents or that psychosocial development among children of lesbian women or gay men is compromised relative to that among offspring of heterosexual parents. Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to data suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth".

2.6 When we stand back and look at the Irish High Court evaluation alongside that of the Patterson APA evaluation I don't think they are fundamentally at odds with each other. My own assessment is that at this point in time the evidence available to date bears a clear direction—in other words it points in a particular way without allowing us to draw definitive conclusions.

Given that the above is roughly speaking where the evidence lies right now we need to take one more step back and ask the following: what amount of evidence should we require in order to reach firm or definitive conclusions'? Should arrival at firm conclusions be deferred until we have available to us a number of longitudinal studies conducted in different locations? Should these studies follow the development and well-being of individuals raised by gay and lesbian parents through their childhood and adolescence and onwards to

their young adulthood and perhaps through parenthood and marriage? To arrive at firm conclusions for ourselves as Irish citizens should we require that such longitudinal studies contain a sample of Irish children within their larger sample? Such questions are not easy to answer. And finally, if we did have findings from longitudinal studies with Irish children in their sample, would we end up having compared the lives of children of heterosexual parents (married or not) with the lives of children raised by gay and lesbian parents who remained debarred from marriage and cut off from its associated social goods throughout the dependency years of their children? No matter how hard we try there seems to be no escape from some level of flaw and paradox.

In summary, what I am saying in this section is that there is a very definite limit to the amount of assistance we can expect from research in approaching our decision-making in the area of same-sex marriage not simply because of the limited nature of research (limits in extent, limits in quality) at a moment in time but also because the development of research in any area brings it own set of new problems and new limits. Factor into this the speed of change in the social contexts to which we want our longitudinal studies to be applicable.

3. *Do Children and Adolescents Need both a Mother and Father as Parents to Grow Up Well?*

3.1 To conclude I want to return to the second question concerning what the current state of professional knowledge tells us about any deficits that may arise in child and adolescent development from growing up in a family without both a mother and father on the child's parenting team. To a considerable degree this question is already enfolded in what has been said above. However, there are specific aspects to this question that have concerned child development professionals that are worthy of mention. Concerns have arisen about the following: by comparison with their peers who are raised in households headed by heterosexual parents, do children and adolescents raised in households headed by gay and lesbian parents suffer (a) any impairments in the development of their *sexual identity*, (b) any challenges to their general *personal development,* or (c) challenges to their creation and maintenance of *social relationships?*

While acknowledging the paucity of studies of children of gay fathers as well as some of the limitations of studies already mentioned, Patterson summarizes the findings of existing research by saying that with respect to the three key elements of sexual identity – namely, *gender identity* (understood as a person's self-identification as male or female); *gender-role behaviour* (understood as the extent to which a person's activities, occupation and the like are regarded by the culture as masculine, feminine or both); or *sexual orientation* (understood as a person's choice of sexual partners who may be homosexual, heterosexual, or bisexual) –

(a) No evidence appeared in any study examined of difficulties around gender identity among children of lesbian mothers.
(b) Existing studies suggest children of lesbian mothers develop patterns of gender-role behaviour much like those of other children, and
(c) Studies of children of lesbian mothers and gay fathers do not suggest elevated rates of homosexuality.

Note the confinement of the Patterson comments in (a) and (b) above to lesbian mothers and their children. My reading of her summary suggests that this confinement is due to the lack of a reasonable number of studies of gay male parents and their children rather than to problematic findings on gender identity and gender-role behaviour in any of the studies of gay male parents and their children that were examined.
Similarly, with respect to the view that the children and adolescents raised by gay or lesbian parents may suffer deficits in their personal development (examined in such issues as their capacity to achieve a level of separateness as individuals from their parents, psychiatric evaluations, behaviour problems and school adjustment) Patterson suggests that existing studies provide no empirical foundation for such a view. And, finally, with respect to their capacity to create and maintain a set of necessary social relationships Patterson's evaluation is that existing research suggests "that children of lesbian and gay parents have positive relationships with peers and that their relationships with adults of both sexes are also satisfactory".

3.2 Again, in evaluating the above evaluation some of the same caution is required as that applied to the earlier arguments. There is a relative absence of studies of children growing up in the care of gay male parents. Hence, firm conclusions are difficult to reach at this point. Nonetheless, the evidence that is there suggests that with respect to certain key aspects of child and adolescent development mentioned above – namely, sexual identity development, general personal development, and the development of social relationships – the children in the studies reviewed showed no evidence of deficits when compared to their peers growing up in households headed by heterosexual parents. All of this suggests that while the evidence is far from complete the evidence that is available is moving in a certain direction.

4. ***Conclusion***

This brief paper has offered some remarks and observations concerning some of the professional literature relevant to key child-focussed questions embedded in the Convention's dialogue today about same-sex marriage. It has proposed a disposition of caution and limited expectation with respect to the assistance research might offer in facing decision-making in the area under consideration. It has also proposed that, notwithstanding the incapacity of existing research to yield firm conclusions, a certain direction in the existing evidence needs to be acknowledged.

There are additional child-focussed questions relating to the topic that cannot be explored within the confines of this short paper. Indeed, some of these questions are of recent origin but will certainly be factored in to future research in this area. One important question which I will just mention in finishing concerns the changing manner of arrival of children in gay or lesbian-headed households. In the past a great percentage of children arrived in these households following the exit of one of their parents from a heterosexual relationship, which may or may not have been a marriage, and as these same parents transitioned in to a gay or lesbian relationship. This group of children usually proceeded to have some level of continuing relationship with their two genetic/biological parents. More recently a range of developing opportunities in the field of assisted human reproduction (AHR) suggest the likelihood of an increasing number of children growing up in households where only one genetic parent is involved in the child's life. I have no doubt that such particular contexts of childhood will be the subject of future child development research as well as of developments in child law.

4.5 Convention discussion

The arguments in favour of a constitutional amendment to allow for same-sex marriage centred on individual freedom and choice. A dominant theme was the need to be proactive in tackling discrimination, the idea that all citizens should be treated equally and that marriage should be available to all. Extending marriage rights to same-sex couples would not diminish the rights of heterosexual married couples, it was stressed. Some argued that permitting same-sex marriage through the Constitution would help to protect young homosexual people from homophobic bullying, as there would be less of a stigma or taboo among a young person's peers about homosexuality. It was argued that the evolution of public opinion on social issues must be reflected in changes to the Constitution. Marriage should be inclusive, and if two people who love each other wish to get married, this should be allowed.

Another dominant theme arising was that the definition of Marriage and/or the definition of the Family might be broadened to include more diverse forms of family life. (Currently, the Constitution defines 'Family' as the Family based on Marriage, which in turn presumably refers to traditional marriage between members of the opposite sex.) Families headed by non-married parents, or single-parent families, were given as examples of other families around which a stigma existed historically.

Those in favour of same-sex marriage argued that parenting skills, the inter-parental relationship and the quality of family life counted for more than the sexual orientation of the parents. They said that research to date shows same-sex parents have as much to offer children as opposite-sex parents do. In any case, only some same-sex marriages would involve children. Another view was that, as the debate concerned only *civil* marriage, churches should not play a significant role in the debate.

The arguments against a constitutional amendment to allow for same-sex marriage related to a broader societal view, based on moral objection and a concern for the welfare of children in such marriages. It was considered by some that the change would radically re-define marriage. Some said the purpose of marriage is to produce children, and that a heterosexual, mother–and-father relationship is the natural and proper environment in which to bring up children. Others wondered whether society is ready for such a change, and pointed out the need to move more cautiously.

Another argument against change was that such change might contain unforeseen consequences, that it might permit other forms of marriage such as polygamy, a gradual erosion being set in train which would steadily undermine the meaning and the institution of marriage. Some queried the role of conscientious objection in relation to same-sex marriage ceremonies which might arise, and some even asked whether religious institutions could be forced to perform same-sex marriages. It was argued that civil partnership as a first step would be a more reasonable move, and

that discrimination against homosexual people in other areas of the law should be addressed as a priority.

Some raised concerns as to the welfare of children in same-sex marriages. They stated that children prosper best in heterosexual-parent families, and that there is insufficient research to the contrary, and they wondered what negative consequences children of same-sex parents might suffer, such as bullying by peers. It was stressed that the issue was not one of tolerance, but of the welfare of children. In same-sex parenting the child will miss out on being jointly parented by both of its biological/genetic parents.

Further concerns were raised in areas of inheritance, surrogacy and adoption, as well as custody of children in the event that same-sex parents separated. Not many countries have legislated for same-sex marriage, and this reflected the fact that marriage is a unique institution.

In terms of options for reform, it was argued by some that the referendum should be directive not permissive, in that it should include wording such as 'the government *shall*' as opposed to 'the government *may* [legislate for same-sex marriage]'. Some voiced a fear that the latter option would result in delays or the changes never being realised, and that a constitutional route would have the benefit of letting the people clearly decide. Some said that while the main question could be dealt with through a referendum, issues such as inheritance and property rights, and adoption and surrogacy should be addressed through legislation.

A recurring issue was that, if same-sex marriage was to be permitted in the Constitution, religious organisations should have the right to conscientious objection, that they should not be forced to provide services outside their ideological position. Concerns about the impact on education, especially in faith-based schools, were also expressed. In other words, the concern was that in the event of same-sex marriage being given constitutional protection, anti-discrimination law could be used to prevent parents and teachers from advocating to children the unique benefits of the 'traditional' family based on a union of a man and a woman (and their children, if any). Some said that there should be a specific clause in any proposed constitutional amendment setting out that the change does not impinge on religious freedom and freedom of speech. Others argued that these values are already adequately enshrined in the Constitution such as to obviate the need for such an additional specific provision. Members from both sides of the argument stressed that the proposal related to civil marriage only, not church marriages. Some stated that it was not possible to resolve these complex issues – both the requisite level of freedom of religion and expression, and how to achieve that – in the weekend session.

A number of members were obviously not comfortable with the idea of providing for full marriage rights for same-sex couples but were clearly in favour of improved equality and recognition of same-sex relationships. The question of achieving a legal "middle-ground" (perhaps introducing legislative provisions rather than

constitutional change) was the subject of some discussion with the expert advisers but a clear consensus did not emerge on the issue in the time-frame allowed. Rather than specifically ballot on the matter, it was agreed that the content of the discussion would be reflected in the final report.

A very large number of submissions (over 1,000 in total) were received by the Convention from members of the public and advocacy groups, and considered by Convention members in advance of the meeting. In addition, given the quantity and quality of the submissions, a summary of key themes emerging from the submissions was prepared for members for further study during the course of the weekend session. This summary, prepared by Maire Mullarkey BL, is included at Appendix C to this report.

Appendix A: Convention on the Constitution Terms of Reference

"Go gceadaíonn Dáil Éireann: Coinbhinsiún ar an mBunreacht a ghairm chun breithniú a dhéanamh ar na nithe seo a leanas agus chun cibé moltaí a dhéanamh is cuí leis agus chun tuairisciú do Thithe an Oireachtais: (i) téarma oifige na hUachtaránachta a laghdú go cúig bliana agus é a chur ar comhfhad leis na toghcháin áitiúla agus leis na toghcháin don Eoraip; (ii) an aois vótála a laghdú go 17 mbliana; (iii) an córas toghcháin don Dáil a athbhreithniú; (iv) an ceart a thabhairt do shaoránaigh a bhfuil cónaí orthu lasmuigh den Stát chun vótáil i dtoghcháin Uachtaráin in ambasáidí de chuid na hÉireann, nó ar shlí eile; (v) foráil maidir le pósadh comhghnéis; (vi) leasú a dhéanamh ar an gclásal i dtaobh ról na mban sa teaghlach agus rannpháirteachas níos mó ag mná sa saol poiblí a spreagadh; (vii) rannpháirteachas na mban sa pholaitíocht a mhéadú; (viii) an cion arb é diamhaslú é a bhaint as an mBunreacht; agus (ix) tar éis na tuarascálacha thuas a chríochnú, cibé leasuithe iomchuí eile ar an mBunreacht a bheidh molta aige; agus go dtugann sí dá haire: — gur 100 duine mar a leanas a bheidh i	That Dáil Éireann: approves the calling of a Convention on the Constitution to consider the following matters and to make such recommendations as it sees fit and report to the Houses of the Oireachtas: (i) reducing the Presidential term of office to five years and aligning it with the local and European elections; (ii) reducing the voting age to 17; (iii) review of the Dáil electoral system; (iv) giving citizens resident outside the State the right to vote in Presidential elections at Irish embassies, or otherwise; (v) provision for same-sex marriage; (vi) amending the clause on the role of women in the home and encouraging greater participation of women in public life; (vii) increasing the participation of women in politics; (viii) removal of the offence of blasphemy from the Constitution; and (ix) following completion of the above reports, such other relevant constitutional amendments that may be recommended by it; and notes that: — membership of the Convention will

gcomhaltas an Choinbhinsiúin:	consist of 100 persons as follows:
— Cathaoirleach a bheidh le ceapadh ag an Rialtas;	— a Chairperson to be appointed by the Government;
— 66 shaoránach atá i dteideal vótáil i reifreann, arna roghnú go hamasach sa chaoi go mbeidh siad ionadaitheach do shochaí na hÉireann i gcoitinne;	— 66 citizens entitled to vote at a referendum, randomly selected so as to be broadly representative of Irish society;
— comhalta de Thionól Thuaisceart Éireann as gach páirtí de na páirtithe polaitíochta sa Tionól a ghlacfaidh le cuireadh ón Rialtas; agus	— a member of the Northern Ireland Assembly from each of the political parties in the Assembly which accepts an invitation from the Government; and
— comhaltaí de thithe an Oireachtais, chun ionadaíocht neamhchlaonta a dhéanamh ar na Tithe;	— members of the Houses of the Oireachtas, so as to be impartially representative of the Houses;
— féadfar ionadaithe a cheapadh faoi réir na gcritéar roghnóireachta thuas, agus beidh na hionadaithe sin in ann páirt a ghlacadh sna himeachtaí agus vótáil faoina n-ainm féin;	— substitutes may be appointed subject to the selection criteria above, who will be entitled to contribute to the proceedings and vote in their own name;
— comhaontóidh an Coinbhinsiún a rialacha nóis imeachta féin d'fhonn a ghnó a sheoladh go héifeachtach ar shlí a bheidh chomh heacnamúil agus is féidir;	— the Convention will agree its own rules of procedure for the effective conduct of its business in as economical manner as possible;
— beidh aird chuí ag an gCoinbhinsiún ar Chomhaontú Aoine an Chéasta agus ar Chomhaontú Chill Rímhinn;	— the Convention will have appropriate regard to the Good Friday Agreement and the St. Andrews Agreement;
— tráth nach déanaí ná dhá mhí tar éis dháta na chéad éisteachta poiblí a thionólfaidh an Coinbhinsiún tabharfaidh an Coinbhinsiún tuarascáil do Thithe an Oireachtais agus déanfaidh sé moltaí dóibh ar gach ceann de na nithe atá leagtha amach ag (i) agus (ii) thuas;	— not later than two months from the date of the first public hearing held by the Convention, the Convention will make a report and recommendation to the Houses of the Oireachtas on each of the matters set out at (i) and (ii) above;

- tuairisceoidh an Coinbhinsiún do Thithe an Oireachtais agus déanfaidh sé moltaí dóibh ar gach ní eile a luaithe a bheidh a phléití críochnaithe aige agus, in aon chás, tráth nach déanaí ná bliain amháin ó dháta na chéad éisteachta poiblí;	— the Convention will report and make recommendations to the Houses of the Oireachtas on each remaining matter as soon as it has completed its deliberations, but in any event not later than one year from the date of the first public hearing;
— féadfaidh an Coinbhinsiún aighneachtaí a iarraidh agus glacadh leo ó chomhlachtaí leasmhara agus lorgóidh sé cibé comhairle shaineolaíoch is dóigh leis is inmhianaithe;	— the Convention may invite and accept submissions from interested bodies and will seek such expert advice as it considers desirable;
— déanfar gach ní a bheidh os comhair an Choinbhinsiúin a chinneadh trí thromlach de vótaí na gcomhaltaí a bheidh i láthair agus a vótálfaidh, seachas an Cathaoirleach a mbeidh vóta cinniúna aige nó aici i gcás comhionannas vótaí; agus	— all matters before the Convention will be determined by a majority of the votes of members present and voting, other than the Chairperson who will have a casting vote in the case of an equality of votes; and
— tabharfaidh an Rialtas freagra san Oireachtas laistigh de cheithre mhí ar gach moladh a dhéanfaidh an Coinbhinsiún agus, má tá sé chun glacadh leis an moladh, cuirfidh sé an creat ama in iúl ar lena linn atá sé ag brath aon reifreann gaolmhar a sheoladh.	— the Government will provide in the Oireachtas a response to each recommendation of the Convention within four months and, if accepting the recommendation, will indicate the timeframe it envisages for the holding of any related referendum.”

Appendix B: Rules and procedures

1. Timing, Frequency and Openness of meetings

Meetings of the Convention will generally take place in a hotel at weekends (Saturdays and Sundays) during 2013. At least one meeting will be held outside Dublin. It is proposed to hold one meeting per month, with the exception of July and August. Members of the public will not have access to the meetings but the plenary sessions will be streamed live at www.constitution.ie.

2. Role and duties of the Chairperson

The Chairperson shall be the sole judge of order and shall be responsible for the smooth running of the Convention in accordance with these rules and the terms of the Resolution of the Houses of the Oireachtas of 10 July, 2012. He shall engage such support services as are necessary for the effective administration of the forum and, from time to time, make such recommendations to the Convention on the management of business as he sees fit.

3. Work Programme

The work programme shall be agreed by the Convention on foot of a proposal by the Chairman. The programme shall be reviewed regularly but any subsequent changes shall only take effect with the agreement of the Convention.

4. Steering Group

A Steering Group shall be established to support the Convention in the efficient and effective discharge of its role and functions. In practice, the Group shall assist with planning and operational issues associated with the work programme. The Steering Group shall consist of the Chairperson and representatives from the political parties, the public members and such other representatives as the Convention sees fit.

5. Debates/speaking arrangements

The format and structure of speaking arrangements shall be agreed in advance and as a general principle, all contributions by members should be brief, respectful and non-repetitive. Any member wishing to speak should indicate and will be called upon by the Chairperson, who will endeavour to ensure fairness in the allocation of speaking time to all members. In an effort to make most efficient use of time in plenary session, members are encouraged to use the opportunity of roundtable discussions to express their views, ask further question of the experts and deliberate with one another. These discussions can be reflected in a brief report to the plenary session.

6. Tabling and Circulation of Papers

All documents received by the Convention secretariat shall be made available to all members of the Convention via the www.constitution.ie website. Alternative arrangements will be made for those members who are not in a position to access the site. Deadlines for receipt of submissions and circulation of documents in advance of plenary meetings should be agreed by the Convention.

7. Presentations to the Convention

Following receipt of submissions on any matter, the Convention may choose to hear oral presentations from any representative group or individual to assist in its deliberations. For the efficient administration of the process, the Steering Group may wish to make recommendations in relation to the selection of interested bodies to present to the Convention. Invitations shall be issued by the Chairperson on behalf of the Convention.

8. Voting

Votes, if required, shall be by secret ballot of the members present and voting. Votes shall be overseen by the Chair with the support of at least 2 members of the Convention.

9. Advisory Panel

The Convention shall establish an advisory panel of academics, constitutional lawyers and others with demonstrated expertise, for access to such expert advice as it considers desirable. The process for selection and appointment of any such advisers shall be agreed by the Convention, on the advice of the Steering Committee.

10. Irish language facilities

A simultaneous translation service from Irish into English will be available for all plenary sessions of the forum.

11. Press and Communications

Authorised members of the media shall be permitted to attend plenary sessions of the Convention, subject to such terms and conditions as may be laid down by the Convention. As a general principle, the Chairperson shall act as spokesperson in relation to administrative or procedural matters.

12. Reports

Reports of the Convention shall be published as soon as practicable after a decision has been reached at each meeting. It shall be possible to finalise the detail of the content of each report other than in plenary session, subject to the agreement of the Convention.

13. Review of Procedures

The Chairperson shall consult with members of the Convention and other interested parties and conduct such reviews of the procedures and administration of the Convention as he sees fit.

14. Convention secretariat

The Chairperson shall have direction and control over the staff of the secretariat and other supports and resources available, subject to the wishes of the Convention.

Appendix C: AN ANALYSIS OF SUBMISSIONS MADE TO THE CONVENTION ON THE CONSTITUTION

Introduction

1077 submissions had been made to the Convention on the Constitution on the subject of same-sex marriage and the Constitution by the deadline of 19th March 2013. These submissions set out the views of private individuals, Church Organisations and a wide variety of interest groups in relation to whether or not they believe persons of the same sex should have a right to marry.

There was a huge variety in the length, style and content of the submissions on both sides of the argument. Nevertheless, some broad themes emerged, the most common of which I have attempted to summarize below. The purpose of this document is to give a flavour of the arguments made by both sides and not all the arguments made can be covered. All of the submissions can be accessed at www.constitution.ie .

Arguments in favour of Same- Sex Marriage

- *Equality/ Discrimination*
    1. Equal citizenship should mean equal rights for all citizens of Ireland, including the right to marry;
    2. Being able to marry the person you love, regardless of gender is a human right. It should not be a privilege afforded to people selectively.
    3. Marriage equality is essential for a fair and just society.
    4. Denying people the same opportunities based solely on their sexual orientation is discrimination.
    5. If the government treats people differently based on who they choose to love, then that can be used as an excuse for others to do the same. Conversely, a public vote in support of the freedom to marry would send a powerful message about respect and fairness.
    6. Why work so hard to prevent homophobic bullying at school level with young people only for these young people to be discriminated against when they want to marry the person they love?
    7. Granting same-sex couples the right to marry would increase the level of acceptance for same-sex relationships and reduce the instances of homophobia in Irish Society.
    8. Marriage is a legal declaration of love between two people. The State should adopt an equality based, inclusive definition of love which would mandate it to legislate for same-sex marriage.
    9. The love between two people in a same sex relationship is just as real and as valid as the love between two people in a heterosexual relationship and should be legally recognised in the same way.

- *Same-sex marriage and children's welfare and best interests:*
    1. Granting same-sex couples the right to marry would foster acceptance and de-stigmatisation of gay children in society and impact positively on their welfare. It would make gay children and

teenagers growing up in Ireland feel more accepted and included in society.

2. Same-sex marriage would provide children who are being raised by same-sex couples with greater stability and security.
3. Children who are being raised by same-sex couples deserve to belong to a legally recognised family unit in the same way as children who are being raised by heterosexual couples.
4. There is no evidence to show that children's welfare is compromised by being reared by a couple in a same-sex union.
5. The lack of a legal relationship between children and non-biological parents who are raising them in the context of same-sex unions creates practical day-to-day difficulties such as passport provision, schools only recognising one parent as a guardian and next-of-kin, and issues surrounding medical care or hospitalisation.
6. Where there is a breakdown in a relationship between a same-sex couples who had previously raised children together, the relationship between the children and their non-biological parent could be preserved by the exercise of access and custody rights which would arise as a consequence of their marriage to the biological parent of a child.

- *The Nature of Marriage*
    1. The argument that the ability to have children is at the core of marriage is unsustainable because the same argument is not applied to heterosexual couples. Couples where one of the couple is unable to impregnate or be impregnated due to medical intervention would be banned from marrying and this is not the case.
    2. The concept of marriage is not a static one but has broadened over time. The last century in particular has seen previous barriers, based on class, faith, race and ethnicity and other definitions removed. Granting same-sex couples the right to marry is just another step in the evolution of marriage.

- *Religion*
  Any change in the constitution to provide for same-sex marriage would apply only to civil marriage and therefore would not infringe on people's religious freedoms. Whether or not religious denominations wish to conduct weddings for gay or lesbian couples would be a matter for each religious denomination to determine on their own terms.

- *The majority of people in Ireland are in favour of same-sex marriage.*
  There is widespread support and acceptance for same-sex relationships in Ireland. Opinion polls demonstrate extremely high levels of acceptance of those relationships and show that a majority of the Irish People are in favour of same-sex marriage.

- *Civil Registration does not go far enough*

1. Civil Registration though a welcome advance still embodies "a legal apartheid" and indicates that same-sex couples deserve fewer rights and less protection than heterosexual ones.
2. There are over 100 differences between civil partnership and marriage and the former is therefore not a valid substitute for the latter.
3. The current system is a two-tiered one which says that same-sex love is inferior to heterosexual love.
4. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 is in denial about the fact that there are gay couples who have children.

- *Same-sex marriage would not impede on anyone else in a negative way*

- *Some of the arguments advanced by gay and lesbian citizens in support of same-sex marriage:*
    1. We are ordinary people- sons, daughters, nieces, nephews, sisters, brothers, aunts, uncles friends, potential mothers or fathers, hard-workers, tax payers, law-abiders, volunteers, and want to be treated just the same as everyone else;
    2. Not being treated as an equal to my parents, my sister, my cousins and my friends has a real and negative impact on my life;
    3. Not allowing same sex marriage discriminates against us and encourages people to think of us as separate or different to them. It encourages homophobia. We are not a danger or a threat to society.
    4. This country has spent a lot of time apologising for past wrongs committed against vulnerable and marginalised people, vowing to learn from these 'mistakes' and never to repeat them. I do not want an apology in 20 years' time, acknowledging that I should have been afforded the basic civil right to marry my partner of 14 years. I want that civil right now.

Arguments against Same-Sex Marriage

- *To allow same-sex couples to marry would be to fundamentally redefine marriage in a way that changes its very essence.*
    1. Marriage is defined as "the voluntary union for life of one man and one woman, to the exclusion of all others." Same-sex marriage is therefore an oxymoron.
    2. Marriage is the societal recognition and formulation of something absolutely inherent and critical to human nature, i.e., the mating pair bond. There is an intrinsic link between marriage and pro-creation.
    3. What defines marriage is not that two adults love each other, rather it is that they comprise in themselves the potential for procreation and parenthood.
- *Same-sex marriage is not in the best interests of children*
    1. It is in a child's best interests to be provided with the complementary rearing attitudes and practices of mother and father, female and male;

2. Children do best when they are raised by their biological mother and biological father;
3. Children will lose their sense of identity, they will not know who their biological parents are, which is vital for their sense of well-being;
4. Same-sex marriage prioritises adult desires over children's rights.

- *Natural Law Argument*
  Marriage between one man and one woman is a natural institution which predates political structures and has been recognised across diverse cultures. Marriage between two people of the same sex is contrary to natural law;

- *The right to marry is not absolute.*
  The right to marry is limited by a host of objective factors, including blood relationship to a certain degree, the existence of an existing legal marriage bond, etc. One of those limiting factors is gender differentiation, since marriage is by definition a union of man and wife.

- *Equality/Discrimination*
  The principle of equality says that we must treat similar situations similarly but that we can treat different situations differently. Same sex relationships differ in a significant way from marriage, which is the union of one man and one woman, oriented towards children, so it is therefore legitimate and desirable to uphold the current definition of this institution.

- *The Civil Partnership and Rights and Obligations of Cohabitees Act 2010 goes far enough to uphold the rights of gay and lesbian couples. Same-sex marriage is unnecessary.*

- *Same-sex marriage would undermine the Constitution*
  1. It would be inconsistent with the Preamble, which acknowledges, *inter alia* "all our obligations to our Divine Lord, Jesus Christ..." Article 44.1 and the Concluding Dedication, as same-sex marriage is contrary to God's divine plan.
  2. It is an attack on the institution of marriage contrary to Article 41.3.1 and Article 41.1.1 of the Constitution.
  3. The State recognises the Family…"as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Therefore, no majority, be it in parliament or in a referendum, has the authority to redefine marriage.

- *Religion*
  Same-sex marriage is contrary to the Church's view of heterosexual marriage as the God-given model for sexual relationships.
  No person has authority to overturn what has been laid down so clearly and foundationally in Scripture.

- *Society*
  Marriage between one man and one woman oriented towards children is the fundamental building block of society. It is the basis of social order.
  Traditional marriage is essential for the well-being of society. The introduction of same-sex marriage would result in the breakdown of society.

- *Same-sex marriage is unnatural and an abomination.*