

Submission on Provision for Marriage for Same-Sex Couples

Convention on the Constitution



Irish Council for
Civil Liberties

Introduction

The Irish Council for Civil Liberties (ICCL) is Ireland's independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone. Founded in 1976 by Mary Robinson and others, the ICCL has been campaigning for over three decades for full equality for same-sex couples.

This paper is designed to answer the questions people frequently have about extending our current definition of marriage.

What does the ICCL think about marriage for same-sex couples?

The ICCL believes that everyone is entitled to equal treatment under the law and that no one should be discriminated against or denied access to services on the basis of gender, sexual orientation, civil status or family status. This includes equal access to the right to marry and found a family.

Denying same-sex couples the right to marry runs contrary to the spirit of equality and non-discrimination protected by the Irish Constitution and by international human rights treaties to which Ireland is a party.

Furthermore, the existing prohibition on marriage for same-sex couples unfairly discriminates against a section of Irish society, including the children in the families of same-sex couples, who are otherwise entitled to equal protection before the law under the Irish Constitution.



What does the law say about marriage for same-sex couples in Ireland?

The following sections will answer this question in detail.

The Irish Constitution

Which Articles of the Constitution deal with marriage?

The Constitutional position on marriage is set out in Article 41 - 'The Family' - under the chapter of the Constitution called 'Fundamental Rights'.

Why is it included under Fundamental Rights?

The Irish Constitution guarantees certain personal rights, with most of these rights set out in Articles 40-44.

These rights include the right to life, the right of all citizens to equality before the law, freedom of speech, freedom to peacefully assemble, the right to own property, freedom of religion, the right to protect one's good name, and the right to free primary education. Some of the rights have been listed in the Constitution and some have been interpreted by the courts as being implied.

How are these rights protected?

In theory, the legal protections associated with each of these rights are guaranteed by the courts by applying the Constitution equally and without discrimination.

In practice, the Oireachtas in legislation may balance and restrict these rights with a view to protecting the rights of others, and with the aim of promoting the common good.

Constitutional Position of Marriage

B.

What does the Constitution say about marriage and the family?

Article 41 of the Constitution recognises that, in Ireland, the notion of the family is based on marriage.

Article 41.1 says that the family is the “natural primary and fundamental unit of society” and Art 41.3 states that marriage is the “foundation” of that unit.

What does that mean?

This means that the only type of family explicitly recognised by the Constitution is one that is based on marriage. As a consequence, other types of family, such as those based on civil partnership, cohabitants or other family relationships do not enjoy the same constitutional rights and protection.

What about non marital families?

The Constitutional Review Group of 1996 noted that rights of an unmarried mother and of a child of unmarried parents, which some might consider as rights resulting from a family relationship, have been held to be personal rights which the State is obliged to protect under Article 40.3.

Does the Constitution state that marriage is only between a man and a woman?

No. The text of Article 41.3 of the Constitution does not make reference to marriage specifically between a man and a woman. It simply states that the marriage is the foundation of the family. However, Irish courts have consistently interpreted the word “marriage” in the Constitution as applying only to the legal union of one man and one woman.

What have the Courts said so far?

The Irish courts have consistently indicated that marriage is only allowable between a man and a woman.

While there has never been a case which ruled explicitly on whether the Constitution would permit legislation extending the right of marriage to same-sex couples, a number of judges have ruled against this proposition.

In *Hyde v Hyde*¹, a case dating from the 19th Century, Lord Penzance confirmed the common law exclusion of same-sex couples from marriage when he stated that marriage is the “voluntary union of one man and one woman for life to the exclusion of all others.” The decision by Lord Penzance was subsequently followed more than 130 years later in the 1995 case *B v R*². In that case, the President of the High Court, Mr Justice Costello described marriage as “the voluntary and permanent union of one man and one woman to the exclusion of all others for life.”

1. [1866] L.R. 1 P & D 130

2. [1995] 1 ILRM 491

In *DT v CT*³, the judge stated that “marriage itself remains a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution.”

In the more recent case of *Zappone and Gilligan v Revenue Commissioners*⁴, the High Court did not recognise the validity of a marriage under existing Irish law of two women who had been legally married to each other in Canada. In her judgment, the Hon Justice Ms Elizabeth Dunne intimated that the term marriage, as it was currently understood in Irish law, meant marriage between two people of the opposite sex. The Court held that there was, in effect, no existing constitutional right for same-sex couples to marry.

What about legislation relating to civil marriage?

The Civil Registration Act 2004 is the first piece of Irish legislation to expressly state that civil marriage cannot be between same-sex couples. Section 2(2)(e) of the Act stipulates that for the purposes of the Act it would be an impediment to marriage if both parties are of the same-sex.

Where does this leave families of same-sex couples in Irish law today?

Only families based on opposite-sex marriage are recognised under Article 41 of the Constitution.

This means that same-sex couples do not have the same rights under the Constitution as marital families, including in situations where they are raising children together in a loving and caring family environment.

This position was confirmed by the Irish Supreme Court ruling in *McD v L*⁵. In that case, the Supreme Court ruled that a same-sex couple and their child were not a family as defined under the Constitution. While the Court acknowledged that the child was being raised in a loving and caring environment it nevertheless stated that a family that is not based on marriage is not recognised under the Irish Constitution.

The Irish Supreme Court also rejected the notion that the couple and their child could be considered a ‘*de facto*’ family, a type of family which is not based on marriage but has been recognised by the European Court of Human Rights (ECtHR) as having the characteristics of a family and entitled to certain rights.

What is meant by ‘de facto’ family?

Where individuals function and depend on each other in the same way that marital families do, they can be considered to be a *de facto* family and to have the rights and protections guaranteed to families under Article 8 (the right to privacy and family life) of the European Convention on Human Rights (ECHR).

In a recent case against Austria⁶, the ECtHR ruled that a same-sex couple and their child may be considered a *de facto* family unit, entitled to the protections afforded under Article 8.

3 [2003] I.L.R.M. 321

4 [2008] 2 IR 417

5 [2010] 1 I.L.R.M. 461

6 *Schalk and Kopf v Austria* [2010] (Application no. 30141/04)

What does a decision of the ECtHR mean in Ireland?

The European Convention on Human Rights (ECHR) was adopted to protect the rights of citizens in the 47 States which make up the Council of Europe region⁷.

As one of these States, Ireland has agreed to be bound by rulings of the European Court of Human Rights in cases taken directly against it. In addition, Section 2 of the European Convention on Human Rights Act 2003 requires the Irish courts to interpret Irish law, where possible, in light of the Convention and the judgments of the ECtHR. Under section 5 of the 2003 Act, Irish law may be declared incompatible with the ECHR, by reference to decisions of the ECtHR not involving Ireland.

Although Ireland is not directly bound by the decision against Austria and does not have to make immediate provisions to recognise *de facto* families in the same way, if a similar case was taken against Ireland, it is likely that the decision would be the same and that Ireland would be bound by the decision.

In order to avoid this outcome, Ireland may decide to future proof its existing laws by amending the law in this area to provide recognition for the *de facto* family.

What has the ECtHR said about the *de facto* family in Ireland?

The ECtHR has already made a number of important decisions in relation to the *de facto* families in cases directly relating to Ireland, though none have yet related to same-sex couples. In *Johnston v. Ireland*⁸ the ECtHR found that Ireland was in breach of Article 8 of the Convention (right to privacy and family life) in respect of a father and his daughter, who was born outside marriage. In that case the ECtHR found that Ireland's failure to allow the father a mechanism to be made a legal guardian of his child infringed his Article 8 rights.

In a more recent case, *Keegan v. Ireland*⁹, the ECtHR found that Ireland's failure to allow an unmarried father to be consulted when his child had been placed for adoption constituted a breach of Article 8.

What does this mean for same-sex couples and their families in Ireland?

In *McD v L*, a case involving a same-sex couple who had used a sperm donor to conceive a child, the Supreme Court stated that same-sex couples do not constitute a *de facto* family in Ireland.

Such decisions make it more difficult for same-sex couples to be recognised as families in the same way that married couples, whether they have children or not, are automatically recognised as families under the Constitution.

⁷ There are 47 States in the Council of Europe region in all including all 27 EU Member States. It is also a rule of the European Union that any member state must have signed up to and ratified the European Convention on Human Rights.

⁸ *Johnston et al. v. Ireland* (Application No. 9697/82), Judgment of 18 December 1986

⁹ *Keegan v. Ireland* (Application no. 16969/90), Judgment of 26 May 1994

Foreign Same-Sex Marriages

C.

Can foreign same-sex marriages be recognised in Ireland?

No. Irish law does not yet recognise the marriages of same-sex couples who have been married in other countries as being valid marriages in Ireland.

In cases where a person is married to a person of the same-sex in another jurisdiction, and that jurisdiction has been designated by the Minister for Justice and Equality, they will be entitled to the same rights and subject to the same obligations as those set out in the Civil Partnership Act 2010¹⁰. This means that in Ireland they will be recognised as civil partners but not as a married couple.

Which countries have already recognised same-sex marriage?

The first country in the world to legalise marriage between same-sex couples was the Netherlands in 2001.

Since then, marriage for same-sex couples has been granted legal recognition in many countries including Argentina, Austria, Belgium, Canada, Denmark, South Africa, Sweden, Portugal, Spain and a number of other countries providing legal protections for civil union and civil partnerships.

Same-sex couples have also been granted the right to marry in many US States including Iowa, Massachusetts, New York, New Hampshire, Vermont and Washington.

What is happening in the UK in relation to marriage for same-sex couples?

In December 2012, the United Kingdom Government announced it would bring forward legislation to legalise marriage for same-sex couples in England and Wales, as early as 2013. Similar provisions are being considered in Scotland.

The move comes in response to previous commitments made by the UK Coalition Parties to legalise same-sex marriage. The proposals included provisions to allow religious organisations to 'opt-in' to performing same-sex marriages if they wish and to implement a 'quadruple-lock' of additional measures to put the protection of religious freedoms beyond doubt.

These measures include:

- *that no religious organisation can be compelled to marry same-sex couples or to permit this to happen on their premises;*
- *that religious organisations who wish to conduct marriages for same-sex couples can opt in to the process. (This provision would still allow an individual minister to refuse to perform a same-sex marriage even when the religious organisation has decided to opt in.);*
- *amending the UK's Equality Act 2010 to reflect that no discrimination claims can be brought against religious organisations or individual ministers for refusing to marry a same-sex couple or allowing their premises to be used for this purpose; and*
- *ensuring that the legislation will not affect the religious or canon law of the Church of England or Wales.*

¹⁰ The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 came into force in 2011.

Will such marriages be recognised in Ireland / Northern Ireland?

Should England and Wales introduce marriage for same-sex couples, the Minister for Justice and Equality may pass a statutory instrument with the result that such spouses of the same-sex married in England or Wales will be treated in Ireland as civil partners.

In relation to Northern Ireland, the Marriages (Same-Sex Couples) Bill proposes that marriages between same-sex couples celebrated in England and Wales will be treated as civil partnerships in Northern Ireland.

D.

Civil Partnership in Ireland

What is civil partnership?

Civil partnership¹¹ is a legal union between same-sex couples in Ireland.

Civil partnership was introduced in Ireland to give same-sex couples similar legal protection to married couples.

Many of the rights and obligations guaranteed by marriage and civil partnership are the same or similar, although it is easier to leave a civil partnership than a marriage within the current law. Since its introduction in 2010, more than 1,000 same-sex couples have entered civil partnerships.

Which rights are similar?

The rights and obligations conferred on civil partners are extensive, and in many cases are similar or identical to those of married couples. In particular, spouses and civil partners are treated substantially the same in respect of the following matters:

- Property rights during and on dissolution of the civil partnership
- Benefits and exemptions under Irish tax law
- Maintenance rights and obligations (financial support)
- Protection in respect of the shared/family home
- Rights and obligations on the dissolution of the civil partnership
- Rights on the death of a partner
- Social welfare entitlements
- Immigration and citizenship
- Equal treatment under equality law
- Pension entitlements
- Protection from domestic violence
- Tenancy legislation

¹¹ More information the rights of Civil Partners and cohabiting couples is available from the joint ICCL and GLEN publication *Know Your Rights*.

Which rights are different?

There are a number of key differences between the laws relating to marriage and the laws relating to civil partnership. Most of these differences involve rights that are available to married people and their children but that are not available to civil partners and their children. These include rights in relation to adoption, guardianship rights and parenthood rights (such as rights relating to assisted human reproduction).

The most obvious differences between marriage and civil partnership relate to child and family matters.

Do the children of civil partners have the same rights as the children of married parents?

No. There are a number of differences between the rights of children in families of civil partnerships and the rights of children in families of married parents.

The following is a brief description of some of the differences in the rights of children of same-sex parents:

Adoption

Adopting a child means that you become the legal parent of the child and have the same rights as a biological parent. While the law permits anyone who meets the legal criteria to adopt a child, same-sex couples are not permitted to adopt a child as a couple in the same way as a married couple can.

Children of Civil Partners

Irish law currently provides rights and obligations for the biological or adoptive parents of children. However, a person who is in a civil partnership does not enjoy the same rights or obligations in respect of their civil partner's child. In fact, a person has almost no legal rights or obligations in respect of the child of their civil partner even where they are living together in a family environment as part of a committed and legally recognised union.

Maintenance

A person in a civil partnership is not obliged to provide maintenance for the child of his/her civil partner nor is the child entitled to be maintained by the civil partner of their biological or adoptive parent. By contrast, the spouse of a parent may be required to support their spouse's child if they know the child is not theirs but have treated the child as a child of the family.

Guardianship

Legal guardianship is a legal mechanism in which a person is granted the right and duty to make the big decisions about a child's life. A person is generally not entitled to become the legal guardian of his/her partner's / spouse's children unless under certain circumstances (e.g. on the death of the previous guardian). This situation differs from adoptive parents who automatically have guardianship rights.

Why are these differences important?

Given the Constitutional position in Article 41.1 and the differences outlined above, it appears that the children of families of same-sex couples enjoy fewer rights and protections than the children of marital families simply because of the same-sex nature of the relationship. In other words, these children do not have an equal right to these Constitutional protections based simply on the issue of sexual orientation of their parents as opposed to the love and commitment that they may experience in a their family unit. This unfairly disadvantages these children.

This unfortunate reality is highlighted in the decision of the Supreme Court in *McD v L*. In that case, the Court determined that under current Irish law a man who donates sperm may be granted all of the rights of parenthood afforded to unmarried fathers. In contrast, a woman who is the civil partner of the mother of a child born using a sperm donor has no legal parental rights over the same child. This is so even where they provide a stable home, financial support, and meaningfully contribute to the family environment in which the child grows up, sharing equally the worries and responsibilities of raising the children.



Human Rights

What does international human rights law say about marriage?

Many international human rights treaties set out provisions on the right to marry and to found a family. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the EU Charter of Fundamental Rights and Freedoms all of which Ireland has signed.

Do such instruments guarantee the rights of same-sex couples to marry?

No. At present, these instruments do not expressly establish the right to marry for same-sex couples as a human right. However, each of these international human rights instruments guarantees the right of all individuals to marry and to found a family and also the right of individuals to be free from discrimination and to be treated equally before the law. In particular, the European Court of Human Rights has said that it is contrary to the ECHR to treat same-sex unmarried couples differently from opposite-sex unmarried couples in relation to aspects of home life and family life. Likewise, the Court has stated that a parent may not be denied custody or access to their own biological child on the basis of their sexual orientation or transgender status.

Legalisation for marriage for same-sex couples is consistent with the spirit of international human rights law with its strong focus on equality, non discrimination and inclusion, including with respect to the right to marry and found a family. This is evident in decisions such as those by the ECtHR in its recognition of the *de facto* family (see above).

Should same-sex couples expect to have the same rights to marry as opposite sex couples?

Yes. The right of same-sex couples to marry would be consistent with international human rights principles known as the Yogyakarta Principles¹². These principles have been established to ensure greater protections for individuals on the grounds of gender and sexual orientation and to promote equality and non-discrimination, tolerance and inclusion. While they are not legally binding, they provide a framework on which States can build greater protections in relation to respect and recognition of the rights of people in relation to gender and sexual orientation.

What do these Principles say?

The Principles are intended to clarify how existing human rights law should be applied by countries around the world in relation to sexual orientation and gender identity.

The Principles give guidance on how the rights in relation to gender and sexual orientation to be free from discrimination, the right to equal protection before the law, the right to privacy, the right to freedom of thought, conscience and religion, the right to education, the right to security of person, the right to be free from torture, cruel, inhuman or degrading treatment and the other rights guaranteed under international human rights law.

What do these principles say about marriage and family?

The Principles state that everyone has the right to found a family, regardless of sexual orientation or gender identity.

The principles also recognise that families exist in diverse forms and that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

Countries are also advised to take positive actions to ensure fair and equal treatment of people based on gender and sexual orientation in relation to marriage. In this regard, states should take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to opposite-sex married or registered partners is equally available to same-sex married or registered partners.

F.

The myths about marriage for same-sex couples.

Should marriage be reserved for opposite sex couples as the only ones who can procreate?

No. There is nothing in international human law which suggests that marriage should be reserved only for opposite sex couples. Human rights law upholds the positive right of all people to marry and found a family. It upholds the ideal of equal and consenting marriage and tries to guard against abuses which undermine these principles. It is not prescriptive as to the types of families and marriages that are acceptable, recognising that there are many different forms of social arrangements in relation to marriage, families and relationships.

¹² The Yogyakarta Principles are a set of guiding principles first proposed in 2006 by a group of leading international human rights experts, activists, academics, NGOs and former UN personnel who came together to determine how international human rights law should be applied by countries in relation to gender and sexual orientation. Among the signatories to the Yogyakarta Principles was former President of Ireland, former UN High Commissioner for Human Rights and founder of the ICCL, Mary Robinson.

Isn't marriage about having children?

No. Many couples who get married choose not to have children. Many more are unable to have children for a variety of reasons. It would be completely unfair to deny couples the right to marry based either on their desire, willingness or ability to have and raise children.

While marriage provides unique legal protections for children of married couples, it is simply not logical to suggest that having children should be the reason to keep marriage between men and women and to deny equal rights.

What about the protections afforded to children of married parents?

It is an irrefutable fact that there are many different types of family in Ireland including families based on marriage, families based on civil partnerships, families based on opposite sex or same-sex couples, families based on cohabitation, single parent families, widowed, divorced or separated families and families where one parent is forced through economic or social circumstances to be absent from the family home for extended periods or even permanently.

The UN Convention on the Rights of the Child states that countries "shall take all appropriate measures to ensure that the child is protected against all forms of discrimination...on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

As already noted, children in civil partnership families are not entitled to the same rights and protections as children in marital families.

Isn't same-sex marriage contrary to religion?

Many people chose to have religious ceremonies to solemnise their marriage. However, as a legal right, marriage is a civil process. When a couple signs the register or is married in a registry office, they are entering into a legal union that is recognised by the State.

The right to freedom of religion is protected both by the Irish Constitution and Irish law as well as international human rights treaties including the European Convention on Human Rights. Legislation to permit marriage for same-sex couples will not be used to compel religious organisations to perform marriages that run contrary to their ethos. This position has already been reflected in the position of the proposed UK law outlined above.

The right of marriage for same-sex couples being debated here relates only to the civil, legal aspect of marriage. Whether or not religious organisations choose to recognise or solemnise a marriage is a matter for them. It would be contrary to human rights principles to oblige a religious celebrant to solemnise a form of union that was contrary to their beliefs.

Recommendations

The ICCL strongly supports granting full marriage rights for same-sex couples through a constitutional amendment. It recommends that the Convention call upon the Government to take immediate action to provide for marriage for same-sex couples by holding a referendum on this issue.

The ICCL considers that only the introduction of civil marriage for same-sex couples will achieve equality of status with opposite-sex couples and that it is necessary to underpin wider respect for equality for LGBT people in Ireland.

The ICCL recommends that, as part of its consideration of marriage rights, the Convention call on the Government to bring forward gender recognition legislation to provide for full gender recognition and remove any ambiguity in relation to the rights of transgender and intersex persons to marry the person of their choice.

The ICCL also recommends that adequate time be provided within the Convention setting to hear the voices of civil society organisations, many of whom have campaigned for decades on the rights of LGBT people in Ireland and specifically on equal treatment of same-sex couples.

Hear Our Voices is an initiative of The Irish Council For Civil Liberties (ICCL), Ireland's independent human rights watchdog, working to ensure that the voices of civil society organisations will be heard in an effective way during the constitutional convention process. The ICCL is a non-party political, non-governmental organisation that receives no state funding.



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