



**LAWYERS
FOR YES**

YES EQUALITY.
The Campaign for Civil Marriage Equality

LAWYERS FOR YES

THE CASE FOR MARRIAGE EQUALITY



APRIL 2015

INTRODUCTION

This document is produced by “Lawyers for Yes”, a group of lawyers in favour of the Marriage Equality referendum. The aim of this document is to inform public debate on the legal implications of marriage equality for same-sex couples and to respond to some of the inaccurate and confusing statements that have been made in the debate so far.

Marriage is celebrated in Ireland as a key part of an individual’s and a family’s participation in the social and cultural life of the State. Extending civil marriage to same-sex couples is a matter of equality and civil rights. The current constitutional position relating to marriage does not provide full recognition and equality of status for same-sex couples. The proposal to hold a constitutional referendum is an important step in ensuring a comprehensive approach to the protection of family life for all couples without distinction as to their sex.

It has been decided that an amendment to the Constitution is necessary, as in the case of *Zappone & Gilligan v Revenue Commissioners & Others*,¹ the High Court found that it did not have the power to expand the legal definition of marriage so as to recognise their Canadian marriage.

AN ISSUE OF EQUALITY

Equality imports the widely accepted idea that at a very basic level, all human beings have equal worth and importance and are, therefore, equally worthy of concern and respect. In other jurisdictions, the courts have recognised that same-sex couples are not afforded equal protection in relation to civil marriage because of the “legacy of severe historic prejudice against them”² and that “[t]heir omission from the benefits of marriage is a direct consequence of prolonged discrimination based on the fact that their sexual orientation was considered to be different from the norm.”³ **The exclusion of same-sex couples from access to civil marriage signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.** It reinforces the notion that they are outsiders. To retain the traditional definition of marriage and to continue to exclude homosexuals from that valued institution sends a message that such persons are necessarily separate from the cultural mainstream of Irish society.

Equality is not only about the material and practical benefits or duties that marriage endows on a couple, but is also about the status and recognition it affords to those who are affected by its presence or absence.⁴

THE PROPOSED AMENDMENT

The amendment proposed by the Thirty-Fourth Amendment to the Constitution (Marriage Equality) Bill 2015 provides for the addition of the following paragraph 4 in Article 41:

“Marriage may be contracted in accordance with law by two persons without distinction as to their sex”.

There has been much discussion in the current debate of the relationship between the institution of marriage and the constitutionally protected family. Article 41 of the Constitution affords the family based on marriage a special status. It protects the family which is founded on the institution of marriage. Article 41.3.1 contains a pledge on the part of the State ‘to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack’. Article 41.2 guarantees to “protect the Family in its constitution and authority, as the necessary basis of social order and indispensable to the welfare of the nation and the State”.⁵

There is no definition of marriage in the text of the Constitution. However the Irish Courts have interpreted the protections under the Constitution as extending to different-sex couples only.⁶ A family unit that is not based on marital union is not recognised as a family for the purposes of Articles 41 and 42 of the Constitution.⁷

The 34th amendment does not insert a definition of marriage, but rather identifies who may marry in accordance with law, namely two persons without distinction as to their sex. The constitutional protections for the family and for the institution of marriage contained in Article 41.1 and 41.3 will remain the same. The monogamous element of marriage remains intact as confirmed by the use of the term ‘two persons’. The use of the phrase ‘in accordance with law’ confirms that the other elements, namely, age, prohibited degrees of relationship and existing marital status will remain in place. The legislature has set out in the Marriage Bill 2015 how those matters will be regulated, if the referendum is passed.

MARRIAGE

The Right to Marry

In Ireland, the right of an individual to marry has been recognised as one of the unenumerated personal rights protected by Article 40.3 of the Constitution.⁸ The insertion of Article 41.4 will, therefore, extend the personal right to marry to all citizens, regardless of sexual orientation. In the course of the recent debate, it has been suggested that gay and lesbian citizens already have a right to marry, because they may marry someone of the opposite gender. This argument denies the fundamental nature of gay and lesbian people by negating their sexual orientation and identity. In respect of them, for the right to marry to be a meaningful and realistic right consistent with their human dignity, it must encompass the right to marry someone of the same gender.

The Nature Of Marriage

The Constitution regards marriage as one of the most significant forms of personal relationships and as a basic element of social organisation. Society has an interest in publicly recognising and supporting committed relationships where people assume responsibility for the care and support of each other. The institution of marriage publicly recognises and supports expressions of love and commitment between individuals, and grants them respect and legitimacy as a couple through this institution.

Marriage has been defined as “a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship”⁹. This definition is equally applicable in respect of same-sex and opposite-sex marriages. The Supreme Court’s definition of marriage as “a civil contract which created reciprocating rights and duties between the parties and, further, established a status which affected both the parties to the contract and the community as a whole”¹⁰ is likewise capable of being applied equally to opposite-sex and same-sex couples.

The extension of the stability associated with marriage to gay and lesbian couples, therefore, furthers the ultimate aim of increasing stability within society and the public interest in encouraging commitment, mutual support and obligation and a requisite degree of permanency. Far from undermining civil marriage, extending access to civil marriage to same-sex couples is a process that strengthens the institution. A ban on same-sex marriage could be said to impede family formation and cause harm to the children who are being raised in those families and who are denied the protection of civil marriage.

Marriage has evolved and is continuing to evolve. Historically marriage had far more to do with arrangements about property and dowries than with the concept of partnership, mutual support and obligation and commitment. Traditional marriage was a very unequal institution for women. Married women did not have complete control over their own property and that did not change until the Married Women’s Status Act, 1957. Prior to the Family Home Protection Act, 1976, most family homes were held in the sole name of the husband who could sell it or mortgage it without his wife’s consent. If a marriage broke down, a wife could find herself homeless with no property and dependant on a maintenance payment. A husband had supremacy in determining the religious upbringing of the children. Rape within marriage was legal and legislation protecting spouses from domestic violence was only introduced in 1976. A husband had a proprietary interest in the society and service of his wife and could sue anyone who interfered with that property interest – a wife did not have the same interest. A husband could seek damages against anyone who took in his wife or had sexual intercourse with her. These actions were not abolished until 1981.

The marital values of today are very different, as marriage is valued as a public commitment of two people to each other.

Some commentators have argued that the extension of the benefits and protection of marriage to same-sex couples would somehow devalue the marriages of opposite-sex couples. This is difficult to understand. The 34th Amendment would represent a strengthening of civil marriage and its key elements of stability, commitment and mutual support and obligations. It would also be an acknowledgement of the importance of these elements to the family in Irish society, and a recognition of the diversity of family life in modern Ireland.

Some commentators have argued that same-sex marriage redefines marriage in a manner that would effectively abolish marriage, and forfeit the vital interests of society. Far from abolishing marriage, the proposed amendment extends marriage to a wider category of couples. It preserves the core elements of mutual support and commitment, and recognises that these exist in same-sex relationships as well as opposite-sex ones.

The Irish Constitution places the family at the heart of society and the Marriage Equality amendment will not change that. The family is the ‘fundamental unit group’ in society. This amendment simply means that we seek as a society to protect more families. Recognising same-sex marriage means recognising that among the ‘fundamental building blocks’ in modern Irish society are families with same-sex couples as well as opposite-sex couples. This amendment reflects and reinforces the central place of marriage and family in Irish society.

Marriage and the Meaning of Family under Article 41

The potential to have children is not a defining characteristic of marriage. The courts have consistently emphasised that a married couple without children is a ‘family’ attracting the constitutional protection of Article 41. Costello J. noted in *Murray v Ireland*¹¹:

“A married couple without children can properly be described as a ‘unit group’ of society such as is referred to in Article 41 and the lifelong relationship to which each married person is committed is certainly a ‘moral institution’. The words used in the Article to describe the ‘family’ are therefore apt to describe both a married couple with children and a married couple without children. It is true that the rights and duties of a married couple with children are more varied than a married couple without children but each ‘unit group’ has the same nucleus and it is reasonable to assume that both were given the same constitutional protection.”

One of the most repeated and fundamental misconceptions advanced by those opposing the Marriage Equality Referendum, is that an intrinsic characteristic of marriage is the procreative potential, that marriage must be “open to new life”¹² / “open to the procreation of children”¹³. This is incorrect as a matter of reality and law. The State does not require opposite-sex couples, whom it permits to marry, to be fertile, to be of child-bearing age, or to make a commitment to procreate. It is the commitment of the marriage partners to one another, not the having of children, that is the sine qua non of civil marriage. In the case of *Zappone & Gilligan v Revenue Commissioners & Others*¹⁴, the High Court noted that the State Defendants had not tried to suggest that “the justification for the exclusion of same-sex couples from marriage was on the basis that the nature of marriage is related to procreation”.

The view that marriage must be open to the procreation of children is demeaning to couples who are incapable of procreating. It is likewise demeaning to couples who begin such a relationship when they no longer have the capacity to conceive. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is also demeaning to couples who voluntarily decide not to have children.

Moreover, same-sex couples across Ireland already have and are bringing up children. These children ought not to be overlooked in the course of the debate on the 34th Amendment. Consideration must be given to what the amendment would mean for them. Its passage would send a positive message of inclusion and respect. Furthermore, gay children will be assured of their equal status in Irish society.

Marriage and Civil Partnership

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 introduced civil partnership, which may be availed of by same-sex couples (and only by same-sex couples). Civil partnership has many but not all, of the features of civil marriage.¹⁵ A number of provisions have been amended since 2010.¹⁶ Some commentators have argued that civil partnership should be sufficient and that there is no need to amend the Constitution.

The key difference which continues to exist between civil partnership and marriage is the fact that civil partnerships do not have constitutional protection or recognition. **The State is not obliged to guard with special care and protect from attack the institution of civil partnership.** Civil partnerships are not constitutionally recognised families and, therefore, are not considered to be a fundamental group in society.

A crucial consequence of this is that the legislation providing for civil partnership could be amended or repealed.

Furthermore, the very fact that same-sex couples in a loving, committed relationship may only avail of civil partnership underlines their exclusion from the societal and cultural status associated with marriage. It enshrines inequality of treatment, and sends out a message that their relationships are less worthy.

Civil Marriage and Religious Marriage

The institution of civil marriage, which is protected under the Constitution, and the religious understanding of marriage are entirely separate¹⁷. There is no basis for the concern which has been expressed that religious clergy may, against their religious beliefs, be required to perform same-sex marriages. The 34th Amendment relates to civil marriage only. The Marriage Bill 2015 (which will give effect to the Amendment if passed) confirms that religious solemnisers will not be obliged to perform same-sex marriages. Head 7 of the Bill provides as follows:

“Nothing in this Act shall be construed as obliging:

- (a) a religious body, within the meaning of section 45 of the Act of 2004, to recognise a particular form of marriage ceremony for the purposes of section 51(3)(c) of that Act; or
- (b) a registered solemniser, who is registered in the Register of Solemnisers on behalf of a religious body, to solemnise a marriage in accordance with a form of ceremony which is not recognised by that religious body.”

If the referendum is passed, and it becomes legal to carry out same-sex marriages, no religious body can be obliged by law to carry out a same sex marriage. In other words, the State cannot force priests to marry two men or two women, and nobody can sue a priest for refusing to do so. Any attempt to provide otherwise would contravene the guarantee of freedom of conscience and the free profession and practice of religion in Article 44.2.1 of the Constitution.

PARENTING, THE REFERENDUM AND THE CHILD AND FAMILY RELATIONSHIPS ACT, 2015

Overview

Same-sex couples are permitted by law to have children. Many such families exist in Ireland. Although many children in Ireland are brought up in households headed by their opposite-sex parents who are genetically related to them, not all children are brought up in this way. As a matter of reality, there are many households that are not based on the traditional family model of a mother father and children. Approximately 30% of households with children are headed by a single parent. The important thing for children is that they are cared for by a loving adult, usually a parent or parents, or someone who is in loco parentis to them.

The argument that “a child has a right to a father and a mother” presupposes that marriage equality will deprive them of a father and a mother. The overwhelming majority of children in Ireland are born to co-habiting or married heterosexual parents. Not one of these children will be deprived of their mother or their father by marriage equality.

Any same-sex couple that raises a child will be raising a child who is not the biological child of one or both of them. This situation also occurs in some heterosexual relationships. There are only two ways in which this can occur in both types of relationship: adoption and assisted reproduction. The vast majority of parents raising children through adoption or assisted reproduction are heterosexual couples.

The Child and Family Relationships Act widened the category of persons who can adopt children. Children can now be adopted by same-sex couples. Prior to the new Act, a gay couple could not apply to adopt, as a couple. However, a single person, who is gay, was eligible to apply, in the same way as a single straight person was eligible.

The Act also regulates Donor Assisted Human Reproduction. The technology has existed for some time, and is largely availed of by heterosexual couples, who for medical reasons are unable to have children. It is already the case that foster children in Ireland are placed with same-sex couples. None of these things is caused by marriage equality, but marriage equality can give greater legal protection to children who are raised by same-sex couples.

The Child and Family Relationships Act 2015 brings about a long overdue reform of Family Law in Ireland, and removes a number of anomalies that existed in the law. As acknowledged by the Chairman of the Referendum Commission, Mr. Justice Cross on 13th April 2015, this legislation will remain law “irrespective of the outcome of the referendum”.¹⁸

Effect of the Referendum on Children

The amendment primarily will affect two categories of children, gay and lesbian children coming to terms with their sexuality and children in same-sex families.

For the first category, the passage of the amendment will reassure them that their community values them equally and will allow them to aspire to marry the person with whom they fall in love, something which has long been recognised as one of the vital personal rights essential to the pursuit of happiness.¹⁹

As regards the second category, a primary effect of the passage of the referendum will be that some children being raised by a same-sex couple will, if that same-sex couple chooses to marry, be part of a constitutional family and will, therefore, have the constitutional protections in Article 41 extended to them. It is difficult to conceive how anyone could argue that this is not a positive thing. The denial of civil marriage to same-sex couples does not mean that their children will be raised by opposite-sex couples. Directly contrary to what has been suggested by some in the course of the current debate, it is in the interests of the protection of children that the Marriage Equality Referendum be passed.

Insofar as opponents of the Marriage Equality Amendment have sought to suggest that a 'no' vote is in the interests of children, there is no legal (or, for that matter, scientific) basis for this. The opposite is the case. It appears, rather, that this position is based on religious views as to the 'ideal' family or adherence to traditional gender roles. This is particularly evident around discussion of adoption and surrogacy.

The changing views of Irish society about gender roles in bringing up children, and advances made in areas such as psychology and psychiatry in understanding the developmental needs and requirements of children, have long been reflected in the decisions of the Irish courts. For example, in 1984, Mc Mahon J. commented on how the distinct roles which our society assigned to fathers and mothers was changing, as "the younger generation of married people tend to exchange roles freely."²⁰ He struck down as unconstitutional a provision of the adoption legislation that prohibited a widower from adopting a child. The psychiatric evidence was that a strong bond had developed between the widower and the child, and that "a man was just as capable as a woman of the most important function of parenthood", which was described as being "to provide the child with a person with whom the child can form an emotional relationship". The evidence was that this bonding process gives the child a sense of security and of being loved. *The Judge held that no evidence had been adduced to establish that the roles of mothers and fathers were "mutually exclusive or that both are essential for the proper upbringing of children or to establish that there is any difference in capacity for parenthood between a widow and a widower."*

This probably accords with the experience in society generally, where many children are raised in one parent families. The argument that a child has a right to a mother and a father does not reflect the reality for many Irish children. But the suggestion in relation to gay couples seems to go further. It seems to be suggested that gay couples, by virtue of being gay, lack the capacity to bring up children, or do not constitute correct role models for children. In making the claim that the best interests of the child are served by having a father and a mother, references are made to studies conducted in social science or psychology. The variables that can be contained in such research are not the focus of this

analysis, however it is worth having regard to recent pronouncements from the Psychological Society of Ireland. It is particularly relevant in terms of defining the best interests of children within the parameters of the debate.

“[...] the PSI has firmly distanced itself from the use of psychological research in the materials distributed by The Alliance for the Defence of the Family and Marriage (ADFAM). As the professional body for Psychology in Ireland, the Society expressed concern about psychological research cited by ADFAM in their promotional literature. Dr D’Alton [President of PSI] said:

‘Information in the ADFAM’s leaflet is outdated and contrary to the position of professional psychological bodies such as the world’s largest representative body of psychologists, The American Psychological Association (APA). In 2012, the APA said: ‘On the basis of a remarkably consistent body of research on lesbian and gay parents and their children, the APA and other health professional and scientific organisations have concluded that there is no scientific evidence that parenting effectiveness is related to parental sexual orientation. That is, lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.’

He also draws attention to the guidelines of his own professional body which conclude: ‘Empirical studies have failed to find reliable differences between the children of same-sex and heterosexual couples with regard to their gender identity, gender role behaviour, sexual orientation, mental health, or psychological and social adjustment.’”

Adoption

In the past 20 years, the number of domestic adoption orders made has fallen dramatically. Of the orders made, significant numbers are within family adoptions. The traditional situation of a newborn child being placed for adoption with strangers is now extremely rare.

There is no legal right to adopt a child. Adoption is regulated by the Adoption Act, 2010, which has been amended by the Child and Family Relationships Act 2015 to extend the category of persons who may apply for adoption.

The Children and Family Relationships Act, 2015 allows adoption by same-sex couples. A same-sex couple, who are civil partners, and who live together, may apply jointly for an adoption order, in the same way that a married couple can. However, as they are civil partners and not a married couple, they will not have the constitutional protection that a married couple, who have adopted a child, have. If the referendum passes, then those couples may marry and their adopted children will have the same Constitutional protection as adopted children of opposite-sex married couples.

The 2015 Act opens step-adoptions to civil partners. ‘Step-adoptions’ are a common practice ²¹ in Ireland at present. The majority of these adoptions arise where the mother of a child marries a man who is not the child’s father, and the couple apply to adopt the child jointly. This has long been regarded by the Adoption Authority of Ireland (and its predecessor, the Adoption Board) as problematic, for a number of reasons. Primarily, there is an obvious difficulty with severing the legal ties between a child and one of his/her birth parents. However, these kinds of adoptions accounted for 74% of adoptions in Ireland in

2013, a trend which will likely continue, irrespective of whether the referendum is carried.

At present, if an unmarried father has been declared a guardian of the child, his consent must be obtained for an adoption and he may veto the placement of the child for adoption. If he has not been declared a guardian, s. 30(3) of the 2010 Act provides that the Adoption Authority must take reasonable steps to ensure that the father of the child is consulted in relation to the adoption.

The consent of the child's mother must always be obtained to the placement of the child for adoption and prior to an adoption order being made. There are two stages for this consent, at the initial placement of the child, and before the making of the final order, and the consent may be withdrawn at any time before the making of the adoption order.

By marrying, a same-sex couple who have adopted a child, as civil partners, will be able to enhance the status of their family, to one which has the benefits of a constitutionally protected family.

In non-family adoptions, as in all adoptions, decisions as to the placement of children, with prospective adopters, will continue to be made on the basis of the best interests of the child concerned.

Assisted Reproduction

Assisted reproduction has far outstripped domestic adoption as the primary means by which same-sex couples, and indeed heterosexual couples who have fertility difficulties, become parents. Opposite-sex couples and single women were the original drivers of the reproductive revolution and they still represent the bulk of those who avail of assisted reproduction. Complex ethical issues arise from these new technologies, but those ethical questions concern all new reproductive technologies, not merely the use of assisted reproduction by same-sex couples.

The Children and Family Relationships Act 2015 regulates family relationships arising from assisted reproduction and is discussed below. Thus far, this is the only aspect of assisted reproduction that has been addressed by the legislature. Surrogacy was originally contained in the Heads of the Bill, but this was subsequently removed.

The Minister for Health, Leo Varadkar, has made a commitment to draft legislation for surrogacy and for assisted reproduction²², but has indicated that this may not be finalized before the general election in 2016. Assuming the current government is reelected, or its replacement carries on this task, the next two years should see the legislature finally getting to grips with the ethical and legal challenges posed by assisted reproduction.

Donor-Assisted Human Reproduction

Until the passage of the Children and Family Relationships Act 2015, Irish law made no special provision for the family relationships arising from donor conception. Nor was there any regulation of the area.

The Children and Family Relationships Act 2015 sets out a comprehensive scheme for the attribution of parenthood in assisted reproduction. The Act provides that the legally recognised mother of any child is the woman that gives birth to him or her. Provided that adequate consent is obtained from all parties, the Act allows for the woman's spouse, civil partner, or cohabitant to be recognised as the second legal parent of the child. The Act deals with opposite-sex and same-sex couples in precisely the same way, hence, **donor assisted reproduction raises the same issues for all parents, regardless of their orientation.**

The Act also establishes rigorous consent requirements for egg, sperm or embryo donors. These clearly require that the donor understands that he or she will not be the child's legal parent, and that he or she recognises that the intended parents will be the child's legal parents. The Children and Family Relationships Act prohibits anonymous egg, sperm and embryo donation in its entirety. Anonymous donation is one of the most ethically controversial aspects of donor-assisted conception.²³ In fact, not only has the Act prohibited anonymous donation, it has established very strong protections for the right of the child to know the identity of his or her donor. None of this will change as the result of the Marriage Equality Amendment.

Surrogacy

The other assisted reproductive technique is surrogacy. A surrogate is a woman who agrees to gestate a pregnancy on the agreement that she will give up the child to its intended parents on birth. Surrogacy can take two different forms. A 'traditional' surrogate uses her own egg whereas a 'gestational' surrogate has an embryo, created through the use of IVF, implanted in her uterus. In the former case the surrogate has the same genetic link to the child as any biological mother, in the latter the surrogate has no genetic link to the child at all. Traditional surrogacy is now extremely rare. Heterosexual couples and same-sex male couples generally use sperm provided by one of them, an egg provided by a donor, and a gestational surrogate.

Irish law currently does not regulate surrogacy and makes no specific provision for the attribution of parenthood in the context of a surrogacy arrangement. In the case of *M.R. v An t-Árd Chláraitheoir*,²⁴ the Supreme Court found that it was the surrogate mother, who gave birth to the child, and not the genetic mother, who was to be registered as the mother of the child for the purposes of the Civil Registration Act 2004.

Surrogacy can only be addressed through careful regulation. But these issues apply equally to surrogacy arrangements entered into by opposite-sex and same-sex couples alike. Again, very many of the couples availing of surrogacy are heterosexual. Surrogacy is availed of by couples in Ireland without regulation at the present time. This usually involves the couple travelling abroad to a country where commercial surrogacy is available. The passing or otherwise of the Marriage Equality Referendum will not affect this. The only change will be when legislation is introduced to regulate surrogacy.

CONCLUSION

On 22nd May 2015, the Irish People will be invited to effect a straightforward and singular amendment to their Constitution. They will vote on a proposal to insert the following seventeen words into the Constitution: “Marriage may be contracted in accordance with law by two persons without distinction as to their sex” This involves ensuring that all citizens, regardless of their sexual orientation, have equal access to the institution of marriage. The special constitutional status of marriage and its core characteristics of “a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship”²⁵ will be unaffected.

The extension of the rights and duties associated with marriage will strengthen, not undermine, that institution, and the children being raised in same-sex relationships will be afforded the possibility of being part of a constitutionally protected family.

This Referendum will affect children. It will affect gay and lesbian children coming to terms with their sexuality. It will assure them that they are valued equally in Ireland and that the State will place no limit on their aspirations for their personal and family lives.

Some children being raised by same-sex couples, if those same-sex couples choose to marry, will become part of a constitutionally protected family. The passage of the Referendum would send them a positive message of inclusion and respect.

As regards adoption, surrogacy and assisted human reproduction, each of these must be the subject of careful regulation. The Child and Family Relationship Act 2015 updates child and family law to reflect modern family life in Ireland. It regulates adoption and assisted human reproduction and those provisions will remain law irrespective of the outcome of the Referendum. Provision is planned for the regulation of surrogacy and the issues to be addressed in that legislation are common to both same-sex and opposite-sex couples.

This referendum is about equality, dignity and respect for all. It presents an historic opportunity for Irish society to demonstrate that it cherishes all of its people equally.

Simply put, the inherent dignity of all gay and lesbian people as individuals, and in the context of their personal relationships, will be recognised with a ‘yes’ vote.

For all of these reasons, the case for voting ‘yes’ to Marriage Equality in the forthcoming referendum is compelling.

FOOTNOTES

1 [2006] IEHC 404, [2008] 2 IR 417

2 Decision of the South African Constitutional Court in *Minister for Home Affairs v Fourie*, [2005] ZACC 19, para. [76].

3 *Ibid.* para. [76]. 4 The Court in *Fourie* also observed that “[i]f heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as to whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.” See also *Halpern v Attorney General of Canada* [2003] O.J. No. 2268 wherein the Supreme Court of Ontario stated: “exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships”.

5 Thus, the primacy and autonomy of the family based on marriage is affirmed such that state intervention is prohibited save in the circumstances set out in Article 42.5 (which is to be deleted and in effect replaced by Article 42A as approved by the People in the 31st Amendment to the Constitution).

6 See *Denham J in J. McD. v P.L.* [2009] IESC 81, [2010] 2 IR 199, (SC) 269.

7 *Walsh J in State (Nicolaou) v. An Bord Uchtála* [1966] IR 567, (1968) 102 ILTR 1, set out very clearly the differences between the marital and non-marital family: “While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based on marriage”.

8 See *JM Kelly, ‘the Irish Constitution’, Fourth Ed., para. [7.6.12.]*

9 *Costello P., Murray v Ireland* [1985] IR 532 (HC), cited with the approval of the Supreme Court in *T.F. v Ireland* [1995] 1 IR 321.

10 *McCarthy J. in N.v K.* [1985] 1 IR 733, at p. 754, cited with approval by *Hamilton C.J. in T.F. v Ireland* [1995] 1 IR 321.

11 [1985] I.R. 532.

12 See the remarks of *Bishop Liam MacDaid*, at the launch of ‘The Meaning of Marriage, a pastoral statement by the Irish Catholic Bishops’ Conference’, available at: <http://www.catholicbishops.ie/2014/12/03/launch-meaning-marriage-pastoral-statement-irish-catholic-bishops-conference/>.

13 ‘Marriage is important – Reflect before you change it’, Statement of the Irish Catholic Bishops’ Conference, 10 March 2015, available at: <http://www.catholicbishops.ie/2015/03/10/marriage-important-reflect-change-it-2/>.

14 [2008] 2 I.R. 417.

15 People in a civil partnership are treated in the same way as married couples in relation to a range of matters, including social welfare, tax, immigration, pensions, remedies on the legal dissolution of the relationship, and protection against domestic violence. In 2011, *Marriage Equality* published a report listing 169 provisions in Acts of the Oireachtas and Statutory Instruments where civil partners and their families are treated different from married couples and their families: ‘Missing Pieces: A Comparison of the Rights and Responsibilities Gained from Civil Partnership Compared to the Rights and Responsibilities Gained through Civil Marriage in Ireland (2011)’, *Paula Fagan*. See also ‘Know Your Rights: The Rights and Obligations of Civil Partners and other Same-Sex Couples (2012)’, the Irish Council for Civil Liberties and the Gay and Lesbian Equality Network, and <http://fergryan.blogspot.ie/2015/04/civil-partnership-v-marriage-some.html>.

16 *Finance (No. 3) Act 2011* and section 134 of the *Finance Act (2012)*; in secondary legislation: *S.I. No. 679/2011 – Housing (Tenant Purchase of Apartments) Regulations 2011*.

17 *Murphy J. in T.F. v Ireland* [1995] 1 IR 321 explained why the Court had declined to hear evidence from a theologian as to the essential features of marriage: “It may well be that ‘marriage’ as referred to in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of parties in relation to marriage are now contained in the Constitution and our laws and, as *Walsh J.* says, it falls to me as a judge of the High Court to interpret those provisions and it is not permissible for me to abdicate that function to any expert, however distinguished.”

18 ‘Referendum Commission kicks off information campaign ahead of polling day’, *David Kearns, Irish Independent*, 13 April 2015, available at: <http://www.independent.ie/irish-news/referendum-commission-kicks-off-information-campaign-ahead-of-polling-day-31138822.html>.

19 See *Loving v Virginia* 388 US1 (1967) in which the United States Supreme Court declared unconstitutional the ban on inter-racial marriage.

20 *T.O’G. v The Attorney General and Y.H appearing by her Mother and Next Friend, M.H.* [1985] ILRM 61.

21 According to the 2013 Annual Report of the Adoption Authority of Ireland (the most recent available), of the 116 adoption orders made, 85 were in the case of a mother and stepfather, and one was in the case of a father and stepmother.

22 ‘Detail on assisted human reproduction rules needs work’, *Paul Cullen, The Irish Times*, 26 February 2015.

23 See generally: *N. Cahn, ‘Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank’* (2009) 12 *DePaul Journal of Health Care Law* 203. For the opposite view, see *I. Glenn Cohen, ‘Rethinking Sperm-Donor Anonymity: Of Changed Selves, Non-identity, and One-Night Stands’* (2012) *Georgetown Law Journal* 431.

24 [2013] IEHC 91, [2014] IESC 60.

25 *Costello P., Murray v Ireland* [1985] IR 532 (HC), cited with the approval of the Supreme Court in *T.F. v Ireland* [1995] 1 IR 321.

