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*66 Unfinished Business? Equality and Family Diversity in the Wake of the Irish Marriage Referendum

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Introduction

In May 2015, the people of Ireland voted in a constitutional referendum to allow same-sex couples to marry.[1]The referendum result—approved by 62.07 per cent of voters on a turnout of 60.52 per cent—led to the insertion in the Constitution of Ireland 1937 of a new Art.41.4 (the "34th Amendment") stipulating that "Marriage may be contracted in accordance with law by two persons without distinction as to their sex". This extended to same-sex couples the right to marry and, with it, the opportunity to access the associated recognition and protection flowing from marriage, including preferential status as a constitutionally recognised family. Following the referendum, the Marriage Act 2015 removed the pre-existing impediment to the marriage of same-sex couples, with effect from 16 November 2015. [2]The first marriage of a same-sex couple in Ireland was celebrated the following day, on 17 November 2015.

The result is all the more significant in that it involves not just a change in legislation but a popularly endorsed and constitutionally entrenched entitlement to marry a person of the same sex. Such an outcome would have been notable in any western European state, but was particularly remarkable in Ireland. Up until comparatively recently, Ireland did not seem a likely candidate for such a resounding, popular pro-LGBTI (Lesbian, Gay, Bisexual, Transgender, Intersex) vote.

Although the outcome is therefore a significant one, this paper contends that the referendum leaves some unfinished business. While the referendum signifies a high level of acceptance and respect for sexual diversity, LGBTI people in Irish society still face challenges, some legal, but mostly social and cultural. Those on the margins of the LGBTI community, in particular, face disproportionately greater prospects of disadvantage and poor mental health outcomes. There remain unanswered questions in relation to concepts such as adultery and consummation in the context of marriages of same-sex couples, and gaps persist in relation to the recognition of gay parenting and the equal treatment of same-sex couples in the context of pensions.

Notably, although the referendum opened up marriage to same-sex couples, it did not displace the privileged position of marriage in the constitutional domain. The family recognised and protected by Art.41 of the Constitution is still exclusively the family based on marriage. Households and unions other than those based on marriage (for example, those headed by unmarried lone parents and cohabitants) continue to be subordinated under the Constitution and legislation. Although legislation has extended some limited rights to non-marital couples and unmarried parents, and has improved the position of the child born outside marriage,[3]Art.41 of the Constitution (concerning the family) still confines its protection and recognition to families founded on marriage, to the exclusion of a growing number of non-marital family units. Indeed, arguably, the outcome (as well as the discourse) of the marriage referendum has further entrenched the privileged status of marriage. In particular, the Marriage Act 2015, passed in the wake of the referendum, has closed civil partnership to new entrants. Although existing civil partnerships remain intact, two people in a civil partnership with each other may marry each other, thus ending the existing civil partnership. With the closing down of civil partnership to new entrants, the prospect of recognising a greater diversity of family arrangements other than marriage has dissipated significantly.

Legislative recognition for cohabitants has improved since 2010, but it is still quite limited. In particular, cohabitants are denied certain tax and pensions benefits that are generally confined to spouses and civil partners. While long-term "qualified" cohabitants have certain rights and obligations in law on the termination of a relationship, these are less extensive than the rights and obligations of spouses and civil partners, and are generally contingent on financial dependence being established.[4]Marriage, therefore,

largely retains its central and privileged position, despite a significant growth in alternative models of family life.

Social Context

Until relatively recently, Ireland generally tended to be conservative on social (particularly socio-sexual) issues. Laws banning consensual homosexual sexual acts between adult males were repealed only in 1993.[5] Divorce had been constitutionally prohibited until 1996, and even now is only permitted after a lengthy period or periods of living apart. [6]Restrictive laws on access to contraception remained in place until the early 1990s. [7]A constitutional ban on abortion (save in the case of a real and substantial risk to the life of the mother) was expressly introduced by referendum in 1983—though the 36th Amendment of 2018, once signed into law, will lift the constitutional restriction and allow for the liberalisation of the law in this area. [8]

Right up to the early 1990s, the Roman Catholic Church dominated social and cultural life, and influenced political and civic developments in a profound manner. The dominance of religion in the life of the State is still reflected in parts of the Constitution, a document shaped in part by Roman Catholic social teaching and replete with religious references.[9]

It is nonetheless clear that Ireland has experienced considerable social liberalisation. Although the 2016 census revealed that 78.3 per cent of the population considered themselves Roman Catholic,[10]the influence of the Church has waned significantly in recent decades. Although marriage remains relatively popular, around one-third of children born ***60** in Ireland since 1999 have been born outside of marriage. [11] Cohabitation outside marriage has grown in both popularity and duration; cohabiting couples (around 49 per cent of whom had children) made up around 12 per cent of all family units in 2016 (152,302 cohabiting couples were counted). [12]The average age at which couples marry has also increased, indicating that many couples are delaying marriage for longer periods than in the past. [13]Lone-parent non-marital families are also a common family format, and are largely spared the social stigma of the past. [14]Spurred on by the fallout of various serious scandals involving the treatment of children and women, the influence of the Roman Catholic Church has waned significantly, with church attendances and adherence falling from the heights of former years. [15]

Attitudes to LGBTI people and same-sex couples softened considerably during the 1990s and 2000s, a change reflected in the development of a more protective legal regime for LGBTI people during that time. Laws prohibiting discrimination on the basis of sexual orientation in employment and the provision of goods and services were passed in Ireland in 1998 and 2000 respectively.[16]Since 1993, it has been expressly unlawful to dismiss a person from employment wholly or mainly on grounds of sexual orientation. [17]Since 1997, a well-founded fear of persecution on grounds of sexual orientation has been an express basis for obtaining refugee status in Ireland. [18]Reform in relation to transgender people proved much slower, though the very progressive Gender Recognition Act 2015 now allows adults to be treated in law as being of their preferred gender, based solely on the person making a statutory declaration (the “self-determination” model).

The Constitutional Context

Although the legal regime for LGBTI people as *individuals* improved throughout the 1990s and 2000s, recognition of same-sex couples proved more difficult to achieve. This reflected, in part, the general reluctance of the State to afford legal recognition and rights to non-marital couples, an approach underpinned by the restrictive constitutional perspective on family.

The constitutional provisions on the family are contained in Art.41 of the Constitution. Although the Constitution does not necessarily preclude legislation addressing other types of household, the courts have repeatedly defined the family of which Art.41 speaks, and to which it provides protection, exclusively as the family based on marriage. The Supreme Court, in particular, has consistently emphasised (as recently as 2018) that “family” for the purpose of Art.41 is confined to marital families, with or without children, and does not refer to non-marital unions or never-married lone parents with children.[19]These precedents stand in sharp contrast to the open and broad understanding of family life under ECHR jurisprudence, which privileges the substance of family relationships over form. Under art.8 of the ECHR, family life has been recognised as existing between (for instance) unmarried parents and their children, cohabiting couples, same-sex couples, and engaged couples. [20]

Aspects of the High Court decision in IRM v Minister for Justice and Equality indicate a possible judicial willingness to reconsider the Constitution's limited recognition of families in light of social change and, in

particular, in the wake of the marriage and children's referendums.[21]In that case, Humphreys J observed:

> "Previous decisions on the lack of rights for the non-marital family are largely creatures of their time, and society has transformed beyond all recognition since that chain of authority was put in motion. More fundamentally, the constitutional framework within which such decisions were generated has been subjected to massive transformation".[22]

In support, he cited the EU Charter of Fundamental Rights, and the 31st Amendment's recognition (in Art.42A of the Irish Constitution) of the natural rights of "*all*' children, which applies "without regard to the marital status of their parents". He also referenced the marriage referendum (the 34th Amendment), noting:

> "To regard this as a mere technical extension of the category of persons who may marry, rather than a quantum leap in the extent to which the Constitution is oriented towards respect and protection for a diversity of private family relationships, is to artificially separate literal wording from history, culture and society".[23]

Viewed alongside societal developments in relation to the family, these reforms:

> "warrant a recognition that members of a non-marital relationship, and non-marital parents of both sexes in particular, enjoy acknowledgement of inherent constitutional rights in relation to their children and each other on a wider basis than has been recognised thus far".[24]

Although these passages held out some hope for a change of perspective, Supreme Court jurisprudence to date nonetheless points definitively and consistently towards an exclusive constitutional definition of family based solely on marriage. While Humphreys J's approach is powerful and compelling, it clearly conflicts with well-established Supreme Court (and other High Court) precedents, and with the express terms of the Constitution protecting the institution of marriage "on which the Family is founded".[25]

Indeed, in IRM itself, on appeal from the decision of Humphreys J,[26]the Supreme Court appeared, albeit in obiter comments, to restate the traditional view. Speaking ****61*** for the Supreme Court, Clarke J noted that an unmarried couple, even with children, did not "form a family unit within the meaning of that term as contained in Article 41 of the Constitution". [27]He observed that Humphreys J's comments on the family were "general and observational in nature, but not intended to be of binding effect". [28]In effect, the High Court's observations on the legal position of non-marital families were (the Supreme Court concluded) obiter dicta and not integral to the issue before the court. Clarke J clarified, however, that even if the High Court judge's comments were intended to be part of the court's reasoning "they could not have the force of precedent on this point in light of the consistent case law of this Court to the contrary stretching back decades and reaffirmed on several recent occasions". [29]In particular, Clarke J cited the Supreme Court decision in HAH v SAA [30]as affirming "that marriage remains a central feature of Irish life for the majority of people … a specific, constitutionally-protected relationship which must be guarded with special care". [31] The Supreme Court pointed also to its recent decisions in JMcD v PL [32], and CC'S & TB v Judge Doyle & Ors, [33]both of which confirm that Art.41 does not apply to the family not based on marriage.

Nonetheless, the Supreme Court was not entirely unsympathetic towards the argument in favour of a more expansive approach to the non-marital family. Given the dramatic social and cultural changes of the past 25 years, Clarke J observed, "at some point in the future the question may arise as to whether the legal and constitutional position of unmarried parents, as between themselves and their children, should be afforded greater recognition than presently exists".[34]Clearly, however, the Supreme Court believed that the case before them was not the appropriate case in which to address the point. Some of the dicta in the Supreme Court judgment, moreover, suggest that it might be difficult for the courts acting alone to displace the long-standing traditional view on the constitutional understanding of family.

The courts in Ireland have acknowledged that non-marital mothers enjoy personal constitutional rights in respect of their non-marital offspring, including the right to custody and care, but under the personal rights provisions of Art.40.3 of the Constitution and not the Art.41 provisions on the family.[35]The constitutional rights of all children, moreover, regardless of the marital status of their parents, are now safeguarded in Art.42A of the Constitution, brought into force in 2015. Non-marital fathers, however, do not enjoy a constitutional right to guardianship or custody of their children, [36]and must instead rely on legislation to obtain guardianship or custody. [37]

Admittedly, the Constitution does not preclude legislative recognition and protection of non-marital unions, though the constitutional privilege for marriage arguably leans against measures that would

undermine the special position of marriage. Marriage is especially protected under the Constitution; other unions and arrangements remain outside the constitutional pale, at least insofar as Art.41 is concerned. Legislative measures may favour marriage, and discrimination against non-marital unions is constitutionally permitted, though not mandated.[38]Legal measures that discriminate against or penalise married couples, by contrast, are unconstitutional. [39]

One might add that, despite the recognition of the right of same-sex couples to marry in Art.41.4 of the Constitution, Art.41 still leans towards a traditional model of family life. The provisions of Art.41.2 (recognising the contribution of women and mothers in the home) valorise a gendered division of labour within families, in a manner that clearly does not expressly affirm households headed by male lone parents and male same-sex couples. Some judges have, however, suggested that Art.41.2 is not necessarily confined to *married* women or mothers, though, if this is the case, it is a narrow exception to the general rule regarding Art.41.

Family Diversity and Cohabitants

The constitutional preference for marriage is also reflected in a family law regime that, until comparatively recently, exalted the institution of marriage as the predominant locus of acceptable family life. Until 2011, with some limited exceptions,[40]Irish family law largely ignored adult relationships outside of marriage. Even where non-marital couples were recognised, moreover, the gendered language usually used to describe cohabitants prior to 2011 appeared, in many cases, to restrict protection to opposite-sex unmarried couples. [41]For instance, although opposite-sex cohabitants have been recognised for most purposes relating to social welfare since the 1990s, same-sex couples were not officially recognised in social welfare legislation until 2011. [42]

The passage of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (the "2010 Act"), however, significantly changed the legal landscape for unmarried couples.[43]Part 15 of the Act defines a "cohabitant" as one of two adults living together as a couple in an intimate and committed relationship, who are not married to each other or civil partners of each other, and are not related to each other within the prohibited degrees of relationship. [44]Notably, cohabitants for this purpose may be of the same-sex or opposite-sex. [45]The 2010 Act also amends some earlier legislation addressing cohabitants to ensure opposite sex and same-sex cohabitants are treated equally.

The law provides some recognition in specific (though limited) contexts for "cohabitants" (such as domestic violence, wrongful death suits, and succession to residential tenancies).[46]Most notably, subject to certain conditions, cohabitants may enter into cohabitation agreements regulating their financial affairs. [47]

More extensive protections apply, however, to "qualified cohabitants", defined as two adults who were in a relationship of cohabitation and were living together as a couple for a period of at least five years (or two years if they have dependent children together) immediately prior to the ending ***62** of their relationship.[48] On the ending of their relationship, a qualified cohabitant who is financially dependent on the other qualified cohabitant, where that financial dependence arises from the relationship or the ending of it, may seek various remedies against the latter, namely maintenance, a pension adjustment order, and a property adjustment order. [49]To avail of these specific remedies, the applicant must demonstrate financial dependence, the implication being that these remedies are intended to be confined to, and to provide a safety net of sorts for, financially vulnerable applicants. [50]

The Act also allows qualified cohabitants, on the death of one of the couple, to seek a court order for provision from the deceased's estate, where the latter has not properly provided for the survivor.[51]In DC v DR, for instance, the High Court awarded relatively generous provision from the estate of a deceased woman who died intestate in favour of her surviving long-term male partner, though the court stopped short of treating the survivor as favourably as the law would have treated a similarly-positioned widower. [52] Where the couple was still together immediately before death, the applicant does not have to demonstrate financial dependence in order to succeed (though his or her financial situation may be a factor in deciding what provision to make).

Comparatively few cases have been heard under these provisions.[53]Although reported cases to date tentatively suggest that the courts may be willing to be reasonably generous in this context, particularly where the relationship was lengthy, the remedies and protections for qualified cohabitants clearly are not as extensive as those available to spouses and civil partners. [54]Cohabitants, furthermore, are generally not entitled to the favourable tax treatment specifically available to spouses and civil partners, [55]or to survivors' benefits (though they are, otherwise, generally recognised for social welfare purposes, an approach that sometimes results in lower payments to couples). Tobin cogently argues that the more limited rights of

long-term cohabitants appropriately reflect the fact that they have not voluntarily accepted obligations of a marital nature, and should not be compelled to take on significant obligations. [56]Nonetheless, it is clear that a growing number of non-marital families in Ireland have relatively limited legal protection and recognition when compared with spouses.

The Rise of Civil Partnership

The vast bulk of the 2010 Act is of particular relevance to same-sex couples. It introduced what was termed "civil partnership", a form of registered union for same-sex couples akin in most respects to marriage.[57]

Prior to the 34th Amendment, marriage was confined to opposite-sex couples. This had always been the case at common law,[58]but s.2(2)(e) of the Civil Registration Act 2004 copper-fastened the impediment to marriage in cases where the parties were of the same sex. Several commentators have cogently argued that the Constitution prior to 2015 did not preclude legislation extending marriage to same-sex couples. [59]It was clear, nonetheless, from the High Court decision in Zappone and Gilligan v Revenue Commissioners [60]that the Constitution (prior to the 34th Amendment) did not require the State to recognise or facilitate the marriage of same-sex couples. Prior to the marriage referendum, the right to marry, Dunne J found, applied only in the context of opposite-sex marriage.

In the absence of a right to marry, the 2010 Act allowed unrelated adults of the same sex to enter into civil partnership, thereby acquiring most of the rights and obligations formerly confined to married couples. While the parties need not necessarily be gay or bisexual, the Act effectively sought to address the exclusion of same-sex couples from marriage. Between 2011 and 2016, 2,078 same-sex couples entered into civil partnership.[61]Subject to certain conditions, specified classes of foreign legal unions between same-sex couples, if entered into before 16 May 2016, are also recognised as civil partnerships in Ireland. [62]

Civil partners are largely treated the same as married couples in the context of property, maintenance, inheritance, pensions, mental health, equality legislation, domestic violence, and remedies following dissolution. For tax[63]and social welfare [64]purposes civil partners are treated identically to spouses, while the civil partners of Irish and EU nationals are treated the same as spouses for the purposes of immigration [65] and the acquisition of citizenship. [66]

The Merits of Civil Partnership

Admittedly, civil partnership does not enjoy the constitutional protection afforded by Art.41 to the family based on marriage. As enacted, moreover, the 2010 Act made little provision for children being raised by civil partners, largely excluding remedies for the benefit of children, and often (though not entirely) ignoring children's interests. Part 12 of the Children and Family Relationships Act 2015, however, has removed many of these deficiencies (though, as discussed below, some gaps remain in relation to LGBT parenting). A small number of common law and legislative remedies and protections for spouses were not extended to civil partners, though the exceptions to the general rule of equal treatment of spouses and civil partners are relatively few. The process for dissolving a civil partnership is notably easier than the tough conditions for divorce.[67]The living apart requirement, in particular, is much shorter for dissolution of a civil partnership (two of the previous three years) than for divorce (four of the previous five years). While a divorce will only be granted, inter alia, where there is no reasonable prospect of reconciliation, no such condition applies in the case of civil partnership dissolution.

Some might argue that civil partnership is preferable to marriage in certain respects, in that civil partnership is entirely secular in its origins,[68]with no history of patriarchal baggage and no taint of former practices oppressive to women. The ***63*** rights and obligations flowing from civil partnership, moreover, have always applied symmetrically and equally to both civil partners, with no history of unequal treatment or subordination. For these reasons of principle, the applicants in R (Steinfeld and Keidan) v Secretary of State for International Development, [69]an opposite-sex couple, favoured civil partnership over marriage. They thus challenged a law in England and Wales allowing same-sex couples to choose between getting married and entering into a civil partnership, while confining opposite-sex couples to marriage alone. The UK Supreme Court found this unequal legal treatment to be incompatible with art. 14 of the ECHR read in conjunction with art.8 thereof. This does not, however, guarantee the extension of civil partnership to opposite sex-couples in England and Wales, as desired by the applicants in that case. The UK Government could equally eliminate this inequality by prospectively abolishing access to civil partnership for same-sex couples.

Despite the arguments in favour of civil partnership, there was comparatively little opposition within the LGBTI community in Ireland to the closure of civil partnership to new entrants in the wake of the marriage referendum result. Notably, in England and Wales, where same-sex couples may still choose between marriage and civil partnership, there were 861 civil partnerships in 2015[70] compared with 6,493 marriages of same-sex couples. [71] In that same year, an additional 9,156 same-sex couples converted an existing civil partnership into a marriage. While the proportion of same-sex couples entering into civil partnership is not inconsiderable, same-sex couples choosing marriage outweigh those opting for civil partnership by a ratio of 7.5:1 (this excludes conversions of civil partnerships). The ratio is even more pronounced in the case of female couples, with a ratio of 12.5:1 in favour of marriage, while male couples favour marriage by 5:1. So while there is a still a constituency of same-sex couples that seem to favour civil partnership, it is a minority.

There is certainly little evidence that same-sex couples in Ireland consider civil partnership superior to marriage. In symbolic terms, civil partnership, for all the benefits it conferred, was seen within some parts of the LGBTI community as a consolation prize for same-sex couples excluded from marriage. Symbolically, it marked same-sex couples out as different and inferior (and, indeed, implicitly "outed" those in a civil partnership given that a civil partner can only be one of a same-sex couple).

Nonetheless, it is submitted that the inception of civil partnership firmly countered the centrality of marriage as "the only show in town". For the first time, persons other than spouses enjoyed significant recognition and protections formerly confined to the constituency of the married. Admittedly, civil partnership differs little from marriage in most respects. Nevertheless, the existence of this parallel and ostensibly exotic union may have served to dent marriage's former monopoly as a substantial registered intimate union.

The Decline of Civil Partnership

It is notable, then, that the extension of marriage to same-sex couples, far from fostering the growth of alternatives to marriage, has arguably consolidated marriage's monopoly. In tandem with opening up marriage to same-sex couples, the Marriage Act 2015 has effectively closed down civil partnership to new entrants. Although existing civil partners may remain indefinitely in their already existing civil partnerships, the Marriage Act 2015 precludes the formation of any *new* civil partnerships on or after 16 November 2015 otherwise than in exceptional cases covered by transitional provisions.[72] Foreign civil partnerships, moreover, are not recognised where formed on or after 16 May 2016.

The 2015 Act, moreover, facilitates those who wish to marry their own civil partners, incentivising such marriages with a reduced fee and shortened notice period. The result is that a civil partnership may be ended and the parties married with as little as one day's notice. Although some civil partners may hold out, the likelihood is that within a comparatively short period of time the number of civil partnerships will dwindle to a handful.[73]

The Government's reasoning in recommending this step to the Oireachtas emphasises the centrality of marriage in the constitutional order. The Minister for Justice and Equality argued that allowing new civil partnerships to be formed by parties who could now marry would potentially provide a competitor to marriage, a step that the Government considered potentially unconstitutional.[74] Given the State's constitutional pledge "to guard with special care the institution of Marriage … and to protect it against attack" the Minister reasoned that maintaining an alternative to marriage, potentially attracting marriageable couples away from the constitutionally preferred union, would undermine the State's pledge.

Thus, while existing civil partners may retain their civil partnerships, and the rights and obligations that flow therefrom,[75] the combination of a bar on the formation of new civil partnerships and the option to marry mean that civil partnerships will likely become much rarer in future years.

The Exaltation of Marriage

Marriage thus largely retains its central and privileged legal position, despite a significant growth in alternative models of family life. Although the narrative of the referendum emphasised equality and diversity, the immediate legal outcome is in fact much narrower than the rhetoric might suggest. The new Art.41.4 opens up marriage to same-sex couples. It does nothing to address the position of those who do not marry, who still fall outside the confines of the constitutionally recognised family.

There is no doubting that admitting same-sex couples to marriage is a significant departure from traditional norms. The symbolism of allowing same-sex couples to be treated as constitutionally-endorsed families is

immense. Yet, in many respects, the narrative of the referendum was arguably ***64*** not a very radical one. The themes of family and tradition loomed large. It is arguable, indeed, that the referendum debate validated marriage as the gold standard of human relationships. From the Zappone-Gilligan case onwards, achieving access to marriage gradually took on the mantle of the number one goal for those seeking LGBTI equality. The fervour of the struggle for same-sex marriage underpinned the importance of marriage as an institution. It possibly displaced, albeit inadvertently, ongoing efforts to broaden the constitutional understanding of family to achieve constitutional recognition within Art.41 for non-marital unions and non-marital, lone-parent households.

The displacement of these efforts can also be seen in the rhetoric of the US Supreme Court in its seminal verdict on marriage equality, allowing access to marriage for same-sex couples. In Obergefell v Hodges, Kennedy J, speaking for the majority, talks of the right to marry as "fundamental because it supports a two-person union unlike any other in its importance to the committed individuals".[76] "Marriage is", he continues, "a keystone of the Nation's social order … States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order". [77]

This exaltation of marriage, worthy as it may be, nonetheless necessarily implies that other family arrangements are "lesser than" and not as significant as families based on marriage. Indeed in a particularly notable passage, Kennedy J remarks:

> "Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples".[78]

Admittedly, Kennedy J is speaking in the context of families *being excluded* from the institution of marriage, rather than about a non-marital union *per se* or those who choose to remain unmarried. Nonetheless the tenor of the passage serves to underline marriage's position as the most exalted union, the gold standard of intimate unions. The judgment does little to celebrate or acknowledge any right of equal treatment for those in non-marital unions. In fact, it is predicated on the inequality between marriage and non-marriage and confirms the centrality and fundamentally integral nature of marriage in society. It thereby implicitly casts doubt on the extent to which households not based on marriage are socially valued. As noted by the US Supreme Court in Griswold v Connecticut, marriage is "an association for as noble a purpose as any".[79]How noble, in the court's view, is the loving union of those who opt not to marry?

Marriage as a Panacea?

It is important not to underestimate the challenges still facing the LGBTI community, despite the referendum outcome. The risk is that the referendum verdict serves to cloud and conceal these challenges. One may wrongly consider that the push for LGBTI equality is over; that no more effort is needed. In fact, while the legal and socio-cultural position of people who are LGBTI has improved considerably in recent years, points of vulnerability remain.

In fairness, the Government and Oireachtas seem to recognise that the struggle has not ended. This is evidenced, in particular, by the publication of the LGBTI+National Youth Strategy 2018-20[80]and the work of the Gender Recognition Act Review, [81]scrutinising the operation of the Gender Recognition Act 2015. Under the Criminal Justice (Victims of Crime) Act 2017, in assessing a victim's needs, the Gardaí are required to have regard (inter alia) to the person's gender identity or expression, and sexual orientation, and to consider whether the crime was "committed with a bias or discriminatory motive, which may be related to the personal characteristics of the victim". [82]Private Members' Bills have also sought to change the law to promote inclusive sex education, [83]to ban conversion therapy, [84]and to address hate crime, [85]though such measures are not yet enacted and there is no guarantee as to when or even if they will become law.

From a legal point of view, however, some unfinished business remains.

Children

The Children and Family Relationships Act 2015 ("CFRA") sought (inter alia) to improve the position of same-sex couples raising children. The Act, for instance, makes it possible for the spouses, civil partners and cohabitants of parents to acquire guardianship and custody of children whom they co-parent, subject to certain conditions.[86]Some former gaps in the recognition of the relationship between children and their

parents' civil partners have been removed, improving the rights of children being raised by civil partners. [87]

Nonetheless, while the CFRA made provision for conferring legal parenthood on the spouse (including a same-sex spouse), civil partner, or cohabitant of a mother who conceived following donor-assisted human reproduction ("AHR"), as of July 2018, these measures have yet to be commenced. In July 2018, the Oireachtas passed legislation rectifying certain textual errors in the 2015 Act, thus paving the way for commencement of Pts 2 and 3 of the 2015 Act.[88]The Government has indicated that these parts will be commenced by October 2018, though, as of 12 July 2018, that legislation has not yet been enacted and the 2015 provisions on AHR are not yet in force. This leaves same-sex couples raising children born as a result of AHR in a precarious position, given that it is not yet possible for both partners (even if married or in a civil partnership) to be treated as legal parents of the same child. [89]The absence of ***65*** fully commenced legislation has had a knock-on effect in the context of citizenship for children of same-sex couples, with some children being refused Irish passports on the basis that the person through whom they claim citizenship is not recognised, as a matter of Irish law, as the child's parent. [90]Laws on parentage following surrogacy are proposed, but have not yet been enacted, and will likely make it very difficult for couples to become parents by this method. [91]

On the other hand, married same-sex couples[92]and (as a result of the Adoption (Amendment) Act 2017) civil partners and cohabitants may now apply to adopt a child jointly, while step-parent adoption by the spouse, civil partner or cohabitant of a parent is now also possible under the 2017 Act. Nonetheless adoptive leave laws still require updating to address the position of married same-sex couples who adopt.

Pensions

Although same-sex married couples and civil partners must generally be treated the same as opposite-sex married couples in relation to pensions,[93]examples of unequal treatment remain. In particular, some pension schemes stipulate that spousal benefits will only be made available where the scheme member marries or enters into civil partnership before retirement or before reaching a particular age. Although these rules apply equally to straight and gay couples, in practice many older gay members of pension schemes would not have been able to satisfy such conditions due to the late arrival of marriage and civil partnership as options.

For instance, in Parris v TCD[94]a Trinity College lecturer complained that his same-sex partner was denied the right to a survivor's pension under his pension scheme. The scheme only recognised a spouse or civil partner where the employee had married or entered into civil partnership before the employee reached the age of 60. In Dr Parris' case, this had proved impossible as civil partnership only came into force in Ireland when he was 64. In 2009, at the age of 63, Dr Parris and his partner entered into a civil partnership in the UK but this was only legally recognised in Ireland from 2011. Nonetheless, the Court of Justice of the European Union found that the exclusion of Dr Parris' partner did not constitute discrimination on grounds of sexual orientation, age, or both combined under the Framework Directive on Equal Treatment in Employment. [95]This was despite the fact that Dr Parris was unable to enter into a legally recognised civil partnership or marriage before his 60th birthday. Similar problems arise for older gay and lesbian civil servants who, in 1984, opted out of signing up to a new pension scheme, reasoning that the improved conditions for spouses in this scheme were unlikely to be of benefit in the absence of any prospect of recognition of same-sex unions. Draft legislation was proposed to address some of these issues, but has yet to be passed. [96]

Sexual relations and gender recognition

Although a marriage may be voidable due to inability to consummate, and a judicial separation may be granted on grounds of adultery,[97]the Marriage Act 2015 remained silent on these points. It would appear, therefore, that while a person may plead adultery on the part of his same-sex spouse, he can only do so where the infidelity involves an act of *heterosexual* sexual intercourse with a person of the *opposite sex.* Similarly, consummation more than likely still requires an act of heterosexual intercourse (though it is likely a court would regard same-sex couples as having waived their right to avoid on this ground by entering into a marriage where heterosexual intercourse is not possible). Though these gaps may cause little difficulty in practice, the absence of legislation addressing these issues indicates a possible unease in dealing with sexual matters arising from same-sex unions. This reluctance to address complex and controversial issues might also be seen in the Gender Recognition Act 2015. While highly progressive by international standards (the model being one of self-determination), the Act stopped short of providing gender recognition for transgender people under the age of 16 and failed to provide a non-binary option. [98]

Anti-LGBTI conduct

Despite dramatically changing attitudes, some LGBTI people in Ireland still experience bullying, verbal abuse, and violence on account of their sexual orientation, gender identity, and gender expression.[99]While the Prohibition of Incitement to Hatred Act 1989 outlaws public speech inciting hatred against a group on account of their sexual orientation, speech directed against people who are transgender is not covered by this legislation. Legislation requiring a person's homophobic or transphobic motivation to be taken into account as an aggravating factor in sentencing remains absent from the Irish legislative landscape, despite repeated calls for such reform. [100]Notably, however, a bill banning conversion therapy (practices designed to change or suppress a person's sexual orientation, gender identity or gender expression) has passed second stage in the Seanad. [101]

Ongoing vulnerability

It is arguable that marriage for same-sex couples, while a significant change, is limited in terms of the impact it can have, and has had on the lives of some LGBTI people. Poorer and marginalised couples stand to gain less from marriage than financially better-established couples. As Ruth Colker noted in 1991 (though the point is still relevant today) "[f]or poor people marriage may offer few economic advantages. It should not surprise us that marriage is a less popular institution in poor communities than in middle-class communities".[102]Many of the key benefits of marriage—pension entitlements for spouses, maintenance and property rights, improved succession rights—presuppose wealth. For couples with limited means, marriage and civil partnership confer fewer financial benefits. While some couples may have benefited ***67** from the 2011 extension of recognition to same-sex couples for social welfare purposes, others may have lost out due to various rules that aggregate a couple's incomes for means tests and that cap certain payments to couples. Recognition may also have deprived some lesbian mothers of the One Parent Family Payment (as formerly unrecognised lesbian cohabitation was now recognised in law).

International research, moreover, supports the view that, despite the myth of the "pink pound", LGBTI people are significantly more likely to face financial insecurity than heterosexual counterparts, particularly when intersectional factors are added to the mix. For example, higher than average rates of poverty and food insecurity have been recorded among LGBTI families in the US.[103]Social and mental health challenges also remain. The LGBTIreland report, [104]which surveyed more than 2,200 LGBTI people in 2014, revealed that mental health outcomes for some segments of the LGBTI community remain poor. While adult gay males generally fared well, researchers identified a hierarchy of wellbeing and risk within the LGBTI community, with younger people, bisexuals, and transgender people still facing significant mental health challenges. Younger LGBTI people, in particular, reported higher than average levels of poor mental health, and are significantly more likely to encounter suicidal thoughts and anxiety, and to engage in self-harm. Sex education for younger people also remains deficient. [105]Challenges remain also in the domain of physical health, with rising HIV rates among men who have sex with men, and access to preventative PrEP medication remaining limited and expensive. [106]LGBT asylum seekers face significant barriers and problems in the Irish asylum system. Transgender people also face challenges and delays accessing appropriate medical treatment and care. On a more subtle note, the LGBTIreland report indicated that many same-sex couples are still reticent about engaging in public displays of affection: 53 per cent of respondents felt unsafe or very unsafe showing public affection, 47 per cent when holding hands with a partner. [107]

Admittedly, the LGBTIreland report pre-dated the marriage referendum. In the wake of the referendum, for instance, some gay couples reported feeling more confident holding hands in public.[108]If anything, however, the referendum process may have exacerbated anxiety within the LGBTI community, with higher levels of calls to the LGBT helpline being recorded during the lead-up to the referendum. [109]A 2016 survey conducted by Dane, Short and Healy [110]found that the referendum considerably raised levels of stress and anxiety amongst LGBTI people in Ireland, particularly among younger people.

Conclusion

There is no doubt that the outcome of the marriage referendum represents a significant vote of confidence in the LGBTI community in Ireland. It is arguable that the vote was more than simply a narrow verdict on the right to marry, but instead took on a wider significance, signalling a generous acceptance of LGBTI people generally. The verdict is a powerfully affirming outcome signifying that Irish society accords full and equal citizenship to LGBTI people, regardless of sexual orientation or gender identity.

In some respects, it might also be argued that the vote represented a clear signal that Ireland has "moved on" and is no longer beholden to traditional views and conservative practices. The vote may be interpreted as a clean break with Christian conservatism, putting the world on notice that the Ireland formerly dominated by organised religion is no more. For traditionally ostracised groups such as unmarried mothers,

non-marital families, and children born outside of marriage, the referendum underlined a general disapproval of laws and attitudes that stigmatised them and others, and affirmed generally the value of equality of all, regardless of family structure.[111]There are, in 2018, signs of renewed momentum for further change.

Nonetheless, it is clear that there is still some unfinished business. In particular, though it implicitly endorses a broader agenda supporting equality and diversity, the marriage referendum result does not, of itself, address wider issues of constitutional recognition for families not based on marriage. The constitutional privilege for the marital family remains, and may well even have been compounded by the referendum outcome. Marriage thus largely retains its central and privileged position, despite a significant growth in alternative models of family life. Social, financial, and health challenges, as well as legal gaps, remain for some LGBTI people and same-sex couples. These will not dissipate without further concerted effort.

***68 *69**

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1. See generally, F. Ryan, "Ireland's Marriage Referendum: A Constitutional Perspective", *DPCE Online* (Diritto Pubblico Comparato Ed Europeo) 2015-2, available at *http://www.dpce.it/wp-content/uploads/2015/07/20152-Ryan.pdf* [last accessed 3 April 2017].

2. Marriage Act 2015 (Commencement) Order 2015 (S.I. No. 504 of 2015).

3. See, in particular, the Status of Children Act 1987.

4. See Pt 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

5. Offences Against the Person Act 1861, ss.61-62; Criminal Law Amendment Act 1885, s.11. The Criminal Law (Sexual Offences) Act 1993 repealed these provisions, decriminalising consensual sexual acts between males both of whom are aged 17 or over.

6. Article 41.3.2 of the Constitution of Ireland 1937, as amended by the 15th Amendment of the Constitution 1995, permits a divorce where the spouses have, at the date of the institution of proceedings, lived ***59** apart from one another for a period of, or periods amounting to, at least four of the previous five years, there is no reasonable prospect of reconciliation, and proper provision has been or will be made for the spouses and any children of either or both of them.

7. The Health (Family Planning) Act 1979, as amended by the Health (Family Planning) (Amendment) Acts 1985, 1992 and 1993.

8. Article 40.3.3 of the Constitution of Ireland 1937, as inserted by the 8th Amendment 1983. See also the Protection of Life During Pregnancy Act 2013. In 2018, the 8th Amendment was repealed and replaced by the 36th Amendment, which permits the Oireachtas to legislate for the regulation of the termination of pregnancies. (At the time of going to press, the 36th Amendment has not yet been signed into law due to court challenges to the referendum process. The Protection of Life During Pregnancy Act 2013, banning abortion except where there is a real and substantial risk to the life of the mother remains in force as of July 2018).

9. The Constitution, for instance, begins with glowing references to "Almighty God", "Our Divine Lord Jesus Christ" and "the most Holy Trinity", and ends by invoking "the Glory of God and the honour of Ireland".

10. Central Statistics Office, *Census 2016 Summary Results—Part 1* (Government of Ireland 2017) at 72.

11. Central Statistics Office, *Vital Statistics: Annual Report 2015*, Birth Tables 2.23, available at *https://www.cso.ie/en/releasesandpublications/ep/p-vsar/vitalstatisticsannualreport2015/births2015/* [last accessed 2 July 2018].

12. Central Statistics Office, *Census 2016 Summary Results—Part 1* (Government of Ireland 2017) at 41.

13. In 2017, the average age for a first opposite-sex marriage for men was 36.1 and for women, 34.1. The equivalent figure for males in 1996 was 30.2, and, for females, 28.4. In 1977 the figure was 26.2 for men, and 24 for women. For same-sex couples marrying the average age of marriage in 2017 was 40.3 for men and 40.5 for women. See *Marriages 2017* (CSO 2018), available at *https://www.cso.ie/en/releasesandpublications/er/mar/marriages2017/* [last accessed 3 July 2018].

14. Central Statistics Office, *Census 2016 Summary Results—Part 1* (Government of Ireland 2017) at 41.

15. See J. Keane, "The Uncertain Future of Catholic Ireland", *America: The Jesuit Review*, 23 February 2018 *(www.americamagazine.org)* [last accessed 3 July 2018]; Keane reports "[m]ore than 90 percent of Irish Catholics reported attending Mass at least weekly in the early 1970s; recent surveys put that percentage at between 30 and 35 percent in recent years".

16. Employment Equality Acts 1998-2015 and Equal Status Acts 2000-2015.

17. Unfair Dismissals (Amendment) Act 1993.

18. Refugee Act 1996, now replaced by the International Protection Act 2015. The relevant provision came into force on 29 August 1997.

19. State (Nicolaou) v An Bord Uchtála
[1966] I.R. 567; G v An Bord Uchtála
[1980] I.R. 32; WO'R v EH
[1996] 2 I.R. 248; JMcD v PL and BM
[2010] 2 I.R. 199; CO'S & TB v Judge Doyle & Ors
[2014] 1 I.R. 556 and M (Immigration—Rights of Unborn) v Minister for Justice and Equality
[2018] IESC 14. See also the High Court in GT v KAO
[2008] 3 I.R. 567; JMcB v LE

[2010] IEHC 123; and KI and others v Minister for Justice and Equality
[2014] IEHC 83.

20. See, for instance, Marckx v Belgium
(1979) 2 EHRR 330, Johnston v Ireland
(1987) 9 EHRR 203, Keegan v Ireland
(1994) 18 EHRR 342 and Schalk and Kopf v Austria (Application No. 30141/04) 24 June 2010.

21. IRM v Minister for Justice and Equality
[2016] IEHC 478.

22. IRM v Minister for Justice and Equality
[2016] IEHC 478 at [99].

23. IRM v Minister for Justice and Equality
[2016] IEHC 478.

24. IRM v Minister for Justice and Equality
[2016] IEHC 478.

25. Article 41.3.1. Despite suggestions from the High Court that Art.41 could apply, in appropriate cases, to extended family members such as grandparents and aunts and uncles, a recent Supreme Court decision seems to have confined the application of Art.41 largely to the nuclear marital family. Contrast Charleton J in OO and others v Minister for Justice and Law Reform
[2015] IESC 26 with the High Court decisions in RX v Minister for Justice, Equality and Law Reform
[2011] ILRM 444 and O'Leary v Minister for Justice, Equality and Law Reform
[2012] IEHC 80.

26. Sub. nom. M (Immigration—Rights of Unborn) v Minister for Justice and Equality
[2018] IESC 14.

27. Sub. nom. M (Immigration—Rights of Unborn) v Minister for Justice and Equality
[2018] IESC 14 at 12.1.

28. Sub. nom. M (Immigration—Rights of Unborn) v Minister for Justice and Equality
[2018] IESC 14 at 12.7.

29. Sub. nom. M (Immigration—Rights of Unborn) v Minister for Justice and Equality
[2018] IESC 14 at 12.11.

30. HAH v SAA
[2017] 1 I.R. 372.

31. Sub. nom. M (Immigration—Rights of Unborn) v Minister for Justice and Equality
[2018] IESC 14 at 12.9.

32. JMcD v PL
[2010] 2 I.R. 199.

33. CO'S & TB v Judge Doyle & Ors
[2013] IESC 60,
[2014] 1 I.R. 556.

34. Sub. nom. M (Immigration—Rights of Unborn) v Minister for Justice and Equality
[2018] IESC 14 at 12.12.

35. G v An Bord Uchtála
[1980] I.R. 32. See also GT v KAO
[2008] 3 I.R. 567.

36. JK v VW
[1990] 2 I.R. 437, WO'R v EH (Guardianship)
[1996] 2 I.R. 248, GT v KAO
[2008] 3 I.R. 567, WS v An Bord Uchtála
[2010] 2 I.R. 530, JMcD v PL and BM
[2010] 2 I.R. 199, JMcB v LE
[2010] IEHC 123 and KI and Others v Minister for Justice and Equality
[2014] IEHC 83. In KI
[2014] IEHC 83, however, the High Court appeared to suggest that children born outside of marriage may have a constitutional right under Art.40.3 to the care and company of both their natural parents, including their father.

37. Fathers of children who are born outside marriage may become guardians of their children by marriage to the mother, by court order under s.6A of the Guardianship of Infants Act 1964, by statutory declaration made jointly with the mother (see s.2(4) of the 1964 Act), or following at least 12 consecutive months of cohabitation with the mother, including a period of at least 3 consecutive months after the birth of the child during which both the mother and father have lived with the child (see s.2(4A) of the 1964 Act). Even where they are not guardians, fathers may seek an order for custody or access under s.11 of the 1964 Act.

38. O'B v S
[1984] I.R. 316.

39. Murphy v Attorney General
[1982] I.R. 241.

40. See, for instance, the Domestic Violence Act 1996, the Civil Liability (Amendment) Act 1996, the Non-Fatal Offences Against the Person Act 1997 and the Residential Tenancies Act 2004.

41. The Domestic Violence Act 1996, the Civil Liability (Amendment) Act 1996 and the Residential Tenancies Act 2004, as originally enacted, all used language that seemed to presuppose an opposition of gender, and thus generally appeared to recognise only cohabitants of opposite sex. (These Acts have since been amended to apply equally to unmarried opposite-sex and same-sex couples). See, however, s.1 of the Non-Fatal Offences Against the Person Act 1997, which speaks in gender-neutral terms of “any person cohabiting or residing with him or her”. The Domestic Violence Act 1996, as originally enacted, allowed cohabiting same-sex couples to seek safety orders. See Harrogate Borough Council v Simpson
(1984) 17 H.L.R. 205 and Fitzpattrick v Sterling Housing Association
[2001] 1 A.C. 27, but see contra, Ghaidan v Godin-Mendoza
[2004] UKHL 30.

42. Social Welfare and Pensions Act 2010.

43. See generally F. Ryan, Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: *Annotated Legislation* (Dublin: Round Hall 2011) and J. Mee "A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009" (2009) 12(4) *Irish Journal of Family Law* 83. See also T. Bracken, *The Modern Family: Relationships and the Law* (Dublin Clarus Press 2016).

44. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

45. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s.172(1).

46. See, for instance, the Domestic Violence Act 2018, the Civil Liability (Amendment) Act 1996 and the Residential Tenancies Act 2004.

47. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s.202. Cohabitants are also recognised for the purpose of domestic violence law, wrongful death suits, and succession to residential tenancies, though often subject to requirements regarding the duration of cohabitation.

48. A person is not a qualified cohabitant if either or both of the cohabitants is or was, at any time during the relationship, married to someone else, unless, at the time the relationship ends, each cohabitant who is or was married has been living apart from his or her spouse for at least four of the previous five years.

49. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, ss.173, 174, 175 and 187.

50. Though one reported case in this area, MO'S v EC (Circuit Family Court), suggests that, once financial dependence is established, the remedies granted may be relatively generous. That case, however, involved a particularly wealthy respondent and a 25-year relationship.

51. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 194.

52. DC v DR
[2015] IEHC 309.

53. See J. Spain, "Live with Me", *Law Society Gazette* (December 2015), 26.

54. In MO'S v EC (Circuit Family Court), generous provision was made to a financially dependent qualified cohabitant, the assets of the respondent having been very substantial. Nonetheless, Spain (in Spain, "Live with Me", *Law Society Gazette* (December 2015) at 29) remarks that the applicant "in this case received roughly 10% of the respondent's assets, notwithstanding the fact that they were together for over 25 years". This was arguably a good deal less than she probably would have received in divorce proceedings had the couple been married.

55. Though cohabitants may avail of the dwelling house relief, subject to satisfying certain conditions. See s.86 of the Capital Acquisitions Tax Consolidation Act 2003. Where orders for redress are made under Pt 15 of the 2010 Act, moreover, certain tax exemptions and reliefs apply.

56. B. Tobin, "The Regulation of Cohabitation in Ireland: Achieving Equilibrium between Protection and Paternalism?" (2013) *Journal of Social Welfare and Family Law*, 35 (3) 279-289.

57. See generally F. Ryan, "The Rise and Fall of Civil Partnership" (2016) 19 (3) *Irish Journal of Family Law* 50-62.

58. Hyde v Hyde and Woodmansee
(1866) LR 1 PD 130; Corbett v Corbett
[1971] Probate 83.

59. See, for instance, the discussion in B. Tobin, "Law, Politics and the Child-Centric Approach to Marriage in Ireland" (2012) 47 *Irish Jurist* 210; F. Ryan "Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family" (2012) 48 *Irish Jurist* 201-248 and F. Ryan, "Are two Irish Mammies (even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution" in E. Carolan (ed.) *The Constitution of Ireland: Perspectives and Prospects* (Dublin: Bloomsbury Professional, 2012). See also C. O'Mahony, "Constitution is not an obstacle to legalising gay marriage", *Irish Times*, 16 July 2012 and E. Daly, "Same sex marriage doesn't need a referendum", (Human Rights in Ireland Blog, 15 July 2012), available at: *www.humanrights.ie/index.php/2012/07/15/same-sex-marriage-doesnt-need-a-referendum/* [last accessed 3 April 2017].

60. Zappone and Gilligan v Revenue Commissioners
[2006] IEHC 404.

61. CSO Statistical Releases on Marriages and Civil Partnerships 2011-2016, *www.cso.ie* [last accessed 2 July 2018]. No civil partnerships were formed in 2017.

62. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s.5, but see Marriage Act 2015, ss.12 and 13.

63. Finance (No. 3) Act 2011.

64. Social Welfare and Pensions Act 2010.

65. See, for instance, European Union (Free Movement of Persons) Regulations (S.I. No.548 of 2015)

66. Civil Law (Miscellaneous Provisions) Act 2011, s.33.

67. Contrast s.110 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 with the Family Law (Divorce) Act 1996, s.5.

68. Indeed, while a valid legal marriage may be entered into before a registered solemniser nominated by a religious or secular body, civil partnership could only be formalised in the presence of a State-appointed Registrar of Marriages.

69. R (Steinfeld and Keidan) v Secretary of State for International Development
[2018] UKSC 32, overturning [2016] EWHC 128 (Admin) and [2017] EWCA Civ 81.

70. There was a slight rise in civil partnerships in England and Wales in 2016 (to 890).

71. See Office for National Statistics' *Statistical bulletins: Marriages in England and Wales: 2015* (ONS 2018), *Civil Partnerships in England and Wales: 2015* (ONS 2016) and *Civil Partnerships in England and Wales: 2016* (ONS 2017), available at *www.ons.gov.uk* [last accessed 3 July 2018].

72. Specifically, a civil partnership could be entered into on or after 16 November 2015 only where a civil partnership registration form had been completed in respect of the civil partnership prior to that date, or where a couple's civil partnership had been delayed due to an unfounded objection. As civil partnership registration forms were only valid for six months from the date of issue, this effectively meant that entering into a civil partnership became next to impossible as of 16 May 2016. Notably, seven civil partnerships were entered into in the first quarter of 2016, but none in the second and third quarters.

73. The Department of Justice and Equality estimated in 2015 "that up to 90% of civil partnered couples will seek to marry over the coming years". *(Regulatory Impact Analysis, Marriage Bill 2015* (Department of Justice and Equality 2015) at 2.

74. *Dáil Debates* Vol.890, 23 September 2015 and *Select Committee on Justice, Defence and Equality*, Vol.2, No.47, 30 September 2015. See also MhicMhathúna v Ireland
[1989] I.R. 504;
[1995] 1 I.R. 484; J. Mee, "Cohabitation, Civil Partnership and the Constitution" in Doyle and Binchy (eds) *Committed Relationships and the Law* (Dublin: Four Courts Press 2007), 201-206; and O. Doyle, *Constitutional Law: Texts, Cases and Materials* (Dublin: Clarus Press 2008), 226-230;

though see P. Dunne, "Civil Partnership in an Ireland of Equal Marriage Rights" (2015) 53(1) *Irish Jurist* 77-99.

75. Indeed, in 2015 the Minister for Justice and Equality reassured civil partners that their status would be completely unchanged: "There is no question of removing any of the rights and obligations of couples in civil partnerships or of changing their status in regard to each other. They will be free to marry each other if they so choose, but are under no obligation to do so. If they choose, they can remain as civil partners for the rest of their lives". *Dáil Debates* Vol.890, 23 September 2015.

76. 576 US_____(2015) at 13.

77. 576 US_____(2015) 16-17.

78. 576 US_____(2015) 15.

79. 381 US at 486.

80. Department of Children and Youth Affairs, *LGBTI+ National Youth Strategy 2018-2020; LGBTI+ young people: visible, valued and included* (DCYA 2018).

81. See s.7 of the Gender Recognition Act 2015 and the Department of Employment and Affairs and Social Protection website: *https://www.welfare.ie/en/Pages/Gender-Recognition.aspx* [last accessed 2 July 2018]. M. O'Halloran, "Call for Publication of Gender-Recognition Law Review", *The Irish Times*, 8 July 2018. See the Review of the Gender Recognition Act 2015 (June 2018).

82. Section 15(2) of the Criminal Justice (Victims of Crime) Act 2017.

83. Provision of Objective Sex Education Bill 2018 (Bill 34 of 2018), which passed second stage in Dáil Éireann in April 2018.

84. Prohibition of Conversion Therapies Bill 2018 (Bill 39 of 2018), which passed second stage in Seanad Éireann in May 2018.

85. Criminal Justice (Aggravation by Prejudice) Bill 2016 (Bill 75 of 2016), which passed second stage in Dáil Éireann in October 2016.

86. See, for instance, Pt 4 of the CFRA, inserting a new s.6C and s.11E into the Guardianship of Infants Act 1964.

87. See Pt 12 of the Children and Family Relationships Act 2015.

88. The Children and Family Relationships (Amendment) Act 2018. S. Bardon, "Same-sex partners to be allowed register names on baby's birth certificate", *Irish Times*, 26 June 2018; C. Fitzgerald, "Cabinet approves law to allow some same-sex partners to both register as parents on baby's birth certificate", *journal.ie*, 26 June 2018.

89. See B. Tobin, "Opinion: 'We still don't have crucial parental rights for same-sex married couples'", *journal.ie*, 29 May 2018.

90. See, for instance, C. McGrattan, "Irish Passport Refused For One Of A Married Lesbian Couple's Two Children", *gcn.ie*, 11 October 2017; . Mulraney, "Ireland refuses to grant passport to baby with two mothers" *irishcentral.ie*, 7 November 2017; P. Dunne, "Gay Couple Refused Irish Passport For Their Son", *gcn.ie*, 2 July 2018.

91. See the General Scheme of the Assisted Human Reproduction Bill 2017.

92. Adoption Act 2010, s.33.

93. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s.99.

94. C-443/15, Judgment of the Court of Justice, 24 November 2016.

95. Though see the opinion of Advocate General Kokott, who had earlier recommended a finding of indirect discrimination on the basis of sexual orientation and direct discrimination on grounds of age, as well as discrimination on both these grounds combined. See C-443/15, Opinion of 30 June 2016.

96. See Head 14 of the General Scheme of the Social Welfare and Pensions Bill 2017 and the Pensions (Equal Pension Treatment in Occupational Benefits Scheme) (Amendment) Bill 2016 (No. 109 of 2016) the latter of which passed second stage in Seanad Éireann in March 2017. The specific issue of pensions equality was not addressed by the Government-sponsored Social Welfare, Pensions and Civil Registration Bill 2017 (Bill 94 of 2017) as initiated (which passed second stage in Dáil Éireann in October 2017), though the Government has indicated it proposes to introduce amendments at committee stage of this Bill to address the issue of pensions equality. See also Walker v Innospec Ltd
[2017] UKSC 47.

97. Judicial Separation and Family Law Reform Act 1989, s.2(1)(a). On adultery and same-sex relationships see F. Ryan, "'Playing Away from Home on an Uneven Pitch?' Spouses, Civil Partners and Adultery in Irish and UK Law" (2014) 17(2) *Irish Journal of Family Law* 41-51.

98. Gender Recognition Act 2015. See, however, the Review of the Gender Recognition Act 2015 (June 2018).

99. See, for instance, K. Donohoe, "Dublin Man And His Husband Recovering From Vicious Homophobic Attack In Laois", *gcn.ie*, 28 June 2018; B. Finnegan, "Gay Fair City Star Suffers Homophobic Abuse Outside The George", *gcn.ie*, 2 July 2018.

100. See A. Haynes, J. Schweppe and S. Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Basingstoke: Palgrave Macmillan 2017); J. Schweppe, A. Haynes and M. A Walters, *Lifecycle of a Hate Crime: A Comparative Report* (ICCL 2018).

101. Prohibition of Conversion Therapies Bill 2018 (Bill 39 of 2018), which passed second stage in Seanad Éireann in May 2018.

102. R. Colker, "Marriage", 3 *Yale Law Journal of Law and Feminism* (1991) 321, 326.

103. See, for instance, M.V. Lee Badgett, L.E. Durso, A. Schneebaum, *New Patterns of Poverty in the Lesbian, Gay and Bisexual Community* (Williams Institute 2013) and Brown, Romero, Gates, *Food Insecurity and SNAP Participation in the LGBT Community* (Williams Institute 2016).

104. Higgins et al., *The LGBTIreland Report: national study of the mental health and wellbeing of lesbian, gay, bisexual, transgender and intersex people in Ireland* (GLEN and Belongto 2016).

105. Provision of Objective Sex Education Bill 2018 (Bill 34 of 2018), which passed second stage in Dáil Éireann in April 2018.

106. K. Donohoe, "On Irish AIDS Day Sexual Health Activists Call For Urgent Government Action On Latest HIV Figures", *gcn.ie*, 15 June 2018.

107. Higgins et al., *The LGBTIreland Report: national study of the mental health and wellbeing of lesbian, gay, bisexual, transgender and intersex people in Ireland* (GLEN and Belongto 2016) at 25. See also "Gay men 'afraid to hold hands in public', survey finds", *BBC News*, 7 September 2017, *https://www.bbc.com/news/uk-41179976* [last accessed 3 July 2018].

108. K. Holland, "Gay couples feel 'a little safer' holding hands since referendum", *Irish Times*, 8 June 2015.

109. LGBT Helpline, *Annual Report 2015* (LGBT Helpline 2016): "Traffic to our website grew over 65% on the previous year, with one of the busiest weeks recorded in the seven days leading up to and including the referendum vote in May" (at p.4).

110. S. Dane, L. Short and G. Healy, *Swimming with sharks: The negative social and psychological impacts of Ireland's marriage equality referendum*

'NO' campaign (School of Psychology Publication, The University of Queensland, 2016).

111. Notably, some of the highest turnout and votes in favour were seen in working class areas, for whom the message of equality seemed to resonate particularly strongly. See J. Elkink, D. Farrell, T. Reidy and J. Suiter, "Understanding the 2015 Marriage Referendum in Ireland" (UCD Geary Working Paper 2015/21, 9 November 2015).