

**Irish Human Rights and Equality Commission**

**Policy Statement on Access to Civil Marriage**

**February 2015**



**An Choimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**

**Irish Human Rights and Equality Commission**

## 1. Summary Statement

The Irish Human Rights and Equality Commission ('the Commission') believes that the opening out of civil marriage to two persons, without distinction as to their sex, is a matter of equality and human rights. In this policy statement the aim of the Commission is to inform Government and the members of the Oireachtas of the relevant human rights and equality law as they consider the question of access to civil marriage. In accordance with its equality and human rights mandate as defined under the Irish Human Rights and Equality Commission Act 2014 ('2014 Act'), the Commission considers that to ensure a comprehensive approach to the protection of family life for all couples without distinction as to their sex, and to promote access to civil marriage to all couples under the Irish Constitution, the Government's proposal to hold a Constitutional referendum is an important step. 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. The Commission considers that the current Constitutional position relating to marriage does not provide full recognition and equality of status for same-sex couples in a way that would underpin wider equality for people within Irish society. Also, the Commission is of the view that in light of the position of the family based on marriage under the Irish Constitution, the Constitution currently does not provide full recognition of the equal right to family life for same-sex couples. In accordance with the 2014 Act, as the statutory agency tasked specifically with protecting and promoting human rights and equality within the State, the Commission presents information on the relevant and emerging human rights and equality standards in this field and legal developments in other jurisdictions.

## 2. Introduction

In accordance with the 2014 Act, the Commission has a statutory remit to protect and promote human rights and equality in the State, to promote a culture of respect for human rights, equality and intercultural understanding, and to promote understanding and awareness of the importance of human rights and equality.<sup>1</sup> The 2014 Act was drafted and enacted with the stated intention of enabling the Commission to take account of new and emerging issues that are of relevance to human rights and equality.<sup>2</sup> This is reflected in the definition of human rights in the 2014 Act which provides that the Commission's mandate includes 'the rights, liberties and freedoms that may reasonably be inferred as being inherent in persons as human beings, and necessary to enable each person to live with dignity and participate in the economic, social or cultural life in the State'.<sup>3</sup>

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<sup>1</sup> The 2014 Act merged the former Irish Human Rights Commission and the former Equality Authority into a single enhanced body. The functions of the Commission are outlined in sections 10(1)(a)–(e) of the 2014 Act.

<sup>2</sup> The then Minister for Justice, Equality and Defence, Alan Shatter, stated that the 2014 Act, 'gives the Commission a mandate to promote human rights in the widest sense, not limited to Irish law, or to conventions that we have ratified or to any existing international convention. The Commission can seek to develop and promote new human rights standards and its direction in that regard is unfettered': Dáil Éireann, Select Committee on Justice, Defence and Equality Debate, 'Irish Human Rights and Equality Commission Bill 2014: Committee Stage', 6 May 2014. The Minister for Justice and Equality, Frances Fitzgerald, reiterated this intention later in the legislative drafting process: Dáil Éireann, Debate, 'Irish Human Rights and Equality Commission Bill 2014: Report and Final Stages', 4 June 2014.

<sup>3</sup> Section 2(1) of the 2014 Act. It should be noted that this broad definition of human rights does not apply to the Commission's mandate in Part 3 of the 2014 Act, entitled 'Enforcement and Compliance'. In accordance

The Commission broadly welcomes the Government proposal to put the question to the People of whether Article 41 of the Constitution should be amended to state that:

‘Marriage may be contracted in accordance with law by two persons without distinction as to their sex’.<sup>4</sup>

The Commission believes that the opening out of civil marriage to two persons without distinction as to their sex is a matter of equality and human rights. In accordance with the 2014 Act, the Commission would like to take this opportunity to set out information relating to the relevant and emerging human rights and equality standards, as well as noteworthy comparative legal developments in other jurisdictions in this field. The aim of the Commission is to inform Government and the members of the Oireachtas of the relevant human rights and equality law as they debate the question of access to civil marriage under the Constitution. The Commission does not perceive its role as being to advocate for or against the proposal, but rather, in line with its statutory mandate, as highlighting the relevant human rights and equality law and emerging jurisprudence in this field, and formulating a view on the referendum proposal in light of the relevant human rights and equality law. As the statutory agency tasked specifically with protecting and promoting human rights and equality within the State, the Commission has decided to publish this policy statement.

The intention to hold a referendum follows a series of important legislative reform initiatives,<sup>5</sup> consultative processes,<sup>6</sup> and cases before the Courts<sup>7</sup> that have considered the position of same-sex couples under Irish law, including the recognition of civil marriage for persons without distinction as to their sex under the Irish Constitution. In general, through legislation, the Government has adopted an incremental approach to law reform in this field, by extending rights and entitlements to

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with section 29, Part III is confined to the rights, liberties and freedoms contained in the Constitution, a treaty or convention that has been given the force of law in the State, and the European Convention on Human Rights Act 2003.

<sup>4</sup> Press release Minister for Justice and Equality 21<sup>st</sup> January 2015, ‘Government Announces Wording for Marriage Equality Referendum’, accessed at <http://justice.ie/en/JELR/Pages/PR15000009> on 9 Feb. 2015.

<sup>5</sup> The key legislation is the Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010. Some protection for same-sex couples had been provided in earlier legislation, including the Domestic Violence Act 1996, although this was solely on the basis of the couple having a shared home and not because they were a same-sex couple. Similarly, Section 151 of the Finance Act 2000 exempted certain people from capital acquisitions tax that had previously applied to the inheritance of shared home.

<sup>6</sup> In 2004 and 2005, the All-Party Oireachtas Committee on the Constitution undertook a public consultation on the family, and in 2006 it concluded that ‘[p]rovision for same-sex marriage would bring practical benefits. But it would require a constitutional amendment’, *Tenth Progress Report: The Family*, at p. 87. Also in 2006, the Government established the ‘Colley Working Group’ which undertook a public consultation on domestic partnership – see *Options Paper Presented by the Working Group on Domestic Partnership to the Tánaiste and Minister for Justice, Equality and Law Reform, Mr. Michael McDowell, T.D.* (2006). The third significant consultative exercise was undertaken in 2013 at the request of the Government by the Convention on the Constitution – see *Third Report of the Convention on the Constitution: Amending the Constitution to Provide for Same-sex Marriage* (2013).

<sup>7</sup> The primary jurisprudential development is the judgment of the High Court in 2006 in the case initiated by Dr Katherine Zappone and Dr Louise Gilligan seeking to have their Canadian marriage recognised in Ireland: *Zappone & anor. v Revenue Commissioners & ors.* [2006] IEHC 404, [2008] 2 IR 417. The Court found that it does not have the power to expand the legal definition of marriage in the way Drs Zappone and Gilligan sought. A further development in case law was the outcome of *J. Mc.D. v P.L.* [2009] IESC 81, [2010] 2 IR 199, 242 in which long-standing jurisprudence was applied to the case of a lesbian couple raising a child, and they were found not to be a family for the purposes of the Constitution.

same-sex couples that are similar to those of married couples in the form of civil partnership, specifically with the enactment of the Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010 ('2010 Act'). In the context of children and family relationships, in September 2014, the Government published a revised General Scheme of the Children and Family Relationships Bill 2014 which is intended to modernise the law regarding the rights of children living in diverse family forms. Proposals that are particularly relevant to this Policy Statement are those enabling civil partners to be eligible jointly to adopt a child and to apply for guardianship and custody.<sup>8</sup> In terms of consultative processes, in July 2012, the Government established a Convention on the Constitution to examine (among other matters) provision for extending access to civil marriage under the Irish Constitution.<sup>9</sup> The Convention recommended by a very large majority that the Constitution be amended to 'allow for civil marriage for same-sex couples'.<sup>10</sup> As a result, the Government agreed to hold a referendum on this question<sup>11</sup> and in December 2014, it was announced that the referendum is to be held in May 2015.<sup>12</sup>

Legal and policy reform to advance the human rights and equality for couples without distinction as to their sex has been an important theme in the work of the former Equality Authority and the former Irish Human Rights Commission.<sup>13</sup> Each of the predecessor bodies published analyses of the

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<sup>8</sup> The General Scheme of the Child and Family Relationships Bill 2014 published in September 2014 replaces a previous General Scheme which had been the subject of public consultation by the Oireachtas Joint Committee on Justice, Defence and Equality. The Joint Committee published its report on the original General Scheme on 28 May 2014. The former Irish Human Rights Commission also welcomed the proposals regarding same-sex couples and adoption: *Oral Statement of The Irish Human Rights Commission and Equality Authority (Designate) (National Human Rights Institution) to the Human Rights Committee on the occasion of the examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights*.

<sup>9</sup> Dáil Éireann Debate, 'Constitutional Convention: Motion' 10 July 2012. Accessed at <http://oireachtasdebates.oireachtas.ie/debatesauthoring/debateswebpack.nsf/takes/dail2012071000026> on 9 January 2015. Seanad Éireann Debate, 'Constitutional Convention: Motion' 12 July 2012. Accessed at <http://oireachtasdebates.oireachtas.ie/debatesauthoring/debateswebpack.nsf/takes/seanad2012071200008> on 9 January 2015.

<sup>10</sup> *Third Report of the Convention on the Constitution: Amending the Constitution to Provide for Same-sex Marriage* (2013), at section 2. The Convention voted 79 votes to 19 votes that the Constitution be amended to provide for same-sex marriage, and by 78 votes to 17 that such amendment be directive, that is requiring the State to provide for same-sex marriage.

<sup>11</sup> Minister for Justice and Equality, Alan Shatter, Dáil Éireann Debate, 'Third Report of the Constitutional Convention – Same-Sex Marriage: Statements' 17 December 2013. Accessed on 9 January 2015 at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013121700035?opendocument#HH00200>.

<sup>12</sup> Department of Justice and Equality, Press Release, 'Minister Fitzgerald welcomes Government approval for Marriage Equality Referendum in May' (2014). Accessed at <http://www.justice.ie/en/JELR/Pages/PR14000369> on 9 January 2015.

<sup>13</sup> See: John Mee and Kaye Ronayne, *Partnership Rights of Same Sex Couples* (2000); Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals* (2002); Judy Walsh and Fergus Ryan, *The Rights of De Facto Couples* (2006). In 2004, the former Irish Human Rights Commission and the Law Society held a conference entitled 'ECHR Act Review and Human Rights in Committed Relationships'. In May 2006 the former Equality Authority, jointly with the Minister for Justice and Equality's working group, held a conference on 'The Legal Status of Cohabitants and Same Sex Couples'. In December 2008, the former Irish Human Rights Commission published a discussion document on the Scheme of the Civil Partnership Bill: *Discussion Document on the Scheme of the Civil Partnership Bill 2008* (2008). The Equality Authority also issued press statements that called for full marriage equality as relevant policy developments occurred stating, for example, that '[t]he introduction of civil marriage for same-sex couples would achieve equality of status for same-sex couples and such recognition that would underpin a wider equality for gay and lesbian people' – see Equality Authority Press Release, 29 November 2006, 'Equality Authority Welcomes Partnership Report'. See further Equality

legal situation and rights of same-sex couples in response to diverse law reform proposals as they have emerged, thereby contributing to debate and law reform. In continuing the work of its predecessor bodies, and in pursuance of its statutory mandate, the Commission wishes to provide further information that will highlight the human rights and equality issues of relevance to the proposed amendment in a way that can inform and assist Government and members of the Oireachtas in their engagement around the important human rights and equality aspects of this debate.

### 3. Legal and Policy Context

Article 41 of the Irish Constitution protects ‘the family which is founded on the institution of marriage...’. Although marriage is not explicitly defined as being between a man and a woman in the text of the Constitution, the Irish Superior Courts have interpreted the protections under the Constitution as extending to different-sex couples only.<sup>14</sup> Article 41.3.1 of the Constitution 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’. Flowing from this protection, the Supreme Court has found that a family unit that is not based on marital union will not be recognised as a family for the purposes of constitutional protection and rights.<sup>15</sup> Therefore, in *State (Nicolaou) v. An Bord Uchtála* Walsh J delineated very definitely between the marital and non-marital family as follows:

‘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’.<sup>16</sup>

It is beyond the scope of this Policy Statement to provide a comprehensive account of the range of protections extended to those who are married under the Irish Constitution.<sup>17</sup> However, in light of this line of jurisprudence, civil partners and other *de facto* family forms do not enjoy a level of Constitutional protection equal to what has been termed the ‘constitutional family’.<sup>18</sup> As a result, it is arguable that it is only through a constitutional referendum that opens up access to civil marriage to two persons without distinction as to their sex that an equal level of constitutional protection will be enjoyed by families that are formed by same-sex couples.<sup>19</sup> This approach has been endorsed by

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Authority Press Statement, 3 December 2009, ‘Equality Authority Welcomes Introduction of Civil Partnership Bill as Important Step Forward for Civil Rights in Ireland’.

<sup>14</sup> See Denham J in *J. McD. v P.L.* [2009] IESC 81, [2010] 2 IR 199 (SC) 269.

<sup>15</sup> *State (Nicolaou) v An Bord Uchtála* [1966] IR 567, (1968) 102 ILTR 1.

<sup>16</sup> *Nicolaou*, [1966] 1 IR 567 at p. 643.

<sup>17</sup> For a comprehensive account of the distinction between marital and non-marital couples under the Irish Constitution see Louise Crowley, *Family Law*, (Roundhall Press: Dublin, 2013). Also, Judy Walsh and Fergus Ryan, *The Rights of De Facto Couples* (Irish Human Rights Commission, 2006) summarise a number of differences under the Constitution at pp. 79–83.

<sup>18</sup> *N and N v HSE, G and G and An Bord Uchtála* [2006] 4 IR 374 at 497 as per McGuinness J.

<sup>19</sup> It should be noted this is a matter of divergent debate within academic commentary. See for example, Conor O’Mahony, Ursula Kilkelly, Catherine O’Sullivan, Claire Murray, Aisling Parkes and Fiona Donson, *Submission to the Constitutional Convention on Same-Sex Marriage*, March 2013 which states that ‘there is nothing in the

important consultative processes including the Convention on the Constitution and the All-Party Oireachtas Committee on the Constitution.<sup>20</sup>

At the legislative level, the Oireachtas has legislated to protect *de facto* families, including civil partners.<sup>21</sup> The Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010 introduced the legal institution of civil partnership, which may be availed of by same-sex couples (and only by same-sex couples).<sup>22</sup> It also provides that certain legal relationships that may be entered into by same-sex couples in foreign jurisdictions may be recognised as civil partnerships under Irish law, including marriages in those countries and states that have removed bans on same-sex couples getting married.<sup>23</sup> Civil partnerships share many, but not all, of the features of civil marriage.<sup>24</sup> In particular, 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,<sup>25</sup> and protection against domestic violence. Although a number of provisions have been amended since 2010,<sup>26</sup> three key areas of legal difference continue to exist between civil partnerships and marriage:

- a. Marriage is protected ‘with special care’ by the Constitution,<sup>27</sup> while civil partnership is not provided for in the Constitution.
- b. Generally, under the law as it currently stands, only one civil partner may have a legal relationship with a child, and therefore civil partners and the children they raise are not regarded as a family. Except in a limited number of situations, civil partners and their children do not have the same responsibilities or rights that children, parents, or step-parents in a marriage have towards each other.<sup>28</sup>

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current text of the Constitution that precludes the Oireachtas from legislating for marriage equality, and no provision that could not be applied to a married same-sex couple in a perfectly workable way’.

<sup>20</sup> Convention on the Constitution (2013) *Third Report of the Convention on the Constitution: Amending the Constitution to Provide for Same-sex Marriage*; All-Party Oireachtas Committee on the Constitution (2006) *Tenth Progress Report: The Family*, at p. 87.

<sup>21</sup> Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010.

<sup>22</sup> Section 3 of the 2010 Act. That Act also legislates for the rights and responsibilities of couples – both same-sex and different-sex – who are cohabitants but who have not formalised their relationship through entering a civil partnership or a marriage. Those provisions are not relevant to this Policy Statement and are not considered further.

<sup>23</sup> Section 5 of the 2010 Act. The foreign legal relationships that have been recognised to date are listed in a set of five statutory instruments, one in each of the years 2010 to 2014 (S.I. No. 649/2010; S.I. No. 642/2011; S.I. No. 505/2012; S.I. No. 490/2013; and S.I. No. 212/2014).

<sup>24</sup> A useful summary in plain English is provided in: Irish Council for Civil Liberties and GLEN, *Know Your Rights: The Rights and Obligations of Civil Partners and other Same-Sex Couples* (2012). In 2011, the civil society organisation 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: Paula Fagan, *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).

<sup>25</sup> Although the remedies on maintenance, the division of shared assets, etc., are the same for civil partnership and marriage once a relationship has legally been ended, the conditions to obtain a dissolution or divorce are different.

<sup>26</sup> See, for example, in primary legislation: 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.

<sup>27</sup> Article 41.3.1.

<sup>28</sup> Two key exceptions in child and parental relationships concern (a) fostering and (b) tax on inheritance and gifts to children. Civil partners are not excluded from being foster parents of a child as the relevant regulations

- c. The requirements for the dissolution of a civil partnership are less onerous than the requirements for the dissolution of a marriage in the context of divorce.<sup>29</sup>

In the context of children and family relationships, in September 2014, the Government published a revised General Scheme of the Children and Family Relationships Bill 2014.<sup>30</sup> The General Scheme would, if enacted as currently drafted, provide that a birth mother and her civil partner, if the mother's civil partner consents, would be the parents of a child born as a result of assisted human reproduction using donor gametes.<sup>31</sup> The General Scheme would also, by amending the Adoption Act 2010, allow civil partners to jointly adopt a child.<sup>32</sup> Both the former Equality Authority and the Ombudsman for Children's Office welcomed the proposed provisions to extend the possibility of adoption to same-sex couples and provisions to provide for children when a civil partnership is dissolved.<sup>33</sup> As the analysis above reveals, to date, the policy of the Government has been to amend legislation on an incremental basis so that the practical responsibilities and rights, as far as the Constitution permits, of civil partners are similar to those of married couples. However, the Constitutional protection of marriage, which has been interpreted by the Courts as being intrinsically linked with family life, provides a stronger level of Constitutional protection to couples and the family based on marriage than to all other family forms.

#### 4. Developments in Regional and International Law

Under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Court of Human Rights (ECtHR) has considered the implications of the Convention for same-sex couples in relation to the right to marry under Article 12 and the right to family life under Article 8 of the ECHR. In *Goodwin v. United Kingdom*, the Court noted that there

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are silent on this matter: S.I. No. 260/1995 – Child Care (Placement of Children in Foster Care) Regulations, 1995. However, both civil partners cannot currently be adoptive parents as section 33 of the Adoption Act 2010 confines eligibility to be an adoptive parent to an individual or a married couple. Where a civil partner makes a gift or a bequest to the child of their partner, this is treated for tax purposes as the gift or inheritance of a parent: Revenue Commissioners, *Taxation and Civil Partnerships Frequently Asked Questions* (2014).

<sup>29</sup> Section 110(a) of the 2010 Act specifies that for a dissolution, the civil partners must have been living apart for at least two of the previous three years. Article 41.3.1(i) of the Constitution requires that spouses must have been living apart for at least four of the previous five years, and Article 41.3.1(ii) requires that a court granting a divorce must be satisfied that there is no reasonable prospect of reconciliation.

<sup>30</sup> The General Scheme of the Children and Family Relationships Bill published in September 2014 replaces a previous General Scheme which had been the subject of public consultation by the Oireachtas Joint Committee on Justice, Defence and Equality.

<sup>31</sup> Head 10(3) in the case of a child born as a result of assisted reproduction using eggs supplied by the mother and head 10(4) in the case of a child born as a result of assisted reproduction using eggs supplied by a donor.

<sup>32</sup> Heads 77–85.

<sup>33</sup> Ombudsman for Children, *Advice of the Ombudsmans for Children on the General Scheme of the Children and Family Relationships Bill 2014*, May 2014; Equality Authority, Submission to the Joint Oireachtas Committee on Justice, Defence and Equality Preliminary Observations on the General Scheme of the Children and Family Relationships Bill, April 2014. The former Irish Human Rights Commission also welcomed the proposals regarding same-sex couples and adoption: *Oral Statement of The Irish Human Rights Commission and Equality Authority (Designate) (National Human Rights Institution) to the Human Rights Committee on the occasion of the examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights*.

had been major social changes in the institution of marriage since the adoption of the Convention, and in particular that there was widespread acceptance of the marriage of transsexuals in their assigned [*sic*] gender.<sup>34</sup>

In the recent case of *Schalk and Kopf v Austria*, the ECtHR, citing *Goodwin*, noted that the right to marry enshrined in Article 12 of the European ECHR is not limited to marriage between persons of different sex.<sup>35</sup> In that case, Mr Schalk and Mr Kopf filed a complaint under the ECHR claiming that the Austrian authority's refusal to allow them to contract marriage violated Article 12 and Article 8, in conjunction with Article 14 (the prohibition against discrimination) of the ECHR. Importantly, although the ECtHR declined to rule that the same-sex applicants had a right to marry under Article 12, a significant element of its reasoning is that there is no consensus on same-sex marriage among States that are party to the ECHR.<sup>36</sup> The Court noted that 'marriage has deep-rooted social and cultural connotations which may differ largely from one society to another' and therefore concluded that it should allow a margin of appreciation to States in this regard.<sup>37</sup> Significantly, however, the Court found for the first time that same-sex couples relationships do come within the scope of 'family life' protected by Article 8 of the Convention.<sup>38</sup> Noting that 'a rapid evolution of social attitudes towards same-sex couples has taken place in many member States' the Court stated that the concept of 'family life' should be extended to include same-sex couples.<sup>39</sup> In addition, the ECtHR noted that the legal status of same-sex couples 'must ... be regarded as one of evolving rights',<sup>40</sup> perhaps signalling that its jurisprudence may evolve in favour of the recognition of the right to marry for same-sex couples in the future. In a context where a growing number of Council of Europe member states may begin to recognise the right to marry for same-sex couples, in the future, the ECtHR could adapt its jurisprudence given that the ECHR is interpreted as a living and dynamic instrument that is subject to change in light of shifting societal attitudes across the member States.<sup>41</sup>

Notably, the Council of Europe has begun to move away from the heteronormative definition of relationships and marriage in its most recent Conventions. For example, the Convention on the Adoption of Children of 2011<sup>42</sup> recognises same-sex couples, and provides that same-sex couples who are married to each other may be permitted to adopt.

The Charter of Fundamental Rights of the European Union, which was originally proclaimed in December 2000 and came into force as law on 1 December 2009,<sup>43</sup> recognises the right to marry and

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<sup>34</sup> *Goodwin v. United Kingdom*, Application no. 28957/95, at paras. 100 and 103.

<sup>35</sup> *Schalk and Kopf v Austria*, aApplication no. 30141/04, at para. 61.

<sup>36</sup> *Schalk*, at para. 58.

<sup>37</sup> *Schalk*, at para. 63.

<sup>38</sup> *Schalk*, at paras. 94 and 95. Previous case law of the European Court of Human Rights had supported rights for same-sex couples on the basis of the right to a private life; the *Schalk* judgment is significant in expanding the basis to the right to a family life.

<sup>39</sup> *Schalk*, at para. 92.

<sup>40</sup> *Schalk*, at para. 105.

<sup>41</sup> In the case of *Tyrer v. United Kingdom*, the ECtHR said: 'the Convention is a living instrument which ... must be interpreted in the light of present-day conditions', *Tyrer v. United Kingdom* Application no. 5856/72 at para. 31.

<sup>42</sup> European Convention on the Adoption of Children (Revised), CETS No.: 202, accessed on 12 January 2014 at <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=202&CM=8&DF=12/01/2015&CL=ENG>.

<sup>43</sup> *Official Journal of the European Union*, Series C, Vol. 53, No. 83, 30 March 2010, p. 389.



found a family.<sup>44</sup> The wording excludes any reference to ‘men and women’ having this right, which is found in the equivalent article of the ECHR.<sup>45</sup> The exclusion of a reference to ‘men and women’ was deliberate. Notably, the *Commentary of the Charter of Fundamental Rights of the European Union* states that ‘[m]odern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few states still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry’.<sup>46</sup>

These developments show increasing recognition that same-sex couples, including same-sex couples with children, are entitled to the protection of human rights law.<sup>47</sup>

## 5. Comparative Jurisprudence and the Equality Standard

In comparative jurisdictions the prohibition of same-sex couples getting married has now been lifted fully in 16 countries.<sup>48</sup> In addition, federal states, (internal) countries or cities have introduced marriage for same-sex couples in three countries with devolved powers or federal systems.<sup>49</sup>

In comparative jurisprudence that has considered the question of marriage equality for persons without distinction as to their sex, the Courts in a number of different jurisdictions have recognised that equality is not only about the material and practical benefits or duties that marriage endows on a couple in areas such as tax arrangements, immigration rights, or obligations for maintenance if a relationship ends, etc.; equality is also about the *status* it affords to those who are affected by its

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<sup>44</sup> Article 9 of the EU Charter of Fundamental Rights.

<sup>45</sup> Article 12 of the ECHR.

<sup>46</sup> *Commentary of the Charter of Fundamental Rights of the European Union*, at sect. 2.3. Accessed at [http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf) on 12 January 2014.

<sup>47</sup> Human rights law on discrimination has developed important jurisprudence in recent years. The ECtHR found that the prohibition of discrimination includes discrimination on sexual orientation, in *Motua v Portugal* (application 33290/96, at para. 28), in which a gay man had been excluded, on the basis of his sexual orientation by the Portuguese courts from parental responsibility for his daughter following his divorce. Significantly, that principle has been adopted outside of the European human rights system, and the *Motua* case was cited by the Inter-American Court of Human Rights in 2012 when it found that discrimination on the basis of sexual orientation applied in a case where a lesbian had been denied care and custody of her children by the Chilean authorities: *Atala Riffo and daughters v. Chile. Judgment of February 24, 2012. I/A Court H.R., Series C No. 239*. Also of relevance in the broader development of human rights standards on sexual orientation and gender identity are the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007 developed by a distinguished group of international human rights experts. Among those who participated in the development of the Yogyakarta Principles was Mary Robinson, former President of Ireland and former United Nations High Commissioner for Human Rights.

<sup>48</sup> Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay.

<sup>49</sup> Mexico (in Coahuila, Mexico City, and Quintana Roo); the United Kingdom (in England and Wales and in Scotland); and the United States of America. In the case of the USA, the situation at the time this Policy Statement is being written is highly fluid across a large number of states, with legal cases resulting in federal courts lifting state bans and some of these then being stayed on appeal. However, marriages of same-sex couples in 16 states and in the District of Columbia are recognised under Irish law (Washington, New York, Delaware, Maine, Maryland, Minnesota, New Jersey, Rhode Island, California, Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, Washington D.C., Hawaii, New Mexico).

presence or absence.<sup>50</sup> In its ruling on marriage equality in 1995, for example, the South African Constitutional Court stated that marriage equality ‘concerns both status and practical regulation’. In particular, the Constitutional Court 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 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.’<sup>51</sup>

The Constitutional Court found that the common law definition of marriage is inconsistent with the South African Constitution, and it ruled that the South African Parliament would have 12 months to amend the Marriage Act.<sup>52</sup>

This understanding of equality has not been confined to cases on marriage and same-sex couples. In Canada, a defining case on equality is *Egan v Canada*, where the Canadian Supreme Court used a term to capture this concern with inequality of status that is used in philosophical scholarship in examining the scope and meaning of equality: ‘recognition’.<sup>53</sup> The Court found that one of the criteria for determining that a distinction is discriminatory is ‘where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is [...] less worthy of recognition’.<sup>54</sup> In the first ground-breaking Canadian case on marriage equality, this lack of recognition was identified by the Court of Appeal for Ontario in *Halpern v Attorney General of Canada*, which found the exclusion of same-sex couples from marriage to be a breach of the Canadian Charter of Rights and Freedoms: ‘[e]xclusion perpetuates the view that same-sex relationships are less worthy of recognition than different-sex relationships’.<sup>55</sup>

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<sup>50</sup> The selected comparative jurisprudence in this part is not a comprehensive account of comparative jurisprudence where the question of access to marriage without distinction as to sex was considered; rather, this section deals mainly with specific cases on marriage for same-sex couples where the question of the meaning of equality was examined.

<sup>51</sup> *Minister of Home Affairs and Another v Fourie and Another*, Constitutional Court of South Africa, [2005] ZACC 19, at para. 72.

<sup>52</sup> It also ordered that if Parliament did not amend the Marriage Act, the Act would be read as including wording that would enable same-sex couples to get married (para. 162). O’Regan J, dissenting, said the court should have developed the common-law rule and should have ‘read in’ the words proposed with immediate effect rather than waiting 12 months to allow Parliament to act (para. 169).

<sup>53</sup> *Egan v Canada*, [1995] 2 SCR 513. On the philosophical examination of recognition as a dimension of equality, see: Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso: London, 2004); John Baker, Kathleen Lynch, Sara Cantillon and Judy Walsh, *Equality from Theory to Action* (Palgrave MacMillan: Basingstoke, 2004); Anne Phillips, *Which Equalities Matter* (Cambridge (UK): Polity Press, 1999); Nancy Fraser, *Justice Interruptus: Critical Reflections on the ‘Post-Socialist’ Condition* (New York: Routledge, 1997); Charles Taylor, ‘The politics of recognition’, ch. 2 in: Amy Gutmann (ed.) *Multiculturalism: Examining the Politics of Recognition* (Princeton NJ: Princeton University Press, 1994).

<sup>54</sup> *Egan v Canada*, [1995] 2 SCR 513, at p. 520, emphasis added.

<sup>55</sup> *Halpern v Attorney General of Canada*, [2003] O.J. No. 2268, at para. 107. This was followed by a similar decision in British Columbia in *Barbeau v. British Columbia (A.G.)* [2003] BCCA 406 (Court of Appeal for British Columbia 8 July 2003) and the following year in Quebec in *Hendricks v Quebec*, 2004 R.J.Q. 851 (2004).

In the United States, the Connecticut Supreme Court in 2008 has likewise considered the relevance of inequality where the only difference was in status, and indeed found that difference in status to be the basis for ruling that a ban on same-sex couples being allowed to marry was a breach of that state's constitution. In the case of *Elizabeth Kerrigan et al. v Commissioner of Public Health et al.* it noted that the state's law on civil union afforded same-sex couples the same legal rights as marriage, but 'because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm'.<sup>56</sup> At a federal level, in the case of *United States v Windsor*, the U.S. Supreme Court also drew attention to the recognition that the state of New York had afforded to Ms Windsor and her (now deceased) spouse when it provided legal recognition to their Canadian marriage:

'When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.'<sup>57</sup>

While the Irish Superior Courts have not fully considered the reasoning advanced in relation to the equality standard in a similar manner to the comparative jurisdictions cited above, the High Court acknowledged that the effect of denial of access to marriage equality is not solely practical or material in the case of *Zappone & anor. v Revenue Commissioners & ors.* Specifically, the Court noted that '[o]ne must remember that [...] there are two individuals at the heart of this case who have spoken eloquently of the sense of social exclusion they feel by virtue of being denied entry to the institution of marriage'.<sup>58</sup>

## 6. The Position of the Irish Human Rights and Equality Commission

In accordance with the 2014 Act, in undertaking many of its statutory functions, the definition of 'human rights' under the Act enables the Commission to consider human rights that may reasonably be inferred as being 'necessary to enable each person to live with dignity and participate in the economic, social or cultural life in the State'.<sup>59</sup> In addition to the rights and entitlements protected under the Constitution and the international and regional treaties the State has ratified, the Commission is entitled to formulate a view on new and emerging issues where dignity and participation in economic, social and cultural life can reasonably be inferred to arise. In addition, the Commission is empowered to 'protect and promote ... equality' which has not been fully defined under the 2014 Act.<sup>60</sup>

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<sup>56</sup> *Elizabeth Kerrigan et al. v Commissioner of Public Health et al.*, Connecticut Supreme Court, SC 17716.

<sup>57</sup> *United States v Windsor* 133 S. Ct. 2675 (2013), Kennedy J for the majority (the 'slip opinion' is available at [http://www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf), accessed on 12 January 2015). In January 2014 the USA Supreme Court decided that it would consider the question of whether states are required to license marriage between two people of the same sex. The submission of briefs and replies is to be completed in April 2015 – see: [http://www.supremecourt.gov/orders/courtorders/011615zr\\_f2q3.pdf](http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf).

<sup>58</sup> *Zappone & anor. v Revenue Commissioners & ors.* [2006] IEHC 404, [2008] 2 I.R. 417, 501.

<sup>59</sup> Section 2(1) of the 2014 Act.

<sup>60</sup> Section 10(1)(a) of the 2014 Act.

The Commission believes that the opening out of civil marriage to two persons without distinction as to their sex is a matter of equality and human rights. Specifically, in light of the Constitutional position of the family based on marriage, a constitutional referendum is welcome and necessary in the Irish legal context to debate the question of whether the right to civil marriage should be extended to all individuals without distinction as to their sex. In accordance with its equality and human rights mandate, the Commission considers that to ensure a comprehensive approach to the protection of family life for same-sex couples under the Irish Constitution, and to promote full marriage equality for all couples, without distinction as to their sex, the Government's proposal to hold a Constitutional referendum is an important step.

In addition to addressing the equivalence of legal protection afforded to the family life of same-sex couples under the Constitution, the Commission draws the Government's attention to case-law relating to the interpretation of equality from comparative jurisdictions. This case-law recognises that the equality standard encompasses not only practical rights and entitlements, but an additional element of *recognition* that flows from engaging in the institution of marriage. In Ireland, marriage is celebrated as a key part of an individual's and a family's participation in the social and cultural life of the State. By excluding couples from participation in a social and cultural institution on the basis of their sex, the Commission considers that Irish law fails to provide full *recognition* and equality of status for same-sex couples in a way that would underpin a wider equality for people within Irish society and would lead to a fuller recognition of their right to family life.

In addition, the Commission draws the Government's attention to the evolving human rights jurisprudence in this domain which is emerging from the European Court of Human Rights. In particular, the concept of the right to 'family life' has been extended to include couples in same-sex relationships to reflect the rapid evolution of social attitudes towards same-sex relationships. While a consensus does not currently exist on the question of the right to same-sex marriage within Council of Europe Member States, there is a possibility that a consensus will emerge in relation to this question in the coming years, and that the ECtHR will find in favour of the right to marry for same-sex couples, thereby potentially necessitating a Constitutional referendum on this question at a later date.