

Domestic Partnerships: A response to recent proposals on civil unions



Foreword

by Dr Martin Mansergh, TD



The Iona Institute has been established to contribute to and stimulate broadly-based and well-informed discussion of social issues. It comes from the perspective of evolving Christian values, which remain part of the foundations of this society by will of the people.

The moderate liberalism and ideals of social democracy, which lie behind many of the changes and reforms of the past 40 years, coexist with these foundations, and are no longer issues of much contention at this stage.

Legislators and the public are confronted with much bigger dilemmas, when faced with trying to reconcile the increasingly assertive strains of radical liberalism that is the consensus shared by many commentators with the still evident attachment of a majority of the population to long-established family norms that enjoy constitutional protection.

Nowhere is this more evident than in the discussion of legislative proposals for civil unions or partnerships, mainly for the benefit of same-sex couples. How to make these compatible with the constitutional primacy of the family, as generally understood, is not an easy task, and many proposals would involve draining of practically all of its substance what would only remain a formal primacy.

The Iona Institute paper on domestic partnerships sets out some of the research that underlines the value and benefit to society of the family, particularly in the context of bringing up children. The findings are obviously aggregate ones. What is the position on average is of course not incompatible with individual exceptions in either direction.

It is ironic that, whereas in an earlier phase of liberalisation the mantra was that Church and State should stay out of the bedroom, many of the proposals for the recognition of civil partnerships positively invite the State back into the bedroom. Determinants of social and tax status, outside of marriage, should, it is claimed, be based on the evidence of sexual intimacy. It could be argued that it is human companionship that it is in the interest of society to encourage, rather than sexual intimacy unconnected to procreation, which within and as regards the law is surely a private matter. In addressing one set of grievances, care should be taken not to create a new injustice. As I argued in my Irish Times column of 15 May 2004, people who look after each other over a long period, whether they are friends, siblings or sexual partners, deserve more favourable consideration from the State than they receive today, even though this would have important revenue costs, unless made good in some other way.

The Iona Institute is to be commended for putting forward for public discussion, prior to the drafting of legislation, a detailed alternative model of non-discriminatory domestic partnerships as an alternative to the civil partnerships as proposed by the Law Reform Commission.

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Domestic Partnerships:

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I. Executive Summary

What should be the general stance of the State towards marriage and the family? Should it continue to favour marriage, or should it make no distinction between family forms?

The latter view, what might be called ‘the family diversity view’ is held by those who say the State must recognise the reality that more and more people are living in families other than the one based on marriage. Those who advocate this view are also likely to say that in matters of family life personal autonomy must be the governing principle and therefore if people choose to live in family forms other than marriage, the State has no business discouraging this through family law, tax policy, social welfare etc.

An alternative view, what might be called the ‘pro-marriage view’, says there are sound reasons why the State and society should continue to favour marriage. These reasons are based on the fact that family form, or family structure, matters. It matters because different family forms produce different outcomes for their members. It matters because the family based on marriage tends to produce better results for its members than other family forms. Obviously there are plenty of exceptions, but in general this holds true. Families based on marriage tend, for example, to produce better educational outcomes for children and are less likely to suffer from poverty than other family forms.

UNICEF, in a recent document, quoted later in this paper, holds to the view that family structure does indeed matter.

The fact that family structure does matter, especially for children, would seem to indicate that the State must be very slow about heeding calls to move toward a position of strict neutrality between family forms. Obviously all families in need must be helped by the State, but there are still very solid, evidence-based reasons for continuing to favour marriage.

However, and despite this, it is the family diversity view that seems to be increasingly dominant in Ireland, certainly in legal and in some political and academic circles.

This has led to calls for couples who are not married to be given some or all of the rights and obligations of married couples. Last year both the Law Reform Commission and a group established by former Tanaiste and Justice Minister Michael McDowell produced papers outlining ways in which cohabiting couples might have their legal and other rights strengthened.

The position of The Iona Institute, for reasons to be discussed further on in this paper, is that the State should reject proposals to give cohabittees all or most of the same rights as married couples. However, there is an argument to be made for adopting the Limited Civil Partnership model advocated by the Working Group established by Michael McDowell on the proviso that this model be made available to any two people in a long-term caring, dependent relationship including, for example, a brother and sister.

Logically, there would seem to be no sound reason for restricting the benefits outlined under the Limited Civil Partnership model to couples in conjugal relationships only, as there would seem to be no reason in logic to prefer such relationships over non-conjugal ones.

The factor that should ‘activate’ the relevant rights and obligations should be the fact that a condition of economic dependence has come to exist within the relationship, and not whether the couples are sexually involved. A court would decide whether or not such a condition of dependence has come to exist and make its decisions concerning property, maintenance etc accordingly.

The scheme should also be made presumptive in nature, that is, it should come into being automatically after a set period of time has elapsed.

Summary of Recommendations

1. The State should not confer on cohabitantes a set of rights and obligations that would be the functional equivalent of marriage, or something very close to this, as it would seriously harm the current special standing of marriage which would in turn be socially harmful, in particular to children.
2. However, the State could consider conferring upon couples in caring, dependent relationships a limited set of rights, for example, a right to apply to court for maintenance in exceptional circumstances. The limited rights could be based to a large extent, and with only some modifications, on the ‘Limited Civil Partnerships’ model as outlined by the Working Group established by the Tanaiste.
3. These limited benefits should not be restricted to couples in conjugal relationships.
4. Such a scheme should be presumptive in nature and would come into effect possibly five to seven years after the commencement of an interdependent relationship. Consideration should be given to making it automatic upon the birth of a child.
5. A better name for this model would be ‘Domestic Partnerships’ rather than ‘Civil Partnerships’ as in the public mind ‘civil’ partnerships imply that the relationships involved are conjugal, whereas the term ‘domestic partnership’ better captures the fact that the benefits under a limited scheme would not depend on the existence of a conjugal relationship.

II. Marriage: Just one family form among others?

Is marriage worth supporting above and beyond other family forms, or is it just another ‘lifestyle choice’? What is sometimes called the ‘family diversity’ view holds broadly to this second position. It maintains that the State and society should have no more and no less an interest in the family based on marriage than in any other kind of family.

This view was well encapsulated by Gabriele Conen, former head of the Family Department at the Ministry for Family, Senior Citizens, Women and Youth in Germany: “The family can be lived in manifold ways. There is no ideological discussion any longer about what a family is. We don’t put up a model, but orientate our policy towards what exists.”

Vera Haberlova, chief analyst with the Prague-based Center for Empirical Research also typifies this view: “The State should take a realistic approach and stop thinking of a family as being just a marriage of two people for life and their children. Such an attitude will help fewer and fewer people. I don’t think the State can do much to reverse the trend, nor does it have any business acting as a kind of priest who tells people how to live together.”

An American family law scholar, Harry D Krause, writing in the Summer 2000 edition of Family Law Quarterly said: “An irrational, sentimental cocoon...has clouded logical discussion and intelligent debate...Today’s sexual and associational lifestyles differ so much that the State should not continue to deal with them as though they were one: the old role-divided, procreative marriage of history. That marriage may not yet be history, but it should be seen for what it has become: one lifestyle choice among many.”

Is marriage worth supporting above and beyond other family forms, or is it just another ‘lifestyle choice’?

He continues: “A pragmatic, rational approach would ask what social functions of a particular association justify extending what social benefits and privileges. Marriage, qua marriage, would not be the one event that brings into play a whole panoply of legal consequences. Instead, legal benefits and obligations would be tailored according to the realities...of the parties’ relationship.”

Professor Krause asks whether cohabiting couples and married couples should be treated differently and answers: “The rational answer seems clear: Married and unmarried couples who are in the same factual positions should be treated alike”.

This, of course, begs the question: Are married and unmarried couples in the same factual position? If they are, then there can be no rational reason for treating them differently. But if there is a factual, real-life difference between marriage, on the one hand, and cohabitation and other family forms on the other, then there may well be a rational justification for the current difference in treatment.

■ Ideological reasons for reducing the status of marriage: The autonomy and equality arguments

It might be argued that there are two ideological grounds for reducing the status of marriage, either by removing its benefits, which is an absolute undermining, or by giving its benefits to people in other family forms, which is a relative undermining.

The first ideological reason stems from belief in the primacy of personal autonomy. This maintains

that people should be able to live in the family form they prefer and that the State has no right to favour one preference over another.

The second reason stems from belief in equality, which would hold that all family forms have a right to be treated equally. This also leads to the conclusion that the State should not favour one family form over another.

Once again, however, both of these positions necessitate us asking whether an ideological attachment to notions of autonomy or equality is a good enough reason to reduce the status of marriage, or if there is a sound, real-life reason to favour marriage?

■ **Pragmatic reason for reducing the status of marriage: It is reflecting reality.**

It is often said that because the family is changing so rapidly the State must alter its policy to reflect this reality. As the table below shows, the first part of that statement is certainly true, although it can be exaggerated as marriage is still easily the most dominant family form. However, the second part of that statement is more contentious. It is hard to resist the argument that family policy must change somewhat to reflect the new reality, but the question is, by how much? Must it change by so much that the State will end up adopting a position of near or strict neutrality between different family forms?

Table: Marital Status of individuals aged over 15 (Source: Census 2006)

Married:	1,544,354
Single:	1,314,700
Cohabiting	243,526
Widowed:	190,359
Separated:	107,263
Divorced:	59,534

■ **Why the State supports marriage: Is it for moral reasons?**

Does the State support marriage purely for moral and/or religious reasons? It is true that Ireland is still a largely Christian country and certainly has a deep Christian heritage and it is also true that this is one reason for the current privileged position of marriage in the law. If this was the sole, or even the main reason for favouring marriage then it would be very difficult to sustain in a pluralist society where many people do not subscribe to Christian or other religious tenets and have a different moral view of marriage in any case.

However, marriage is a universal institution and exists in cultures where institutional religion has historically been very weak, for example, in China. This indicates that there are reasons other than moral ones, or in addition to moral ones, for supporting marriage.

■ **Marriage as a public institution**

People can obviously form themselves into families in many different ways. If the State regards all these myriad ways as essentially private affairs that produce the same outcomes for society, then there can be no reason, once moral ones have been discarded, for favouring marriage over other family forms.

However, suppose marriage does produce outcomes for its members that are better, on average, than the outcomes produced by other family forms. What if adults, and more importantly, children, who live in a family based on marriage, tend to have better educational outcomes, emotional outcomes, financial outcomes etc, on average, than members of other family forms? If this is so, then there would be a rational reason for both the State and society to go on favouring marriage, while assisting all families in need.

Social policy must be aimed at producing the best outcomes and not just supporting personal choices regardless of outcome. Supporting all personal choices equally, regardless of the real-world outcome of these choices could perhaps be justified if only adults were affected. But once children are also affected – children who are often powerless to affect the decisions made on their behalf – then the State and society have a duty to objectively assess which family forms produce the best outcomes for children.

■ **Marriage is about protection first, recognition second.**

In fact, the main reason marriage has evolved, and is a universal institution, is precisely because of its real-world effects. Children tend to do better when raised by both of their natural parents, and their natural parents are more likely to stay together if married. This being the case, both the State and society have an interest in creating incentives to marry.

We should not forget that it is mainly for the sake of children that the State has designed the raft of rights, benefits and obligations that attach to marriage. In other words, as a social institution marriage exists mainly to protect and nurture children. This is quite contrary to the impression that these rights etc attach to it as a kind of reward for two adults loving each other, or as the State's recognition of that love. If this was the case, then there would indeed be no good reason for them to remain attached to marriage alone and they could extend even to multiple (e.g. polygamous) partnerships.

But to repeat, they are attached to marriage because of the children most marriages produce and because of society's judgment, based on the evidence, that children fare better on average with their mothers and fathers, and that marriage is more stable than other family forms, all things being equal.

It is mainly because of children that married couples receive, for example, tax allowances, pension rights and inheritance rights that do not attach to non-married couples. It is assumed that at some point one or other spouse, usually the wife in practice, will drop out of the paid workforce, or opt for part-time work, in order to have more time for children. This is still a very common practice and it involves a huge financial sacrifice.

She (or he) must be compensated for this financial vulnerability in some fashion, and one way is to allow her to pass on her tax allowances to her husband (tax individualisation has greatly eroded this benefit), inherit his pension, and inherit his property free of tax. In this way, she can opt out of full-time work and be compensated for this fact.

If it were not for the connection between marriage and children, these benefits would make little public policy sense. Of course, it might be argued that non-married couples also have children, but to simply parcel out the benefits of marriage to all couples with children would remove the incentive to marry.

Children tend to do better when raised by both of their natural parents, and their parents are more likely to stay together if married.

III. How marriage benefits children

“The use of data on the proportion of children living in single-parent families and stepfamilies as an indicator of wellbeing may seem unfair and insensitive.

Plenty of children in two-parent families are damaged by their parents’ relationships; plenty of children in single-parent and stepfamilies are growing up secure and happy.

Nor can the terms ‘single-parent families’ and ‘stepfamilies’ do justice to the many different kinds of family unit that have become common in recent decades.

But at the statistical level there is evidence to associate growing up in single-parent families and stepfamilies with greater risk to well-being – including a greater risk of dropping out of school, of leaving home early, of poorer health, of low skills, and of low pay.

Furthermore such risks appear to persist even when the substantial effect of increased poverty levels in single-parent and stepfamilies have been taken into account”.

UNICEF Report Card 7: an Overview of Child Wellbeing in Rich Countries.

If marriage does indeed confer benefits on the children of married couples that, on average, are greater than those enjoyed by children in other family structures, then there is a compelling reason for the State to preserve the special status of marriage in the law and in taxation, especially if the State wishes its family policy to be child-centered.

Looking at empirical evidence, the intact marriage – one with a married mother and father – is the best, on average, for the child and the couple. The intact married family has proven the most beneficial in the areas of physical and mental health, education, income and the ability to form future families. Because of the effectiveness of the intact family for society and the common good, it deserves to be protected and held up as the ideal. What follows is a quick review of some of the literature which is drawn mainly from US sources because this is where much of the research in this area originates.

Health

Repeated studies report that children of divorced parents, even after they are grown, are significantly more vulnerable to depression compared to those from intact families.¹ Furthermore, the mental and physical well-being of children whose parents were never married is worse than those children from divorced families.² From depression to suicide, additional research shows that children who attempted suicide were more likely to live in non-intact families, even after controlling for factors such as age, income, race, and religion. In this case study over half of those children who had attempted suicide lived in houses with one or less biological parent, while only about a third of those who did not attempt suicide lived in such a setting.³

Marital disruptions, such as divorce, affect psychological well-being before and after the breakup.⁴ Children from single parent homes also have a greater risk of suffering from psychiatric disorders: nearly four times for girls and three times for boys.⁵ Also, adolescents in one-parent families are more than three times as likely to be referred to mental health services.⁶ In contrast, children from homes with intact married parents are happier and enjoy greater mental health.

Education

Educationally, single parent homes are the worst for the child even after controlling for factors such as income and the mother's education.⁷ For students, not only is there a direct correlation between single parent homes and less years of education attained,⁸ they also have lower academic achievement, receive lower grades, and are more likely to repeat grade levels.⁹ One study shows that a child who lives with both biological parents scored 103 in terms of math achievement, while a child living with a never married mother scored a 92, a fifteen point difference.¹⁰ The gap deepens when the single mother gives birth as a teen; one half of adolescents born to teen parents have failed a grade. One reason for the disparity between single and intact families is that single parents are not as able to spend their time, money, and attention to assist the child in his or her learning, which makes a significant difference, especially in the child's younger years.

Children of divorced parents perform worse in school compared to children from intact families.¹¹ Remarriage also hurts the child and cohabitation after divorce hurts the child even more.¹² Yongmin found that those children who experienced marital disruptions scored lower on academic tests and had lower academic aspirations before and after the disruptions.¹³ Another study shows that with divorce, educational achievement measures were consistently and cumulatively low across four years.¹⁴ Step families are better than other family structures, but when compared to the intact family, they still fall short in any one of the six areas of grades attained, educational expectations, math, reading, history, and science scores.¹⁵ Children from divorced families are also less likely to complete each stage of schooling. Less students complete high school, less go to college, and even less receive a degree.¹⁶

Children of divorced parents perform worse in school compared to children from intact families.

Children from intact married families obtain more years of schooling. Generally they receive more encouragement and their parents have higher expectations. Not only do students from married parent families go to school longer, but they receive better grades.¹⁷ In the US, teens from intact families earned an average Grade Point Average of 2.85, while those from non-intact families received a 2.6.¹⁸ Forehand found that adolescents from intact homes not only obtain higher grades, but they were also perceived by their teachers as being more socially competent.¹⁹ Teens from intact families are also the least likely to be expelled or suspended.²⁰

There is a direct correlation between education and future income. Children who receive less education earn lower incomes and are less likely to support their own child's education.

Income

Marriage is economically robust. According to the US Federal Reserve Board's Survey of Consumer Finance for the year 2000, incomes for families with children under the age of 18 are as follows: intact family (\$54,000), cohabiting (\$30,000), divorced (\$23,000) and the never married (\$9,400). Smith found that the median assets for couples reaching retirement was \$132,000 for the intact family, \$35,000 for those never married, \$30,000 for the divorced family, and \$7,600 for the separated.²¹ Not even combining the assets for both couples in a divorce equaled the intact family's assets. Looking at younger families with children under the age of eighteen, the intact family again had higher assets than any other family structure.²²

Intact families work more hours in the marketplace than any other family structure. However, having the benefits of partnership, the individuals do not necessarily work the most hours per person.²³

Marriage just makes economic sense, boosting many out of poverty and according to Smith's study doubling the chances for one to move out of a poor neighbourhood if currently residing in one.²⁴ Evidence also confirms the presence of a "marriage premium." A causal relationship exists between marriage and a 27 percent premium or wage increase.²⁵

Economically, other family structures repeatedly fall short in comparison to the intact family ... divorce is devastating to a family's income.

Economically, other family structures repeatedly fall short in comparison to the intact family. For example, divorce is devastating to a family's income. After divorce, nearly half of those families drop into poverty.²⁶ Data from the last 27 years show that after divorce, household incomes are cut between 28 to 42 percent, a cut that mimics the economic loss experienced during the Great Depression.²⁷ In addition, three-fourths of women who apply for welfare do so because of the effects of divorce.²⁸ Cohabiting and remarriage cannot make up for the loss.²⁹ The needs-to-income is worse for those kids living in a divorced home, compared to another study in which married mothers reported the highest income-to-needs ratio for their six month old babies.³⁰

Cohabiting couples also cannot compete financially with the intact family. One third of those who cohabit in the US failed to finish high school.³¹ They have lower earnings and are more likely to work longer hours.³² Also unlike the 5 percent of children from intact families that need public assistance, 25 percent of children from cohabiters need public assistance.³³ One reason for this phenomenon is that partners in a cohabiting relationship are less financially supportive of each other. Single mothers, however, do the worst financially. In a survey of seven western countries, families with single mothers and children had the highest rates of poverty.³⁴

Evidence has accumulated showing that present income affects a child's future propensity for income, thus continuing the cycle of poverty. Those with less income currently receive less education and, comparatively, a smaller future income. Furstenbert found that women whose parents divorced during childhood were more likely to be less educated, earn a lower income, be on welfare, and live in social housing at age 33 than those women whose parents did not divorce during childhood.³⁵

Family Itself

One's family of origin affects one's future family. Crowder found that female teens living with a single parent have a greater risk of teen pregnancy.³⁶ Adamczyk said that teenagers living with two parents were 20 percent less likely to have ever had sexual intercourse,³⁷ and Sieving found that teens living with their biological parents were 38% less likely to transition to sexual intercourse.³⁸ Teen boys from intact families also average the fewest sexual partners over a lifetime.³⁹

It seems that those who come from families with married parents believe more in the institution of marriage and trust that they can have a lasting happy marriage. Colman discovered that males whose parents never married were significantly less likely to marry and were more likely to cheat and walk out on their romantic partners. Likewise, women with never married parents were more likely to cohabit with and walk out on their partners. Women with divorced parents had higher rates of marriage and cohabitation, but they also had higher rates of dysfunction such as walking out on their partners and divorce.⁴⁰ Children, as part of a married intact family, can incorporate the successes of their parent's marriage in their own.

Differences not explained by income or education alone

Abundant studies prove the importance and effectiveness of the intact married family. However, some may disregard the studies arguing that the desired outcomes are a result of higher education or income, not the family. In fact, as shown earlier, there seems to be a relationship between the intact married family and higher incomes or education. **However, the family is not merely a result of these other factors.** When they are controlled for there is still something powerful found in family bonds. For example, Sampson and Laub studied adults who were delinquent in their youth but discontinued this behavior as adults. Of all the characteristics studied – their previous adult criminal record, income, and job stability – marital attachment was the greatest factor overall in protecting these men from again falling into criminal or deviant behavior.⁴¹

Velez and Cohen found that children who attempted suicide were more likely to live in non-intact families, even after controlling for factors such as age, income, race, and religion.⁴² And as noted, children from single parent homes do much worse in education even after controlling for factors such as income and the mother's education.⁴³

Regardless of income or education, family disruptions consistently result in negative conditions for the children and couples. On the other hand, the intact family continues to produce positive outcomes across many nationalities, income disparities, and education levels.

Couples and children thrive in the intact married family. They consistently do better in the areas of physical and mental health, education and income. Therefore, the family based on marriage deserves our protection.

IV. Cohabitation and its effects

According to the 2006 Census there were 121,000 cohabiting couples in Ireland. This is a 56 per cent increase in only four years. Twenty years ago the national Census did not even record this figure separately.

However, it is crucial at the outset to point out that while social trends in Ireland are causing cohabitation to increase, it is also the case that a great deal of the increase is due to the fact that a very high percentage of non-nationals living in Ireland cohabit. This is probably mainly a function of their age as most migrants are young people and are part of the age cohort most likely to live together before marriage. In other words, it is not Irish social trends alone that accounts for the huge jump in cohabitation in just four years.

It is also crucial to note that the population of cohabiting couples does not consist of the same people over long periods. In general people move into and out of cohabitation rapidly. This makes it quite different from marriage which is generally long-term.

- According to the only piece of Irish research in this area, only one in four cohabiting relationships in Ireland last seven years or more. ⁽⁴⁴⁾ The rest end in marriage or break-up. According to British figures, only 3pc of cohabiting relationships last 10 years or more. ⁽⁴⁵⁾
- Couples who cohabit before marriage are more likely to separate/divorce than those who do not cohabit first. ⁽⁴⁶⁾
- Slightly more than half of cohabiting couples do not have children. ⁽⁴⁷⁾
- Marriage is far more stable. According to British data, cohabiting couples are more than twice as likely as married couples to split up even after allowing for other socio-economic factors such as poverty. ⁽⁴⁸⁾

Why are couples who cohabit before marriage more likely to divorce than couples who don't first cohabit? It is difficult to answer this with certainty. However, it is reasonable to speculate that once this low-commitment, high-autonomy pattern of relating is learned, it becomes hard to unlearn.

Perhaps the most obvious explanation is that those people willing to cohabit are more unconventional than others and less committed to the institution of marriage. Such a group would be more likely to leave a marriage if it becomes troublesome. By this explanation, cohabitation doesn't cause divorce but is merely associated with it because the same types of people are involved in both phenomena. There is substantial empirical support for this position. Yet, in most studies, even when this "selection effect" is carefully controlled statistically, a negative effect of cohabitation on later marriage stability still remains. And no positive contribution of cohabitation to marriage has ever been found (Popenoe & Whitehead 2002). All this means that children born to cohabiting parents are more likely to experience a series of disruptions in their family life, which can have negative consequences for their emotional and educational development. Waite (2000) has concluded that the cumulative evidence clearly suggests that compared to marriage, uncommitted cohabitation – cohabitation by couples who are not engaged – does not compare well.

It may therefore be asked whether there is really any over-riding justification for providing a marriage-like legal structure for cohabitants in view of the above and this is quite apart from any effect it may have in reducing the incentive to marry.

Cohabitation mainly short-term and not marriage-like

The exact number of long-term cohabiting couples in Ireland is unknown. However, it is likely to be few. Only one quarter of cohabiting relationships in Ireland last into their seventh year, according to research quoted above, and in Britain only 3 per cent survive beyond ten years. In other words, the figure of 121,000 cohabiting couples in Ireland can be misleading. It can give the false impression that these couples are in permanent, long-term, relationships and it can then be erroneously concluded on this basis that they should be given certain marriage-like benefits. To repeat, the vast majority of such couples either marry or go their separate ways.

V. Current Civil Partnership proposals

As mentioned, two papers have recently been published that outline possible options for dealing with cohabiting couples. One, produced by the Law Reform Commission (LRC), is called ‘Rights and Duties of Cohabitants’. The second was produced by a Working Group established by former Tanaiste and Justice Minister, Michael McDowell, and is called an ‘Options Paper Presented by the Working Group on Domestic Partnerships’. It is this second document that will most concern us here, especially in view of the fact that Taoiseach Bertie Ahern confirmed in July that the Government was examining this paper in particular.

The Working Group looked at a number of options including a Full Civil Partnership scheme, a Limited Civil Partnership scheme, and a so-called ‘Presumptive Scheme’. It also examined whether to extend the rights and benefits to individuals in caring, dependent relationships, but who are not sexually involved.

The great majority of cohabitees eventually marry or split up, usually after only a few years together

This paper will now look at some of those proposals, comment on each, and then propose its own way forward.

1. Full Civil Partnerships

Summary

The Full Civil Partnerships option outlined by the Working Group would give to cohabiting couples who register their relationships virtually all of the same benefits as married couples.

As the Working Group itself points out, opposite-sex couples who want the rights and obligations of marriage have the option of civil marriage. This opens to question why the option of Full Civil Partnerships should be offered at all. As it says: “...full civil partnership is already available to opposite sex couples in the form of civil marriage. There are no obvious additional benefits to introducing an alternative to marriage in the form of a civil registration scheme for cohabiting opposite-sex couples, apart from offering a marriage-identical commitment without the marriage title to those couples who may object to marriage *per se*.”

It also points out that creating a scheme that is marriage in all but name might be “vulnerable to constitutional challenge on the ground that it constitutes an attack on the institution of marriage by providing a competing institution.”

Comment

Why do couples choose to cohabit? There is no proper research in Ireland that answers this question. However, we do know that most cohabiting couples marry or break-up and very few see cohabitation as a permanent alternative to marriage.

Do they want the benefits and obligations of marriage before they marry? We don't know. But if they do, it is difficult to see why they wouldn't simply get married. Perhaps they feel they are not ready for marriage. But again, entering a Full Civil Partnership scheme would be tantamount to getting married. If on the other hand a couple has a philosophical objection to marriage, then why would they want marriage in all but name which is what Full Civil Partnership represents?

2. Limited Civil Partnership

The other major option offered by the Working Group is called Limited Civil Partnership. It is a greatly scaled down version of Full Civil Partnership. There are no automatic entitlements. It would not extend the tax benefits of marriage to those in a Limited Civil Partnership.

It would, however, entitle someone who had availed of such a scheme to apply for maintenance in the event of the break-up of their relationship. This would only be granted in "exceptional circumstances". The same would obtain with respect to succession rights. A bereaved resident partner could "apply to the Court to argue that proper provision has not been made for him or her in the deceased's will, or on intestacy." (For full details of the Working Group's Limited Civil Partnership model, see the appendix).

Comment

Due to the fact that the Limited Civil Partnership model differs significantly from marriage compared with the Full Civil Partnership option, the objection to it on the grounds that it undermines the special status currently enjoyed by marriage has less purchase. Given the lesser, even minimal extent to which it would adversely affect marriage as a public institution, it can be claimed that the social justice argument in favour of such a scheme becomes compelling. This viewpoint, essentially, is that individuals in a caring, dependent relationship should have certain protections under the law in the event of their relationship breaking up.

3. Presumptive Scheme

This brings us on to another option put forward by the Working Group, which is the so-called 'Presumptive Scheme'. The Working Group describes the justification for this option as follows: "The Presumptive Scheme is designed to protect the vulnerable partner in a relationship in the absence of any other formal recognition of that relationship. It would apply at the end of the relationship either through the death of one of the partners or the breakdown of the relationship. At the end of the relationship it would be open to either partner to make an application to court for relief under the provisions of the Presumptive Scheme with each case being considered on its own merits." Overall, the benefits available under the Presumptive Scheme are as per the Limited Civil Partnership scheme.

The chairperson of the Working Group, Anne Colley, addressed the issue of presumptive schemes at a seminar organised by the Law Reform Commission on December 1, 2006.

She refers to the fact that couples can regulate their affairs through private contracts, but adds: “The Working Group recognises that many couples will never make contracts for all kinds of reasons, such as a lack of awareness of the legal consequences of an unregulated relationship, unwillingness of one or both to make any formal commitment, one or other party being already married to someone else or an intention that the relationship be casual or transient. As a result, vulnerable partners in unregulated relationships enjoy little, if any, legislative protection at present and the consequences, financial and otherwise, at the end of a long relationship owing to death or break-up may be catastrophic. Hence the Working Group agrees in principle with the Law Reform Commission recommendation for a Presumptive Scheme for both opposite-sex and same-sex couples”.

The Presumptive Scheme would automatically apply to all cohabiting couples after a set qualifying period. Where there is no child, the Working Group suggests that this period be three years. When a child is born, the Working Group suggests that the scheme come into effect immediately. The Law Reform Commission, however, challenges the view that the birth of a child should bring the scheme into operation. We are of the view that consideration should be given to making the scheme automatic upon the birth of a child.

The personal autonomy objection to the Presumptive Scheme

It can be objected that the Presumptive Scheme violates the concept of personal autonomy in a way a voluntary civil partnership scheme does not. Surely it is against personal autonomy to simply impose such a scheme upon a possibly unwilling couple?

The counter-argument is that one partner in a relationship may be in a position of vulnerability and may want to enjoy some of the rights that could be obtained under, say, the Limited Civil Partnership scheme, but cannot, because the other partner refuses to enter such a scheme. Should the willing partner be denied certain protections of the law because of the unwillingness of the other partner? Is this fair? On the other hand, it can be argued that both individuals entered the relationship knowing that certain rights and obligations were not available to them and therefore it would be excessively paternalistic of the State to impose those rights and obligations.

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Response: Extend the Presumptive Scheme qualifying period

Currently the proposal of the Working Group is that the Presumptive Scheme should come into operation once a couple have lived together for three years or more. The personal autonomy argument taken on its own suggests that there should be no Presumptive Scheme at all. However, the ‘vulnerable partner’ argument is also compelling. Perhaps the best way to balance the two arguments is to extend the qualifying period to at least five years.

However, once a child is born it might be appropriate to impose the scheme straight away in light of the child’s vulnerability.

Should we discriminate in favour of sexual relationships?

Any two people may be in a caring, dependent relationship, or to use another term, an interdependent relationship. They need not be in a sexual/conjugal relationship. They could, for example, be an elderly brother and sister sharing the same house.

Both the Law Reform Commission, and the Working Group recommend that the Presumptive Scheme, and indeed both voluntary schemes, i.e. the Full and the Limited Civil Partnership models, be considered only for couples in sexual relationships.

If the intention of the Presumptive Scheme is to take care of people who have become economically dependent upon their partners, then what is the relevance of them being in a sexual relationship?

This seems odd, especially in the case of the Presumptive Scheme. If the intention of the Presumptive Scheme is to take care of people who have become economically dependent upon their partners, then what is the relevance of them being in a sexual relationship? In other words, why should conjugal relationships be favoured over non-conjugal relationships? To put it yet another way, what is so special about sex that the State will give certain legal protections to couples in a sexual relationship, but not to couples, say the aforementioned brother and sister, who are not in one?

It must be recalled that the State, and society, has little or no compelling interest in whether a couple are having sex or not. Its interest only really arises when a child results. To repeat a point made earlier in this document, the State does not provide marriage with certain benefits because a husband and wife are in a sexual relationship, but because of the children that normally result from a marriage.

Children can, of course, result from non-marital relationships, but again to repeat, the State encourages marriage because it wants parents to publicly commit to one another for the sake of their children, and to stay together for their sake. Marriage provides the best chance of this happening.

But to privilege sexual relationships for no reason other than that they are sexual, makes little or no sense. There is a much more compelling public policy interest, a more rationally defensible reason, in giving interdependent relationships per se, certain benefits, as per the Limited Civil Partnership model.

There may be rational grounds for discriminating in favour of marriage, but there appears to be no rational grounds for discriminating in favour of sexual relationships.

Domestic, not Civil Partnerships

The term ‘civil partnership’ implies in the public mind a sexual relationship. This would not capture what is entailed in giving interdependent relationships per se, certain rights and obligations. Therefore the term ‘domestic partnerships’ would seem a more accurate one to use in this context.

A practical objection to Domestic Partnerships and a reply.

The Working Group points out that there is very little research in Ireland on the topic of non-conjugal relationships. It also says it received very few submissions on same. Furthermore, it points out that people in non-conjugal relationships can come to private legal arrangements

The following counter-objections can be raised. The first is that there is also very little research on cohabittees. Secondly, very few submissions were received from cohabiting couples as distinct from groups or individuals speaking on their behalf. Finally, if people in non-conjugal relationships can come to private arrangements, so can individuals in conjugal relationships.

In other words, the objections to setting up a scheme for non-conjugal relationships apply with almost equal force to schemes for conjugal relationships.

In any event, and as the Working Group points out, interdependent relationship schemes already exist in a number of countries, for example, Alberta, Canada, or New South Wales in Australia,

A registration ceremony?

Given that the Presumptive Scheme, the one favoured by this paper, would not require registration, a registration ceremony would appear to be unnecessary.

Conclusion

The State should continue to favour marriage because of its undoubted social benefits. However, there is an argument to be made for extending a strictly limited set of marriage-like benefits to non-married couples so long as the qualifying criterion isn't the existence of a conjugal relationship and is rather the existence of economic dependence.

Consideration could be given to a Presumptive Scheme so long as the qualifying period for this is at least five years.

The above approach would appear to best balance the duty of the State to support marriage with its duty of care to all couples in interdependent relationships.

Appendix

Limited Civil Partnership Model as set out by the Working Group

6.28.1 Property Rights

Limited civil partners (registered partners) should be entitled to apply to court for the right to reside in the couple's home, to the exclusion of the other partner, in exceptional circumstances.

Registered partners should be entitled to make an application to court, following the dissolution of the partnership, for a property adjustment order in exceptional circumstances, and to apply for the right to reside in the home until the property adjustment application is decided.

In considering whether a property adjustment order should be granted by a court, the following factors would be relevant: the financial and non-financial contributions made directly or indirectly by or on behalf of the parties in the relationship to the acquisition; conservation or improvement of any of the property of the parties; and the contributions made by either of the parties to the relationship, or to the welfare of the family. A registered partner must issue any such proceedings within one year from the date of dissolution of the relationship.

The extension of the provisions of the Family Home Protection Act 1976 with respect to the domestic residence of a couple who have registered a limited civil partnership.

6.28.2 Succession Rights

The establishment of a discretionary relief allowing a bereaved registered partner to apply to the Court to argue that proper provision has not been made for him or her in the deceased's will, or on intestacy. This would be similar to an application under s.117 of the Succession Act 1965 (such applications must be made within 6 months of the first taking out of representations to the deceased estate).

The consequential amendment of Order 79 of the Rules of the Superior Courts to allow a limited civil partner to extract a grant of administration intestate, or a grant of administration with will annexed, to the estate of their deceased partner at the discretion of the Probate Office and on production of such proofs as may be required. A registered partner should be placed above siblings of the deceased in the list of persons entitled to extract such grant.

6.28.3 Maintenance Rights

The extension of the Courts of a discretionary power to award compensatory maintenance to one of the partners in exceptional circumstances where it considers it just and equitable to do so. A limitation

period of one year from the date of the break-up of a relationship should apply to this.

Where there are children of the relationship and in a context where there is no ongoing maintenance for the custodial parent, the Court should also take into account the child rearing costs incurred by the custodial parent when making a maintenance order under the Family Law (Maintenance of Spouses and children) Act 1976.

6.28.4 Social Welfare

The retention of the current arrangements for registered partners under the social welfare code.

6.28.5 Pensions

There should be no change to the current law regarding private sector pensions, as many schemes already give discretion to trustees to benefit cohabitants.

The amendment of public service spouses and children schemes to allow for the payment of a survivor's pension to a financially dependent partner in circumstances where there is no legal spouse and where a person nominates a limited civil partner as a beneficiary.

The Working Group believes, and is in agreement with the Law Reform Commission, that pension adjustment orders, which are currently available on marital breakdown, should not apply to limited civil partners on the break-up of their relationship.

6.28.6 Taxation

The Working Group is not proposing any change to the treatment of registered partners for income tax purposes nor does it favour any change to the law governing capital gains tax.

Registered partners would be placed in Group Threshold 1 for Capital Acquisitions Tax. Cohabiting couples are already exempt from CAT in respect of the principal residence they shared with, and either inherited or received by way of a gift from, their partner, under certain conditions.

The entitlement of registered partners to the same relief as 'related' persons for the purposes of stamp duty (50% relief).

The above two reliefs should be subject to anti-avoidance and appropriate clawback provisions.

6.28.7 Health and Other Miscellaneous Issues

The inclusion of registered partners within the category of persons, mentioned in the Medical Council Guidelines, with whom a doctor should confer when treating a seriously ill patient who is unable to communicate or understand.

The Powers of Attorney Act 1996 should not be amended to include registered partners as mandatory notice parties for the purposes of an enduring power of attorney. (Cohabitants can currently be appointed attorneys but are not within the relevant category of persons who must be notified if the enduring power is to be activated and registered in the High Court.)

The extension of section 47(1)(c) of the Civil Liability Act 1961 (as amended) which deals with civil actions for wrongful death, to include limited civil partners within the definition of dependents.

Access to medical information and records is governed by the contract between a patient and their medical practitioner, and the Data Protection Acts 1988-2003, the Freedom of Information Acts 1997 and 2003, and by discovery in court proceedings. The Medical Council guidelines state that information must not be disclosed to any person without the consent of the patient. The Working Group is of the view that there should be no change to the present position as regards access to medical records, which provisions apply equally to spouses.

6.28.8 Child Issues

Adoption: The Working Group is of the view that the eligibility that married couples have to jointly adopt should not be extended to registered partners. However, while the eligibility to be considered for adoption should not be extended to registered partners as a couple, it should be noted that single people are eligible to be considered for adoption. Accordingly, it would be possible for one of the partners in a limited civil partnership to apply to adopt a child under the current rules.

6.28.9 Immigration (resident permit, citizenship)

A limited civil partnership can be offered as proof of a durable relationship for immigration purposes under the EC Free Movements of Persons Directive.

6.28.10 Testifying against a partner

Section 3 of the Evidence (Amendment) Act 1853 provides that a spouse cannot be compelled to give evidence in a civil case of any communication made to the other spouse during the course of their marriage. Section 22 of the Criminal Evidence Act 1992 provides that the spouse of an accused is generally not compellable to give evidence in a criminal case at the suit of the prosecution. There are however a number of exceptions to this general rule such as sexual offenses, violence or threat of violence, when the crime is perpetrated against the spouse or child of the spouse or a crime committed against any person under the age of 17. The Group does not recommend that registered partners should come under the scope of the 1853 or 1992 Act.

6.28.11 Debts

Responsibility for a partner's debts would not be extended to registered partners.

6.28.12 Domestic Violence

Couples registered under a limited civil partnership scheme would be treated as spouses for the purposes of domestic violence legislation.

6.28.13 Dissolution

There are two aspects to the dissolution of a limited civil partnership. One is establishing when the relationship ceases to exist, and the second is the financial or property settlement, if any, following the break-up of the relationship. The Working Group proposes that an immediate dissolution of the relationship would take effect if both parties agree. If there is no such agreement, the dissolution would take effect after three months from notice being given by one party to the other and the registration of such notice. This three month period is for the partners to reflect and allow them to consider and if possible reach agreement, or begin the process of reaching agreement on a settlement. This timeframe reflects the restricted nature of limited civil partnership. The Courts should not be involved in making decisions on whether there has been a dissolution of the relationship or not, only in determining the material relief after dissolution. An application to court for relief must be brought within one year from the date of dissolution.

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