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## CIVIL UNIONS BILL 2006

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### EXPLANATORY MEMORANDUM

#### *Purpose of Bill*

The purpose of this Bill, as its long title outlines, is to provide for the recognition and registration of civil unions entered into between two persons of the same sex. A civil union is defined for this purpose as a “conjugal status relationship”.

A status relationship is similar to a contractual relationship in that it is a voluntary agreement between persons of full legal capacity. Unlike a contract, however, the terms and conditions of a status relationship are pre-determined by law and are not negotiated between the parties.

Marriage is a status relationship and not a contract. By virtue of common law rules, buttressed by section 2 (2) (e) of the Civil Registration Act 2004 and, more importantly, the constitutional understanding of marriage, persons of the same sex cannot marry each other.

This Bill seeks to create an equivalent status relationship for the benefit of persons who are of the same sex. It provides that, in most respects, the rules of law applying to marriage will apply also to civil unions.

Article 41.3.1 of the Constitution states that: “The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack”.

It is considered that this Bill would not offend against that subsection since the institution it seeks to create is solely for the benefit of those who cannot marry and so runs parallel to marriage rather than in competition with it.

This view is buttressed by the conclusions set out in the Options Paper presented by the Working Group on Domestic Partnership to the Tánaiste and Minister for Justice, Equality and Law Reform in November 2006. In dealing with options for opposite sex partnerships, under the heading “Option of Full Civil Partnership”, the Working Group has this to say:

#### 6.32 Comment

Full civil partnership would have the benefit of according status and recognition to cohabiting couples. However, 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. Introducing an alternative which is equivalent or closely analogous to marriage for opposite-sex couples is vulnerable to constitutional challenge on the ground that it constitutes an attack on the institution of marriage by providing a competing institution.

6.32.1 Ostensibly there may be public policy reasons for making an option not called marriage available to opposite-sex couples because it introduces the possibility of greater legal certainty and protection for those not willing to marry. Nevertheless, the Working Group is not convinced that there are many cohabiting opposite-sex couples who are unwilling to marry but may be willing to enter a registration scheme which has all the attendant obligations of marriage.

On the other hand, so far as same sex couples are concerned –

7.21 Full civil partnership entails the State introducing a civil registration scheme, which extends the full range of rights and duties of marriage to same sex couples who choose to register their partnership. The parties must not be married or in an existing registered partnership and must not come within the prohibited degrees of relationship. Full civil partnership must be an exclusive union between two people aged 18 years or more. The notification and other formalities before registration are the same as those for civil marriage. The partnership must be formally registered in the same way as civil marriage. All the legal provisions available on the breakdown of marriage apply to the breakdown of full civil partnership. Full civil partnership can only end on death or dissolution by a court and dissolution is subject to the same requirements as divorce. While there is no constitutional impediment to a less onerous dissolution regime than divorce for full civil partnerships, the Working Group is of the view that the two institutions, i.e. marriage and full civil partnership which are equivalent in terms of the consequent rights and duties, should be subject to the same dissolution requirements.

#### 7.22 Legal Consequences

The legal consequences for the parties would extend to all the elements of marriage and family law including both public and private law and parental responsibilities. The introduction of full civil partnership for same-sex couples would ensure equivalent treatment under the social welfare and tax codes. The same treatment the State affords to married couples would be afforded to full civil partners so that husband or wife in relevant legislation would be read to include a full civil partner. The legal rights and responsibilities of registered partnerships would be the same as those of civil marriage. Full civil partnership would put same-sex couples on an equal footing with opposite-sex married partners, with the notable exceptions of not ascribing a marital identity and not offering the protection the Constitution affords to marriage and family life.

#### 7.23 Comment

Full civil partnership falls short of full equality for same-sex couples as it excludes such families from the protection given to the family in the Constitution. While there is a consensus on the granting of as full recognition as possible to same-sex couples, in the absence of civil marriage the full civil partnership option is seen by the Group as one which would address the majority of the issues encountered by same-sex couples.

7.23.1 Full civil partnership for same-sex couples, in contrast with opposite-sex couples, is viewed by the Group as a distinct institution separate from, and not competing with marriage. The Group believes that full civil partnership for same-sex couples does not suffer the same constitutional vulnerability as full civil partnership for opposite sex couples.

7.23.2 Introducing a full civil partnership scheme in Ireland would achieve equivalence in this area with Northern Ireland where the Civil Partnership Act is in force since December 2005.

This Bill is proposed on an analysis that accords with the observations of the Working Group. It proposes “a civil registration scheme which extends the full range of rights and duties of marriage” for same sex couples.

It does so on the basis that, as the Working Group concludes –

- there are no obvious additional benefits to introducing an alternative to marriage in the form of civil registration for opposite-sex couples, apart from offering a marriage-identical commitment without the marriage title to those couples who object to marriage per se,
- introducing an alternative which is equivalent or closely analogous to marriage for opposite-sex couples is vulnerable to constitutional challenge ,
- like the Working Group, we are “not convinced that there are many cohabiting opposite-sex couples who are unwilling to marry but may be willing to enter a registration scheme which has all the attendant obligations of marriage”, and
- quoting the Taoiseach Bertie Ahern TD speaking in April 2006: “Our sexual orientation is not an incidental attribute. It is an essential part of who and what we are. All citizens, regardless of sexual orientation, stand equal in the eyes of the law. Sexual orientation cannot, and must not, be the basis of a second-class citizenship. Our laws have changed, and will continue to change to reflect this principle.”

#### *Provisions of Bill*

*Section 1* defines a civil union as a conjugal status relationship, by virtue of which two persons of the same sex as each other receive the benefits and protections, and are subject to the responsibilities, of parties to a marriage.

*Section 2* assimilates the general law as to capacity to enter a civil union with capacity to marry. The impediments to marriage are underage, previous valid marriage, same sex, lunacy and prohibited degrees of relationship. These will apply to civil unions subject to the modifications that persons of the opposite will have no capacity and the prohibited degrees are somewhat simplified.

The rule against bigamy is also modified by specifying that a person who is a party to a subsisting civil union or marriage has no capacity to enter a civil union or to marry.

*Section 3* assimilates the law as to the notification, solemnisation and registration of a civil union to the law applicable to marriage. Part 6 of the Civil Registration Act 2004 will apply accordingly.

However, it is specified that nothing in the Bill will require a “registered solemniser” who is not a registrar of marriages to solemnise a civil union if the religious body of which he or she is a member has no recognised form of ceremony for the purpose of if he or she has a conscientious objection to so doing.

“Registered solemniser” is the term introduced by the Civil Registration Act 2004 to describe persons appointed and authorised to solemnise marriages. It includes the local registrar of marriages and also those clergy of various religious denominations who apply for the purpose.

*Section 4* deals in five subsections with the benefits, protections and responsibilities of parties to a civil union. The essential purpose is to provide that parties to a civil union are entitled to the same rights, privileges and benefits and are subject to the same obligations, penalties and other sanctions, whether deriving from statute law, common law or an administrative scheme, policy, rule, procedure or practice, as those to which spouses in a marriage are entitled or subject.

In addition, parties to a civil union are to be included in any definition or use of terms such as “married couple”, “spouse”, “family”, “dependent”, “next of kin”, and the like. And the expressions “brother-in-law”, “daughter-in-law”, “parent-in-law”, “sister-in-law”, “son-in-law”, “step child” and “step-parent” and similar expressions will include relationships arising by virtue of a civil union as well as relationships arising by virtue of a marriage.

*Subsection (4)* states in particular that parties to a civil union are responsible for the support of one another to the same degree and in the same manner as is provided by law for married persons.

And, by *subsection (5)*, the rights and obligations of parties to a civil union with respect to a dependent child are the same, *mutatis mutandis*, as those of a married couple with respect to such a child. A “dependent child” means –

- a child adopted by both parties or in relation to whom both spouses are *in loco parentis*, or
- a child of either party or adopted by either party or in relation to whom either spouse is *in loco parentis*, where the other party has treated the child as a member of the family,

who is under the age of 18 years. It also includes children above that age in full-time education and children with a mental or physical disability to such extent that it is not reasonably possible for the child to maintain himself or herself fully.

Finally, *subsection (6) of section 4* deals, to the extent that the law already recognises them, with pre-nuptial agreements. It states that persons who are entering or who are parties to a civil union may agree particular terms and conditions with respect to their union in the same manner, to the same extent and with the same effect in law as persons who are entering a marriage or who are married.

*Section 5* deals with foreign civil unions and foreign same sex marriages. It creates a rule for the recognition of such relationships under Irish law in terms that are similar to the existing rules for the recognition of foreign marriages.

Those rules require that, for a foreign marriage to be recognised as valid:

- the formalities of the place in which it was celebrated must be complied with, and
- the parties must have had capacity under the law of their domicile.

As applied here, the rule states that, where a foreign jurisdiction provides for same sex marriage or civil union, then that relationship shall be recognised as a civil union if the same rules as would, *mutatis mutandis*, apply to the recognition of a marriage solemnised outside the State are satisfied both as to the capacity of the parties and the obligation to meet any requirements for the formal validity of the relationship.

*Section 6* assimilates various aspects of existing family law to civil union relationships. These include rules relating to annulment, separation, divorce, child custody and support and property division and maintenance.

However, the rules relating to annulment on grounds of non-consummation and judicial separation on grounds of adultery are excluded since neither concept, as defined in Irish law, is applicable to same sex relationships.

The section stipulates that the Circuit family Court and the High Court, will, as with marriage breakdown cases, have concurrent jurisdiction. Various existing rules relating to the venue of the courts hearing family law cases, the transfer of business between courts, the hearing and conduct of proceedings, and so on, are also applied to civil union cases.

It is stated that such proceedings shall follow the same procedures and be subject to the same substantive rights and obligations as are involved in proceedings relating to a marriage.

In addition, provision is made for appropriate rules of law to deal with the jurisdiction of the courts in relation to civil unions solemnised outside the State and the recognition of the judgments and orders of the courts of other states in proceedings relating to civil unions.

*Section 7* permits the Minister for Justice, Equality and Law Reform by regulations to make such general or specific adaptations of or modifications in other statutes, “in conformity with the purposes, principles and spirit of this Act”, as are necessary or expedient in order to enable such enactment to have the same force and effect in relation to civil unions as it does to marriages. He or she may also by regulations adapt forms and the information to be contained in any notice to be used for any purpose to which this Bill relates.

*Section 8* has two substantive provisions dealing with adoption. *Subsection (1)* states that parties to a civil union who are living together may apply to adopt a child. At present only a married couple or a single individual (regardless of sexual orientation) can adopt. There is no provision for joint adoption save by married couples.

*Subsection (2)* makes a general amendment to the law of adoption by setting out, for the first time, adoption principles or criteria, to be of general application in all adoption cases. The subsection provides that, in any decision on or relating to an application to adopt a child, whether made by parties to a civil union or otherwise, due regard shall be had to –

- the principle that the first and paramount consideration is the best interests and welfare of the child, throughout his or her life,
- the concomitant principle that no person, whether by virtue of membership of a particular class of persons or otherwise, has a right to adopt a child or any particular child or a right to preferential consideration of his or her application to adopt a child or any particular child,
- the child’s ascertainable wishes and feelings regarding the decision, considered in the light of the child’s age and understanding,
- the child’s particular needs,
- the likely effect on the child, throughout his or her life, of having ceased to be a member of the original family and become an adopted person,
- the likely effect on the child, throughout his or her life, of having become an adopted child of the person or persons who applied to adopt that child,

- the child's age, sex, religion or religious background, national origin and cultural and linguistic background and any other relevant characteristics,
- any harm which the child has suffered or is at risk of suffering,
- the relationship which the child has with relatives and with any other relevant person, including –
  - the likelihood of any such relationship continuing and the value to the child of its doing so,
  - the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop and otherwise to meet the child's needs,
  - the wishes and feelings of any of the child's relatives, or of any such person, regarding the child,
- the child's right to know the identity of his or her parents and as far as practicable to be brought up by his or her parents and each of them or by other family members.

*Section 9* deals with cohabitation rather than civil unions. It provides that enactments, rules of law and administrative schemes, practices and the like that confer rights, privileges or benefits or imposes obligations, penalties or other sanctions on a cohabiting couple or either of them, whether as between themselves or as regards other persons, shall operate to the same effect regardless as to whether each of the couple are of different sexes or the same sex.

*Section 10* makes standard provision for the short title of the Bill. It provides that it will come into operation six months after its passing. It also provides for the collective citation of *section 8*, dealing with adoption, with the Adoption Acts 1952 to 1998.

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*December, 2006*