Position Paper prepared by the Human Rights Committee for consideration by the Council of the Law Society of Ireland

‘Marriage Equality Referendum’

22 May 2015

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Introduction

1. There will be two referendums held on 22 May 2015:

    - The Marriage Referendum;
    - The Age of Presidential Candidates Referendum.

2. This position paper deals with the Marriage Equality Referendum ('the Referendum').

3. The Referendum proposes to insert a new clause in the Constitution which would mean that two people will be able to marry each other regardless of their sex. The new clause would be inserted into Article 41 of the Constitution, as Article 41.4.

4. Full details are set out in the Bill and Explanatory Memorandum.

5. In fuller detail, the Explanatory Memorandum states:

> The purpose of the Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015 is to amend the Constitution so as to provide that persons may marry without distinction as to their sex. If the amendment is approved at a Referendum of the people, same-sex couples will have the right to marry. Marriage will continue to be regulated by legislation and the common law.

6. The text of the amendment would state as follows: 'Marriage may be contracted in accordance with law by two persons without distinction as to their sex.'

7. The principal role of the Referendum Commission is to prepare a statement containing a general explanation of the subject of the referendum, the text of the Bill and any other relevant information the Commission considers appropriate.[1]

8. The statement prepared for this Referendum by the Referendum Commission will be circulated to Council members when it becomes available.

9. The Constitutional Convention[2] discussed the issue of marriage equality during its third plenary session in April 2013. The Convention discussed whether the Constitution should be amended to allow for same-sex marriage, and what form any such amendment should take.

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[1] www.refcom.ie/en/Frequently-Asked-Questions/#wharol

[2] The Constitutional Convention was established by the Government in 2012 to discuss proposed amendments to the Constitution. www.constitution.ie/AboutUs.aspx See their terms of reference as set out in the 'Resolution of the Houses of the Oireachtas of July 2012'. www.constitution.ie/Documents/Terms_of_Reference.pdf

10. In relation to the question whether the Constitution should be changed to allow for civil marriage for same-sex couples, the Convention voted as follows[3]:

    - 79 voted in favour of amending the Constitution;
    - 19 voted against; and
    - 1 had 'no opinion'.

11. Regarding the second question of the form of the amendment:[4]

    - 78 voted in favour of the amendment being directive ("e.g., 'the State shall enact laws providing for same-sex marriage'");
    - 17 voted that it should be permissive ("e.g., 'the State may enact laws providing for same-sex marriage');
    - 1 had 'no opinion'.

12. A final question was put to the Convention – "*In the event of changed arrangements in relation to marriage, the State shall enact laws incorporating necessary changed arrangements in regard to the parentage, guardianship and upbringing of children*" – 81 voted in favour of this, with 12 against, and 2 had 'no opinion'.

13. The Irish Human Rights and Equality Commission (IHREC) recently issued a policy statement on access to civil marriage. It noted that in comparative jurisdictions the prohibition of same-sex marriage has been lifted in 16 countries[5]; and additionally, in certain countries based on a federal system, federal states or cities have introduced marriage for same-sex couples[6].

14. This position paper will first highlight some of the relevant legal issues which arise in the debate about marriage equality before then addressing two specific questions, namely what is the nexus with the legal profession and should the Law Society take a public position in this Referendum.

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[3] Third Report of the Convention on the Constitution, June 2013, section 2, pg. 6.
See also the Press Release of the Convention on the Constitution of 14 April 2013.
https://www.constitution.ie/AttachmentDownload.ashx?mid=b4bee9f7-fda4-e211-a5a0-005056a32ee4

[4] See above.

[5] Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay. (Irish Human Rights and Equality Commission *Policy Statement on Access to Civil Marriage* February 2015, at pg. 9, footnote 48.)
http://www.ihrec.ie/download/pdf/ihrec_policy_statement_access_civil_marriage_11_feb_2015.pdf

[6] See above at footnote 49 – Mexico (Coahuila, Mexico City, Quintana Roo), The United Kingdom (England and Wales and Scotland); United States of America.
In America, the issue is currently under review before the US Supreme Court in the case of *Obergefell v Hodges*. This case links four appeals of marriages bans in four States (Kentucky, Ohio, Michigan, and Tennessee. The case will be heard on 28 April 2015. http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/
In any event, in America, same-sex couples are able to marry in 37 states, the District of Columbia, and some counties in Missouri.
http://www.freedomtomarry.org/pages/where-state-laws-stand

The legal context of the issue of marriage equality

Civil partnership

15. Same-sex couples can currently only avail of the legal institution of 'civil partnership'. The *Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010*[7] introduced this particular legal form of partnership, and it can only be availed of by same-sex couples.

16. Civil partnerships share many features of the legal institution of civil marriage but significant differences exist between the two. In legal terms, there are considered to be over 160 statutory differences between the civil marriage and civil partnership[8], but in broad terms, three main areas of key differences can be identified, these are:

    - Marriage is recognised as being deserving of special protection by the Constitution;[9]

    - Currently, only one civil partner may have a legal relationship with a child; civil partners and the children they raise are not *legally regarded* as family. This has many legal implications, for example in terms of adoption, fostering, custody and inheritance tax obligations;[10]

    - The requirements for dissolution of a civil partnership are less onerous than those required for dissolution of a civil marriage (i.e., divorce).[11]

17. Thus while there has been incremental legislative progress in granting certain forms of rights and responsibilities to same-sex couples so that they can be considered to be in a *somewhat similar* legal position to that of married couples, it is still clear that significant and notable differences exist between civil partnership and civil marriage.

18. In basic legal terms, civil marriage and civil partnership are not the same and do not afford an equal level of rights and protections to different-sex and same-sex couples.

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[7] http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0024.pdf
[8] http://www.marriagequality.ie/getinformed/marriage/faqs.html
[9] Article 41.3.1° of the Constitution.
[10] See the 'Marriage Equality' website; http://www.marriagequality.ie/getinformed/marriage/faqs.html.
See also the Irish Human Rights and Equality Commission *Policy Statement on Access to Civil Marriage* February 2015, at pg. 6 http://www.ihrec.ie/download/pdf/ihrec_policy_statement_access_civil_marriage_11_feb_2015.pdf
The passing of the *Children and Family Relationships Bill* will remedy some of these legal differences such as allowing same-sex couples to adopt as a couple, and thus it will allow an adoptive same-sex couple to be both viewed as 'parents' in statutory terms; however, as regards the Constitution, they will still not be recognised as a 'family' for the purposes of Article 41.
[11] Section 110(a) of the *Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010* states that the civil partners must have been living apart for at least two of the previous three years in order to get a decree of dissolution. Article 41.3.2° (i) of the Constitution requires that spouses must have been living apart for at least four of the previous five years, and Article 41.3.2°(ii) requires that the court must be satisfied that there is no reasonable prospect of reconciliation.

The Constitution and the 'Family'

19. When considering the legal framework in which both civil partnership and civil marriage co-exist, Article 41 of the Constitution is of paramount importance and constrains the extent to which further legal reform of civil marriage can be introduced.

20. Although civil marriage is not explicitly defined as that of between a man and woman, the Irish courts have long interpreted the protections afforded by Article 41 as encompassing only different-sex couples. Article 41 states:

> 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
> 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
> 2 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
> 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
> 3 1° 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.[12]

21. The difference in constitutional protection afforded to families has been traditionally interpreted by the courts as being dependent on whether it is a marital or non-marital family.

22. In the case of *State (Nicolaou) v. An Bord Uchtála,* the Supreme Court held that a family unit which was not based on marriage, would not be recognised as a family for the purposes of constitutional protection and rights.[13] Two clear statements of this position are provided by Walsh J and Henchy J 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 upon marriage*.[14] [Walsh J]
> ….

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[12] http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/December_2013_-_Bhunreacht_na_hEireann_Constitution_Text.pdf

[13] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567. http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/pagecurrent/9FA0AA8E8D261FC48025765C0042F6B3?opendocument&l=en

[14] Ibid at 643.

> *I am satisfied that no union or grouping of people is entitled to be designated a family for the purposes of the Article if it is founded on any relationship other than that of marriage. If the solemn guarantees and rights which the Article gives to the family were held to be extended to units of people founded on extra-marital unions, such interpretation would be quite inconsistent with the letter and the spirit of the Article.*[15] [Henchy J]

23. A long line of jurisprudence has followed this interpretation of the Constitution with the result being that it is a long-established and truly well-entrenched position in Irish law, that the protections offered under Article 41 extend only to the family based on civil marriage.[16]

24. In the recent case of *Zappone & Anor -v- Revenue Commissioners & Ors*[17], Ms. Justice Dunne provided an overview of what must be understood to be the constitutional definition of marriage:

> *Marriage was understood under the 1937 Constitution to be confined to persons of the opposite sex. That has been reiterated in a number of the decisions which have already been referred to above, notably the decision of Costello J. in Murray v. Ireland [1985] IR 532, the Supreme Court decision in T.F. v. Ireland [1995] 1 I.R. 321 and the judgment of Murray J. in D.T. v. C.T (Divorce: Ample Resources) [2002] 3 I.R. 334. The definition was reiterated in Foy v. An tÁrd Claraitheóir Unreported, High Court, McKechnie J., 9th July, 2002), although there must be a caveat concerning the use of the words biological man and biological woman given the decision in Goodwin v. United Kingdom (2002) 35 E.H.R.R. 447. That has always been the definition. The judgment in the D.T. v. C.T (Divorce: Ample resources) was given as recently as 2003. Thus it cannot be said that this is some kind of fossilised understanding of marriage.* (Emphasis added.)

25. In summary, "*the relevant case law in regard to the nature of marriage indicates that the concept of marriage under the Constitution is derived from the Christian notion of partnership and is confined to persons of the opposite sex. It also indicates that Irish domestic law is grounded in the monogamous union of a man and woman.*"[18]

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[15] Ibid at 622.

[16] "*In Re J An Infant* [1966] IR 295 and *G. v. An Bord Uchtála* [1980] IR 32. More recently in *J. McD. V. P.L. and B.M.* [2010] 2 IR 199, the Supreme Court held that it would be a breach of Article 41.3.1 of the Constitution if the State awarded equal protection to the family founded on an extra marital union as that awarded to the family founded on marriage."
Presentation by Gerry Durcan, SC, to the Constitutional Convention, 13 April 2013, in relation to marriage equality - see footnote 1, pg. 5.
https://www.constitution.ie/AttachmentDownload.ashx?mid=5f029d00-2aa4-e211-a5a0-005056a32ee4

[17] *Zappone and Gilligan v. The Revenue Commissioners and Others* [2008] 2 IR 417 at para 238.

[18] Presentation by Gerry Durcan, SC, to the Constitutional Convention, 13 April 2013, in relation to marriage equality, at footnote 9, regarding the 'Christian notion of partnership' – "*Murray v. Ireland* [1985] IR 532 per Costello J. at p.535, approved by the Supreme Court in *T.F. v. Ireland* [1995] 1 IR 321 per Hamilton C.J. at p.373."
See also, footnote 10 – "*Zappone and Gilligan v. The Revenue Commissioners and Others* [2008] 2 IR 417 per Dunne J. at para 238, pp 504-505 where she refers to a number of previous authorities including *Murray v. Ireland* [1985] IR 532, *T.F. v. Ireland* [1995] 1 IR 321, *D.T. v. C.T. (Divorce: Ample Resources)* [2002] 3 IR 334 and *Foy v. An tÁrd Chlaraitheóir*, unreported

26. This means that there is a significant difference in the level of recognition and protection which can be afforded to same-sex couples, as opposed to opposite-sex couples, based on the well-established judicial interpretation of what is meant by marriage under Article 41 of the Constitution. In order for the same level of protection to be granted to families formed by same-sex couples, it is considered that a constitutional referendum is required to normalise the definition of civil marriage to include same-sex couples.

The issue of equality

27. Some commentators argue that civil partnership is 'as good as' civil marriage and that the *Children and Family Relationships Bill* will act to further reduce some of the differences between the two 'institutions'.[19] The essence of this argument is as follows; how can a difference in name be said to amount to discrimination? (This is notwithstanding the fact that, as mentioned above, there are as many as 160 ways in which civil partnership is 'the lesser' of the two 'unions'.)

28. This issue of equality 'in all but name' has repeatedly arisen in jurisdictions abroad, particularly the US, Canada and South Africa.

29. Where the issue has arisen in US courts, the approach adopted has been that, even if all material legal differences were eliminated, and the only difference to remain was that of name, then that difference alone would nevertheless constitute discrimination.

30. US judicial decisions have stressed that there is a particular social status that attaches to the term 'marriage' which cannot be denied to same-sex couples on the basis that it causes little *practical* effect. The US Court of Appeals for the Ninth Circuit aptly described it as follows: "… *we emphasise the extraordinary significance of the official designation of 'marriage'. That designation is important because 'marriage' is the name that society gives to the relationship that matters the most between two adults. A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not*."[20]

31. The California Supreme Court in 2008, in the case of '*In re Marriage Cases'*, held that there was there was no "*compelling state interest*" to justify the retention of the traditional definition of marriage as being limited to opposite-sex couples and emphatically rejected that narrow definition:

> First, <u>the exclusion of same-sex couples from the designation of marriage clearly is not necessary in order to afford full protection to all of the rights and benefits that currently are enjoyed by married opposite-sex couples</u>;

High Court McKechnie J. 9th July 2002. At para.241, p.505 Ms. Justice Dunne says '*The definition of marriage to date has always been understood as being opposite sex marriage*'."

[19] For example, the Children and Family Relationships Bill will allow civil partners to jointly apply for adoption. Currently, only one may apply for adoption. See footnote 10 above.

[20] *Perry v Brown* (2012), Court of Appeals for the Ninth Circuit, No. 10-16696. http://cdn.ca9.uscourts.gov/datastore/general/2012/02/07/1016696com.pdf

permitting same-sex couples access to the designation of marriage will not deprive opposite-sex couples of any rights and will not alter the legal framework of the institution of marriage, because same-sex couples who choose to marry will be subject to the same obligations and duties that currently are imposed on married opposite-sex couples.

Second, retaining the traditional definition of marriage and affording same-sex couples only a separate and differently named family relationship will, as a realistic matter, impose appreciable harm on same-sex couples and their children, because denying such couples access to the familiar and highly favored designation of marriage is likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples.

Third, because of the widespread disparagement that gay individuals historically have faced, it is all the more probable that excluding same-sex couples from the legal institution of marriage is likely to be viewed as reflecting an official view that their committed relationships are of lesser stature than the comparable relationships of opposite-sex couples.

Finally, retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise — now emphatically rejected by this state — that gay individuals and same-sex couples are in some respects "second-class citizens" who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.[21] (Emphasis added.)

32. The Connecticut Supreme Court in 2008[22] also considered this issue of the difference being limited to that of status (in name only). In the case of *Elizabeth Kerrigan et al*, the Court found that retaining this difference in status was a breach of Connecticut's constitution; "*We conclude that, in light of the history of pernicious discrimination faced by gay men and lesbians, and 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*."

33. In 2012, the Court of Appeals for the Ninth Circuit found that California's ban on same-sex marriage[23] "*serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their*

[21] *In re MARRIAGE CASES* (2008) [Six consolidated appeals], California Supreme Court, S147999. http://www.courts.ca.gov/documents/S147999.pdf

[22] *Elizabeth Kerrigan et al. v Commissioner of Public Health et al*., Connecticut Supreme Court, SC 17716 (2008) http://www.jud.state.ct.us/external/supapp/Cases/AROcr/CR289/289CR152.pdf

[23] 'Proposition 8' was adopted by the people of California on 4 November 2008; it amended the state constitution to remove the right of same-sex couples to marry. The Perry v Brown case focussed on whether that amendment was unconstitutional.

relationships and families as inferior to those of opposite-sex couples."[24] The ban was struck down as being unconstitutional in light of the US Constitution's 'Equal Protection' clause.

34. The South African Constitutional Court also struck down a prohibition of same-sex marriage in the strongest of terms, by focussing on what could be considered as a legal right to equality of treatment or opportunity.[25] It stated:

> Yet what is in issue is not the decision to be taken, but the choice that is available. If 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.[26]

35. As highlighted by the IHREC, the case of *Egan v Canada*[27] in the Canadian Supreme Court offers insight into what can be really meant by 'equal status', and in doing so, the Supreme Court employed a particular term to consider the meaning of equality - '*recognition*': "(*T)he Canadian Supreme 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*." [28]

36. The IHREC[29] also refer to another important Canadian decision for marriage equality - the case of *Halpern v Attorney General of Canada*.[30] The Ontario Court of Appeal found that prohibiting same-sex marriage breached the Canadian Charter of Rights and Freedoms, and that the exclusion "*perpetuates the view that same-sex relationships are less worthy of recognition than different-sex relationships".*[31]

37. The core principle underlying the relevant international jurisprudence, some of which is outlined above, is simply that in order for there to be real and substantive *equality* between opposite-sex and same-sex couples, the institution of civil marriage must include same-sex couples and thus *recognise* and affirm their equal value and contribution to society. To deny same-sex couples the option of being married, in the full legal and civil sense of the term, is to reinforce the view that these couples must be

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[24] *Perry v Brown* (2012), Court of Appeals for the Ninth Circuit, No. 10-16696. http://cdn.ca9.uscourts.gov/datastore/general/2012/02/07/1016696com.pdf
[25] *Minister for Home Affairs v Fourie* (2005), South African Constitutional Court, Case CCT 60/04. http://www.saflii.org/za/cases/ZACC/2005/19.pdf
[26] Sachs J, at para 72, pg 46.
[27] *Egan v Canada* (1995), Canadian Supreme Court, 2 SCR 513.
[28] Irish Human Rights and Equality Commission *Policy Statement on Access to Civil Marriage* February 2015, at pg. 10. http://www.ihrec.ie/download/pdf/ihrec_policy_statement_access_civil_marriage_11_feb_2015.pdf
[29] Irish Human Rights and Equality Commission *Policy Statement on Access to Civil Marriage* February 2015, at pg. 10. http://www.ihrec.ie/download/pdf/ihrec_policy_statement_access_civil_marriage_11_feb_2015.pdf
[30] *Halpern v Attorney General of Canada* [2003] O.J. No. 2268
[31] *Ibid* at para 107.

treated differently and be classed as being 'separate' or 'apart' from opposite-sex couples in society, simply because of their sexuality. This is despite the fact that sexuality is an inherent and naturally occurring trait, similar to race or age, and intrinsic to one's biological and psychological make-up, i.e. a trait which cannot be altered.

38. Permitting full equality of marital status would recognise that civil marriage is a social and legal institution in which all competent and consenting adults can partake. The IHREC summarised the position as follows:

> 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. (Emphasis added.)

The legal institution of marriage

39. The state and societal definition of civil or legal marriage has undergone change before in order to accommodate and reflect the needs of modern society. Far reaching changes were introduced as regards capacity in respect of marriage age, and more crucially, as regards the indissolubility of marriage.

40. The definition of civil marriage cannot be fixed to such an extent that its nature is *now* rendered universal and unchanging as of 22 May 2015. It is arguable that to adopt such a position is somewhat irrational. For example, at the time of the divorce referendum, many 'vote no' campaigners vehemently argued that the definition of marriage could not encompass dissolution, and that it was irrevocably unalterable in its form at that specific point in time; however, the 'definition' of marriage was varied to allow for separation and divorce. Attempting to ignore the fact that the definition of marriage can be, and has been, changed over time is to disregard history and the evolving needs of society.

41. Additionally, marriage and procreation are not mutually dependent, i.e., in order to sustain the legal validity of civil marriage, the married couple does not have to have children. There has never been, nor will there ever be, a pre-requisite for civil marriage based on a couple's biological ability to reproduce.

42. The Ontario Court of Appeal, in the case of *Halpern v Attorney General of Canada*, pointed out that any argument made to the effect that marriage must be heterosexual

because it "*just is*" that way, offers only an explanation but no justification for the 'opposite-sex' requirement – it merely amounts to "*circular reasoning*".[32]

43. The Ontario Court of Appeal also gave the example of how equivalent discrimination in terms of race or religion would be unacceptable:

> Third, whether a formal distinction is part of the definition itself or derives from some other source does not change the fact that a distinction has been made. If marriage were defined as "*a union between one man and one woman of the Protestant faith*", surely the definition would be drawing a formal distinction between Protestants and all other persons. Persons of other religions and persons with no religious affiliation would be excluded. Similarly, if marriage were defined as "*a union between two white persons*", there would be a distinction between white persons and all other racial groups. In this respect, an analogy can be made to the anti-miscegenation laws that were declared unconstitutional in Loving v. Virginia, 388 U.S. 1 (1967) because they distinguished on racial grounds.[33]

44. As Dr Conor O'Mahony points out, the legal definition in place for centuries was that marriage was; (i) voluntary, (ii) monogamous, (iii) heterosexual, and (4) permanent. The divorce referendum changed the fourth requirement – marriage is no longer necessarily permanent. This Referendum seeks to alter the third element. The proposed wording of the amendment makes clear that the monogamous element will remain intact ("two persons"). Similarly, by stating that "*marriage may be contracted in accordance with the law*", it also makes clear that other legal impediments to marriage, such as age, marital status, or prohibited degrees of relationship, will remain in place. The only element being changed is that the parties would no longer have to be of opposite sex.

45. What is the legal justification for denying equality to same-sex couples in relation to the civil institution of marriage? For any lawyer, the argument that '*civil marriage has just traditionally been that way*' cannot provide a sound and just legal justification for denying equal rights to Irish citizens.

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[32] *Halpern v Attorney General of Canada,* (2003) CanLII 26403 (ON CA) at para 71. http://www.canlii.org/en/on/onca/doc/2003/2003canlii26403/2003canlii26403.html

[33] *Ibid* at para 70.

The position of the Law Society

47. The Co-Ordination Committee has requested that the Human Rights Committee prepare this position paper, and in doing so, it has requested that two specific questions be addressed:

    - What, if any, nexus does the proposition have with the legal profession?
    - Should the Law Society express a public position and, if so, what and why?

Nexus with the legal profession

48. This Referendum is connected to the legal profession as it concerns the right to equality of Irish citizens in the context of legal/civil marriage (i.e., an individual's fundamental civil right to marry).

49. In the broadest of terms, the solicitors' profession operates within and serves a legal system which is based – in part – on two inherent principles that are rooted in our common law system and specifically within the Constitution:

    - All citizens should be equal before the law[34];
    - The rights of all citizens ought to be vindicated and protected[35].

50. The influence of these principles ought to be visible in the exercise of legislative powers by the state, and all laws applicable to its citizens including the Constitution. These principles represent the fundamental characteristics that we consider to be necessary features of our legal system. As lawyers, we have vocational interests in the creation and application of laws which are fair in their content and scope, and which balance both public and private interests.

51. As a result of our professional interest in, and indeed our dependence on the law, it is fair to say that our profession also has an ethical obligation to ensure that wherever possible, the nation's legal framework provides the best means of supporting and protecting fundamental rights.

52. This connection between the legal profession and our duty to promote a just and balanced legal system is explored in a little more detail in the next section which considers whether the Law Society should adopt a public position in this Referendum.

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[34] Article 40.1 – "All citizens shall, as human persons, be held equal before the law.
This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

[35] Article 40.1.3° – "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

Should the Law Society express a public position?

53. As solicitors, we fulfil the essential role of advocating the interests of our client within the legal system; we act in the interests of those seeking legal redress for wrongs done to them while equally being able to act for those in need of a defence. However, we are also agents of '*the law*', i.e., lawyers are guardians or advocates of the legal system as a whole.

54. Solicitors must uphold the law and help preserve the integrity of the legal system. Part of this role must encompass occasionally speaking out in relation to issues concerning the fundamentals of the legal system, such as the rights and liberties enjoyed by citizens, and lending our voice to ensure a fairer legal system for all.

55. In this manner, the Law Society has spoken out in relation to constitutional referenda in the recent past because, after careful consideration of those issues, it concluded that the referenda had the potential to greatly affect our legal system (in different ways - positively and negatively, depending on the specific constitutional issue); as a consequence, the Law Society strongly believed that it could add its voice to the public debate and stated its view of those issues concerning legal procedures and fundamental rights.

56. The first such occasion was in relation to the constitutional referenda on 'Parliamentary Inquiries and Judicial Pay' in October 2011. The Law Society expressed "*grave concerns*" over both in a press release; for example, "*The Society believes that the amendment, if passed, would signify a serious shift in the Constitutional balance of authority between the courts and the Parliament in matters regarding the rights of individuals whose good names may be negatively affected by inquiries*".

57. Regarding judicial pay, it also stated - "*It is well recognised across the democratic world that interference with judicial pay is a classic means of interfering with judicial independence and, accordingly, great care needs to be taken about any mechanism designed to achieve the Government's objective*."[36]

58. On the second occasion in November 2012, in relation to the Children's Rights Referendum, the Law Society publicly stated that it was supporting a 'yes' vote; "*The Council of the Law Society considered carefully the text of the proposed Constitutional amendment and concluded that it achieved the correct balance between the autonomy of the family and the rights of the child*."[37]

59. There will be referenda which will have little connection or impact upon the legal system, the legal profession, or fundamental rights, and which would not warrant the Law Society adopting any public position one way or the other. Furthermore, there may be referenda dealing with extremely sensitive and/or controversial issues, upon which little

[36] https://www.lawsociety.ie/Global/eNewsletters/ebulletin/LSRB_2011/NewsRelease-referenda_171011.pdf
[37] https://www.lawsociety.ie/Documents/Media/2%20Nov%202012%20Law%20Society%20elects%20new%20president%20and%20calls%20for%20a%20yes%20vote%20in%20the%20Childrens%20Referendum.pdf

consensus or middle ground can be found, and which would therefore curtail the Law Society's ability to agree a public position.[38] Nevertheless, as with the referenda concerning Parliamentary Inquiries and Judicial Pay, and Children's Rights, there will, on occasion, be referenda that could change our legal framework or assist in the vindication of personal rights, and it is in relation to these kinds of issues that the Law Society could take a public position.

60. As stated above, this Referendum is connected to the legal profession as it concerns the vindication of fundamental personal rights under the Constitution – the right to equality of same-sex couples in the context of legal (civil) marriage and their fundamental civil right to marry.

61. On considering the development of marriage equality in the case law of other jurisdictions, the Law Society should consider taking this opportunity to support the strengthening of our legal system by supporting a yes vote in this Referendum. Supporting a yes vote would:

    - Respect the civil right to marry of same-sex couples; and,
    - Reflect a full commitment to equality for all citizens in respect of civil marriage.

62. Furthermore, in the sense that this Referendum seeks to extend and clarify individual rights under the Constitution, it is somewhat similar to the situation of the Children's Rights Referendum. As it did in relation to the latter issue, the Law Society, if it wishes, could choose to voice its support of greater equality of rights for all citizens – in this Referendum it would mean supporting equality regardless of sexuality.

63. As Minister Fitzgerald stated[39];

> <u>This is an opportunity for Ireland to demonstrate that it is truly inclusive, truly mature in its understanding of marriage</u>.
>
> Of course, marriage enjoys a unique place in Irish society and in our Constitution. Article 41 sets marriage as the institution on which the family is founded. As a result, the marital family enjoys unique constitutional protections that are not available to people in other types of relationships. Let me be clear about this because this piece of information will be critical to get

[38] In relation to the 2013 referenda concerning the Abolition of the Seanad and the establishment of a Court of Appeal, the Law Society issued an eBulletin, from the President (James McCourt) to all members, urging a yes vote in relation to the Court of Appeal question (it chose to stay silent in relation to the issue of the abolition of the Seanad):

> "*At its most recent meeting the Council of the Law Society decided it would be failing in its duty to seek constant improvement in the administration of justice in Ireland if it remained silent on this vitally important referendum. … In the interests of the administration of justice in Ireland, therefore, the Society is urging every solicitor to vote 'yes' in the referendum on a proposed Court of Appeal and, in addition, to recommend to as many others as possible that they do so as well. If you are comfortable in doing so and consider it appropriate you might write to other voters, including your clients, recommending that they support this necessary and modernising improvement to the justice system in this country. I attach a very brief draft letter that might assist you to do this.*"

[39] Speech by the Minister for Justice and Equality, Frances Fitzgerald TD, on the Marriage Equality Referendum, February 5th, 2015, Cork. http://www.finegael.ie/latest-news/2015/speech-by-the-minister-fo/index.xml

home in the coming months - We are not proposing to change any existing parts or provisions of Article 41.

This is about extending a right.

64. Recognising same-sex partnership as being equal in social value and legal status to that of opposite-sex partnership is a natural and overdue progression in the recognition of the fundamental rights of same-sex couples. The Law Society should consider voicing its support for equality for all citizens in respect of the legal institution of marriage.

April 2015