

**Inter-Departmental Committee on  
Reform of Marriage Law**

**Discussion Paper No. 5**

**Part 1: Definition of Marriage**

**Part 2: Who Can Marry**

**Part 3: Capacity to Marry**

**September 2004**

## **Part 1**

### **Definition of Marriage**

## 1 **Introduction.**

- 1.1 The Inter-Departmental Committee has been established by Government to review current marriage procedures and to bring forward a universally applicable framework of clear and simple procedures to underpin the solemnity of the marriage contract. As part of its remit, it also seeks to establish the fundamental concepts which will underpin this framework. In this context, it should be noted that the Committee's work concerns marriage in its constitutional and legal sense, that is, the union between a man and a woman.
- 1.2 Traditionally, marriage has been characterised as the giving of mutual consent to the public recognition of the union of one man and one woman to the exclusion of all others. Marriage is therefore perceived to be both a social contract and a partnership based on a relationship.
- 1.3 Married persons are entitled to legal rights, privileges and duties from which persons who are not married are generally precluded. In addition, Article 41.3.1 of the Constitution pledges the State to guard with special care the institution of marriage on which the family is founded and to guard it against attack.
- 1.4 This paper outlines the current position and proposals for reform.
- 1.5 The Committee has received several submissions on the issue of same sex / domestic partnerships / relationships / unions and related matters. This issue falls to be dealt with by the Department of Justice, Equality & Law Reform and all submissions received by the Committee on this topic have been referred to that Department.

## 2 **Current Definition of Marriage.**

- 2.1 There is no statutory definition of marriage. The role of defining marriage has therefore been filled by the Courts.
- 2.2 The current legal basis for marriage is founded on the classic definition of marriage given by Lord Penzance in *Hyde v Hyde* over 140 years ago  
*“voluntary union for life of one man and one woman to the exclusion of all others”.*
- 2.3 The Irish Courts have expanded on this definition. In *Murray v Ireland* [1985] IR 532 at 535) Costello J. stated that “the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship”. A later case *B v R* [1995], defined marriage as “the voluntary and permanent union of one man and one woman to the exclusion of all others for life”. The Supreme Court in *T.F. v Ireland* [1995] IR 321 approved the Costello J. definition of marriage.
- 2.4 According to Shatter in *Irish family Law* (1995), four factors are required to ‘constitute a marriage’ in Irish law. A marriage must be:
- Voluntary - must be entered into freely and without force;
  - Monogamous;
  - Potentially for life;
  - Between parties of a different sex.
- 2.5 With the introduction of divorce in Ireland, a marriage does not have to last for life (*H.S. v J.S.* (Unreported) Supreme Court, April 1992). In addition, it is unnecessary for a married couple to live together for its continued validity *T.F. v Ireland* [1995] IR 321.

### 3 **Proposed Future Approach.**

3.1 Marriage is not viewed as simply another type of contract. It has been described as both a public contract and a relationship based on partnership. It imparts legal protections and imposes obligations. It is the inception of “a unique and very special life-long relationship” *Murray v Ireland* [1985] IR 532. It also imparts an entirely new legal status on the parties thereto.

3.2 It is considered that future marriage law should contain a definition of marriage. It is proposed that the definition should be that approved by the Supreme Court i.e.

*“the voluntary and permanent union of one man and one woman to the exclusion of all others for life”.*

## **Part 2**

### **Who Can Marry**

#### 4 **Introduction.**

- 4.1 It is a generally held view that Irish law requires that one party to a marriage must be male and the other must be female.
- 4.2 The parties to a marriage must be 18 years old or over, unless a court exemption is obtained. Certain persons related by blood or marriage cannot marry one another and the parties to a marriage cannot already be validly married to third parties at the time of the marriage.
- 4.3 This paper outlines the current position and proposals for reform.
- 4.4 It should be noted that the Committee intends to publish a separate Discussion Paper on the development of the law in relation to the marriage of persons following gender re-assignment.

## 5 **Current Provisions.**

### **Sex**

- 5.1 The current provisions require that one party to a marriage must be male and the other female. In the case *B v R* [1995] 1 ILRM 491, Costello J. defined marriage as

*“the voluntary and permanent union of one man and one woman to the exclusion of all others for life”.*

The Supreme Court in (*T.F. v Ireland* [1995] IR 321) approved the Costello J. definition of marriage. In *Foy v An tArd-Chláraitheoir* (Unreported) McKechnie J. stated that

*“marriage as understood by the Constitution, by statute and by case law refers to the union of a biological man with a biological woman”.*

### **Minimum Age for Marriage**

- 5.2 The age at which persons may marry is regulated by the Family Law Act 1995 (Section 31). The rule is that both parties to a marriage must be at least 18 years of age. The minimum age requirement applies to all marriages celebrated in the State and to the recognition of all marriages wherever celebrated where either one or both of the parties at the time of the marriage is/are ordinarily resident in the State.
- 5.3 A limited exception to the minimum age requirement is contained in Section 33 of the Family Law Act, 1995. Persons under the age of 18 years can marry where an exemption is granted by either the Circuit Court or the High Court. Such exemptions to the statutory minimum age requirements may only be granted by the Circuit Court or High Court on application being made by or on behalf of both parties prior to the solemnisation of the marriage. A court may not grant such exemption lightly. It must be shown that the exemption is “justified by serious reasons and is in the interest of the parties to the intended marriage”.
- 5.4 If a person under 18 attempts to marry without court authorisation, the marriage is null and void because compliance with the age requirement is a substantive requirement for a valid marriage. Those asked to solemnise a marriage can ask for evidence of age. Where the evidence shows that

one of the couple is under the minimum age, the marriage ceremony should not proceed.

- 5.5 A person who “knowingly” solemnises or permits the solemnisation of a marriage or is party to a marriage, which is not valid as a consequence of a failure to comply with the minimum age requirement, is guilty of a criminal offence and is liable to a fine on conviction.

### **Prohibited Degrees – Consanguinity and Affinity Relationships**

- 5.6 Prohibitions apply to marriages between persons:
- a) Closely related by blood (consanguinity) - relationships of the half-blood (where the parties share one parent in common) have the same effect as those of the whole blood; and
  - b) Related through marriage (affinity).

Parties within the prohibited degrees of relationship cannot marry.

- 5.7 The statutory provisions on prohibited degrees date back to the Marriage Act 1537. Until the Marriage Act 1835 marriages within the prohibited degrees of relationship were voidable by order of the Courts. This was considered unreasonable having regard to the position of children of the marriage and it was therefore considered that all marriages celebrated after August 1835 between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void and not merely voidable.
- 5.8 The Marriage Act 1835 was subsequently amended by the Deceased Wife’s Sisters Marriage Act of 1907 and the Deceased Brother’s Widow’s Marriage Act of 1921 to enable a man to marry his deceased wife’s sister and a woman to marry her deceased husband’s brother.

### **Justification for Prohibitions**

- 5.9 There is a clear distinction between relationships of consanguinity – those closely related by blood and those of affinity – relationship through marriage.
- 5.10 There are social reasons for discouraging marriage between blood relatives. Sexual relations among family members have been regarded as disruptive of family harmony and stability. In addition, in relation to

marriage of blood relations it is considered that there is an enhanced risk of genetic damage for the issue of persons closely related to each other.

- 5.11 There are, in general, universal rules prohibiting marriage between certain categories of relatives, however there is considerable diversity in their content.
- 5.12 Northern Ireland, which has similar legal provisions on marriage within prohibited degrees of relationship as Irish law, recently carried out a review of marriage law prior to introducing new marriage legislation. They concluded that the current rules in respect of prohibited degrees of relationship did not require to be changed.
- 5.13 In England, Wales and Scotland the rules in relation to marriage within prohibited degrees of relationships have been changed in recent years to enable a stepfather and stepdaughter marry provided they are both over 21 years of age and the younger party has at no time before reaching 18 years lived in the same house as the older party.
- 5.14 On the other hand, Australia has adopted a more liberal approach and only prohibits marriage between close relatives e.g. a person and an ancestor or a descendant of the person, brother and sister and a stepbrother and stepsister even if the brother or sister has been adopted, and an adoptive parent and an adopted child.

#### **Current Prohibitions Based on Consanguinity (Blood Relationships)**

- 5.15 The following table lists those currently prohibited from marrying by reason of blood relationships.

**Table 1: Consanguinity - Blood Relationships**

A man may not marry his:

1. Grandmother
2. Mother
3. Father's sister (aunt)
4. Mother's sister (aunt)
5. Sister
6. Father's Daughter (half sister)
7. Mother's Daughter (half sister)

8. Daughter
9. Son's Daughter (granddaughter)
10. Daughter's Daughter (granddaughter)
11. Brother's Daughter (niece)
12. Sister's Daughter (niece)

A woman may not marry her:

13. Grandfather
14. Father.
15. Father's Brother (uncle)
16. Mother's Brother (uncle)
17. Brother
18. Father's Son (half brother)
19. Mother's Son (half brother)
20. Son
21. Son's Son (grandson)
22. Daughter's Son (grandson)
23. Brother's Son (nephew)
24. Sister's Son (nephew)

5.16 These prohibitions are based on both social and genetic grounds. It is considered that any change would be disruptive of the natural social order.

5.17 The Law Reform Commission (Law of Nullity 1984) reviewed the prohibitions based on consanguinity having regard to social, genetic and religious considerations. It recommended that the present prohibition on marriage between blood relations (parents and children, brothers and sisters, uncle and niece or aunt and nephew and between all other direct ancestors and descendants) be retained and extended to include marriages between great-uncle and great-niece or great-aunt and great-nephew.

### **Marriage of Cousins**

- 5.18 There is no legal restriction on the marriage of first cousins. Issues arise, however, because of the perceived increased risk of genetic disorder for the children of such marriages.
- 5.19 Confusion has arisen between the statutory prohibition on consanguinity and rules of various religious bodies. However, it is understood that, where religious restrictions apply, dispensations allowing marriages between first cousins are frequently granted.
- 5.20 A marriage between two people who are biologically related as second cousins or closer is called a consanguineous marriage. Worldwide, the most common form of consanguineous marriage is between first cousins. It is now known that cousin marriage is the preferred choice in many regions of the world.
- 5.21 The genetic risks of inter marriage of second cousins and closer was addressed by the Traveller Consanguinity Working Group. The Group concluded that consanguineous marriage is not harmful in itself and does not necessarily cause genetic disorders among children of the consanguineous couple.
- The Group's report referred to a number of major studies on genetic consequences of consanguineous marriage in different populations that have been carried out in recent years. These have shown that for first cousin marriages, the risk of death due to recessive disorders is 4% to 5% higher than in the general population. The risk of other forms of genetic disorder is not affected. Community genetics services are now offered routinely in many population groups where consanguinity is a cultural norm.
- 5.22 The Working Group recommended that:
- “since consanguinity can increase the risk of recessive genetic disorders, it is essential that consanguineous couples should be helped to manage their risk through voluntary confidential genetic counseling and, if necessary, through blood testing to determine if they are carriers of an altered gene”.*
- 5.23 In Ireland, genetic services are provided through the National Centre for Medical Genetics, Our Lady's Hospital for Sick Children, Crumlin, Dublin 12 and its outreach clinics in regional centres. Specialised services for

inherited metabolic disorders are provided in the Children's University Hospital, Temple St, Dublin 1.

### **Adoption**

- 5.24 The issue of marriage between persons related by adoption has not been addressed under Statute or Common Law. However, Section 24 of the Adoption Act 1952 provides that upon an adoption order being made, the adopted child

*“shall be considered with regard to the rights and duties of parents and children in relation to each other as the child of an adopter or adopters, born to him, her or them in lawful wedlock”.*

This appears to prohibit a marriage between an adopted child and his/her adoptive parents.

- 5.25 This issue was addressed by the Law Reform Commission Report on Nullity of Marriage, (LRC 9 of 1984). It recommended that statutory prohibition apply to marriage between a parent and his/her adoptive child and between adoptive siblings even in cases where an adoption order ceases to exist.

### **Donor Insemination**

- 5.26 The provisions in respect of blood relationships apply to donor insemination. However, it is difficult to anticipate how such relationships should be policed, other than by way of objection lodged by some party having knowledge of the fact.

### **Current Prohibitions Based on Affinity (Relationship by Marriage)**

- 5.27 The following table lists those currently prohibited from marrying by reason of affinity – related by marriage

**Table 2: Affinity - Relationship by Marriage**

A man may not marry his:

1. Grandfather's Wife (step-grandmother)
2. Father's Wife (stepmother)
3. Father's Brother's Wife

4. Mother's Brother's Wife
5. Son's Wife
6. Son's Son's Wife
7. Daughter's Son's Wife
8. Brother's Son's Wife
9. Sister's Son's Wife
10. Wife's grandmother (grandmother-in-law)
11. Wife's Mother (mother-in-law)
12. Wife's Father's Sister
13. Wife's Mother's Sister
14. Wife's Daughter (stepdaughter)
15. Wife's Son's Daughter.
16. Wife's Daughter's Daughter
17. Wife's Brother's Daughter
18. Wife's Sister's Daughter

A woman may not marry her:

19. Grandmother's Husband (step-grandfather)
20. Mother's Husband (stepfather)
21. Father's Sister's Husband
22. Mother's Sister's Husband
23. Daughter's Husband
24. Son's Daughter's Husband
25. Daughter's Daughter's Husband
26. Brother's Daughter's Husband
27. Sister's Daughter's Husband
28. Husband's Grandfather (grandfather-in-law)
29. Husband's Father (father-in-law)
30. Husband's Father's Brother
31. Husband's Mother's Brother

32. Husband's Son (stepson)
33. Husband's Son's Son
34. Husband's Daughter's Son
35. Husband's Brother's Son
36. Husband's Sister's Son

- 5.28 Prohibitions based on affinity reflect a historical, cultural and social tradition. The Report of the Law Reform Commission (LRC 9 of 1984) noted that "the present law relating to prohibitions on marriages between persons related by affinity is very broad" and also that "the policy considerations regarding this subject are somewhat different from those affecting consanguinity."
- 5.29 The report considered the arguments that may be made against the approach of the present law regarding prohibitions based on affinity. It noted that there are "no genetic reasons why persons related by affinity should not marry".
- 5.30 The Report also noted inconsistency in public policy in this area. The law has made exceptions to the general rule on affinity by permitting the marriage of a man with his deceased wife's sister or a woman with her deceased husband's brother (Acts 1907/1921). Therefore a man may marry his sister-in-law (when his wife is dead) but not persons who are far more distantly related to him by marriage.
- 5.31 The Report noted that these exceptions were justified on social and economic grounds i.e. a deceased wife's sister coming into the family home to rear the children on account of his inability to pay for domestic help. While this would be the case in many instances, not all such marriages would have been contracted for such reasons.

The third argument referred to was that legislation should not place unnecessary obstacles in the path of persons who wish to marry. Current prohibitions have their genesis in religious or cultural mores which applied in the 19th century. These justifications alone would not warrant their continued inclusion in legislation. More recently, the High Court in 2001 granted an order in the case of a marriage between a woman and her deceased aunt's husband was lawful and validly registered. The case was taken by the woman as she had concerns regarding the effects of laws of affinity in the Marriage Act 1535 on the validity of her marriage.

- 5.32 The Law Reform Commission also reviewed the arguments in favour of the retention of prohibited degrees of relationship based on affinity.

The prohibitions are based on an historical cultural tradition with the support of the religious denominations. There has been no call for change in public discussions. Prohibitions based on affinity can claim a sound social justification based on the need to protect the stability of the family unit. The Report refers to a proposed view that a distinction should be made between the termination of marriage by the death of a spouse and a marriage terminated by divorce and the concern that the possibility of a marriage to a divorced spouse's sibling might create an environment that would jeopardise the stability of the marriage.

#### **Introduction of Divorce**

- 5.33 The introduction of divorce in Ireland in 1996 has given rise to an anomaly in the law with regard to a woman marrying her divorced husband's brother or a man marrying his divorced wife's sister. If a marriage is terminated as a result of a divorce as opposed to a spouse's death, the prohibition on a woman marrying her husband's brother or on a man marrying his wife's sister still remains. A man may marry his deceased wife's sister and a woman may marry her deceased husband's brother having regard to the provisions of the Acts of 1907 and 1921. These contradictory rules are giving rise to difficulties in the application of the law where capacity to marry is being established.

- 5.34 The Law Reform Commission considered this issue in some depth (Law of Nullity 1984). It concluded that the best approach would be to abolish all prohibitions based on affinity as any restrictions, whether specific or discretionary, would be likely to prove inappropriate or less than fully satisfactory in specific cases.

- 5.35 It considered the position of step-parents and step-children in a family-type relationship. Commenting on the absence of guidance in relation to a marriage between a step parent and a step child the Law Reform Commission cited a case in the New Zealand Courts in the 1950's which stressed the importance of the existence of a guardian/ward relationship between the parties concerned in determining whether such a marriage would be "abhorrent to public opinion".

- 5.36 However its view was that a prohibition would have little or no justification in cases where a family-type relationship was not present. The problem posed by family-type relationships is not limited to cases where a step-

relationship exists between the parties and could arise in less formalised circumstances.

- 5.37 The Commission were also of the view that difficulties involved in attempting to draft a law to deal with these types of situations appeared to outweigh the advantages.

*“After much consideration we (i.e. the Law Reform Commission) have come to the conclusion that the best approach would be for the law to abolish all prohibitions based on affinity.”*

- 5.38 The Law Society's Law Reform Committee's report Nullity of Marriage: The Case for Reform (October 2001), supported the recommendations in the Law Reform Commission's report (LRC9-1984) in relation to reform of prohibitions on marriage.

#### **Other Jurisdictions**

- 5.39 The issue of marriage within prohibited degrees of relationship has been addressed in other jurisdictions. In Northern Ireland the review of aspects of marriage law in 1984 and in 1993 led to some of the earlier measures being rescinded;

- Under the Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 (S.I. 1984 No. 1984 (N.I. 14)) as amended by the Family Law (Northern Ireland) Order 1993 (S.I. 1993 No. 1576 (N.I. 6)) certain marriages between persons related by affinity are rendered void. A man is prohibited from marrying the following persons:
  - Daughter of former wife
  - Former wife of father
  - Former wife of father's father
  - Former wife of mother's father
  - Daughter of son of former wife
  - Daughter of daughter of former wife
- A woman may not marry the following persons:
  - Son of former husband
  - Former husband of mother
  - Son of daughter of former husband
  - Former husband of mother's mother
  - Son of son of former husband

- Former husband of father's mother
- The 1993 Order further amended the law so as to permit the marriage of persons in certain degrees of affinity. Accordingly, since 1993 a marriage between a man and the mother of a former wife of his shall not be void, provided both the parties to the marriage have attained the age of 21 at the time of the marriage and the marriage is solemnized after the death of both the former wife and the father of the former wife.
- A marriage between a man and the former wife of his son shall not be void, provided both the parties to the marriage have attained the age of 21 at the time of the marriage and the marriage is solemnized after the death of both his son and the mother of his son.
- Similarly, a marriage between a woman and the father of a former husband of hers shall not be void, provided both the parties to the marriage have attained the age of 21 at the time of the marriage and the marriage is solemnized after the death of both the former husband and the mother of the former husband.
- Finally, in the case of a marriage between a woman and a former husband of her daughter, the marriage shall not be void, provided both the parties to the marriage have attained the age of 21 at the time of the marriage and the marriage is solemnised after the death of both her daughter and the father of her daughter.

It will be noted that this list incorporates 12 of the present 24 prohibitions in current law.

5.40 The law in England and Wales was amended in 1949 and more recently in 1986. The Marriage (Prohibited Degrees of Relationship) Act 1986 provided that a marriage between a man and a woman who is the daughter or grand-daughter of a former spouse of his or who is the former spouse of his father or grandfather is no longer void provided both parties have attained the age of twenty-one at the time of the marriage and the younger party has not at any time before attaining the age of eighteen been a child of the family in relation to the other party.

5.41 The provisions which apply in other EU countries are outlined in Appendix 1.

In summary, there is a consensus on restricting marriage within close blood relationships and to a lesser degree between adoptive parents and children and between adoptive siblings.

However, in relation to affinity there is considerable variation. Prohibitions apply in Portugal, France, Switzerland, Greece, Belgium and Denmark.

No prohibitions are applicable in Netherlands, Norway, Sweden, Finland, Germany and Austria. It is not clear what, if any, restrictions apply in Spain and Italy.

## 6 **Proposals for Reform.**

The following approach to reform is recommended by the Committee.

### **Sex**

- 6.1 No proposals to change current provisions.

### **Age**

- 6.2 The current rules, established by the Family Law Act 1995 relating to age do not appear to be giving rise to any practical difficulties. No changes are therefore proposed.

### **Prohibited Degrees**

- 6.3 The present law reflects biological, religious and social considerations which pertained over a hundred years ago. Even then, it was considered that the law should be changed to reflect social and economic conditions. The question arises as to whether the law on prohibited degrees continues to have validity in today's society.
- 6.4 Commentators have pointed to the need for reform of the laws in relation to marriage within prohibited degrees of relationship - in particular, those in relation to divorce, adoption and affinity. Two reports - The Law Reform Commission's report on Law of Nullity 1984 (LRC 9 – 1984) and the Law Society's Law Reform Committee's report Nullity of Marriage (October 2001) included recommendations in relation to marriage within prohibited degrees of relationship.

### Consanguinity

- 6.5 The Law Reform Commission recommended that the current list of prohibited degrees be extended to include the following blood relationships:
1. grand uncle and grand niece
  2. grand aunt and grand nephew

- 6.6 The Committee accepts the recommendations of the Law Reform Commission.

#### Adoption

- 6.7 It is considered that the law in relation to marriage between parties related by Adoption is deficient. Prohibitions against marriages between parents and an adoptive child and between adoptive siblings, even in cases where an Adoption Order ceases to have effect, should be introduced.

#### Affinity

- 6.8 The issues in relation to prohibited degrees of affinity are complex. The question arises as to whether all or at least some of the restraints based on affinity should be removed. Another consideration is whether the State should place any obstacle to a marriage without due cause.
- 6.9 The law has already been changed to deal with social and economic issues by permitting marriage of a man and his deceased wife's sister or a woman and her deceased husband's brother (Acts of 1907 & 1921).
- 6.10 More recently, the High Court (2001), granted an application for the recognition of a marriage between a woman and her deceased aunt's husband.
- 6.11 The absolute prohibition on a person marrying their divorced spouse's brother (or sister) may be perceived to be unduly restrictive or construed as discriminatory.
- 6.12 The position in other European countries shows that some States do not have any restriction on marriage within affinity degrees of relationship. It is noted that Northern Ireland which share our legislative heritage has reviewed prohibitions based on affinity and has retained some 10 of the current prohibitions listed in Table 2 above.
- 6.13 The Law Reform Commission (1984) had considered the relevance of prohibitions based on affinity in some depth and concluded, on balance, that all restraints on marriage based on affinity should be abolished. The Law Society Reform Committee report on Nullity of Marriage (2001) concurred with their views.

6.14

The Committee notes that this is a sensitive and complex issue and seeks views on whether prohibitions on marriage based on affinity should be retained and what, if any, amendments should be made to the current list.

There would appear to be broadly three options available:

- No change to the current restrictions.

The defect of this option would be to ignore developments of the common law and it could potentially leave as unresolved, issues arising from changes in society mores.

- Lifting of some of the current restrictions in order to bring our regulations more into line with those of other jurisdictions, including Northern Ireland.

For those favouring changes along these lines, your views are requested on which degrees of affinity should be retained and which should be dropped, giving the reason(s) in support of your recommendations.

- Abolish all restrictions based on degrees of affinity.

This option would bring Ireland into line with the recommendations of the Law Reform Commission in 1984, as supported by the Law Society Reform Committee in 1991. However, the absence of any restrictions would leave us in a position of being considerably out of line with most European countries, including our closest neighbours. While this option would circumvent the necessity to balance competing views in society, it would require very careful consideration to ensure that appropriate safeguards to the institution of marriage remained in place.

## **Part 3**

### **Capacity to Marry**

## **7 Introduction.**

- 7.1 One of the key principles of Marriage Law is that to contract a valid marriage both parties to the marriage must give their full, free and informed consent. To give an informed consent a person must be able to understand the nature of the marriage contract, the duties and responsibilities as well as the status conferred by marriage.

## 8 **Current Provisions .**

### **Consent**

- 8.1 Persons entering into marriage must do so freely and without force. The consent to marry must represent the full and free exercise of the independent will of each of the parties to the marriage.
- 8.2 A number of different circumstances can render a person incapable of giving free consent to a marriage:
- Intoxication
  - Mental / Psychological incapacity
  - Duress
  - Mistake
  - Misrepresentation
  - Already married

### **Intoxication**

- 8.3 Where either party to a marriage is intoxicated to such a degree or is under the influence of drugs so as to be unable to understand the nature of the marriage ceremony he or she cannot contract a valid marriage.
- 8.4 Instances have arisen where a registrar did not proceed with a civil marriage ceremony because one of the parties to the marriage was intoxicated.

### **Mental / Psychological incapacity**

- 8.5 Mental or psychological incapacity can render a person incapable of consenting to marriage. The incapacity should be of such degree to render the party unable to understand the nature and consequences of the marriage ceremony. This is a very complex area of law and does not lend itself to easy definition.

- 8.6 The issue to be considered is whether the parties to a marriage have the capacity to give an informed consent. The key question is whether each of the parties has an understanding of the nature of the marriage contract and the responsibilities normally attaching to marriage.

#### **Marriage of Lunatics Act 1811**

- 8.7 There are, in addition, restrictions on persons marrying on the grounds of mental capacity. The Marriage of Lunatics Act of 1811 provides that persons declared insane cannot marry before being declared sane.
- 8.8 This Act was repealed in England in 1959, and no equivalent legislation exists in most other common law countries. However, a number of civil law jurisdictions have provisions similar to the 1811 Act.
- 8.9 The Law Reform Commission recommended that the prohibition contained in the Act of 1811 should be replaced by a prohibition based on grounds of mental capacity.

#### **Duress**

- 8.10 Consent to a marriage must be voluntary and represent a full free exercise of the independent will of the party concerned. Therefore, consent must not be due to pressure imposed on a party to the marriage by emotional, interpersonal or circumstantial factors.

#### **Mistake or Misrepresentation**

- 8.11 Consent to a marriage must be an informed consent. The parties must understand the importance, legal significance and obligations imposed by the marriage contract.
- 8.12 Irish Law regards as irrelevant the motive to marry once the parties exchange a full, free and informed consent.

#### **Already married**

- 8.13 A person who is in a subsisting valid marriage lacks the capacity to marry.

### **Public Notice of Intended Marriages**

- 8.14 The marriage contract, imposes duties and responsibilities, confers rights and entitlements and alters the status of the parties concerned in the community. Society has an interest in protecting the institution of marriage and of bringing to attention any impediment to a proposed marriage. This was achieved in 19<sup>th</sup> century legislation by various measures. In the case of marriage by religious solemnisers it was presumed that the church or body concerned knew the parties concerned. There were measures such as the reading of Banns of intended marriages, which have now more or less fallen into disuse. In the case of marriages solemnised by the registrar a list of marriage notices were displayed in the registrar's office. In addition a copy of the notice of marriage was referred to the church or registered building where the parties attended religious worship or in some cases the notice was published in the local papers. This latter provision was discontinued in 1996.

### **Caveats**

- 8.15 A registrar may be advised of any known impediment to a marriage by a third party. There is provision in current legislation to enter a caveat with a registrar against the granting of a certificate or licence for the marriage of a named person(s). Any such caveat must contain the grounds for the objection together with the name and address of the person lodging the caveat. The matter falls to be dealt with in the first instance by the registrar but may be referred to An tArd-Chláraitheoir (Registrar General) for advice and direction. The person entering a caveat also has the right of appeal to An tArd-Chláraitheoir.

## **9 Proposed Future Approach.**

### **Consent**

- 9.1 To contract a valid marriage both parties must give their full, free and informed consent.
- 9.2 The proposals for reform of procedural preliminaries for marriage and the solemnisation of marriages will underpin the principle of consent and should remove any ambiguities as to the nature and significance of marriage.

### **Marriage of Lunatics Act 1811**

- 9.3 The Committee proposes that, in line with the recommendation of the Law Reform Commission, the Marriage of Lunatics Act 1811 should be replaced by a prohibition based on lack of capacity.

### **Public Notice of Intended Marriages**

- 9.4 In conjunction with the introduction of new civil preliminaries for marriage, it is intended to introduce a system whereby all notifications of intended marriages will be published on the General Register Office website [www.groireland.ie](http://www.groireland.ie) for a period of up to three months prior to the intended date of marriage and will thus be open to public scrutiny.

- 9.5 **Objections to an Intended Marriage**

The current provision to enter an objection to a proposed marriage will be retained. In addition, a provision giving the right to appeal a decision of An tArd-Chláraitheoir to the Circuit Court has been included in the Civil Registration Act 2004.

## **Appendix 1.**

### **Marriage Within Prohibited Degrees of Relationship Provisions Applying in Other EU Countries**

### **United Kingdom**

- The current law on the prohibited degrees of relationship in the United Kingdom is contained in the Marriage Act 1949. Under this enactment a man cannot marry, for reasons of affinity as opposed to consanguinity, his:
  - Wife's mother
  - Wife's daughter
  - Father's wife
  - Son's wife
  - Father's father's wife
  - Mother's father's wife
  - Wife's father's mother
  - Wife's mother's mother
  - Wife's son's daughter
  - Wife's daughter's daughter
  - Son's son's wife
  - Daughter's son's wife.
- Under the 1949 Act, a woman is prohibited from marrying her:
  - Husband's father
  - Husband's son
  - Mother's husband
  - Daughter's husband
  - Father's mother's husband
  - Mother's mother's husband
  - Husband's father's father
  - Husband's mother's father
  - Husband's son's son
  - Husband's daughter's son
  - Daughter's daughter's husband
  - Son's daughter's husband.

- The 1949 Act goes on to specifically exclude certain relationships from being rendered void by reason of affinity. These relationships include those between a man and his:
  - Deceased wife's sister
  - Deceased brother's wife
  - Deceased wife's brother's daughter
  - Deceased wife's sister's daughter
  - Father's deceased brother's wife
  - Mother's deceased brother's wife
  - Deceased wife's father's sister
  - Deceased wife's mother's sister
  - Brother's deceased son's wife
  - Sister's deceased son's wife.
- Also excluded are relationships between a woman and her:
  - Deceased sister's husband
  - Deceased husband's brother
  - Father's deceased sister's husband
  - Mother's deceased sister's husband
  - Deceased husband's brother's son
  - Deceased husband's sister's son
  - Brother's deceased daughter's husband
  - Sister's deceased daughter's husband
  - Deceased husband's father's brother
  - Deceased husband's mother's brother
- The Marriage (Prohibited Degrees of Relationship) Act 1986 altered the position in relation to marriages solemnised after the commencement of that Act. Under section 1 of the Act a marriage between a man and a woman who is the daughter or grand-daughter of a former spouse of his or who is the former spouse of his father or grandfather is no longer void provided both parties have attained the age of twenty-one at the time of the marriage and the younger party has not at any time before attaining the age of eighteen been a child of the family in relation to the other party.

- Other marriages which are no longer void in accordance with section 1 of the 1986 Act include those between:
  - A man and a woman who is the grandmother of a former spouse of his or is a former spouse of his grandson.
  - A man and a woman who is the mother of a former spouse of his, provided the marriage is solemnised after the death of both that spouse and the father of that spouse and after both the parties to the marriage have attained the age of twenty-one.
  - A man and a woman who is a former spouse of his son provided the marriage is solemnised after the death of both his son and the mother of his son and after both the parties to the marriage have attained the age of twenty one.

### **Scotland**

- Under section 2 of the Marriage (Scotland) Act 1977 a man is prohibited from marrying the following persons by virtue of his relationship of affinity with them:
  - Mother of former wife;
  - Daughter of former wife;
  - Former wife of father;
  - Former wife of son;
  - Former wife of father's father;
  - Former wife of mother's father;
  - Mother of father of former wife;
  - Mother of mother of former wife;
  - Daughter of son of former wife;
  - Daughter of daughter of former wife;
  - Former wife of son's son;
  - Former wife of daughter's son;
- A woman, similarly, cannot marry the following persons:
  - Father of former husband;
  - Son of former husband;
  - Former husband of mother;
  - Former husband of daughter;

- Former husband of father's mother;
- Former husband of mother's mother;
- Former husband of daughter's daughter.
- Father of mother of former husband;
- Son of son of former husband;
- Son of daughter of former husband;
- Former husband of son's daughter;
- Father of father of former husband;

### **Northern Ireland**

- Under the Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 (S.I. 1984 No. 1984 (N.I. 14)) as amended by the Family Law (Northern Ireland) Order 1993 (S.I. 1993 No. 1576 (N.I. 6)) certain marriages between persons related by affinity are rendered void. A man is prohibited from marrying the following persons:
  - Daughter of former wife
  - Former wife of father
  - Former wife of father's father
  - Former wife of mother's father
  - Daughter of son of former wife
  - Daughter of daughter of former wife
- A woman may not marry the following persons:
  - Son of former husband
  - Former husband of mother
  - Son of daughter of former husband
  - Former husband of mother's mother
  - Son of son of former husband
  - Former husband of father's mother
- The 1993 Order amended the law so as to permit the marriage of persons in certain degrees of affinity. Accordingly, since 1993 a marriage between a man and the mother of a former wife of his shall not be void, provided both the parties to the marriage have attained the

age of 21 at the time of the marriage and the marriage is solemnized after the death of both the former wife and the father of the former wife.

- A marriage between a man and the former wife of his son shall not be void, provided both the parties to the marriage have attained the age of 21 at the time of the marriage and the marriage is solemnized after the death of both his son and the mother of his son.
- Similarly, a marriage between a woman and the father of a former husband of hers shall not be void, provided both the parties to the marriage have attained the age of 21 at the time of the marriage and the marriage is solemnized after the death of both the former husband and the mother of the former husband.
- Finally, in the case of a marriage between a woman and a former husband of her daughter, the marriage shall not be void, provided both the parties to the marriage have attained the age of 21 at the time of the marriage and the marriage is solemnised after the death of both her daughter and the father of her daughter.

### **Netherlands**

- The parties must not be within the prohibited degrees of relationship. A marriage is forbidden between a parent and his or her child and between brothers and sisters. In cases where a child has been adopted, a marriage between a brother and sister by adoption may be authorised with the consent of the Minister of Justice. Marriages between uncle and niece or nephew and aunt or nephew or niece are permitted under Dutch law.

### **Norway**

- The parties must not be within the prohibited degrees of relationship. Marriages between lineal ascendants and descendants and between brothers and sisters are forbidden.

### **Sweden**

- The parties must not be related to one another in a direct ascending or descending line, or be brother or sister of full blood. No dispensation can be given from these impediments. If a marriage has been entered into in conflict with this impediment, it should be dissolved by divorce. Half-sisters and brothers may in exceptional circumstances, receive dispensation to marry one another.
- Adoptive children and parents may, at present marry one another, such a marriage has the effect of ending the adoption and all its legal consequences.

### **Austria**

- The parties must not be within the prohibited degrees of relationship. . Marriages between ascendants and descendants and between full and half brothers and sisters is prohibited.
- While adoption is in force, adopter and adoptee cannot marry. Upon application an adoption may be dissolved by the court.

### **Finland**

- No one may conclude a marriage with his or her direct ascendant or descendant, nor with his or her siblings of full or half blood and there can be no exception to these impediments. Marriage between two persons, one of whom is a descendant of the other's brother or sister, is also forbidden unless the Ministry of Justice grants a dispensation to marry for special reasons.
- An adopted child and his or her adoptive parent may not intermarry. However, the Ministry of Justice is able to give them a dispensation to marry if there are especially weighty reasons for doing so. If such a marriage is concluded the legal effects of the adoption cease, with the consequence that it is impossible for two persons to be simultaneously adoptive parent and child and husband and wife.

### **Germany**

- The parties must not be within the prohibited degrees of relationship. A marriage shall not be entered into by persons, where one is a descendant of the other, or by persons who are issue of the same parents or one parent. In contrast to former law, marriages between step-parent and stepchild, or between a parent-in law and a son/daughter-in- law are allowed now.

### **Belgium**

- The parties must not be within the prohibited degrees of relationship. Marriage is prohibited between ascendants or descendants in the direct line or their spouses. It is also prohibited between brothers and sisters or their spouses, except that a marriage between a man and his sister-in-law or a woman and her brother-in-law is allowed after the death of the brother or sister whose marriage gave rise to the relationship, or by special consent of the King. Marriage between aunts and nephews and uncles and nieces is also prohibited, but may be permitted by the consent of the King.

### **Denmark**

- The parties must not be within the prohibited degrees of relationship. Marriages between lineal ascendants and descendants and between brothers and sisters are prohibited, but is permitted uncle and niece and aunt and nephew and between cousins. Where a party to a marriage has previously been married to a lineal ascendant or descendant of the other party, permission to marry must be obtained from the Minister of Justice.
- An adopter and adoptee cannot marry while the adoption is in force.

### **France**

- The parties to the marriage must not be within the prohibited degrees of relationship. A marriage is prohibited between: parent and child; sister

and brother. Aunts and uncles cannot marry their nephews and nieces, except with the permission of the President of the Republic.

- A marriage is prohibited between: mother-in-law and son-in-law; father-in-law and daughter-in-law; stepfather and stepmother; stepdaughter and stepson. In the case of stepfather/stepmother; stepdaughter/stepson permission to marry can be granted by the President of the Republic, provided the marriage which created the relationship was terminated by death. There is no prohibition brother-in-law and sister-in-law.
- The same prohibitions apply to adoptive relationships.

### **Greece**

- The parties to the marriage must not be related within the prohibited degrees of consanguinity or affinity. Marriage between persons related to each other by blood, in direct ascending or descending line, or collaterally up to the fourth degree, is forbidden. Affinity (in direct ascending or descending line, or collaterally up to the third degree) is also an impediment to marriage. A marriage between persons related by blood or by affinity in contravention of these rules will be deemed void.
- The parties must not be related by adoption. Adoptive parents, as well as members of the adoptive family (within the prohibited degrees of consanguinity) may not marry either the adoptive child or his or her relatives (within the same degrees). Two adoptive children of the same adoptive parent may not intermarry. When the person adopted is an adult, there is an impediment to marriage only between the person adopted and his or her adoptive parent. Failure to satisfy these rules may render the marriage void.

### **Portugal**

- The parties must not be within the prohibited degrees of relationship. Marriage between certain persons related by blood or other family ties is forbidden. A man cannot marry his mother, grandmother, daughter, granddaughter, sister, mother-in-law, stepmother or stepdaughter. The same rules apply to a woman in respect of her equivalent male relations. A marriage between such persons is void.

- Being within the prohibited degrees of relationship by virtue of a “full adoption” is also an impediment to marriage in the same way as other blood relations.

### **Switzerland**

- The parties must not be within the prohibited degrees of relationship. Marriage between certain persons related by blood or marriage is forbidden. Marriage is prohibited between relatives related to each other by descent or between persons who are the issue of the same parent(s), as well as between stepparents and stepchildren.

These prohibitions also apply to persons related through adoption. Adoption does not cancel out the impediment to marriage between the adoptive child (and his or her descendants) and his or her family of origin.

### **Italy**

- The parties must not be within the prohibited degrees of relationship.

### **Spain**

- The parties must not be within the prohibited degrees of relationship.