**IRISH CONSTITUTION AND SAME-SEX MARRIAGE**

**Brian Lacey**

A lot of LGBT people have been delighted by the government's decision to hold later this year a referendum on same-sex marriage, or on what has been called marriage equality. The decision, which has been campaigned for and welcomed on behalf of gay people by GLEN, has been trumpeted as a brave and historic decision to extend to gay people constitutional rights which they do not currently have. But what if they do have such rights already: rights which may not be expressed explicitly but which are implicit in the existing references in the constitution to 'marriage' and the 'family'; rights which already exist but which are currently denied by the government and the legal system? If that were the case then the forthcoming referendum would not be such a positive advance but, in fact, an impertinence. I believe that this is the case and that the decision to, as it were, kick the matter out to the decision of the electorate is a dangerous betrayal and denial of existing rights already contained in the constitution.

We are very well used in this country to discovering that our constitution contains existing rights previously denied to us by successive governments and judicial decisions. The classic example of that in this context is that we didn't need a referendum in 1993 to decriminalise homosexual behaviour by men, despite the government having previously spent a fortune in the courts defending the position that such was not permitted by the constitution. Over my lifetime I have repeatedly heard politicians, attorney generals and senior judges telling us how other things (mostly relating to sexual or family matters) were unconstitutional, only to have them subsequently be forced to backtrack - usually by decisions of the European courts.

The wording for the forthcoming referendum proposes to add a sentence to the constitution; not even a comma of what is already in it is to be changed. This is an implicit admission that, whatever about explicit provision, there is no impediment to same-sex marriage in the constitution as it currently stands. What prevents same-sex marriage at present are the relevant laws of this country, not the constitution. Those laws can be changed by the Oireachtas immediately, given the government's majority and the overwhelming support for such change from most sections of the opposition. There is absolutely no need for an expensive and (probably) divisive referendum, which some commentators - including several pro-change government ministers - fear might fail.

In 2006 the High Court ruled in the case taken by Katherine Zappone and Ann Louise Gilligan that there was no constitutional provision to allow same sex couples the right to marry. Correct! There is none, but neither is there any impediment. The 2006 decision is currently being appealed to the Supreme Court. But in her ruling in 2006 Ms Justice Dunne said:

"It is to be hoped that the legislative changes to ameliorate these difficulties will not be long in coming. Ultimately, it is for the legislature to determine the extent to which such changes should be made."

She did not say that same-sex marriage if legislated for by the Oireachtas would be unconstitutional. On the contrary she threw the ball back to the Oireachtas.

Our courts act on the basis that all our laws are constitutional until they are shown not to be - usually by the challenges of ordinary citizens. In this case there is a presumption that the discriminatory laws against same-sex marriage are constitutional. If the Oireachtas changed those laws - and there is nothing to stop that happening immediately, if the political will existed - the opposite laws would be considered to be equally constitutional unless they were successfully challenged in the courts. If that were to happen, then and only then would we need a referendum.

Advocates of the referendum point out that the Constitutional Convention recommended it to the government. But the Constitutional Convention was not asked the open question as to whether or not the state should permit same-sex marriage. Instead it was asked to consider - the loaded and, in my opinion, politically-cowardly question - if the government should hold a referendum to give explicit permission for same-sex marriage in the constitution. Not once in the fairly lengthy report of the Convention does it actually cite anything in the existing constitution that needs to be changed.

Apart from the amendment on divorce, marriage is mentioned only once in the constitution, at Article 41.3.1 where it states [in English) 'the state pledges itself to guard with special care the institution of marriage, on which the Family is founded'. Despite all sorts of incorrect public comments on the issue, there is no definition anywhere in the constitution of what constitutes either 'marriage' or the 'Family'.

However, as was averted to in a recent tragic case, article 25.4 says that the text of the constitution in Irish has precedence in any dispute about its meaning. The equivalent references in the constitution to what is expressed in English as the 'Family' are expressed in the Irish language texts as 'Teaghlach', the primary and etymological meaning of which (in English) is 'household', a completely gender-neutral concept. Under our constitution an LGBT 'teaghlach' is just as much a 'teaghlach' as any other, and is entitled to all the support the state can give or (as in this case) currently withholds. The Irish word used in the constitution as the equivalent of 'Marriage' is 'Pósadh'. That word was borrowed from the original Latin 'spondeo', the meaning of which was to promise or pledge oneself. 'Pósadh' primarily means, therefore, to promise oneself to one's partner. Like 'teaghlach', it carries no inherent gender limitations. Incidentally, it might be pointed out that neither are there any gender-loaded words in Irish for the English language concepts of 'husband' and 'wife'. In Irish one is either a fear céile ('man partner') or a bean céile ('woman partner') – which means that there are no problems there either for same-sex marriages.

I accept that the referendum - if passed - will give explicit recognition to a right which I believe is already inherent in the constitution. But what if it fails? Another ten to twenty years before the issue is raised again? The government should abandon this completely unnecessary referendum and instead do what is needed and fully possible - pass laws in the Oireachtas which will terminate the denial of existing marriage rights to same-sex couples and protect the nation's 'teaghlaigh' in all their human diversity. The proposed referendum is a needless gamble. Gay people deserve better than that; they deserve the certainty of legislation.