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# Marriage, Civil Partnership and the Prohibited Degrees of Relationship

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This article considers the degrees of relationship which prevent persons from marrying each other or which, under the Civil Partnership Bill 2009 (“the Bill”),<sup>1</sup> would exclude them from registering a civil partnership together. The possibility of reform in respect of the prohibited degrees of relationship for marriage has long been discussed.<sup>2</sup> The planned introduction of civil partnership has raised the issue again, with the Bill providing for a list of prohibited relationships which, in addition to the necessary adjustment in terms of the parties being of the same gender, differs from that applicable in the marriage context. The list in the Bill seems to reflect a policy of implementing, in the civil partnership context, the law reform proposals which have been made in respect of marriage. It is possible to speculate that the intention is that the rules on marriage will be modernised by future legislation, so that they will ultimately be equivalent *mutatis mutandis*. As will be discussed, however, the list in the Bill reflects some changes which were not actually proposed by the relevant law reform bodies. In addition, there are serious questions as to the credibility of at least one of the law reform proposals which has influenced the proposed list of prohibitions in respect of civil partnership. This article will discuss the question of devising a list of prohibited relationships for civil partnership and reforming the list for married couples. In addition, the article identifies a significant problem with the current terms of the Bill relating to prohibited degrees of relationship, as this issue impacts on the Bill’s provisions for the recognition in Ireland of foreign legal relationships analogous to civil partnership.

## ***The Prohibited Degrees for Marriage***<sup>3</sup>

The legislative history of the relevant rules is very complex, partly because of divergences between the statutes enacted by the Irish and English parliaments.<sup>4</sup> The

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<sup>1</sup> The Bill was published on June 26, 2009 and the discussion in this article refers to the Bill as initiated. For an analysis of the scheme in the Bill dealing with cohabitation outside marriage or civil partnership, see J Mee “A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009” (2009) 12 Irish Journal of Family Law (forthcoming). The definition of “cohabitant” in s.170(1) of the Bill excludes couples who are in the prohibited degrees of relationship, an aspect of the Bill which is discussed and criticised in the article just cited. See also J Mee “Succession Law Aspects of the Civil Partnership Bill 2009” (2009) 14 CPLJ 86 dealing with issues in respect of both civil partnership and cohabitation.

<sup>2</sup> See Law Reform Commission *Report on Nullity of Marriage* (LRC 9-1984) pp 45-48; 130-144; Law Society Law Reform Committee *Report of Marriage: the Case for Reform* (October 2001); Interdepartmental Committee on Reform of Marriage Law *Discussion Paper No 5* (September 2004) pp 9-22 (available at [www.groireland.ie/docs/marriagelaw\\_discussion\\_paper\\_no5.pdf](http://www.groireland.ie/docs/marriagelaw_discussion_paper_no5.pdf)).

<sup>3</sup> See generally, M. Harding “To Affinity and Beyond: A Critical Analysis of Marriage Within Prohibited Degrees of Relationship” in K. Boele-Woelki and T. Sverdrup (eds) *European Challenges in Contemporary Family Law* (Antwerp: Intersentia, 2008); S. Cretney and J. Masson, *Principles of Family Law* 5th edn (London: Sweet and Maxwell, 1990) pp 35-44 (the discussion in this edition being more extensive than in later editions).

ultimate source of the law in Ireland appears to be the Marriage Act 1537,<sup>5</sup> which proscribed marriage within the degrees “prohibited by God’s law”, listing a range of specific degrees of relationship to which the prohibition applied.<sup>6</sup> The Marriage Act 1542 confirmed that “no reservation or prohibition (God’s law except) shall trouble or impeach any marriage without [i.e. outside] the [L]evitical degrees.” The reference here is to the prohibitions on “uncovering nakedness” in the biblical Book of Leviticus.<sup>7</sup> As has been mentioned, the Bill applies a modified version of these rules to determine eligibility for civil partnership for same sex couples, this being somewhat ironic because Leviticus is also the source of the notorious condemnation of male homosexual acts as an “abomination” punishable by death.<sup>8</sup>

In summarising the current law on the prohibited degrees of relationships in respect of marriage, which apply equally to relationships of the half-blood as to those of the whole blood<sup>9</sup> but do not apply to relationships by adoption,<sup>10</sup> it will be convenient to state the rules applicable to women, since parallel rules apply to both sexes. On the grounds of consanguinity, a woman is forbidden from marrying her father, grand-father, uncle, brother, son, grandson or nephew. Putting it another way, the prohibition extends as far as relationships in the third degree (such as between uncle and niece), the method of counting degrees of relationship in this context being the same as in respect of intestate succession.<sup>11</sup> By way of exception, there is no prohibition in Ireland (or in England and Wales) on marriage with one’s great-grandparent, a relation in the third degree, although this avenue of temptation is closed in Scotland.<sup>12</sup> The list of prohibited relationships does not cover relationships in the fourth degree, so that there is no objection to a marriage between first cousins<sup>13</sup> nor (as is discussed later in this article)<sup>14</sup> does the established law

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<sup>4</sup> See the useful discussion by Laffoy J in *O’Shea v Ireland* High Court, unreported, 17 October 2006 (available on First Law), pp 5-11. See also *LRC Report on Nullity of Marriage* note 2 above, pp 46-47. Compare S Wolfram *In-laws and Outlaws: Kinship and Marriage in England* (London: Croom Helm, 1987), Chapter 2.

<sup>5</sup> 28 Hen 8, c 2.

<sup>6</sup> 33 Hen 8, c 6, repealed by 3 & 4 Ph & M, c. 8 (1556) but revived as to degrees of consanguinity only by 2 Eliz 1, c 1, s 2 (1560).

<sup>7</sup> In the context of the English legislation, it became established that the prohibited degrees of relationship were those identified in a famous table produced by Archbishop Parker in 1563, although this table covers a wider range of relationships than those listed specifically in the Henrician statutes: see Wolfram note above, pp.26-27; *R v Chadwick* (1847) 11 QB 205 and see also *Wing v Taylor* (1861) 2 Sw & Tr 278. The discussion in this article proceeds on the basis of the generally accepted view that this is also the position in Ireland: see the discussion in Harding n 3 above, pp 162-163.

<sup>8</sup> Leviticus 20:13.

<sup>9</sup> So that, for example, a half-sister would be treated in the same way as a “full” sister.

<sup>10</sup> This issue is discussed in detail in the text following note 40 below, where it is explained that a prohibition probably does apply between adoptive parent and child.

<sup>11</sup> See Succession Act 1965, s 71(2).

<sup>12</sup> Marriage (Scotland) Act 1977, s 2 and Sch 1.

<sup>13</sup> In relation to marriage between cousins, see Interdepartmental Working Group note 2 above, pp 12-13, discussing a report by the Traveller Consanguinity Working Group which concluded that such marriages were not harmful in themselves but recommended making available, on a voluntary basis, confidential genetic counselling. In thirty US states, the prohibition on marriage extends as far as relationships in the fourth degree, thus prohibiting marriage between cousins, while in twenty (“mostly Eastern”) states marriages between cousins are permitted: see L Wardle and L Nolan *Fundamental Principles of Family Law* (Buffalo, NY: William Hein & Co Inc, 2006) p 87.

on consanguinity apply to a relationship between a great-uncle/grand-niece or great-aunt/grand-nephew. On the grounds of “affinity”, a woman cannot marry the former husband of her mother, daughter, grand-daughter, grandmother, aunt or niece, or her former husband’s son, father, grand-father, uncle, grandson or nephew (and parallel rules apply to men). Originally, in addition to the prohibitions listed above, it was not permissible for a person to marry the brother or sister of a former spouse but, following “one of the most protracted struggles in British parliamentary history”,<sup>15</sup> this rule was modified by statute in the early 20<sup>th</sup> century to allow such a marriage provided that the spouse was dead.<sup>16</sup> In *O’Shea v Ireland* in 2006,<sup>17</sup> Laffoy J held that the requirement in the relevant legislation that the sibling be deceased was unconstitutional, so that such a marriage is permissible even where the first marriage ended in divorce.

The status of the surviving affinity prohibitions is questionable. In the context of English legislation, the European Court of Human Rights ruled in 2005 in *B and L v United Kingdom*<sup>18</sup> that a prohibition on marriage to the parent of one’s former spouse and the converse prohibition on marriage to the former spouse of one’s child<sup>19</sup> (two of the headings on our list of relationships forbidden on the grounds of affinity) constituted a violation of Article 12 of the European Convention on Human Rights<sup>20</sup> on the facts of the case. One influential factor in the case was the fact that, under English law, it was possible to obtain an exemption from the rule by means of a personal act of parliament.<sup>21</sup> English law has been amended to eliminate the relevant prohibition.<sup>22</sup> It seems likely, then, that at least some of the affinity prohibitions in Irish law are unconstitutional and/or contrary to the ECHR. To take one example, in light of *O’Shea v Ireland* and *B and L v United Kingdom*, what can be said in defence of the existing prohibition on (say) a person marrying his former wife’s half-brother’s daughter?<sup>23</sup>

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<sup>14</sup> See text following note 27 above.

<sup>15</sup> See Wolfram note 4 above, p 30: “[i]t took 65 years, 46 sessions of debate [and] 18 successful second readings in the House of Commons”. S Cretney *Family Law in the Twentieth Century: A History* (Oxford: OUP, 2003) p 45 notes that “Bills on the subject were described in Gilbert and Sullivan’s *Iolanthe* as ‘that annual blister’”.

<sup>16</sup> See Deceased Wife’s Sister’s Marriage Act 1907 as amended by the Deceased Brother’s Widow’s Marriage Act 1921.

<sup>17</sup> *O’Shea v Ireland* note 4 above.

<sup>18</sup> *B and L v United Kingdom* [2006] 1 FLR 35. For criticism, see S Cretney “Marriage, mothers-in-law and human rights” (2006) 122 LQR 8.

<sup>19</sup> The absolute nature of these prohibitions had already been diluted: see Marriage Acts 1949-1986, s 1(5).

<sup>20</sup> Article 12 provides that “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”.

<sup>21</sup> See note 18 above, paras 20-23; 40.

<sup>22</sup> See Marriage Act 1949 (Remedial) Order 2007, 2007 No 438.

<sup>23</sup> Compare L Siggins *Review of Affinity Marriages Sought by TD*, Irish Times, December 18<sup>th</sup> 2006, p 3 (reporting on a case of a man prevented from marrying his former wife’s niece). Note also *Woman Told Her Marriage 29 Years Ago was Lawful* Irish Times, June 28<sup>th</sup> 2001, p 4 (the reasons for the decision of Smyth J here, apparently upholding the validity of a marriage to an aunt’s former husband, not being explained in the newspaper report).

## ***Reform and the Proposed Prohibited Degrees of Relationship for Civil Partnership***

Section 26 of the Bill inserts a new Third Schedule into the Civil Registration Act, 2004, listing the prohibited degrees of relationship for entering into a civil partnership.<sup>24</sup> These degrees of relationship differ from those applicable to marriage in that they include the relationships based on consanguinity (adding two new classes of prohibited relationship, as discussed below) but do not include any relationships based on affinity. In addition, it is provided that the relationships include “relationships and former relationships by adoption”, also departing from the current position in relation to marriage. For the most part, the list of relationships in the relevant Schedule reflects the traditional prohibited degrees of relationship for marriage, as modified to reflect the reform proposals made in that context in 1984 by the Law Reform Commission<sup>25</sup> (and, obviously, with the genders reversed). Given that this extension reflects law reform proposals which were made in the context of marriage, it seems likely that the approach in the Bill is linked to an intention to legislate in the future to modify the rules on marriage so that they are parallel to those specified in the Bill in relation to civil partnership. Thus, the changes proposed in the Bill, in terms of transposing the marital list of prohibited relationships to the civil partnership context, are of potential significance in the marriage law context also. These changes will now be analysed.

### *(i) A New Relationship Based on Consanguinity*

It is obviously a difficult question as to whether or not the marital consanguinity rules, based partly on genetic considerations, should be applied to same sex civil partnership.<sup>26</sup> However, in the interests of parity of esteem, there are clear attractions in the idea of ensuring equivalent rules in relation to both institutions in respect of the prohibited degrees of relationship.<sup>27</sup> In terms of the creation of new classes of prohibited relationships, the Bill includes on the list of prohibited relationships that between great-uncle/grand nephew and great-aunt/grand-niece. For clarity, it should be explained that what is at issue here is the relationship between a person and his or her grand-parent’s sibling. One might expect a large age difference in this context but, as was noted by the LRC, “of course in specific cases there may be no significant age difference”.<sup>28</sup> These relationships are not currently within the prohibited degrees of relationship for marriage, which were set out above. The proposal in the Bill to add them to the prohibited list of relationships can be traced to a Law Reform Commission Report of 1984 which appeared to recommend such a modification in the marriage context.<sup>29</sup> On closer inspection, the LRC’s recommendation is problematic. In an initial statement of the law, the LRC Report lists the prohibited degrees of relationship in full, correctly not including the relationship

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<sup>24</sup> See also s 105(e) (dealing with the grounds for nullity of civil partnership).

<sup>25</sup> *Report on Nullity of Marriage* note 1 above, pp 130-144.

<sup>26</sup> Compare S Cretney *Same Sex Relationships: From ‘Odious Crime’ to ‘Gay Marriage’* (Oxford: OUP, 2006) pp 36-37.

<sup>27</sup> Note the view of the Irish Council for Civil Liberties in *ICCL Submission to the Minister for Justice, Equality and Law Reform on the Scheme of the Civil Partnership Bill 2008* (August 2008; available [www.iccl.ie/publications/Equality/ICCL-Submission-on-the-Civil-Partnership-Bill-\(August-2008\).pdf](http://www.iccl.ie/publications/Equality/ICCL-Submission-on-the-Civil-Partnership-Bill-(August-2008).pdf)) p 8 that there should be no difference in the two sets of rules.

<sup>28</sup> *Ibid*, p 134. This is probably more likely where a relationship of the half-blood is involved.

<sup>29</sup> *LRC Report on Nullity of Marriage* note 2 above, pp 134-135.

under discussion on the list of current prohibitions.<sup>30</sup> At a later stage in the Report, however, when discussing possible reform of the law, the LRC proposes (after discussion) that the law should “retain the present prohibition” in respect of the relationship under discussion.<sup>31</sup> There is clearly an error of some nature here.

The most obvious possibility is that the LRC forgot that the relevant relationship was not on the prohibited list and believed that it was simply recommending the continuation of a centuries-old prohibition, which would clearly be a far less radical step than a recommendation that the traditional list of prohibitions should be extended. Alternatively, it may be that the error lay in the phrasing of the recommendation and that the LRC actually intended to propose the retention of the existing rule that these relationships are *not* on the prohibited list, i.e. suggesting retaining the pre-existing rule, rather than “retaining” a not actually pre-existing prohibition. This interpretation is bolstered to some extent by the manner in which the discussion of the point is presented, in that the arguments in favour of a prohibition are not advanced with much enthusiasm. For example, it is conceded that “[t]he genetic argument has considerably less force” than in the uncle/niece or aunt/nephew relationship,<sup>32</sup> which itself was not regarded by the LRC as beyond debate in terms of inclusion on the prohibited list. In addition, the LRC stated that the issues in relation to great-uncle/aunt and grand-niece/nephew “can be dealt with somewhat more briefly”<sup>33</sup> than those relating to uncle/aunt and niece/nephew (where no change in the law was recommended). It would seem odd to devote less space to an issue on which a change in the law was being suggested than to one on which no change was recommended. Whatever the nature of the LRC’s error, it appears to detract seriously from the persuasive value of the relevant recommendation.

In its report on nullity of marriage published in 2001, the Law Society Law Reform Committee simply adopted the recommendations of the LRC, without discussion, including the one in question.<sup>34</sup> Along the same lines, the Interdepartmental Committee on Reform of Marriage Law asserted in 2004 that the LRC had recommended that the existing prohibition should be “extended” to the relationships in question<sup>35</sup> and adopted that recommendation, again with no discussion.<sup>36</sup> These recommendations, reflected in the relevant provision in the Civil Partnership Bill, are very difficult to understand. While the other recommendations of the LRC in the area are sensible (and the recommendation under discussion has presumably piggy-backed on those recommendations), it seems bizarre to contemplate *extending* the list of prohibited relationships in respect of the relationships under discussion. Is the Book of Leviticus, as interpreted in the 16<sup>th</sup> century, really too tolerant for us? The LRC made no plausible case for a change in the law, citing no new advance in scientific understanding which would require a rethinking of the

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<sup>30</sup> *Ibid*, pp 46-47. Compare *Harrison v Burwell* (1670) 2 Vent. 9.

<sup>31</sup> *Ibid*, p 134. The recommendation is repeated in the same form in the summary at the end of the Report: *ibid*, p 187.

<sup>32</sup> *Ibid*, p 134.

<sup>33</sup> *Ibid*.

<sup>34</sup> Note 2 above, p 71.

<sup>35</sup> Note 2 above, p 11.

<sup>36</sup> *Ibid*, pp 20-21.

ancient rules (and was, in fact, unaware of suggesting a change in the law). Therefore, the extension under discussion should, it is submitted be abandoned.

By way of brief digression, it can be mentioned that it might be more appropriate to consider moving Irish law in the opposite direction, by permitting marriage between uncle/niece and aunt/nephew and civil partnership between uncle/nephew and aunt/niece. In 2004, the Interdepartmental Committee on Reform of Marriage Law undertook a comparative survey and, although this point is not drawn out in the relevant Discussion Paper, this survey suggests that such marriages are permitted in a clear majority of the European countries examined.<sup>37</sup> Such marriages are also permitted, for example, in Australia and Canada.<sup>38</sup> In 1984, the LRC recommended no change in the relevant prohibition<sup>39</sup> but that was 25 years ago and, in principle, the matter could be revisited. It may well be that public opinion, the importance of which in the present context was emphasised by the LRC,<sup>40</sup> would not favour making the change under discussion.<sup>41</sup> However, it is now more obvious than it was in 1984 that there is a human rights dimension to the issue. This suggests that it is not appropriate for it to be determined solely by reference to public opinion (which is likely to be ill-informed about the extent of current legal prohibitions, with many people incorrectly assuming e.g. that first cousins are not permitted to marry). While it may be fairly unlikely that the legislature would consider removing the relationships under discussion from the prohibited lists, the fact that a fair case can be made for taking this step seems to reinforce the view that it would be a mistake to extend the prohibitions to a more remote set of relationships by precluding marriage or civil partnership between a person and his or her great-uncle or great-aunt.

#### *(ii) Relationships by Adoption*

The Bill prefaces its list of prohibited relationships with the statement that all the prohibited relationships “include relationships and former relationships by adoption”.<sup>42</sup> Under current Irish law, it is arguable that marriage is not permitted between an adoptive parent and child due to s 24 of the Adoption Act 1952. This section does not explicitly

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<sup>37</sup> *Ibid*, Appendix 1. According to this source (and the author has not investigated the accuracy of the summary presented by the Committee), it is permitted in Austria, Germany, Denmark, Portugal, the Netherlands, Norway, Sweden and Switzerland; prohibited subject to the possibility of obtaining a special dispensation in France, Belgium and Finland, and prohibited in the United Kingdom and Greece (with information not being available on the positions in Spain and Italy).

<sup>38</sup> See Marriage Act 1961, ss 23 and 23B (Australia); Marriage (Prohibited Degrees) Act 1990, c. 46 (Canada).

<sup>39</sup> *Report on Nullity of Marriage* note 25 above, pp 133-134.

<sup>40</sup> *Ibid*, p 134.

<sup>41</sup> The variation across different jurisdictions is illustrated by the fact that the English Sexual Offences Act 2003, ss 64 and 65 criminalises consensual sexual activity between adults in the relationship under discussion, even where the parties are validly married under the law of another jurisdiction. Note the criticism by Spencer “The Sexual Offences Act 2003: (2) Child and Family Offences” [2004] Crim LR 347, 357, who attributes this curious rule (which apparently only applies to relationships of the whole blood) to “a last-minute amendment”.

<sup>42</sup> See s 26. It might be advisable for the legislation to confirm expressly that this does not affect the existing rule that the prohibitions apply also as between the adopted child and his blood relations (although, as is pointed out by A Shatter *Family Law* (Butterworths, 3<sup>rd</sup> ed, 1997) p 156, there is the practical difficulty that the adopted child may not know the identity of his or her natural parents).

address the issue of a prohibition on marriage but states that, upon the making of an order for adoption, “the child shall be considered with regard to the rights and duties of parents and children in relation to each other as the child of the adopter or adopters born to him, her or them in lawful wedlock”. This may be sufficient to create a prohibition,<sup>43</sup> although it seems clear that it creates no prohibition in respect of other relationships by adoption, e.g. between an adopted child and the natural child, or other adopted children, of the adoptive parent.<sup>44</sup> The wording in the Bill actually achieves a result which goes beyond the LRC’s 1984 recommendation (and those of the Law Society Law Reform Committee<sup>45</sup> and the Interdepartmental Working Group)<sup>46</sup> because it covers *all* relationships, and former relationships, by adoption, not just those between parent and child and between siblings.

There is, in fact, a case to be made for permitting civil partnership and marriage between adoptive siblings, as the law in England and Wales still does notwithstanding other reforms to the prohibited degrees of relationship<sup>47</sup> (and as Irish law currently does in respect of marriage). On one view, allowing such marriages “seems a curious exception to the principle that adoption integrates the child fully into the adoptive family.”<sup>48</sup> However, the point is not a simple one since the force of the arguments in favour of a prohibition varies depending on the circumstances. As Cretney has pointed out, “the considerations which might make it repugnant to contemplate the marriage of two people brought up from infancy to maturity as brother and sister clearly would not apply to the marriage of a young woman adopted at age sixteen and her adoptive brother who had never been a member of the same household.”<sup>49</sup> It may be that it would be too complex to develop a rule which could discriminate between different sets of circumstances<sup>50</sup> and that it would be justifiable to adopt the LRC’s recommendation that all such marriages should be prohibited. However, in light of *B and L v United Kingdom*,<sup>51</sup> one should not be too surprised if the imposition of a blanket prohibition were to come unstuck in the ECHR if a hard case arose in practice. In the case of “former relationships by adoption”, i.e. those arising in circumstances “where the adoption order for some reason ceases to have effect”,<sup>52</sup> the issues are even more difficult.<sup>53</sup> It might be harsh to deny the right to

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<sup>43</sup> See Shatter *ibid*, pp 155-156; LRC *Report on Nullity of Marriage* note 2 above, p 48.

<sup>44</sup> Shatter cautiously states *ibid*, p 156 that the applicability of any prohibition as between adoptive siblings “must be doubtful” but, in light of the terms of s 24, there does not really appear to be any possibility that such a prohibition applies. The LRC note 2 above, p 48 was of the view that there is “clearly” no such prohibition.

<sup>45</sup> Note 2 above, p 71.

<sup>46</sup> Note 2 above, p 21.

<sup>47</sup> See e.g. Masson, Bailey-Harris and Probert *Cretney: Principles of Family Law* 8<sup>th</sup> ed (London: Sweet and Maxwell, 2008) p 48; pp 825-826.

<sup>48</sup> *Ibid*, pp 825-826.

<sup>49</sup> S Cretney *Law, Law Reform and the Family* (Oxford: OUP, 1998) p 200. See more generally *ibid*, chap. 8 “Adoption – from Contract to Status?”.

<sup>50</sup> Such a rule might involve a requirement that, if the marriage is to be permitted, the parties must (say) be over the age of 21 and never have lived together in the same household when under the age of 18. Compare the rule in England in respect of marriages between step-parent and step-child: Marriage Acts 1949-1986, Sch 1 and s 78; see Masson, Bailey-Harris and Probert note 47 above, p 48.

<sup>51</sup> Note 18 above.

<sup>52</sup> LRC note 2 above, p 143.



marry to those who were only very briefly “adoptive siblings”, though the case in favour of a prohibition on marriage between the child and his or her former adoptive parent is clearly stronger.

Whatever about these complex issues, it is probably unwarranted for our legislation to seek to extend the prohibited degrees of relationship to more remote relations by adoption, in particular to the relationship between a person and an aunt or uncle by adoption. This would suggest that the Bill should be amended so that position in relation to adoptive relations is no stricter than that envisaged by the LRC and other Irish law reform bodies in the marriage context.

### *(iii) Relationships by Affinity*

The Law Reform Commission recommended in 1984 that all restrictions on marriage based on affinity should be abolished.<sup>54</sup> In English law, the various affinity prohibitions have gradually been discarded,<sup>55</sup> so that all that remains now is a qualified prohibition in relation to marriage between step-parents and step-children and step-grandparent and step-grandchildren, with parallel prohibitions applying in the context of civil partnership.<sup>56</sup> The prohibition does not apply if both parties are aged over 21 and the younger party has not, before the age of 18, “lived in the same household as [the other person] and been treated by that person as a child of his family”. There is no genetic argument in the context of relationships by affinity, so that the rationale for any such rules is the avoidance of sexual rivalry or tension in the family context. The strongest argument for retaining an affinity rule relates to the step-parent and step-child situation, although it has been pointed out that, in the absence of any prohibition on sexual relations or cohabitation, a prohibition on marriage may not be particularly effective to protect a young person against an abusive step-parent.<sup>57</sup> It may, therefore, be reasonable to adopt the LRC’s recommendation to dispense with all prohibitions based on affinity.

## **A Problem in the Civil Partnership Bill**

A problem arises in the Bill in relation to the recognition of registered foreign relationships. Section 5 of the Bill provides that the Minister for Justice, Equality and Law Reform “may, by order, declare that a class of legal relationship entered into by two parties of the same sex is entitled to be recognised as a civil partnership” in Ireland.

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<sup>53</sup> See Masson, Bailey-Harris and Probert note 47 above, p 48 (referring to the “apparently unsatisfactory rule” that an adoptive parent and child continue to be in the prohibited degrees of relationship even if someone else subsequently adopts the child).

<sup>54</sup> Note 2 above, pp 141-142.

<sup>55</sup> For discussion, see Cretney *Family Law in the Twentieth Century* note 13 above, pp 41-57.

<sup>56</sup> Marriage Acts 1949-86, s 1(3) and Sch 1, Pt 2, as amended *inter alia* by Civil Partnership Act 2004, Sch 27. Some English texts do not refer expressly to the (less practically significant) prohibition involving step-grandchildren (see e.g. Masson, Bailey-Harris and Probert note 47 above, pp 47-51; J Herring *Family Law* 3<sup>rd</sup> ed (Harlow: Pearson Longman, 2007) pp 44-45) but the author’s research has found no legislation removing this prohibition and it is discussed by other textbook writers: see J Miles and S Harris-Short *Text, Cases and Materials: Family Law* (Oxford: OUP, 2007) pp 123-125; N Lowe and G Douglas *Bromley’s Family Law* (Oxford: OUP, 2007) pp 49-51.

<sup>57</sup> See Masson, Bailey-Harris and Probert note 47 above, p 50.

Before such an order is possible, it is necessary (amongst other things)<sup>58</sup> that “under the law of the jurisdiction in which the legal relationship was entered into ... the relationship may not be entered into by persons within the prohibited degrees of relationship” set out in the Bill.<sup>59</sup> Unfortunately, this test would not be passed e.g. by the forms of civil partnership recognised in England and Wales, Scotland or Northern Ireland<sup>60</sup> because there is no restriction in those jurisdictions on entering into civil partnership with one’s great-uncle or great-aunt. In addition, the rules in respect of adoptive relationships are not as broad in the UK jurisdictions as those set out in the Bill; as has been mentioned, their restrictions apply only between adoptive (and former adoptive) parent and child but not between adoptive siblings or other relations by adoption.

In terms of attempting to solve this problem, it would not be sufficient to limit the rules in relation to adoptive relationships to those proposed by the LRC and to give up on the misconceived idea of a prohibition on civil partnership with one’s great-aunt/uncle or grand-niece/nephew. There would still be a difference from UK law because adoptive siblings can form a civil partnership in the United Kingdom. Also, the UK position is obviously only one important example. Without undertaking a comparative survey, it seems clear that many other jurisdictions’ forms of civil partnership will have restrictions in terms of prohibited degrees of relationship which are, in some respect or other, more limited than those applicable in this country. The solution appears to be to take a different approach to that favoured in the Bill, dropping the stipulation concerning prohibited degrees of relationship in the context of the recognition of classes of registered foreign relationships and seeking to address the issue in another manner.

One possible source of guidance is the UK’s Civil Partnership Act 2004. Under that Act, an “overseas relationship” will be recognised if it is on a list of specified relationships<sup>61</sup> or if it satisfies the “general conditions” which require (in summary) that the relationship be exclusive, of indeterminate duration and that the effect of its registration is that the parties are treated as a couple either generally or for specific purposes or are treated as married.<sup>62</sup> It is also required that the parties have registered their relationship in the other jurisdiction, met the requirements for validity under the foreign law and meet the

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<sup>58</sup> It is also necessary that the relationship is “exclusive in nature”, “permanent unless the parties dissolve it through the courts”, that “the relationship has been registered under the law of the other jurisdiction”, and that “the rights and obligations attendant on the relationship are, in the opinion of the Minister, sufficient to indicate that the relationship would be treated comparably to a civil partnership.” See s 5(1)(a), (b), (d) and (e).

<sup>59</sup> s 5(1)(c).

<sup>60</sup> The prohibited degrees of relationship are set out in the Civil Partnership Act 2004, Schedule 1 (England and Wales), Schedule 10 (Scotland) and Schedule 12 (Northern Ireland). In relation to Scotland, see also Adoption (Scotland) Act 1978, ss 39 and s 41(1) (as amended).

<sup>61</sup> See s 213 and the list in Schedule 20, which is updated from time to time by statutory instrument.

<sup>62</sup> s 214. The Bill makes no provision for the recognition of relationships other than by inclusion on a specific list. F Ryan “Civil Partnership: Your Questions Answered: A Comprehensive Analysis of the Civil Partnership Bill” (GLEN, 2008), p 33 (available at [www.glen.ie/civil\\_partnership/Civil\\_Partnership.pdf](http://www.glen.ie/civil_partnership/Civil_Partnership.pdf)) suggests that, arguably, “the extraordinary pace of change worldwide militates in favour of a general provision for recognition of civil partnerships and marriage, as is the case in the UK.” See also B Barrington “Civil Partnership in the United Kingdom and Ireland” in *The Civil Partnership Bill: Legal Consequences and Human Rights Implications* (ICCL Seminar Series, Volume 1, January 2009) p 60.

requirement of being of the same sex.<sup>63</sup> Where one or both of the partners were domiciled in the United Kingdom at the time they registered the foreign relationship, the parties' relationship will not be recognised in the United Kingdom unless the parties were both over 16 and were not within the prohibited degrees of relationship applicable to the part of the United Kingdom in which they were domiciled.<sup>64</sup> If neither was domiciled in the United Kingdom at the time of registration, it appears that the prohibited degrees of relationship are not operative, although there is a general proviso that a relationship between two persons will not be recognised as constituting a civil partnership in the UK if it would "be manifestly contrary to public policy to recognise the capacity, under the relevant [foreign] law, of one or both of them to enter into the relationship".<sup>65</sup> It seems that the Irish legislation could provide for the recognition of specified classes of foreign relationship without a requirement in relation to the prohibited degrees of relationship, subject to a separate stipulation that no individual registered relationship falling within the recognised classes will qualify as a civil partnership in Ireland if the parties were within the prohibited degrees of relationship under Irish law at the time of registration.<sup>66</sup> Alternatively, we could follow the UK example and apply this stipulation only where one or both of the partners were domiciled in Ireland at the time of the registration of the foreign relationship.

## **Conclusion**

This article has considered the prohibited degrees of relationship for marriage and civil partnership, in light of past law reform proposals and the list of relationships specified in the Civil Partnership Bill 2009. It has been assumed in the article that equivalent prohibitions should apply to marriage and civil partnership, so that legislation modernising the prohibitions in respect of marriage should follow the enactment of the civil partnership legislation. Three main conclusions have been offered in respect of the list of prohibited relationships in the Bill. First, it is not appropriate to extend the list of prohibited relationships to include the relationship between great-uncle/aunt and grand-niece/nephew. Such a prohibition appears to have been recommended by the LRC in the marriage context in 1984 but this seems to have been on the basis of a mistaken belief that it already represented the law (and it is even conceivable that the LRC did not actually intend to recommend the relevant prohibition at all). Secondly, while it would be reasonable to prohibit civil partnership and marriage between adoptive parent and child and, somewhat more debatably, between adoptive siblings, it would not be appropriate to go beyond the recommendation of the LRC and other law reform bodies in Ireland by prohibiting civil partnership or marriage between persons related more remotely through adoption, as is the effect of the current wording of the Bill. Finally, it has been noted that there is a problem with the Civil Partnership Bill as it stands, since it prevents the recognition in Ireland of foreign registered relationships which are analogous to civil partnership unless persons in the prohibited degrees under Irish law are precluded from

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<sup>63</sup> ss 215-216.

<sup>64</sup> s 217.

<sup>65</sup> *Ibid*, s 218.

<sup>66</sup> In connection with this suggestion, it should be remembered that, under s 5(1)(e), a class of relationship can only be recognised if "the rights and obligations attendant on the relationship are, in the opinion of the Minister, sufficient to indicate that the relationship would be treated comparably to a civil partnership".

registering the relationship under the law of the foreign jurisdiction. To take just one important example, UK civil partnerships could not be recognised because of the more narrow range of prohibited relationship provided for under the Civil Partnership Act 2004. This problem is a relatively significant one for the Bill and the author suggests a possible solution.<sup>67</sup>

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<sup>67</sup> By way of digression, linked to the subject matter of this article only by the fact that it also concerns civil partnership, the author wishes to mention another problem with the Civil Partnership Bill, in respect of the Criminal Law (Sexual Offences) Act, 1993, s 5. This provision criminalises sexual intercourse, acts of buggery, or acts of gross indecency (in the final case only, by a male with another male) with a person who is “mentally impaired”. It is provided in s 5(5) that “‘mentally impaired’ means suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation”. There is an exemption where the person who engages in the sexual acts with the “mentally impaired” person is (or reasonably believes he or she is) married to that person. The Bill provides no exemption for civil partners. This is especially significant because of the overly broad definition of mental impairment; note the discussion in the LRC Report on *Vulnerable Adults and the Law* (LRC 83-2006) pp 77-79. Consider a case where one civil partner suffers from a mental illness or form of dementia, such that he is “incapable of living an independent life” and must depend heavily on his civil partner. If the civil partners continue to engage in the forms of certain sexual relations mentioned in the 1993 Act, one of the civil partners is guilty of a serious sexual offence and must rely on the (clearly insufficient) safeguard of the prosecutorial discretion of the DPP to avoid a conviction (see s 5(4)). Why should the exemption for spouses here not be extended to civil partners? The section under discussion also has unfortunate implications in the context of couples, whether same sex or opposite sex, who cohabit in long-term relationships without marriage or civil partnership. Wider reform of its wording is also clearly necessary.