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Mr Shane McAteer
Clerk
Committee for Finance and Personnel
Room 419
Parliament Buildings
Stormont

24 May 2013

Dear Shane,

Please find attached briefing paper on the Marriage (Same Sex Couples) Bill which will be presented to the Committee on Wednesday 29 May 2013.

Yours sincerely,

A handwritten signature in cursive script that reads "Judith Finlay".

JUDITH FINLAY
Departmental Assembly Liaison Officer

BRIEFING PAPER ON THE MARRIAGE (SAME SEX COUPLES) BILL

From: Oswyn Paulin

Date: 24 May 2013

Summary

Business Area: Civil Law Reform Division, Departmental Solicitor's Office, Department of Finance and Personnel.

Issue: Marriage (Same Sex Couples) Bill

Restrictions: None.

Action Required: The Committee has requested a briefing on the above-named Bill.

BACKGROUND

1. Under the current law in the UK, a marriage will only be valid if it is between a man and a woman. However, same sex couples may, in accordance with the Civil Partnership Act 2004 ("the 2004 Act"), enter into a civil partnership by way of a civil ceremony.
2. In March 2012 the UK Government published a consultation on "Equal Civil Marriage". On 11 December 2012 the Government stated that it would proceed with its proposal to introduce marriage for same sex couples. It also said that it would –
 - permit religious marriage ceremonies for same sex couples according to the rites of religious organisations which wished to conduct such ceremonies; and
 - provide protection for religious organisations and individuals which did not wish to conduct such ceremonies.
3. The Marriage (Same Sex Couples) Bill, which was introduced in the House of Commons on 24 January 2013, is intended to give effect to the UK Government's agreed policy. Its main purpose is to allow same sex couples to marry, either by way of a civil ceremony (e.g. in a register office or approved premises) or, provided that the religious organisation concerned is in agreement, on religious premises.
4. The Bill does not remove the availability of civil partnerships for same sex couples. However, it does allow for a civil partnership to be converted into a marriage if that is what the couple want.

5. The Bill also contains a number of other related provisions, including provisions that will enable a person to change his or her legal gender without ending his or her existing marriage; provisions dealing with consular marriage/marriage of service personnel overseas and consequential and interpretative provisions.
6. A number of the provisions of the Bill are to be given effect through subordinate legislation.
7. The UK Government has endeavoured to provide reassurance to religious organisations and the Bill is designed to ensure that:
 - no religious organisation or representative is required to marry a same sex couple;
 - no discrimination claims can be successfully brought against religious organisations or individuals for not marrying a same sex couple;
 - there is an "opt-in" mechanism whereby a marriage of a same sex couple cannot be carried out on religious premises or with a religious ceremony without the express consent of the religious organisation's governing body;
 - the Bill does not interfere with Anglican Canon law; and
 - the common law duty on Church of England and Church in Wales clergy to marry parishioners does not extend to same sex couples.
8. Nevertheless the Bill has been the subject of intense debate and one of the concessions which has had to be given is an undertaking to review the operation of the 2004 Act in England and Wales, with a view to assessing whether civil partnerships should be available to opposite sex couples.

PROVISIONS IN THE BILL WHICH EXTEND TO NORTHERN IRELAND

9. Although the Bill essentially relates to England and Wales, the following substantive provisions are stated to extend to Northern Ireland:
 - Clause 10(3) and Schedule 2 (treatment of English/Welsh same sex marriages);
 - Clause 12 and Schedule 5 (gender recognition);
 - Clause 13 and Schedule 6 (marriage overseas);
 - Clause 15 (transitional and consequential provision); and
 - Clause 16 (orders and regulations).

TREATMENT OF ENGLISH/WELSH SAME SEX MARRIAGES

10. Schedule 2 to the Bill essentially provides for how English/Welsh same sex marriages will be treated in Scotland and Northern Ireland. Ordinarily, such marriages will be treated as civil partnerships. However, the Secretary of State may by order provide for the treatment of a marriage as a civil partnership to be subject to certain provisions or, in specified cases, for a marriage not to be treated as a civil partnership.

GENDER RECOGNITION

11. Schedule 5 to the Bill effects certain amendments to the Gender Recognition Act 2004 (“the GR Act”) to take account of the proposed new arrangements with regard to same sex marriage. The GR Act sets out how a transsexual person can obtain legal recognition for his or her acquired gender. If a full gender recognition certificate (“GR certificate”) is issued, the person will be entitled to a new birth certificate and may marry a person who is the opposite gender to his or her acquired gender. However, if a person is married or in a civil partnership, an interim GR certificate will be issued and the person will then have 6 months in which to obtain a decree of nullity/nullity order. The court will issue a full GR certificate when the decree/order is made absolute/final.
12. With the introduction of same sex marriage in England and Wales there will be no need to end a marriage or civil partnership where there is a change of gender. Accordingly, Schedule 5 to the Bill provides for the amendment of the GR Act to allow an existing marriage which is registered in England or Wales or outside the UK (a “protected marriage”) or a civil partnership which is registered in England and Wales (“a protected partnership”) to continue, provided both parties are content to proceed on that basis. The statutory declaration which accompanies the application for a GR certificate will have to say whether the applicant is married or in a civil partnership, where the marriage/civil partnership took place and whether the spouse/civil partner consents to the marriage/civil partnership continuing. If there is no “declaration of consent” from the spouse/civil partner an interim GR certificate will issue.
13. Schedule 5 will also amend the GR Act to allow for the correction of errors and for applications to a court to quash the grant of a gender recognition certificate which has been obtained by fraud.

MARRIAGE OVERSEAS

14. Schedule 6 to the Bill deals with marriages overseas. The overall effect of Parts 1 and 2 is to allow for an Order in Council to provide for the arrangements in respect of marriages, including same sex marriages, in British consulates. Part 3 allows for an Order in Council to provide for the arrangements in respect of marriages, including same sex marriages, of service personnel overseas.

TRANSITIONAL AND CONSEQUENTIAL PROVISION

15. Clause 15 allows for the making of an order dealing with consequential/transitional matters.

ORDERS AND REGULATIONS

16. Clause 16 sets out the procedural arrangements with respect to the making of secondary legislation. When introduced that Clause provided for the Department of Finance and Personnel to be consulted with regard to the making of an order which amends Northern Ireland legislation. It has, however, been amended to provide that the Secretary of State or the Lord Chancellor must obtain the consent of DFP before making such an order.

LEGISLATIVE CONSENT MOTION

17. The UK Government has said it will proceed in accordance with the convention that the UK Parliament will not normally legislate with regard to devolved matters in Northern Ireland except with the agreement of the Northern Ireland legislature.
18. The Executive has agreed to seek a Legislative Consent Motion in respect of the following provisions:
 - Clause 10(3) and Schedule 2 (treatment of English/Welsh same sex marriages);
 - Clause 12 and Schedule 5 (gender recognition);
 - Clause 15 (transitional and consequential provision); and
 - Clause 16 (orders and regulations).

The Executive has also agreed that where DFP consent is required under the provisions of this legislation, that consent will only be given with the agreement of the Executive.

ACTION REQUIRED

19. The Legislative Consent Memorandum is to be laid today and will be referred to the Committee for consideration and report.