



Northern Ireland  
Assembly

Committee for Finance and Personnel

# OFFICIAL REPORT (Hansard)

Marriage (Same Sex Couples) Bill:  
DFP Briefing

5 June 2013

# NORTHERN IRELAND ASSEMBLY

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**Members present for all or part of the proceedings:**

Mr Daithí McKay (Chairperson)  
Mr Dominic Bradley (Deputy Chairperson)  
Mr Leslie Cree  
Ms Megan Fearon  
Mr Paul Girvan  
Mr John McCallister  
Mr David McIlveen  
Mr Peter Weir

**Witnesses:**

Ms Laura McPolin	Department of Finance and Personnel
Mr Oswyn Paulin	Department of Finance and Personnel

**The Chairperson:** I welcome Oswyn and Laura back to the Committee. Oswyn, do you wish to make some brief comments?

**Mr Oswyn Paulin (Department of Finance and Personnel):** Yes. Thank you, Mr Chairman. Since we gave evidence last week, we have responded to the Committee and the research paper, and an equality screening exercise has been carried out.

As a preliminary, I wish to correct an aspect of my evidence last week, in which I referred to a decision by Lord Lyndhurst. In fact, the judge was Lord Penzance, and the case that I was trying to remember was that of Hyde v Hyde, which was decided in 1866. There, the court was considering a polygamous marriage, and the judge said that marriage was a lifelong union between one man and one woman.

As I said, an equality screening exercise has been carried out, and it will be published in due course. The exercise has determined that the policy of the legislative consent motion (LCM) is compliant with section 75 of the Northern Ireland Act.

I turn to the submissions made to the Committee. We are grateful for these being made available to us earlier this morning. We note that the co-convenor of the Church and Society Committee of the Presbyterian Church supports the LCM, not least because the Church regards it as a very necessary motion to help safeguard current marriage legislation in Northern Ireland. We also note that the Church and Society Commission of the Church of Ireland considers that the Church's understanding of marriage is not impinged on by the proposals in the motion.

Our comments on the Rainbow Project's submission are as follows. In our view, the rule of law is not affected by differences in substantive law in the constituent jurisdictions of the United Kingdom. If that

had been the common view, devolution would not have occurred in 1998 and 1999. Even before devolution, there were separate legal systems and, in many respects, there was different law in Northern Ireland, Scotland, Wales and England.

As regards adoption, policy in this area, as has already been stated, is a matter for the Department of Health, Social Services and Public Safety (DHSSPS). However, if people move from one jurisdiction to another, it is inevitable that they will face different legal arrangements. For example, the law governing parental consent to marriage differs between Northern Ireland and Scotland.

The changes to the Civil Partnership Act 2004 in respect of the use of religious premises for civil partnership ceremonies have a complex history, but the power under which this was accomplished does not extend to Northern Ireland. This is very much in the devolved area, and quite far-reaching changes to existing registration law would be required. Whether consensus could be achieved among the various interests is a matter that would require careful consideration.

Regarding internal borders, the UK Government position is that they cannot unilaterally change the European Convention on Human Rights, which, as currently interpreted, does not confer a right to marry on same-sex couples. Accordingly, it is our view that it is permissible to have differences in relation to marriage law within the United Kingdom. Regarding gender reassignment, since the Assembly has twice rejected the concept of same-sex marriage, it follows that, where gender reassignment occurs with one of the parties to an opposite-sex marriage, by that decision, the party is required to bring the marriage to an end.

Regarding the Equality Commission's submission, I have already referred to the equality screening, which it raised. Regarding adoption, as previously stated, policy responsibility rests with DHSSPS, so any guidance on adoption is a matter for that Department and not for the Department of Finance and Personnel (DFP).

Regarding the submission by the Northern Ireland Human Rights Commission, we note the position stated in paragraph 14, and we agree on this with the commission. I will not read it now, but members will be familiar with it. However, we do, respectfully, have difficulty with paragraphs 17 to 20. In our view, the Human Rights Act gave greater effect to the European Convention on Human Rights in the United Kingdom. The convention, as scheduled to the Act, is not a free-standing bill of rights. Further, the Act sets out what a court must take into account in determining a question that has arisen in relation to rights, and they are: a judgement of the European Court of Human Rights; an opinion of the European Commission of Human Rights; a decision of the commission; and a decision of the Committee of Ministers. So, it is quite clear that the interpretation of marriage in the convention is very much to be guided by the jurisprudence of the European Court of Human Rights.

So, I am afraid that we do not agree with the commission on the idea that, somehow, the Human Rights Act 1998, and the convention under the Human Rights Act, differs from the convention as understood generally.

So those are our comments on the submissions and, if the Committee so wishes, we will attempt to answer questions.

**The Chairperson:** When did the equality screening take place, Oswyn?

**Mr Paulin:** Just over the past week.

**The Chairperson:** Can we have details of that?

**Mr Paulin:** Yes, we will provide those.

**The Chairperson:** Is there any particular reason why it did not go to an equality impact assessment? Was there no impact on equality whatsoever?

**Mr Paulin:** We think it has a positive impact.

**The Chairperson:** OK. The Equality Commission's submission calls for clarification as to whether Assembly consent will be required before the Secretary of State would exercise the order-making power in clause 2(2).

Can an assurance be provided on that point? If not, can the Department request the responsible Whitehall Department to secure an amendment to the Bill to provide for that?

**Mr Paulin:** Do you mean paragraph 2(2) of schedule 2, part 1? My recollection is that the Bill has been amended, as it has gone through Parliament to require consent from DFP to orders made by the Secretary of State that apply to Northern Ireland. DFP has agreed in the Executive paper that it will bring any such proposals to the Executive, so the Executive would be —

So it is, as it were, a matter between the Executive and the Department.

**The Chairperson:** The Equality Commission also made reference to the issuing of guidance for adoptive parents who move from Britain to here and are aware of the position regarding the recognition of the adopted children here. Would it be possible for the Department to provide an assurance that some sort of guidance along those lines can be issued?

**Mr Paulin:** As I said in my opening remarks, we take the view that guidance on adoption is a matter for DHSSPS, not DFP, so we do not propose to issue guidance.

**The Chairperson:** Obviously, there is a bit of crossover here between the two Departments on this.

**Mr Paulin:** No. My view is that adoption is quite clearly an issue for DHSSPS. That is where the policy responsibility lies. We do not have responsibility for adoption.

**The Chairperson:** Has the Department not communicated with the Department of Health on that issue?

**Mr Paulin:** We have had informal discussions, but I do not think that their view would differ from ours.

**The Chairperson:** Have they made any proposal on that?

**Mr Paulin:** I am not aware of it. I am aware that, as you know, there is a whole policy development process going on in relation to adoption. No doubt, in due course, fresh guidance will be issued about it.

**Mr D Bradley:** Good afternoon. You heard the submission made by the Rainbow Project. One of the points that its representatives made was that, within a unitary state, it is unreasonable, illogical and constitutionally unsustainable to have the situation that this LCM will bring about. What is your reaction to that?

**Mr Paulin:** As I said in my opening remarks, we take the view that if that were the view that had been widely held in 1998, we would not have devolution in Northern Ireland. The whole point of devolution is to enable different decisions to be taken in different jurisdictions.

**Mr D Bradley:** I agree, but some parties insist on parity in certain issues.

**Mr D McIlveen:** The sensible parties.

**Mr D Bradley:** That is a matter of opinion. The other point the Rainbow Project made was that there are currently significant differences between civil partnerships here and in GB, and that this LCM will make matters worse.

**Mr Paulin:** It will not. I do not think it would make any difference to the differences that there are between civil partnerships here and those in the rest of the United Kingdom. I think that the differences that they have pointed to relate to adoption and the registration of buildings. I do not know whether they have produced much more in the way of differences.

**Mr D Bradley:** I have the Rainbow Project paper in front of me, and that is one of its points. Thank you.

**Mr McCallister:** My question relates to the advice from the Rainbow Project about voting against the LCM. If we were to vote against it, with no agreement as to what the policy direction would be, what would the outcome be, apart from a mess?

**Mr Paulin:** It is quite interesting, because the UK Parliament retains the right to legislate in respect of any transferred matter. So, the UK Parliament could legislate in respect of this matter. There is, however, a convention that it does not, and the legislative consent motion is the mechanism by which it gets the Assembly's agreement on any proposed legislation that is in a transferred area. We do not know what the consequences would be. We are headed into uncertain territory.

**Mr McCallister:** You would assume that Westminster would be reluctant to legislate in an area that the Assembly had twice tested.

**Ms Laura McPolin (Department of Finance and Personnel):** We do not make any assumptions; I think that is the answer to that.

**Mr Paulin:** I just do not know, because there would be an illogical outcome, which would be that same-sex marriages in England and Wales would not be recognised as civil partnerships. If they did not legislate, because the Assembly had rejected the LCM, and so did not legislate to recognise same-sex marriages in England and Wales, and if there was a requirement that we in Northern Ireland should recognise them as civil partnerships and left it that we did not recognise them at all, it would be inconsistent with same-sex marriage in Spain, France or wherever. I do not know; it would be a very strange situation. With respect to the Assembly, I would regard that situation as being illogical.

**Mr McCallister:** I agree, although I think it would be a very risky strategy to reject the LCM when you have no policy to replace it with. It would be different if we were working through this and it was likely that there would be changes. However, when you have no policy, no agreement around what that policy would look like and no framework to replace it with, even in areas that you are not responsible for, such as adoption, civil partnerships and same-sex marriage, it would seem illogical to collapse the process or vote against it. That would be inviting a mess. A much better way would be to agree some sort of process to replace it or to make changes that you want to make.

**Mr D Bradley:** Is that the Sewel convention? Is that what it is called?

**Mr Paulin:** Yes.

**Mr D Bradley:** That says that the Westminster Parliament will not legislate on matters that have been devolved to the regions.

**Mr Paulin:** It will not do so without the consent of the legislature in the devolved region.

**Mr D Bradley:** Yes. Even if this LCM were not passed, there would not be consent from the Assembly, so, according to that convention, Westminster would not be in a position to legislate. Is that correct?

**Mr Paulin:** Only if Westminster continued to honour the convention, but the convention is almost like an act of grace, whereby Westminster is saying, "We will not do this." It is not bound by that; there is no legally binding requirement for Westminster not to legislate.

**Mr D Bradley:** Fair enough; that clarifies it a bit.

**Mr Weir:** As I said, there is, ultimately, the overriding power of whatever Westminster wants to do on it, but, to some extent, it restrains itself by way of convention.

On John's point; presumably, we would be in the courts very quickly and without much of a leg to stand on if we said no to an LCM and had a level of recognition for somebody who had gone through a same-sex marriage in Canada or France, for instance, but did not give the same level of recognition to someone who had come over from England. Presumably, if anybody made a grave challenge or was in that position, the courts would be involved.

I do not necessarily buy into the analysis of the Human Rights Commission, and this is irrespective of the arguments used earlier about its position, but, presumably, it would be a fairly indefensible position from the Department's point of view and from a legal point of view if we were to recognise the equivalent to a same-sex marriage in Canada, say, and treated the two completely differently.

**Mr McCallister:** It is a bit like student fees.

**Mr Weir:** I think you will find that student fees are in a slightly different situation. Strictly speaking, on that basis, you would have a more or less similar situation in England and Canada, but you would have a differentiation between Northern Ireland and England. There is a difference on that side of it. Clearly, from that point of view, if no recognition was given to someone who had a same-sex marriage in England, but there was recognition of a civil partnership of someone from England, for instance, it would not be defensible in court.

**Mr Paulin:** I think you would run into the territory of what you will be familiar with, Wednesbury unreasonableness, in other words, and the court could readily find that such a policy was irrational.

**The Chairperson:** There are no more questions. Oswyn and Laura, thank you very much.