



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Marriage (Same Sex Couples) Bill: Northern
Ireland Human Rights Commission 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)
Mrs Judith Cochrane
Mr Leslie Cree
Ms Megan Fearon
Mr Paul Girvan
Mr John McCallister
Mr David McIlveen
Mr Mitchel McLaughlin
Mr Peter Weir

Witnesses:

Miss Rhyannon Blythe	Northern Ireland Human Rights Commission
Dr David Russell	Northern Ireland Human Rights Commission

The Chairperson: I welcome Rhyannon Blythe and David Russell. We have only 15 minutes for each of the sessions. Would you like to give a brief presentation, after which we will open the meeting to questions and answers?

Dr David Russell (Northern Ireland Human Rights Commission): Thank you, Chair and Committee members. I will keep the presentation as brief as possible so that there will be time for questions.

The commission provides advice subject to the Northern Ireland Act 1998 and our statutory function. We have engaged in this topic since June 2012, first, with the UK Government consultation and, subsequently, with the Minister here and the Committee, as you will see from the correspondence on the provisions of the Bill, specifically with regard to their impact in Northern Ireland.

The commission's position on same-sex marriage follows international human rights jurisprudence, which does not require the state to legislate for same-sex marriage at present. The commission is only engaged with the Bill in so far as it impacts upon this jurisdiction and, therefore, we have not had any substantial discussion in our submissions on the protection of religious freedoms, as, in the current Bill, same-sex marriages will not be available in Northern Ireland. Article 12 of the European Convention on Human Rights (ECHR) does not require the state to legislate, however the state is entitled to raise the bar of protection above that minimum standard. The question arises for the commission as to whether the extension of the definition of marriage by the Bill will extend the definition under the Human Rights Act. The state is entitled to go further under the Human Rights Act than the European Court may have gone under the European Convention, and this will potentially

cause complications for Northern Ireland, given that the Human Rights Act is to have equal force across the jurisdictions of the United Kingdom. The commission does not have the answers to these concerns, but we are raising them with the Committee as possible consequences of the Bill.

The Chairperson: Thank you, David. We all have the correspondence between you and the Ministers, which goes back over the past few months. How open to legal challenge is the definition of marriage as it is understood under the ECHR and the Human Rights Act? I want to try to get some sense of the differences between jurisdictions.

Dr Russell: I will say a little and then pass to Rhyannon to fill in if I have missed anything. The Human Rights Act allows for regional differences in the application of the European Convention. So, to the extent that the Bill provides for differentiation with regard to how relationships will be recognised in Northern Ireland, that is allowed for. Our concern is that article 12 under the Human Rights Act, rather than the convention, is slightly different in that the Act is meant to have equal force throughout the entirety of the UK. We are not clear, and as you can see from the correspondence, we have tried to become clear over the past 12 months about whether, as a consequence of this Bill, article 12 under the Human Rights Act will change. From the correspondence with the Minister, it appears that, in some senses, the Government themselves are unclear and that this is being left to the courts. Rhyannon can come in on the back of this, but my initial view is that there may be legal challenge, potentially.

The Chairperson: There is a response from Maria Miller that does not make sense to me. She says:

"the HRA will continue to apply to all jurisdictions ... equally, as you say, but the nature of devolution and differences in provision within the UK may potentially result in different outcomes."

So, it is equal, but it is not.

Miss Rhyannon Blythe (Northern Ireland Human Rights Commission): That was the point that we were trying to raise to differentiate between article 12 of the European Convention and article 12 as it will be understood under the Human Rights Act in the three jurisdictions. So, we did not have an answer to that confirmed by the Minister.

Mr Mitchel McLaughlin: To clarify, David, did you say that there will possibly or probably be legal action? Have you an opinion on that?

Dr Russell: We do not know, and, to be honest, that is what we have been trying to sort out. As is totally correct, the Minister has been quite clear that it is not within the UK Government's remit to change the terms of the convention, which defines marriage as being between a man and a woman. However, as we said in our submission, there is nothing to prevent domestic protections from being lifted. Clearly, here in the UK, marriage is being redefined in England and Wales, and, to the extent that that is taking place, the commission is unclear about whether, as a consequence of that redefinition of marriage, it has potential to engage an article 12, under the Human Rights Act, case. Our concern is that, if it gets through the door of a court eventually for whatever reason and the Human Rights Act will be engaged in one of these subjects, and if it were to go to the Supreme Court and a ruling applied as a consequence, that ruling would have to apply here because the jurisprudence of the Supreme Court applies in Northern Ireland and has to be read in by the domestic courts here in Belfast.

Mr Mitchel McLaughlin: So, your difficulty is that, as a result of the legislation that is going through Westminster, the impact on the obligations under the Human Rights Act will be affected and that case law will eventually develop that will guide you as a regional authority.

Dr Russell: I have to be very careful on this. We do not think that the European Convention is being affected, but we do think, to the extent that the European Convention has been given further domestic effect in the Human Rights Act, that the Human Rights Act may be affected.

Mr Mitchel McLaughlin: Yes. I understand. But the basic point is the same: you are unable to anticipate the definitions or determinations that will be based on case law. You might have opinions on it, but that is of no benefit to anyone here because it could be contradicted as a consequence of that.

Dr Russell: As you can see from the correspondence, we have been trying to seek clarity for a year. We still remain unclear ourselves. That is why we are bringing it in front of the Committee. We think that it is a valid question for the Committee to consider.

The Chairperson: When the Minister responded, she made reference to the Magee case, which stated that there was not always a uniform approach to legislation within different jurisdictions. How do you respond to that?

Miss Blythe: The Magee case was actually a fair trial case that originated from Northern Ireland. The argument made was that there had been a breach of article 14 on the basis of national origin; effectively, discrimination on the basis of geography, in that persons in Northern Ireland were being treated differently from people in the rest of the UK. Yes, the European Court did come back and say that regional differences were permissible. To an extent, the commission does accept that. Our concern is regarding article 12, and is, therefore, a slightly different point. We are not necessarily saying that a discrimination case would be possible, but there may be possible action under article 12, if the definition is extended under the Human Rights Act.

Dr Russell: The important thing about the Magee case, and Rhyannon will keep me correct here, is that what was at question there were two different pieces of legislation and the test. Here, what we are dealing with, as was said, is the Human Rights Act, which is meant to have equal force. So, we are dealing with a single piece of legislation that has been interpreted, certainly by the courts, as having a degree of constitutional standing.

The Chairperson: As to where there are possible legal shortcomings, you have highlighted the ECHR and the Human Rights Act. There is also reference to certain United Nations documents and the union charter principles. We have dealt with other legislation and talked about documents and the UN, but you are not going to end up in court over the head of that; those are just principles. So, the only two areas we should be concerned about in that regard are the Human Rights Act and the ECHR.

Dr Russell: Yes. More specifically, the Human Rights Act. As the Minister rightly pointed out, it is not in the gift of the UK Government to change the terms of the convention. The convention is quite clear, through jurisprudence and in the substantive document, that marriage is between a man and a woman. That is the difference between lifting the bar through the Human Rights Act and potentially tampering. We do not necessarily foresee a European Court case evolving, but we could potentially see Supreme Court cases evolving domestically out of this.

Mr McCallister: You are very clear that it does not look like it would breach the convention but that our problem is with the Human Rights Act. If the Minister was pursuing the current policy on this, would he have to campaign for the Westminster Government to amend the Human Rights Act and give Northern Ireland an opt out of that part of it? Is that something that —

Dr Russell: I do not think that that is an option for the Human Rights Act at all. Certainly, the commission would not advocate that. Like I say, the Human Rights Act is meant to bring, with equal domestic force, the European Convention into law here. The idea that there might be some sort of opt out clause would, I think, cause all sorts of legal difficulties.

Mr McCallister: So, he is faced with the option that he could go to the European Supreme Court, and lose there; and if you lose there, that then becomes the law here.

Dr Russell: No, because, as I said, I do not think that we are talking about the convention here. We are talking only about the Human Rights Act. The convention case would be engaged only to the extent that all possible domestic avenues had been explored and exhausted. The difficulty with a convention case is that marriage is clearly defined for the purposes of the convention. What is being tampered with here is possibly the definition of marriage for the purpose of the Human Rights Act. Therefore, recourse to Strasbourg probably would not be open.

Mr Weir: Thank you for your evidence. I suppose that it will be decided ultimately in the Supreme Court domestically. Essentially, it is on the basis of the Human Rights Act and, to some extent, it depends on what precise interpretation the courts take. There is no certainty, and I think that that is reasonably clear. Are there any specific points? Arguably, that might be described as the wider context of the same-sex marriage legislation that is going through Westminster. On the pure read-

across with regard to a legislative consent motion, is there anything specific that the Human Rights Commission has on it beyond the wider challenge that might take place?

Dr Russell: No. There is nothing to say, except that we think that the issue we have raised is peculiar to the legislative consent motion here for the Committee and the Minister to consider. This is a specific. Once the differentiation in marriage, as newly defined, comes into force in England and Wales, the fact that it will be transferred here as a civil partnership will raise the issue for us. However, with regard to the actual motion of consent, no, that is the proper parliamentary process.

Mr Weir: I just wanted to clarify that it has, essentially, boiled down to the single issue. As a result of the ruling, there is no breach of the convention rights side of it. Therefore, it is an issue of whether there is or is not a case with regard to the Human Rights Act, and it is very much couched on the basis of "may".

Dr Russell: It is very much that. Our advice is that the Committee and the Minister should seek clarity on that point because of the peculiarities if cases were taken forward in England and Wales, and rightly so, because of the definition that applies there. Our concern is that the rulings of the court would then apply here, and that would impact on whatever decision the Assembly has made.

Mr Weir: The only issue that I can see in relation to that in the broader sense is that you say we should seek clarity. From the point of view of seeking clarity, presumably differing legal opinions could be given. With regard to seeking clarity, is the clarity ultimately not only going to be there once somebody has taken a court case and whether it has been successful? I appreciate your position. With respect, there may be an issue that could have an impact. A summary of what you are saying is this: if this goes to court, we do not know how it will go. I am not quite sure whether the Department, the Committee or the Minister can get clarity on that. Surely, the only clarity would be when somebody decides to take a test case and it goes through the courts. Ultimately, it will be an opinion, and different lawyers could give different opinions. Therefore, I am not sure how we get clarity.

Dr Russell: As you can see from the correspondence, the commission has sought the Minister's opinion on this. To date, the only opinion that we have managed to get back that would provide evidence to the Committee is an opinion regarding the application of the European Convention. The Westminster Department is not clear yet regarding the impact on the Human Rights Act, and that is where we are coming from.

Mr Weir: To some extent, the point is that the most that could be got, whether it is to point in one direction or another, is someone's opinion. There will be a limit to the clarity provided. It may be that you get differing views.

Mr Mitchel McLaughlin: It will have to be tested.

Mr Weir: The reality is, I suspect, that somebody, somewhere down the line, will test this in court, and that is the only way in which you will get clarity. You may get a departmental opinion that says one thing or another, or says that there is a risk of this or we are confident that such and such will not happen. However, at the end of the day, I assume that someone will take the matter to court, and that will give us the proper clarity. I appreciate that, with regard to human rights or other aspects, it will be abundantly clear what will happen if there is a court case. For example, it would be relatively clear that, if a legislative consent motion did not go through, you could see where there could be a direct challenge, and you could make a fairly confident prediction as to precisely what would happen. However, at best, any clarity at this stage will be an educated guess.

Dr Russell: It could well be. You could be right, but we have not had any educated guesswork to date.

Mr Weir: I am just questioning what the value of educated guesswork will be, to be honest.

Mr Cree: There appears to be tension between your reference to regional variations being acceptable and the claim that changing the law in England and Wales may lead to unequal human rights protection across the jurisdiction of the UK. Do those not come from different ends?

Dr Russell: Well, they do. That runs to the nub of the issue. That is exactly where we are unsure. Essentially, what we are saying is that we do not know. There can be regional variations, but not with

regard to the application of a substantive right under the terms of the Human Rights Act 1998. So, marriage, under article 12, is protected. It is fine to have different legislation. For example, the Assembly may decide to raise the bar with regard to protection under the Human Rights Act 1998. It would be perfectly within its rights to do so. However, what cannot happen is that a substantive right is applied unequally in and of itself, because that would, probably, raise a legal challenge. To date, that has not happened.

Mr Weir: Sorry; on the flip side of that, does that mean that, if it were applied on that basis, say, on any particular issue — whatever issue it happened to be that is relevant to it — and Northern Ireland legislated to raise the bar beyond what there is in England, Wales or Scotland, by the same logical argument, effectively, by way of court ruling, England, Scotland and Wales would have to follow suit?

Dr Russell: No. There is a difference in actually raising the level of protection under a substantive right and changing the meaning of the right itself, to the extent that the Human Rights Act 1998 brings into force the European Convention and it currently defines marriage between a man and a woman. What we are talking about here is a redefinition of the substantive right. That is very different from raising the bar. For example, when Wales gives a degree of legal force to the Convention on the Rights of the Child, it does not necessarily follow suit that all devolved regions in the UK have to do likewise.

Mr Cree: I think that that is correct. Again, that is the variance that I was talking about. Can you comment quickly on schedule 2(2) — that the Secretary of State may intervene? Do you see that as being in any way contentious from the point of view of changing the level playing field?

Dr Russell: An intervention by the Secretary of State?

Mr Cree: Yes.

Dr Russell: The only thing that I think we would have to say about an intervention by the Secretary of State is that, from a human-rights perspective, it is within the gift for the Secretary of State to intervene in legislative action by a Department here under section 24 or 26 of the Northern Ireland Act 1998. That is to ensure that the action is compliant with the European Convention or with binding international human rights obligations — those treaties that the UK has ratified freely.

Mr Cree: It is very limited, then. Perhaps, a better term is "clearly focused".

Dr Russell: Yes. Here, I think that we are talking about the European Convention and, in particular, the Human Rights Act 1998.

The Chairperson: OK, members? Thank you very much, David.