



NORTHERN  
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HUMAN  
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COMMISSION

Rt Hon Theresa May MP  
Lynne Featherstone MP  
Government Equalities Office  
3<sup>rd</sup> Floor Fry  
2 Marsham Street  
London  
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11 June 2012

Dear Ministers,

The Northern Ireland Human Rights Commission ('the Commission') is the National Human Rights Institution ('NHRI') for Northern Ireland. It was created in 1999 under the Northern Ireland Act 1998, pursuant to the Belfast (Good Friday) Agreement of 1998.<sup>i</sup> The Commission is accredited with 'A' status by the United Nations International Co-ordinating Committee of NHRIs.<sup>ii</sup>

The Commission has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights<sup>iii</sup> and advising on whether a Bill is compatible with human rights.<sup>iv</sup> In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights ('ECHR'), other treaty obligations in the United Nations and Council of Europe systems, and the range of international standards developed by the human rights bodies.

Although the Commission has no jurisdiction in relation to reviewing prospective legislative changes in England and Wales, it wishes to comment on the Consultation paper "Equal civil marriage", March 2012 given the potential human rights implications it may have upon the position as it currently stands in Northern Ireland.

The Commission notes the absence of a statutory definition of marriage and the current expression referring to Lord Penzance's

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description in *Hyde v. Hyde*<sup>v</sup> as "the voluntary union for life of one man to one woman to the exclusion of all others".<sup>vi</sup> This position currently excludes same sex couples from accessing civil marriage.

The right to marry is protected in international law by a number of treaties, including:

- Article 16, Universal Declaration of Human rights 1948 (UDHR);
- Article 23(2), International Covenant on Civil and Political Rights 1966 (ICCPR);
- Article 12, European Convention on Human Rights 1950 (ECHR);
- Article 9, European Union Charter of Fundamental Rights 2000.

In addition, the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity further discuss the concept of same-sex marriage under the right to found a family. Principle 24E expresses that States shall;

Take all necessary legislative, administrative and other measures to ensure that in State that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners.

The restriction of marriage to opposite-sex couples does not violate the international standards and this is clear from both the International treaties and the jurisprudence of the European Court of Human Rights and the United Nations Human Rights Committee.

The European Court has not, thus far, extended the protection of Article 12 to same-sex couples. The issue of a marriage of two persons of the same-sex was first considered by the Court in *Schalk and Kopf v. Austria*.<sup>vii</sup> The Court considered the right to marry under Article 9 of the Charter of Fundamental Rights which states that "the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". Notably the Charter does not make reference to gender leaving the matter to the respective State.

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The Court went on to hold that:

Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting States.<sup>viii</sup>

Thus, while there is nothing in international law to prevent a State from extending the protection of Article 12 to same-sex couples, the jurisprudence of the European Court suggests that there has been a shift away from the traditional definition of marriage but that a European consensus on the issue does not yet exist. The issue is again before the ECt.HR and judgment is awaited in the matter of *Chapin & Charpentier v. France*.<sup>ix</sup>

The UN Human Rights Committee considered the issue of whether the failure of a State to provide for same-sex marriage constituted a breach of the right to marry in the individual communication of *Joslin v. New Zealand*<sup>x</sup>. The Committee's decision held that the refusal of a State to provide for marriage between homosexual couples did not violate the Covenant as the right is defined using the term "men and women" instead of the general language used elsewhere in the ICCPR.<sup>xi</sup> However, it is important to note the individual opinions of Committee members Rajsoomer Lallah and Martin Scheinin which further explain that the provision does not limit a State from recognising the marriage of a same-sex couple.<sup>xii</sup>

The United Nations Committee on Economic, Social and Cultural Rights have since noted with appreciation the decision by Argentina to legalise same-sex marriage.<sup>xiii</sup> This adds to the growing number of states which permit same-sex marriage within their domestic legal system.

The Commission notes the approach of the Government to allow equal access to civil marriage by removing the current statutory bar

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on same-sex couples. We observe that a change in the law in England and Wales may lead to an unequal level of human rights protection across the jurisdictions of the United Kingdom.

In this regard we recall to the attention of Ministers that at present there is no consultation taking place in Northern Ireland and there remains a bar on access to marriage for same-sex couples.

The unequal enjoyment of human rights across the United Kingdom is a matter of concern to this Commission. The Commission recalls Principle 2 of the Yogyakarta Principles which states that:

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Taking account of the UK's international obligations to protect freedom of thought, conscience and religion under Article 19 ICCPR and Article 9 ECHR, the Commission welcomes the decision not to make any legislative changes regarding the religious form of marriage.

In conclusion, the Commission would welcome engagement with the Government in order to ensure that the same level of human rights protection is guaranteed throughout the United Kingdom.

Yours sincerely,

Professor Michael O'Flaherty  
Chief Commissioner

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<sup>i</sup> The Commission's powers were modified by the Justice and Security (Northern Ireland) Act 2007.

<sup>ii</sup> The UK has two other accredited NHRIs: the Equality and Human Rights Commission for Great Britain, and the Scottish Human Rights Commission for Scotland. The present submission is solely on behalf of the Northern Ireland Human Rights Commission.

<sup>iii</sup> Northern Ireland Act 1998, s.69(1)

<sup>iv</sup> *Ibid*, s.69(4)

<sup>v</sup> *Hyde v. Hyde and Woodmansee* (1866) LR 1 P & D 130

<sup>vi</sup> *Ibid*, at [133]

<sup>vii</sup> *Schalk and Kopf v. Austria* (2010) Application no. 30141/04

<sup>viii</sup> *Ibid*, at [61]

<sup>ix</sup> *Chapin & Charpentier v. France*, Application No. 40183/07

<sup>x</sup> *Joslin v. New Zealand* (902/1999), CCPR/C/75/D/902/1999

<sup>xi</sup> *Ibid*, at [8.2 and 8.3]

<sup>xii</sup> *Ibid*, Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring) at [Appendix]

<sup>xiii</sup> UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Argentina, 2 December 2011, UN Doc. E/C.12/ARG/CO/3, at [5]

