



Northern Ireland  
Assembly

## Research and Information Service Briefing Paper

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# Legislative consent motion: the Marriage (Same Sex Couples) Bill

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## 1 Introduction

The *Marriage (Same Sex Couples) Bill* will enable same sex couples in England and Wales to marry. It does not apply elsewhere in the UK but some elements of the Bill relate to Northern Ireland (and Scotland). As marriage is a devolved matter these provisions trigger the convention whereby the UK Government shall seek the consent of the NI Assembly. The Explanatory Notes to the Bill state that:

*... The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters in Northern Ireland except with the agreement of the Northern Ireland legislature. There are a number of provisions within the Bill which trigger that convention.<sup>1</sup>*

The Memorandum from the Department of Finance and Personnel (DFP) accompanying the draft Legislative Consent Motion (LCM) states:

*There are a number of provisions in the Bill, as introduced, which would trigger that convention. However, some of those provisions are not in keeping with the Northern Ireland policy position on same sex marriage.<sup>2</sup>*

This paper outlines the provisions relating to Northern Ireland, those which are included in the LCM and highlights key issues the Committee may wish to raise with the Department.

## 2 Provisions of the Bill that relate to Northern Ireland

### 2.1 **Clause 10(3) and Schedule 2** of the Bill states:

*Northern Ireland*

*2(1) Under the law of Northern Ireland, a marriage of a same sex couple under the law of England and Wales is to be treated as a civil partnership formed under the law of England and Wales (and accordingly, the spouses are to be treated as civil partners).*

*(2) The Secretary of State may by order—*

*(a) provide for the treatment of a marriage as a civil partnership (by virtue of sub-paragraph (1)) to have effect subject to provision made by the order;*

*(b) specify cases in which a marriage is not to be treated as a civil partnership by virtue of sub-paragraph (1).<sup>3</sup>*

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<sup>1</sup> [http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/cbill\\_2012-20130126\\_en\\_4.htm#sch2](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/cbill_2012-20130126_en_4.htm#sch2)

<sup>2</sup> Paragraph 10 Memorandum Accompanying Legislative Consent Motion in Respect of the Marriage (Same Sex Couples) Bill  
Department of Finance and Personnel May 2013

<sup>3</sup> [http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/cbill\\_2012-20130126\\_en\\_4.htm#sch2](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/cbill_2012-20130126_en_4.htm#sch2)

This section of the Bill gives legal status to same sex couples married in England and Wales who move to NI. Their legal status will be as civil partners. (Civil partnership has been legal in Northern Ireland since 2005<sup>4</sup>). This provision was examined during legislative scrutiny at Westminster. MP for Strangford Jim Shannon raised an amendment to remove the provision from the Bill. In reply Minister of State Hugh Robertson explained;

*The general proposition in the Bill is that marriages of same-sex couples solemnised under English and Welsh law will be treated in Northern Ireland as a civil partnership. That mirrors the current position in the case of same-sex marriages solemnised outside the UK. Amendment 41, taken with the other amendments in the group, would remove that provision from the Bill, leaving a same-sex couple married under the Bill with no legal status in Northern Ireland, and the amendment has been drafted purely to address that issue. That would contrast with the situation of a same-sex couple who married outside the UK – for example, in Canada or Portugal—because such couples are already treated in Northern Ireland as civil partners in accordance with the provision of the Civil Partnership Act 2004. Leaving same-sex couples married in England and Wales in legal limbo if they move to Northern Ireland would clearly be unjust.<sup>5</sup>*

Civil partnership is very similar but not fully identical to marriage. It has been noted that successive UK governments have steadily removed differences between married, cohabiting and same sex couples by, for example allowing single people and same sex couples (in GB) to adopt; extending domestic violence legislation to all couples; calculating benefits by household occupation rather than marital status; and extending occupation rights to partners and parental responsibilities to all categories of persons.<sup>6</sup> It must be noted however, that whilst single men and women, regardless of sexual orientation can apply to adopt in NI unmarried heterosexual couples, same sex couples and couples in civil partnerships are not eligible to be considered for adoption in NI<sup>7</sup>.

2.2 **Clause 12 and Schedule 5** make amendments to the law on gender recognition ending the requirement to end a marriage or civil partnership where there is a change of gender<sup>8</sup>. According to the Department this has implications in relation to the

<sup>4</sup> Under the Civil Partnership Act 2004

<http://www.legislation.gov.uk/ukpga/2004/33/contents>

<sup>5</sup> Public Bill Committee 11<sup>th</sup> Sitting 7 March 2013

<sup>6</sup> Page 4 *Same-sex marriage and civil partnerships* Standard Note SN/HA/5882 House of Commons Library Dec 2012

<sup>7</sup> In 2012 the NIHRc applied for a judicial review on the compatibility of *the Adoption Order NI 1987* with the ECHR. The High Court ruled that the blanket ban on adoption by civil partners and on unmarried couples is unjustifiable.

[http://www.courtsni.gov.uk/en-gb/judicial%20decisions/summaryjudgments/documents/j\\_si\\_nihrc-adoption-jr\\_181012/j\\_si\\_nihrc-adoption-jr\\_181012.pdf](http://www.courtsni.gov.uk/en-gb/judicial%20decisions/summaryjudgments/documents/j_si_nihrc-adoption-jr_181012/j_si_nihrc-adoption-jr_181012.pdf)

On 15 January 2013 Minister Poots stated that an appeal had been lodged on behalf of the DHSSPS on 11 Dec 2012

<http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-12-13/15-January-2013/>

<sup>8</sup> The Gender Recognition Act 2004

<http://www.legislation.gov.uk/ukpga/2004/7/contents>

pensions of some same-sex spouses moving to Northern Ireland. The Department has indicated that there will be some differences in pension provision for such persons and stated:

*The differences are historical (they largely relate to older married women and derive from a time when less women worked). Assuming that there are no amendments to the Marriage (Same Sex Couples) Bill, they will continue to exist after the Bill is enacted. When the new law comes into force, a civil partner and a same-sex spouse will ordinarily have the same pension rights. The one exception will be a woman who is in a same-sex marriage because her husband has changed gender. In those circumstances the rules which previously applied to that woman will continue to apply.*

*Given the above, the number of same-sex spouses who are likely to be adversely affected in pension terms by a move to Northern Ireland is likely to be extremely small (i.e. women born before 6 April 1950, whose husbands change gender and who consent to the marriage continuing as a same-sex marriage).<sup>9</sup>*

2.3 **Clause 13 and Schedule 6** includes a power to make provision by an Order in Council about how UK consulates overseas carry out marriages and how service personnel can marry overseas<sup>10</sup>. The Briefing Paper on the Bill prepared by the Department for this Committee (24 May 2013<sup>11</sup>) notes that these provisions extend to Northern Ireland however this section is not included in the consent motion. The Committee may wish to seek further clarification from the Department on the exclusion of this section of the Bill from the consent motion.

2.4 **Clause 15** (transitional and consequential provision). Transitional and consequential provision generally involves what will be done to make the transition from the existing law to the law as it will be and the consequences of that transition. The Explanatory Notes to the Bill state:

*It may be necessary to deal with the transition from the situation where marriage is only available to man and a woman to the situation where*

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<sup>9</sup> Committee correspondence with the Department of Finance and Personnel 17 May 2013

<sup>10</sup> The Explanatory Notes to the Bill state: *The Order would authorise a marriage only where the couple would have been eligible to marry in a part of the United Kingdom to be determined in accordance with the Order. Thus the marriage of a same sex couple would be authorised only if the relevant part of the United Kingdom were one which permits such marriages.*

Paragraph 166 page 39 [http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/cbill\\_2012-20130126\\_en\\_4.htm#sch2](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/cbill_2012-20130126_en_4.htm#sch2)

<sup>11</sup> Briefing Paper on the Marriage (Same Sex Couples) Bill DFP 24 May 2013

*marriage is also available to same sex couples. It may also be necessary to deal with the consequences of that change.*<sup>12</sup>

Clause 15 has four parts. Parts 15(1) to 15 (3) are included in the draft consent motion and provide powers to the Secretary of State or Lord Chancellor to make orders. However the Annex to the Memorandum includes all four parts of the clause. Part four gives effect to Schedule 7 which includes amendments to the *Marriage Act 1949*. The Committee may wish to ask the Department to confirm if all four parts of clause 15 are covered by the draft consent motion.

- 2.5 **Clause 16** (Orders and regulations) sets out the procedural arrangements with respect to the making of secondary legislation. It includes a power for the Secretary of State to make consequential amendments in devolved areas with the consent of the Department of Finance and Personnel. The Committee may wish to ask the Department to indicate where it anticipates that consequential amendments might occur.

### 3 Issues for further consideration

- The DFP has listed the provisions of the Bill which extend to NI.<sup>13</sup> One of these is not included in the draft consent motion (Clause 13 and Schedule 6: marriage overseas). The provisions may relate to non-devolved matters however the Committee may wish to seek clarification from the Department.
- The Committee may wish to ask the Department to clarify if all four parts of clause 15 are covered by the draft consent motion.
- Same sex couples married in England and Wales who move to NI will be recognised as civil partners. This is already the case for same sex couples who have been married overseas, for example Canada. Same sex marriage may be legalised in the Republic of Ireland following the Convention on the Constitution's recent vote in favour of civil marriage for same sex couples<sup>14</sup>. The Committee may wish to inquire from the Department how these marriages will be treated in Northern Ireland.

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<sup>12</sup> Paragraph 60 Explanatory Notes to the Bill [http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/cbill\\_2012-20130126\\_en\\_4.htm#sch2](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/cbill_2012-20130126_en_4.htm#sch2)

<sup>13</sup> Briefing paper on the Marriage (Same Sex Couples) Bill DFP 24 May 2013

<sup>14</sup> On receipt of the Convention's report the Irish Government will respond within four months by way of a debate in the Oireachtas. If agreement is reached on the recommendation to amend the Constitution, the Government will produce a timeframe for a referendum.

<https://www.constitution.ie/AttachmentDownload.ashx?mid=b4bee9f7-fda4-e211-a5a0-005056a32ee4>

- The Bill amends the law on gender reassignment in England and Wales<sup>15</sup>. With enactment of the Bill a person in a mixed sex marriage who wishes to change gender won't have to be divorced from their spouse in England and Wales. These couples may stay married if they wish. They will have the same pension rights. The Department has indicated however there will be a pension disadvantage for some such couples who come to live in NI – but only a small number of women are likely to be affected. The Committee may ask the Department to provide further details on the issue.
- Despite the changes in England and Wales in relation to the law on gender recognition, it will remain the case that a mixed sex marriage will have to be dissolved in NI in order for a full gender recognition certificate to be issued to an individual in a civil partnership who wishes to change gender. The Committee may wish to ask the Department for its view on the potential for future legal challenge in relation to this difference between NI and GB.
- Same sex married couples living in England and Wales can soon apply jointly to adopt a child. Should they move to Northern Ireland they will be unable to do this. This is because their marriage will be treated as civil partnership and civil partners cannot jointly apply to adopt in NI<sup>16</sup>. The Committee may wish to ask the Department to comment on the potential for legal challenge on this matter.
- In addition the Committee may wish to enquire of the Department whether existing adoptions to same sex couples moving to NI from England and Wales will have legal recognition under NI law.
- The Bill gives the Secretary of State powers to make consequential amendments in devolved areas by order. To do this the Secretary of State must consult with the DFP. The Committee may wish to ask the Department to indicate where it anticipates that consequential amendments might occur.
- The Northern Ireland Human Rights Commission (NIHRC) has stated 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” and that this was “a matter of concern” to the Commission.<sup>17</sup> The Commission raised the matter again in February and April 2013<sup>18</sup>. Correspondence from the Department on 20 March to this Committee stated that... *The Bill is not, therefore, being presented as a measure which is required to protect human rights...*<sup>19</sup> however the Committee may wish to question the Department further on its view of the NIHRC's concerns.

<sup>15</sup> *The Gender Recognition Act 2004* <http://www.legislation.gov.uk/ukpga/2004/7/contents>

<sup>16</sup> In addition unmarried heterosexual couples may not apply to adopt. An unmarried individual regardless of sexual orientation may apply to adopt.

<sup>17</sup> Correspondence between Prof P O'Flaherty NIHRC and Rt Hon Theresa May MP Government Equalities Office 11 June 2012

<sup>18</sup> Correspondence between Prof P O'Flaherty NIHRC and Rt Hon Maria Miller MP Minister for Women and Equalities 26 February 2013 and 9 April 2013

<sup>19</sup> Correspondence between Departmental Assembly Liaison Officer DFP and Clerk to Committee 20 March 2013