



Response to the Legislative Consent Motion in respect of the Marriage (Same Sex Couples) Bill

1. The Northern Ireland Human Rights Commission (the Commission), pursuant to Section 69(4) of the Northern Ireland Act 1998, advises the Assembly whether a Bill is compatible with human rights. In accordance with this function the following statutory advice is submitted to the Committee for Finance and Personnel on the Legislative Consent Motion in respect of the Marriage (Same Sex Couples) Bill.
2. The Commission bases its position on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe and United Nations systems. The relevant international treaties in this context include;
 - The European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951];
 - The International Covenant on Civil and Political Rights, 1966 (ICCPR)[UK ratification 1976];
 - The European Union Charter of Fundamental Rights, 2000 (CFR).
3. The Commission recalls that the Northern Ireland Act 1998 requires that all acts of the Department are compatible with the ECHR and all international obligations.¹ The Commission, therefore, advises that the Committee scrutinise the

¹ s.24(1) and s.26, Northern Ireland Act 1998

Legislative Consent Motion for compliance with international human rights standards.

Relevant international human rights standards

4. The Commission recalls that the right to marry is protected in international law by a number of treaties, including:

- Article 23(2) of the ICCPR, which states that;

The right of men and women of marriageable age to marry and to found a family shall be recognised.

- Article 12 of the ECHR, which states that;

Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right.

- Article 9 of the CFR, 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.

5. The jurisprudence of the European Court of Human Rights (ECt.HR) and the United Nations Human Rights Committee (HRC) has confirmed that the restriction of the institution of marriage to opposite sex couples is not in violation of international human rights standards.

6. The ECt.HR considered the issue of same-sex marriage in *Schalk and Kopf v. Austria*, taking into account the right to marry under article 9 CFR which, unlike article 12 ECHR, does not make reference to gender, leaving the matter to the respective State. The Court held 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.*²

7. Thus, while a State is entitled to extend the protection of article 12 to same sex couples, the jurisprudence of the ECt.HR indicates that a State is not required by the terms of the ECHR to make legal provision for such marriages.
8. With regard to the situation concerning the ICCPR, the UN Human Rights Committee considered whether the failure of a State to provide for same sex marriage constituted a breach of the right to marry found in article 24 ICCPR in *Joslin v. New Zealand*.³ The Committee 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.⁴ However, as observed in the individual opinions of two Committee members, article 24 does not preclude a State from recognising the marriage of a same sex couple.⁵
9. The Commission recalls that the freedoms of thought, conscience and religion are protected under:
 - Article 18 of the ICCPR, which states that;
 1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
 2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
 3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order,*

² *Schalk and Kopf v. Austria* (2010) Application no. 30141/04, at [61]

³ *Joslin v. New Zealand* (902/1999), CCPR/C/75/D/902/1999

⁴ *Ibid*, at [8.2 and 8.3]

⁵ *Ibid*, Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring) at [Appendix]

health, or morals or the fundamental rights and freedoms of others.

- Article 9 of the ECHR, which states that;

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

- Article 10 of the CFR, which states that;

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

10. The freedom to manifest one's religion may be limited in certain circumstances. Any limitation must be prescribed by law and seek to achieve a legitimate aim. The limitation must be necessary in a democratic society and proportionate in achieving the stated aim.⁶

11. It is the view of the Commission, in so long as secular opportunities are made available to conduct same sex marriages, that any requirement on religious organisations that oppose same sex marriage to conduct such marriages may violate the right of freedom of religion.

⁶ See article 18(3) ICCPR and article 9(2) ECHR

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12. The Commission has previously raised its concerns, engaging with the Minister for Women and Equalities for the United Kingdom Government, the Minister of Finance and Personnel of the Northern Ireland Executive and this Committee. In the present Advice it recalls the views it expressed in those communications.
13. In correspondence with the Ministers and the Committee to date, the Commission had focused on the narrow area of the Marriage (Same Sex Couples) Bill which applies to Northern Ireland.⁷ Under paragraph 2(1) of Schedule 2, a same sex marriage in England and Wales will be treated as if it is a civil partnership in Northern Ireland. Where an individual changes his or her gender and seeks the continuance of a marriage or conversion of a civil partnership to a marriage, such a marriage will be treated as a civil partnership in Northern Ireland.
14. The Commission recalls that the statutory bar on access to marriage for same sex couples remains in place in Northern Ireland. While the Northern Ireland Assembly is not precluded as a matter of international human rights law from legislating for same sex marriage, neither is it required to do. However, the Committee must consider how the Bill will impact upon the enjoyment of rights in Northern Ireland.
15. The Marriage (Same Sex Couples) Bill will have the effect of extending the legal definition of marriage in England and Wales to include same sex marriages. The effect of this proposed extension in domestic law does not appear to bring same sex marriages within the ambit of article 12 ECHR.
16. Indeed, in correspondence, the Minister for Women and Equalities indicated that the Government does not accept that the Bill is capable of extending the UK understanding of the meaning of marriage under article 12 ECHR.⁸

⁷ The Bill also contains clauses which refer to Scotland. This is outside the remit of the NIHRC and so no comment has been made.

⁸ Correspondence received from Minister for Women and Equalities, 21 March 2013; Correspondence received from Minister for Women and Equalities, 26 April 2013. These are attached as an appendix to the submission for reference.

17. Article 12 is also protected within the Human Rights Act 1998 (HRA). It is unclear whether or not the introduction of same sex marriage would change the current definition of marriage as protected by the HRA.
18. If the Bill does indeed change the definition of marriage, as it is understood under the HRA, it would seem to the Commission that there may be created an unequal regime of human rights protection in the distinct parts of the United Kingdom. This would be problematic since the HRA is designed to have equal force across the United Kingdom. The Minister for Women and Equalities commented, in correspondence, that "the HRA will continue to apply to all jurisdictions in the UK equally".⁹
19. In this regard, the Commission is aware that devolution often leads to legislative differences within the United Kingdom. The Commission notes the case, cited by the Minister, of *Magee v. the United Kingdom* in which the ECt.HR observed that there is not always a uniform approach to legislation within the constituent parts of the United Kingdom.¹⁰ The Court concluded that legislation can "take account of regional differences and characteristics of an objective and reasonable nature"¹¹ and as a result there was no violation of article 14 in conjunction with article 6.¹²
20. The Minister did not, therefore, accept the Commission's concerns. Recalling the *Magee* case, she stated that "the nature of devolution and differences in provision within the UK may potentially result in different outcomes".¹³ The Commission advises the Committee that the present situation is different to *Magee*. In the present scenario, the issue concerns the application of one piece of UK-wide legislation, the HRA, which is intended to apply throughout the United Kingdom with equal force. By contrast, *Magee* was concerned with the application of two distinct statutes; one in Northern Ireland and one in England and Wales.

⁹ Correspondence received from Minister for Women and Equalities, 26 April 2013

¹⁰ *Magee v. the United Kingdom* [2000] ECHR 216, at [50]

¹¹ *Ibid*

¹² *Ibid*, at [51]

¹³ Correspondence, 26 April 2013

21. Finally, with regard the protection of the right of freedom of religion, the Commission notes that as same sex marriage is not available in Northern Ireland, concerns do not appear to arise for the purpose of the present legislative consent motion.

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