



**Committee for Finance and Personnel**

**Report on the  
Legislative Consent  
Motion: Marriage (Same  
Sex Couples) Bill**

**Wednesday 12 June 2013**

**NIA 118/11-15**

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## **List of Abbreviations and Acronyms**

CP	Civil Partnership Act
DFP	Department of Finance and Personnel
DHSSPS	Department of Health, Social Services and Public Safety
ECNI	Equality Commission for NI
ECHR	European Convention on Human Rights
EQIA	Equality Impact Assessment
EU	European Union
GB	Great Britain
HRA	Human Rights Act 1998
LCM	Legislative Consent Motion
LGB& T	Lesbian Gay Bisexual & Transgender
NI	Northern Ireland
NIHRC	Northern Ireland Human Rights Commission
RaISe	Assembly Research & Information Service
RoI	Republic of Ireland
UK	United Kingdom

# Introduction

## Background

1. Following a public consultation on “Equal Civil Marriage”, on 11 December 2012, the UK Government stated that it would proceed with its proposal to introduce marriage for same sex couples. It also said that it would:
  - permit religious marriage ceremonies for same sex couples according to the rites of religious organisations which wished to conduct such ceremonies; and
  - provide protection for religious organisations and individuals which did not wish to conduct such ceremonies.
2. The Marriage (Same Sex Couples) Bill was subsequently introduced in the House of Commons on 24 January 2013 and is intended to give effect to the UK Government’s agreed policy.<sup>1</sup>

## Provisions of the Marriage (Same Sex Couples) Bill applicable to Northern Ireland

3. The main purpose of the Marriage (Same Sex Couples) Bill is to allow same sex couples to marry, either by way of a civil ceremony (e.g. in a register office or approved premises) or, provided that the religious organisation concerned is in agreement, on religious premises. Although the Bill essentially relates to England and Wales, the following substantive provisions are stated to extend to Northern Ireland (NI):
  - Clause 10(3) and Schedule 2 (treatment of English/Welsh same sex marriages);
  - Clause 12 and Schedule 5 (gender recognition);
  - Clause 13 and Schedule 6 (marriage overseas);

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<sup>1</sup> Appendix 4d: DFP Papers: DFP Correspondence, 24/05/13

- Clause 15 (transitional and consequential provision); and
  - Clause 16 (orders and regulations).
4. The Memorandum accompanying the Legislative Consent Motion (LCM) in respect of the Marriage (Same Sex Couples) Bill, which was laid in the Assembly on 24 May 2013, explains the need for the provisions of the LCM in the following terms:

*“It is important to take account of the interface between the law in Northern Ireland and the law in England and Wales. By providing for English/Welsh same sex marriages to be treated as civil partnerships we are utilising an established legal framework (i.e. the CP Act) and treating those marriages in the same way that we treat overseas same sex marriages. Also, we must have appropriate procedures for handling applications for gender recognition certificates, including procedures for correcting errors, bearing in mind the changes which will be effected to the law in this area to take account of the availability of same sex marriage in England and Wales”<sup>2</sup>*

### **Committee Approach**

5. The Committee’s attention was first drawn to this matter following correspondence from the Northern Ireland Human Rights Commission (NIHRC) in March 2013, which was forwarded to the Department of Finance and Personnel (DFP) for clarification on the issues raised. From the Department’s response it was noted that the Minister was considering a request from the UK Government in respect of the NI related provisions in the Marriages (Same Sex Couples) Bill. It was also pointed out that the Minister of State, Department for Culture, Media and Sport had confirmed that “there is absolutely no requirement on Northern Ireland to introduce same-sex marriages, neither an equality requirement nor a requirement

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<sup>2</sup> Appendix 1: Memorandum Accompanying the Legislative Consent Motion

under the European Convention on Human Rights”.<sup>3</sup>

6. The Committee subsequently requested clarification from the Department on the differences between the rights/benefits/entitlements of people in civil partnerships as compared to same sex marriages; for advice on how these could be impacted in cases where same sex married couples move to NI from Great Britain (GB); and for information on whether DFP has sought any legal advice on these issues. The Department’s response is at Appendix 6a.
7. On 14 May 2013, the Minister of Finance and Personnel then wrote to the Committee to advise that he had asked the Executive to pursue a LCM in respect of a number of provisions in the Marriage (Same Sex Couples) Bill. The memorandum accompanying the LCM was subsequently laid in the Assembly on 24 May 2013, at which point the matter stood referred to the Committee for reporting to the Assembly within 15 working days, as provided for in standing order 42A. Members agreed to seek an oral briefing from departmental officials at the earliest opportunity, to commission Assembly research and to invite NIHRC, the Equality Commission, the Rainbow Project and the four main local churches to provide written comment on the LCM.
8. At its meeting on 29 May, the Committee received a briefing from Assembly Research and the research paper was forwarded to the Department for comment.
9. At the same meeting, the Committee took initial oral evidence from DFP officials and, at their meeting on 5 June 2013; members considered written submissions received from the Church of Ireland, the Presbyterian Church in Ireland, the Rainbow Project, the Equality Commission and NIHRC. Members agreed to take up offers of oral briefings from the Rainbow Project and NIHRC and held a final oral hearing with DFP officials. Members also noted that the Northern Ireland Public Service Alliance LGB&T Group had indicated that it

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<sup>3</sup> Appendix 4a: DFP Papers: DFP correspondence, 20/03/13

would have welcomed the opportunity to make a stakeholder submission but was unable to do so because of the time constraints arising from the LCM process.

10. With a view to informing the wider Assembly, the Committee agreed to publish the written submissions and other relevant papers relating to the LCM on the Committee webpage as soon as possible in advance of the plenary debate on the LCM. The written submissions and other papers can be found in the appendices to this report.

**11. The Committee has endeavoured to gather evidence on the proposed LCM, as practicable, and report to the Assembly within the time constraints set out in standing order 42A (7) – i.e. 15 working days from the date of referral. However, given the complexities and sensitivities around the issue in question, this timeframe is far from ideal and the Committee believes that the potential for the LCM should have been indicated at an earlier stage, which would have facilitated a more thoroughgoing evidence gathering and scrutiny exercise.**

## **Key Issues from the Evidence**

12. The Committee identified several key issues from the written submissions and oral evidence received, which are outlined below. More detail on these and other issues is available in the documents contained in the appendices to this report.

### **Redefinition of Marriage**

13. While the Committee's call for evidence from identified stakeholders was focused on the specific provisions contained within the LCM, it was recognised that the proposals for NI are made within the wider context of both

the policy direction being adopted in GB and recent decisions of the Assembly on the issue of same-sex marriage.<sup>4</sup> The current lack of consensus over the principle of legislating for same-sex marriage in NI was reflected in the evidence to the Committee.

14. In their respective written submissions, the Church of Ireland indicated that its understanding of marriage was not impinged on by the proposals in the LCM, while the Presbyterian Church in Ireland supported the LCM, as being a necessary measure to help safeguard the current marriage legislation in NI.<sup>5</sup>

15. The Rainbow Project, on the other hand, opposed the policy approach of the LCM and expressed clear support for extending same-sex marriage to NI, pointing to the need for consistency across the UK and to “a clear and growing consensus among European countries, particularly those that are EU members” on legislating on the matter. It also highlighted that a decision not to extend same-sex marriage to NI would exacerbate the circumstances arising from the existing differences between civil partnerships in GB and NI, whereby the provision which exists in England, Scotland and Wales for civil partnerships to be held in registered religious venues with registered celebrants has not been extended to NI.<sup>6</sup>

**16. The Committee notes that the proposed LCM would result in NI departing from the policy direction being taken in GB. In particular, the UK Government’s Marriage (Same Sex Couples) Bill would, amongst other things, enable same sex couples to marry in England and Wales; and the Scottish Government has indicated its intention to follow suit by shortly introducing the Marriage and Civil Partnership (Scotland) Bill.<sup>7</sup> Moreover, the proposed LCM would also leave NI out-of-step with an**

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<sup>4</sup> <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-12-13/01-October-2012/>  
<http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-12-13/29-April-2013/>

<sup>5</sup> Appendices 3a & 3b: Written submissions from Church of Ireland and Presbyterian Church in Ireland

<sup>6</sup> Appendix 2d: Minutes of Evidence from Rainbow Project, 05/06/13

<sup>7</sup> <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-22691285>  
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8173>



increasing number of other countries, including RoI, which are moving towards legalising or that have already introduced same-sex marriage.<sup>8</sup> Nonetheless, the Committee accepts that the approach planned for NI under the LCM aligns with the majority view in the Assembly, as expressed in recent debates on same-sex marriage, and that such regionalised policy variation on transferred matters is a natural outworking of devolution. That said, members are also mindful of the strongly-held and divergent views around this issue and of the need for careful assessment of the implications of the proposed policy, both prior to and following implementation.

### **Application of Human Rights Law**

17. From the evidence received, the Committee notes that the LCM may give rise to a potential anomaly regarding human rights protection. In its written submission and oral hearing, NIHRC acknowledged that the extension of the legal definition of marriage in domestic law in England and Wales to include same-sex marriage does not appear to impact on article 12 of the European Convention on Human Rights (ECHR), which defines marriage as between a man and a woman. However, NIHRC also advised that the state is entitled to go further under the HRA than the European Court may have gone under the ECHR and that the position is less clear as regards whether, as a result of the Bill, section 12 of the Human Rights Act 1998 (HRA) will change. The Commission pointed out that “it is unclear whether or not the introduction of same sex marriage would change the current definition of marriage as protected by the HRA” and that “there may be created an unequal regime of human rights protections in the distinct parts of the United Kingdom” which “would be problematic since the HRA is designed to have equal force across the United Kingdom”.<sup>9</sup> The Commission’s concern is that if this was

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<sup>8</sup> <http://www.bbc.co.uk/news/world-21321731>

<sup>9</sup> Appendix 3d: Written Submission from NIHRC

challenged in the Supreme Court and a ruling applied as a consequence then that ruling would also have to be applied by courts in NI.<sup>10</sup>

**18. The Committee is, therefore, aware that the implementation of the different policy approach provided for in the LCM may well give rise to future legal challenges in terms of the application of human rights law in NI. While a successful legal challenge could lead to NI eventually falling into line with GB, the Committee believes that certainty on this matter will only be established following the outcome of any future legal challenges.**

### **Equality Impact**

19. During the oral evidence from DFP officials, the Committee queried the extent to which the equality implications of the LCM had been considered. While the Memorandum accompanying the LCM stated that “no differential impacts have been identified as far as the Northern Ireland equality groupings are concerned”, the Committee was subsequently advised by the DFP officials, during oral evidence on 29 May 2013 that the LCM would shortly be subject to equality screening. In follow up oral evidence on 5 June, the DFP officials advised that an equality screening exercise had now been carried out and that this had determined that the policy of the LCM is compliant with section 75 of the NI Act 1998. While the completed equality screening form, which was provided to the Committee on 7 June and published online, noted that the policy would have an impact on several of the section 75 groupings and explained that “there has been no opportunity for the customary consultation” due to time constraints, the conclusion was reached that it was not necessary for the policy to be submitted to a full EQIA.<sup>11</sup>

20. In its written submission, the Equality Commission noted the Department’s initial indication that the LCM would be subject to further equality screening

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<sup>10</sup> Appendix 2c: Minutes of Evidence from NIHRC, 05/06/13

<sup>11</sup> Appendix 4f: DFP Papers: Marriage (Same Sex Couples) Bill and Explanatory Memorandum

and, in welcoming this, stated an intention to “consider the DFP’s consideration of this in due course”.<sup>12</sup> **The Committee would welcome an early indication from the Equality Commission as to its consideration of the equality screening undertaken, which could provide added assurance ahead of the Assembly taking its decision on the LCM.**

### **Adoption Issues**

21. The Assembly research highlighted the difference which would be created by the policy of the LCM whereby same sex couples living in England and Wales can apply jointly to adopt a child whereas this would not be the case should they move to NI. During oral evidence, the Committee questioned DFP officials on whether adoptions to same sex couples who move to NI from England and Wales would have legal recognition under the NI law.

22. DFP officials advised the Committee that adoption policy is the responsibility of the Department of Health, Social Services and Public Safety (DHSSPS) but explained that:

*“... an adoption is a once-and-for-all-event. Once a child has been adopted, by a same-sex couple or by people in a civil partnership, that child is treated as their child when they move to Northern Ireland. That is how it will continue: the child will still have the status of being their child, and those parents will be the parents.”<sup>13</sup>*

23. In its submission the Equality Commission welcomed this clarification and stated that it “would encourage the DFP to issue clear guidance so that adoptive parents who move from other parts of the UK to reside here are aware of the position”.

24. The Equality Commission also pointed out that the outcome of the Judicial Review brought by NIHRC “has the potential to change the legal position for

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<sup>12</sup> Appendix 3e: Written Submission from the Equality Commission

<sup>13</sup> Appendix 2a: Minutes of Evidence from DFP, 29/05/13

same sex couples in Northern Ireland seeking to adopt” and members are mindful that this is subject to an ongoing appeal by DHSSPS to the Court of Appeal.<sup>14</sup>

25. During their oral evidence DFP officials stated that “we take the view that guidance on adoption is a matter for the DHSSPS, not DFP, so we do not propose to issue guidance”.<sup>15</sup> **While the Committee is aware that responsibility for adoption falls to DHSSPS and not DFP, it believes that, in the event of the policy of the LCM being implemented, there will be a practical requirement for information to be made available to ensure that adoptive parents who move from Britain to NI are clear on the position here regarding their legal status as adopted parents and that of their adopted children.**

### **Gender Reassignment**

26. From the Assembly research, the Committee notes that, despite the legislative changes in England and Wales in relation to gender reassignment, it will remain the case that a mixed-sex marriage or a civil partnership will have to be dissolved in NI in order for a full gender recognition certificate to be issued to a partner who wishes to change gender. In its evidence, the Rainbow Project voiced concern in this regard and emphasised that this would “place an emotional and costly burden on vulnerable people and creates additional bureaucracy without any discernible benefit”<sup>16</sup>

27. In a written response, dated 31 May 2013, to the issues raised in the Assembly research, DFP stated that “the existing rules in relation to gender recognition are rights compliant”<sup>17</sup> Further to this during their oral hearing on 5 June, the DFP officials stated that “since the Assembly has twice rejected the concept of same-sex marriage, it follows that, where gender reassignment

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<sup>14</sup> Appendix 3e: Written submission from the Equality Commission

<sup>15</sup> Appendix 2b: Minutes of Evidence from DFP, 05/06/13

<sup>16</sup> Appendix 3c: Written Submission from the Rainbow Project

<sup>17</sup> Appendix 4e: DFP Papers: DFP correspondence, 31/05/13

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”.<sup>18</sup> **While noting the DFP advice regarding the difference that would exist between NI and GB in respect of the process for obtaining a full gender recognition certificate, the Committee believes that this issue should have been included in the equality screening exercise which has been undertaken on the policy of the LCM.**

## **Pensions**

28. With reference to the provision in the Bill to amend the law on gender reassignment in England and Wales making it no longer necessary to end a marriage or civil partnership where there is a change of gender, the evidence from DFP has confirmed that this has implications in relation to the pensions of some same-sex spouses moving to NI. In correspondence to the Committee, the Department 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>19</sup>*

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<sup>18</sup> Appendix 2b: Minutes of Evidence from DFP, 05/06/13

<sup>19</sup> Appendix 4c: DFP Papers: DFP Correspondence, 17/05/13

29. In follow up correspondence, DFP also sought to assure the Committee that “the UK Government has said that the differences with regard to pension entitlement are a legacy from the past and will eventually cease to exist”<sup>20</sup>

### **Order-making powers of the Secretary of State**

30. Arising from the Assembly research on the LCM, members queried with DFP the provisions in clauses 15 and 16 and paragraph 2 of Schedule 2 to the Bill, which will give the “Secretary of State” order-making powers in respect of devolved areas. In particular, paragraph 2(2)(b) in Part 1 to Schedule 2 will provide a power to specify cases in which a marriage of same sex couples under the law in England and Wales is not to be treated as a civil partnerships in NI.

31. In its written submission, the Equality Commission sought clarification as to whether consultation with the consent of the Assembly is required before the passing of such an order.<sup>21</sup> It was evident from the Committee’s questioning of DFP officials during the initial oral evidence session on 29 May that there was no clarity about the circumstance in which this power would be used and that it was provided for in terms of unforeseen circumstances.

**32. In terms of the uncertainty around the precise circumstances in which the order-making powers of the Secretary of State applying to NI might be used, the Committee welcomes the clarification received during oral evidence from DFP officials on 5 June 2013 that the consent of DFP will be required to orders being made and that the Department has, in turn, agreed to bring any such proposals to the Executive.<sup>22</sup> In this regard, the**

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<sup>20</sup> Appendix 4c: DFP Papers: DFP Correspondence, 17/05/13

<sup>21</sup> Appendix 3e: Written Submission from the Equality Commission

<sup>22</sup> Appendix 2b: Minutes of Evidence from DFP, 05/06/13

**Committee would also wish to be consulted on any future proposals to exercise these powers before DFP brings them to the Executive.**

### **Other Issues**

33. During oral evidence with the Rainbow Project, the Committee heard that there may be a potential economic impact to having a different position in NI to that in GB (and potentially also to that in RoI) in respect of same-sex marriage. In particular, it was suggested that recognition of same-sex marriage within states can be a factor which large multi-national companies take into consideration, in terms of their human resources, when making decisions on foreign-direct investment; and that NI could therefore be placed at a competitive disadvantage to other states which have introduced such reform.
34. A further issue cited by the Rainbow Project was the administrative problems and potential punitive impacts arising from same sex married couples who move from GB to NI and inadvertently declare themselves married when completing tax returns, insurance applications etc.
35. An additional issue upon which there remains a lack of clarity in relation to the query raised in the Assembly research regarding why the LCM does not cover the provisions relating to marriage overseas, contained in clause 13 of, and Schedule 6 to, the Bill, despite this being listed as a provision which extended to NI.<sup>23</sup> In a written response on the issue, DFP simply stated that it “was unable to secure appropriate assurances with regard to the handling of overseas marriages and it will not, therefore be seeking a legislative consent motion” in that regard.<sup>24</sup> The Committee would, however, welcome further information on any communication the Department has had with Whitehall on this matter.

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<sup>23</sup> Appendix 4d: DFP Papers: DFP Correspondence, 24/05/13.

<sup>24</sup> Appendix 4e: DFP Papers: DFP Correspondence, 31/05/13

36. **The Committee considers that, given the cross-cutting issues identified in the evidence, the Executive should undertake a review of the practical and legal implications of the policy of the LCM within three years of implementation.**

#### **Recommendation on the LCM**

37. Notwithstanding the aforementioned conclusions on the issues raised in the evidence and recognising that, in the absence of an agreed alternative, the measures contained in the LCM are necessary in practical terms, **the Committee for Finance and Personnel supports the Minister of Finance and Personnel in seeking the Assembly's agreement that "the following provisions in the Marriage (Same Sex Couples) Bill, which relate to the treatment of same sex marriages in Northern Ireland and gender recognition, should be considered by the UK Parliament:**

- **Clauses 10(3), 12, 15(1) to (3) and 16,**
- **paragraph 2 of Schedule 2; and**
- **Schedule 5 (as introduced in the House of Commons on 24 January 2013)."**



## **Appendices:**

1. [Memorandum Accompanying Legislative Consent Motion](#)
2. Minutes of Evidence
  - a. [Evidence from DFP 29/05/13](#)
  - b. [Evidence from DFP 05/06/13](#)
  - c. [Evidence from NIHRC 05/06/13](#)
  - d. [Evidence from the Rainbow Project 05/06/13](#)
3. .Written Submissions
  - a. [Church of Ireland](#)
  - b. [Presbyterian Church](#)
  - c. [Rainbow Project](#)
  - d. [NIHRC](#)
  - e. [Equality Commission](#)
4. DFP Papers
  - a. [DFP correspondence dated 20/03/2013](#)
  - b. [DFP correspondence from Minister, Sammy Wilson, dated 14/05/2013](#)
  - c. [DFP correspondence 17/05/2013](#)
  - d. [DFP correspondence 24/05/2013](#)
  - e. [DFP correspondence 31/05/2013](#)
  - f. [Marriage \(Same Sex Couples\) Bill & Explanatory Notes](#)
  - g. [Marriage \(Same Sex Couples\) Bill Policy Screening Form](#)
5. [Research paper](#)
6. Other Papers
  - a. [NIHRC letter to Maria Miller MP, Secretary of State for Culture, Media and Sport, dated 26/02/2013](#)
  - b. [NIHRC letter to Maria Miller MP, Secretary of State for Culture, Media and Sport, dated 09/04/2013](#)
  - c. [NIHRC letter to Committee for Finance and Personnel Chairperson, Daithi McKay, dated 19/04/2013](#)
  - d. [Maria Miller MP, Secretary of State for Culture, Media and Sport, letter to NIHRC dated 26/04/2013](#)
  - e. [NIHRC letter to Theresa May MP and Lynne Featherstone MP dated 11/06/2012](#)
  - f. [NIHRC letter to DFP Minister, Sammy Wilson, dated 11/06/2012](#)
  - g. [Maria Miller MP, Secretary of State for Culture, Media and Sport, letter to NIHRC dated 21/03/2013](#)
  - h. [Committee for Finance and Personnel letter to NIHRC \(11/04/13\) regarding DFP correspondence dated 20/03/2013](#)