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1 Horse Guards Road,
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Dear Raphaela

**Re: Proposed Regulations on same-sex religious marriage and conversion
(marriage and civil partnership)**

We have set out below our comments and recommendations relating to the NIO's consultations on the proposed Regulations to introduce same-sex religious marriage in Northern Ireland and on conversion rights that should be available to married couples and civil partners. The Commission has only responded to those questions that are within its remit and expertise.

Overarching recommendations

The Commission welcomes the introduction of legislation permitting same sex marriage in Northern Ireland. The Commission also supports the availability of civil partnerships to opposite-sex and same-sex couples on the same basis.

As set out in our earlier recommendation¹ supporting the introduction of legislation permitting same-sex marriage, our overarching recommendation is that there are clear protections within the legislation so as to make sure unequivocally that no religious organisation or individual is forced to marry same-sex couples, whilst also ensuring that those organisations who wish to conduct these marriages can do so, as they can for civil partnerships.

However, the Commission is clear that any exception to the law must be narrowly defined and objectively justifiable. We do not support exceptions to equality law or other law that do that meet these essential requirements. It is also essential that Government ensures that its proposals and any exceptions under the proposed Regulations are in compliance with human rights law.

¹ ECNI (2013), [Promoting Sexual Orientation Equality: Priorities and Recommendations](#)

Response to proposed Regulations on same-sex religious marriage

Officiants: Non-compulsion (Question 2)

Introduction

The consultation seeks views on whether ‘officiants should be free to choose whether to solemnise same-sex marriages, even where their religious body chooses to consent to such marriages’.

Response

We **recommend** that Government ensures that the proposed provision (to ensure that an individual officiant of a religious body who does not wish to solemnise a same sex marriage cannot be compelled to do so, even where a religious body chooses to give consent), is narrowly defined and objectively justifiable and is in compliance with human rights law.

Objectively justifiable

Government should ensure this proposed provision is both narrowly defined and objectively justifiable.

At the outset, we recognise the need to balance the protection of rights of individual officiants of a religious body, the rights of religious organisations, as well as the rights of same-sex couples who wish to have a same-sex religious marriage.

We draw to Government’s attention the following points, in the context of its consideration of whether or not there is objective justification for this provision.

- Government should assess, including through its engagement with religious organisations as part of this consultation, and through reviewing the impact of the operation of this provision in other parts of the UK, the degree to which there is a clear need for this provision.

In particular, it should consider the extent to which, in Northern Ireland, individual officiants are likely to object to participate in same-sex marriages, in circumstances where their religious body consents, and therefore would require protection under the legislation.

- Further, Government should balance this with a consideration of the potential impact of this provision on LGB individuals, including that its outworking has the potential to negatively impact on, or restrict, the ability of LGB individuals to access religious same-sex marriages.

This is particularly true in the situation of a smaller religious organisation, with only a few officiants, which is willing to solemnise the marriage. The decision of an individual officiant to choose not to do so could impact on access to religious same-sex marriage. This might be further exacerbated where there are a limited number of officiants in particular geographic areas, with potentially limited, or no availability of alternative ministers.

There may also be situations where a chaplain in a non-religious setting refuses to solemnise a same sex marriage, in circumstances where their religious body consents. As there may only be one chaplain in a particular secular setting (such as a hospital) this restricts LGB individuals' ability to access religious same-sex marriages in those settings, particularly if no alternative chaplain can be found to conduct the ceremony.

Human rights compliance

Government should ensure that the proposed provision is in compliance with human rights law.

We note that in Great Britain the Joint Committee of Human Rights, in its report *Legislative Scrutiny: Marriage (Same Sex Couples) Bill* in 2013², raised concerns that the non-compulsion provisions of the Bill relating to individuals may have the effect of preventing a religious organisation that opts-in to conduct same sex marriage from maintaining its decision throughout the organisation. It indicated that this was an interference with the organisation's Article 9 rights³. It requested that the Government consider whether the Bill should be amended to deal with this concern.

We also note that a legal opinion obtained by the Equality and Human Rights Commission (EHRC) (2013) and presented to the Joint Committee in evidence, suggested the provisions in the Bill in its present form could amount to the state acting unlawfully by interfering with the freedom of religious organisations (under Article 9 of the European Convention on Human Rights) to enforce their religious doctrines within their particular organisation. It also stated that the Bill did not clearly provide for the freedom of religious organisations to ensure its employees or officials act in accordance with its ethos under Article 4 of the European Union Framework Directive 2000/78⁴.

We note that the Government, in its response to the Joint Committee of Human Rights' concerns, indicated that it did not consider that the Bill should be amended⁵. We recommend that Government reviews this decision, including in context of any advice received from the NI Human Rights Commission.

Monitoring of Impact

² Joint Committee of Human Rights (2013), [Legislative Scrutiny: Marriage \(Same Sex Couples\) Bill](#)

³ Rights under Art 9 of the ECHR; namely, the right to freedom of thought, conscience and religion.

⁴ See [Memorandum](#) submitted by The Equality and Human Rights Commission (2013) to Joint Committee of Human Rights, in its Legislative Scrutiny Inquiry on the Marriage (Same Sex Couples) Bill,

⁵ See UK Government (2014), [Legislative Scrutiny - Marriage \(Same Sex Couples Bill\), Government response to the Joint Committee on Human Rights, Second Report of Session 2013–14](#). The Government stated that no religious organisation or representative should be compelled to conduct same sex marriage ceremonies and the Bill reflected that commitment. It considered it highly unlikely that religious organisations which have opted in would, in practice, wish to force individual ministers to act against their conscience in this way. It further considered that, even if such a case did arise, it had correctly balanced the protection of the individual and the rights of the organisation. It stated that this is because an unwilling minister is not imposing his or her views on the religious organisation; and it is open to the organisation to find an alternative minister to conduct the ceremony.

Further, we **recommend** that, if this provision is introduced, Government monitors on an ongoing basis the impact of this provision on LGB individuals' ability to access religious same-sex marriage in Northern Ireland.

In particular, if introduced, as set out above, there is the potential for its outworking to negatively impact on, or restrict, the ability of LGB individuals to access religious same-sex marriages.

Monitoring of this impact on an ongoing basis will assist Government in assessing the effectiveness of the legislation and whether or not there is an ongoing need for the proposed protections for individual ministers and others acting on behalf of a religious body or under its auspices, in the specific context of Northern Ireland.

We consider that monitoring the impact of the implementation of this policy, if implemented, is consistent with the NIO's Section 75 duties and commitments under its Equality Scheme. As set out below (see comments on screening), after the implementation of policy changes, the NIO will need to ensure that the Section 75 equality impacts of policies are monitored, to ensure that any actions being taken arising from an equality assessment (screening and EQIA) have the desired effect.

Non-compulsion provisions (religious bodies) (Question 5)

We note that the consultation seeks views on whether 'no religious bodies or persons acting on behalf of, or under the auspices of, such bodies should be compelled to undertake specific activities relating to same-sex marriage'.

Response

In general, we **agree** that religious bodies, and religious officiants, should not be compelled to solemnise same-sex marriages in circumstances where they object to same-sex marriages. We note that similar protections for religious organisations are enshrined in legislation in England and Wales⁶.

This is subject to our comments above in relation to the proposed provision to ensure that an individual officiant of a religious body who does not wish to solemnise a same sex marriage cannot be compelled to do so, even where a religious body chooses to give consent.

It is noted that the proposed provisions will apply to 'those acting on behalf of a religious body or under their auspices'. Whilst not explicitly referred to in the consultation paper, if the approach in England and Wales is followed, this will widen the scope of the non-compulsion provisions beyond individual religious officiants to include other individuals, such as church organists or church flower arrangers, whether acting as an employee or volunteer for the religious body⁷.

Government should ensure that extending this provision to include 'those acting on behalf of a religious body or under their auspices' is also objectively justified, and

⁶ We note that the Consultation Paper (para. 47) makes clear that in Scotland, a religious or belief body or celebrant could in theory be compelled to solemnise same-sex marriage as a result of an obligation under other legislation such as an employment contract; though it makes clear that in practice this is unlikely to occur.

⁷ See [Explanatory Notes](#) to The Marriage (Same sex couples) Act 2013

consider any potential negative impact it could have on LGB individuals seeking to avail of such services by church employees and/or volunteers.

We also **agree** that the non-compulsion provisions should not apply to service providers that are not religious bodies or acting on behalf of religious bodies, such as hoteliers, wedding photographers and florists. As highlighted in the consultation paper, this is consistent with the duties on service providers not to discriminate in the provision of goods and services on the grounds of sexual orientation.

It will be noted that the Supreme Court in the case of *Lee v Ashers Baking Company Ltd & Ors* (2018)⁸ held, in the circumstances of that case, that the refusal of a bakery to make a cake with a slogan supporting same-sex marriage was not discriminatory on the grounds alleged⁹. We are aware that proceedings relating to the case have been lodged with the European Court of Human Rights (ECtHR), and will monitor developments in relation to this matter.

As set out below, we recommend that there is clear guidance to underpin and accompany the introduction of religious same-sex marriage Regulations. This guidance should include guidance for service providers on the outworking of the Supreme Court decision in the above mentioned case.

Exceptions under Equality Law (Questions 7 & 8)

The consultation seeks views on proposals to add new exceptions, relating to the services of a religious body or person acting on its behalf, to the sex discrimination legislation and the sexual orientation discrimination legislation, as regards provisions that prohibit discrimination on grounds of sex and sexual orientation in the provision of services to the public.

The proposals also include that ministers and chaplains working in non-religious settings, such as hospitals or schools, should also be able to avail of the proposed protections under equality law.

Response

As set out above, in general, we **agree** that religious bodies, and religious officiants, should not be compelled to solemnise same-sex marriages in circumstances where they object to same-sex marriages. Again, this is subject to our comments above in relation to the proposed provision to ensure that an individual officiant of a religious body who does not wish to solemnise a same sex marriage cannot be compelled to do so, even where a religious body chooses to give consent.

We **agree** that chaplains or ministers in secular organisations, in circumstances where their religious body does not consent to solemnise same-sex marriage should not be compelled to do so, and there should be exceptions under equality law to reflect this.

⁸ Lee v Ashers Baking Company Ltd & Ors [\[2018\] UKSC 49](#),

⁹ For further information on the Supreme Court Judgement, see [ECNI Reflections on Lee v Ashers Baking Company Judgment](#) (2019).

We also **agree** that employers or principals should not be deemed to be acting unlawfully if, in the circumstances outlined above, an employee (such as a chaplain) refuses to solemnise same-sex marriages.

The introduction of these exceptions, aligned to the above non-compulsion provisions outlined above, will provide clarity and certainty for religious organisations; in particular, that they will not be in breach of the sex discrimination legislation and the sexual orientation discrimination legislation if they refuse to conduct a same-sex marriage because of a religious objections to marriages of same-sex couples.

We note that these provisions will be similar to those introduced in Great Britain, that there are similar exceptions for religious organisations enshrined in the Equality Act 2010 as regards England and Wales.

We **agree**, as proposed, that these exceptions should not apply to service providers that are providing goods, facilities, services or premises to the public that are not religious bodies or acting on behalf of religious bodies.

Aligned to our overarching recommendation, Government should ensure that these proposed exceptions are narrowly defined and objectively justifiable, and are in compliance with human rights law.

Guidance

Further, aligned to our recommendations on proposed *Civil Same-Sex Marriage/Opposite-Sex Civil Partnerships Regulations 2019*, we **recommend** that Government ensures that there is clear guidance to underpin and accompany the introduction of religious same-sex marriage Regulations.

This guidance should include setting out good practice for religious organisations who have opted in to marrying same-sex couples, in terms of steps they can take as regards appointing replacement officiants, in situations where an official does not wish to solemnise a same-sex marriage.

There is a need for guidance for religious bodies on the scope of these exceptions, which should include guidance for ministers and chaplains working in non-religious settings. Our recommendation is consistent with the approach taken in Great Britain following the introduction of *The Marriage (Same Sex Couples) Act 2013* in England and Wales¹⁰.

We note that the consultation paper (para 19) states that religious marriage in Scotland can be held at any location agreed by the marrying couple and the approved celebrant and that further exceptions in the Equality Act 2010 ensure that a religious body, or a person acting on its behalf, is not unlawfully discriminating if it refuses to allow premises owned or controlled by the religious body to be used to solemnise same-sex marriage.

Whilst we recognise that it is likely that most religious premises will be owned or rented by solely one religious body, it is not clear what the position will be if premises

¹⁰ In particular, we note that the Equality and Human Rights Commission issued general guidance (2014), as well as sector specific guidance for religious organisations, which included guidance for chaplains.

are owned or rented by two or more religious bodies, *with differing views* on allowing the solemnisation of same-sex marriages in those premises. We recommend that this is clarified in guidance¹¹.

Response to Proposed Regulations on conversion entitlements (Marriage and Civil partnership)

Conversion from civil partnership to marriage (question 1)

We note that the consultation seeks views on whether 'same-sex couples should be permitted to convert their civil partnership to marriage'.

Response

We **agree** that same-sex couples should be permitted to convert their civil partnership to a marriage. As recognised in the consultation paper (para 17), when civil partnerships were introduced in Northern Ireland in 2005, the option of availing of same-sex marriage was not available, but couples may have chosen that option had it been available.

We also **agree** that those who choose not to convert their relationship from civil partnership to same-sex marriage should be able to do so without a legal detriment.

We note that this proposal will bring Northern Ireland into line with the provisions in the rest of the UK.

Guidance

Further, aligned to our recommendations on proposed *Civil Same-Sex Marriage/Opposite-Sex Civil Partnerships Regulations 2019*, we **recommend** that Government ensures that there is clear guidance to underpin and accompany the introduction of the Regulations on conversion entitlements (Marriage and Civil partnership).

Response to screening (same-sex religious marriage and conversion rights)

In the context of Section 75, 'policy' is defined in the NIO Equality Scheme. It commits the NIO to screening at the earliest opportunity in the policy development/review process, to identify those policies that are likely to have an impact on equality of opportunity and/or good relations. In terms of the application of these duties, we advise that:

1. There should be clarity with regard the policy areas being screened. This consultation follows the changes to the law which came into effect on 13 January 2020 and focuses on the related provisions including giving the right to convert from

¹¹ We note that *The Marriage of Same Sex Couples (Registration of Shared Buildings) Regulations 2014* have been introduced in England and Wales. We recognise that the situation in NI is different to that adopted in England and Wales; as in England and Wales there is legislation that allows for the registration of a certified place of religious worship for the solemnization of marriages of same sex couples.

a civil partnership to marriage (and vice versa), and also how to allow for religious same-sex ceremonies while providing the appropriate religious protections in Northern Ireland. Each of these policy areas should be separately screened to ensure clarity with regard the evidence and assessment of impacts on the Section 75 groups.

2. The screening should include the NIO's assessment of impacts (positive and negative) of the two policy areas. The consultation on both policy areas pose a number of questions with regard protections and conversion entitlements. It will be important to screen the draft Regulations for each policy area, as per Equality Scheme commitments, ensuring that the screening is informed by the information and evidence obtained from this consultation.

3. On completion of screening, there should be one of three potential outcomes, i.e. the policy is 'screened in' for equality assessment, 'screened out' with mitigation or an alternative policy adopted or 'screened out' without mitigation or an alternative policy adopted. While it would appear that each of the policies has been screened out, as noted above, information will be obtained through this consultation and it will be important that Equality Scheme commitments are adhered to in terms of appropriately assessing any potential impacts and finalising the policies.

4. Post implementation of policy changes, the NIO will need to ensure that the Section 75 equality impacts of policies are monitored, to ensure that any actions being taken arising from an equality assessment (screening and EQIA) have the desired effect.

Finally, if you require further information in relation to the above points and recommendations, please do not hesitate to contact us.

Yours Sincerely

Roisin Mallon
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