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Dear Brandon

In September 2019, the Northern Ireland Human Rights Commission (the NIHRC) provided statutory advice to the Secretary of State pursuant to Northern Ireland Act 1998, section 69(3). In addition to that advice, the NIHRC welcomes the opportunity to respond to the NIO’s public consultation on marriage and civil partnership conversion. The NIHRC’s response is in line with our function to review the adequacy and effectiveness of law and practice relating to the protection of human rights, pursuant to the Northern Ireland Act 1998, section 69(1).

Non-discrimination

Within the human rights framework there has not been specific consideration of marriage and civil partnership conversion entitlements. However, human rights standards are clear that there should be no discrimination. For example, Article 14 of the European Convention on Human Rights (ECHR), which states that:
the enjoyment of the rights and freedoms set forth in [the ECHR] shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The E CtHR is clear that "sexual orientation is a concept covered by Article 14".¹

Article 14 ECHR is not a stand-alone right and must fall within the ambit of another substantive ECHR right for example, the right to respect for private and family life (Article 8). The E CtHR and Supreme Court of the United Kingdom have confirmed that civil partnership and same-sex marriage fall within the ambit of Article 8 ECHR.²

Non-discrimination in similar terms to Article 14 ECHR is also set out in Article 2(1) of the United Nations International Covenant on Civil and Political Rights (UN ICCPR). ICCPR, Article 26, further provides that:

all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The European Court of Human Rights (E CtHR) has set out that:

according to the [E CtHR's] settled case-law, in order for an issue to arise under Article 14 [ECHR] there must be a difference in the treatment of persons in comparable situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.³

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¹ Vallianatos and Others v Greece (2013) ECHR 1110, at para 76.
³ Vallianatos and Others v Greece (2013) ECHR 1110, at para 76.
The ECtHR acknowledges that “the Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment”. However:

the notion of discrimination within the meaning of Article 14 [ECHR] also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the [ECHR].

Furthermore, the ECtHR is clear that:

just like differences based on sex, differences based on sexual orientation require “particularly convincing and weighty reasons” by way of justification. Where a difference in treatment is based on sex or sexual orientation the State’s margin of appreciation is narrow. Differences based solely on considerations of sexual orientation are unacceptable under the [ECHR].

The NIHRC also highlights several judgments of the UK Supreme Court regarding non-discrimination and proportionality. The case *R (DA and DS) v Secretary of State for Work and Pensions* [2019] challenged the lawfulness of provisions relating to what is known as the revised benefit cap is of particular relevance. The UK Supreme Court’s judgment suggests that while the burden is on the State to justify a difference in treatment, a case will rarely turn to where the burden lies and rather the test is whether the difference in treatment is manifestly without reasonable foundation. The UK Supreme Court’s judgment in this case sets the bar low for State justification of difference in treatment.

This approach was also further endorsed in the case of *Langford v Secretary of State for Defence* [2019]. The Court of Appeal described the judgment as providing a clear practical guide to the lower courts as to how one should approach the manifestly without reasonable foundation test in any individual case. The UK Supreme Court provided a well-developed domestic test for the concept of proportionality in defence of differential treatment in the case of *Bank*

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4 *Vallianatos and Others v Greece* (2013) ECHR 1110, at para 76.
5 Ibid.
6 Ibid, at para 77.
7 *R (on the application of DA and DS and others) v Secretary of State for Work and Pensions* [2019] UKSC 21.
8 Ibid.
9 *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271.
10 Ibid, at para 50.
Mellat v Her Majesty’s Treasury [2013].\textsuperscript{11} The judgment outlined that:

it is necessary to determine:

1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

2) whether the measure is rationally connected to the objective;

3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and

4) whether, balancing the severity of the measures effects on the rights of the person to whom it applies against the importance of the objective, to the extent that the measures will contribute to its achievement.\textsuperscript{12}

In answer to Questions 1, 2, 3 and 4, there should be no differential treatment based on sexual orientation, without an objective and reasonable justification that pursues a legitimate aim and is proportionate to achieving that aim. Drawing from the UK Supreme Court’s recent judgment in R (DA and DS) v Secretary of State for Work and Pensions [2019], the NIHRC advises that the State has limited discretion in treating same-sex and opposite sex couples differently. The NIHRC advises that the conversion approach should permit same sex and opposite sex couples to convert their civil partnerships to marriage. In addition, the NIHRC advises the UK Government to either allow both opposite and same sex couples to convert a marriage into a civil partnership, or to not allow same sex and opposite sex couples to do so.

If the NIHRC can be of further assistance, please do not hesitate to get in touch.

Yours sincerely,

Les Allamby
Chief Commissioner

\textsuperscript{11} Bank Mellat v Her Majesty’s Treasury [2013] UKSC 38.

\textsuperscript{12} Ibid, at para 43.