



Guidance issued under section 4 of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018

Presented to Parliament
by the Secretary of State for Northern Ireland
by Command of Her Majesty

December 2018



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Issued by the Secretary of State for Northern Ireland on 17 December 2018

Introduction

1. This guidance is issued by the Secretary of State for Northern Ireland under section 4 of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (the 2018 Act).
2. Section 4 of the 2018 Act provides:
 - (1) “In the absence of Northern Ireland Ministers to address the matters identified by recent, current and future court proceedings in relation to the human rights of the people of Northern Ireland, the Secretary of State must issue guidance to senior officers of all Northern Ireland departments which will specify how to exercise their functions in relation to-
 - (a) the incompatibility of the human rights of the people of Northern Ireland with the continued enforcement of sections 58 and 59 of the Offences against the Person Act 1861 with the Human Rights Act, and
 - (b) the incompatibility of the human rights of the people of Northern Ireland with the continued enforcement of section 13(e) of the Matrimonial Causes (Northern Ireland) Order 1978where they pertain to the provision and management of public services in Northern Ireland.
 - (2) The Secretary of State shall report guidance under this section on a quarterly basis to the House of Commons and set out her plans to address the impact of the absence of Northern Ireland Ministers on human rights obligations within three months of the day on which this Act is passed.”
3. As outlined above, section 4 of the 2018 Act requires the Secretary of State to issue guidance to senior officers of all Northern Ireland departments. Where any Northern Ireland department is exercising functions in relation to the matters mentioned in section 4 of the 2018 Act therefore, senior officers of those departments must make sure they are aware of this guidance. The Secretary of State understands, however, that it is the Departments of Finance, Justice and Health, which are the Northern Ireland departments responsible for relevant policy in relation to these matters so this guidance is, in particular, directed at those departments.
4. It is important to note that neither the 2018 Act, nor this guidance, in any way change Northern Ireland’s law in relation to abortion or same-sex marriage, or enable the law to be changed by way of guidance issued by the Secretary of State. Departments must act within the current state of the law in Northern Ireland at all times, and abide by all existing legislative obligations, in discharging their functions. In the event of any conflict between this guidance and the law, the latter will always prevail.
5. Furthermore, a declaration of incompatibility, made by the courts, does not result in an automatic change to the law. There is no legal obligation on Government to

address a declaration of incompatibility. However, where one is made, it is for the relevant government (whether HMG or a devolved administration) to consider the declaration so as to determine if it should be addressed by the relevant legislature either through primary legislation or by way of a remedial order provided for under the Human Rights Act 1998.

Abortion law in Northern Ireland

6. In Northern Ireland, the law relating to abortion, or the termination of pregnancy, is contained in sections 58 and 59 of the Offences Against the Person Act 1861, and in section 25 of the Criminal Justice Act (Northern Ireland) 1945. Abortions are only permitted where considered necessary to preserve the life of a woman, or where there is a risk of serious adverse effect on her physical or mental health which is either long term or permanent.
7. No declaration of incompatibility under section 4 of the Human Rights Act 1998 has been made by the Courts in respect of sections 58 and 59 of the Offences Against the Person Act 1861. However, the Secretary of State recognises that, whilst the challenge by the Northern Ireland Human Rights Commission to the current law was dismissed on grounds of standing, a majority of the Supreme Court held, that to the extent that the law in Northern Ireland denied women lawful termination of their pregnancies in cases of rape, incest or fatal foetal abnormality, it was incompatible with their rights under article 8 of the European Convention on Human Rights¹ (see *Re: Human Rights Commission for Judicial Review [2018] UKSC 27*). The Secretary of State also recognises that further legal proceedings are ongoing.
8. Whilst recognising the assessment of whether they are acting within the law is a matter for health professionals, that the enforcement of the law is a matter for the law enforcement authorities, and that no declaration of incompatibility has been made:
 - 8.1. in light of any relevant emerging legal judgments or other developments, as appropriate, the Department of Health should consider whether its Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland should be reviewed; and
 - 8.2. in light of any relevant emerging legal judgments or other developments, as appropriate, the Departments of Health and Justice should consider whether policy advice and options should be prepared to inform Northern Ireland Ministers on the issues arising.
9. More generally, the Departments of Health and Justice should, in relation to health and criminal justice policy so far as they concern abortion law, continue to have regard to all of their legal obligations, including the Human Rights Act 1998 and sections 24 and 75 of the Northern Ireland Act 1998 in exercising any relevant functions.

¹ Right to respect for private and family life.

Same-sex marriage law in Northern Ireland

10. Article 13(1)(e) of the Matrimonial Causes (Northern Ireland) Order 1978 (the 1978 Order) provides that a marriage is void if the parties are not respectively male and female.²
11. No declaration of incompatibility under section 4 of the Human Rights Act 1998 has been made in respect of Article 13(1)(e) of the 1978 Order. However, the Secretary of State is aware of previous and ongoing relevant litigation on these issues.
12. Recognising that it is the General Register Office for Northern Ireland that is responsible for the administration of marriage and civil partnership law:
 - 12.1. the Department of Finance must continue to exercise its functions in relation to marriage policy consistently with all of its legal obligations, including the Human Rights Act 1998 and sections 24 and 75 of the Northern Ireland Act 1998, taking account of any other forthcoming court judgments that may arise.

Reporting and accountability measures

13. In order to ensure transparency, the Executive Office, on behalf of relevant Northern Ireland departments, should update the Secretary of State, on a periodic basis on how their relevant functions are being exercised in light of this guidance.
14. In accordance with section 4(2) of the 2018 Act, the Secretary of State must report on guidance under this section on a quarterly basis to the House of Commons; the Secretary of State must also set out her plans to address the impact of the absence of Northern Ireland Ministers on human rights obligations within three months of the day on which the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 was passed.³

Review

15. This guidance remains extant until such time as it is reviewed and superseded by further guidance from the Secretary of State, or Ministers are appointed (whichever is earlier).

² Article 6 of the Marriage (Northern Ireland) Order 2003 (the 2003 Order) makes provision in respect of the legal impediments to marriage in Northern Ireland. There is a legal impediment to marriage if both parties are of the same sex. However, section 4 of the 2018 Act makes no reference to Article 6 of the 2003 Order and, accordingly, this guidance only applies to Article 13(1)(e) of the 1978 Order.

³ Reporting by 1 February 2019.

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