

**Statutory Advice to the Committee for Health, Social Services and Public Safety on the Issue of deferral of blood donation for men who have sex with men (MSM)**

**Introduction**

The Northern Ireland Human Rights Commission (‘the Commission’) is the National Human Rights Institution (‘NHRI’) for Northern Ireland. It was created in 1999 under the Northern Ireland Act 1998, pursuant to the Belfast (Good Friday) Agreement of 1998.[[1]](#footnote-1) The Commission is accredited with ‘A’ status by the United Nations International Co-ordinating Committee of NHRIs.

The Commission is required, pursuant to Section 69 (3) of the Northern Ireland Act 1998, to advise on legislative and other measures that ought to be taken to protect human rights. In accordance with this function the following statutory advice is submitted to the Committee for Health, Social Services and Public Safety on the issue of the deferral of blood donation for men who have sex with men (MSM).

A review of the evidence for blood donor selection criteria was conducted by the Advisory Committee on the Safety of Blood, Tissues and Organs (SaBTO) and published in 2011. The Committee was tasked with “reviewing the evidence base for donor deferral and exclusion in the UK in relation to sexual behaviours”[[2]](#footnote-2) and considered;

* Advances in donation testing and handling;
* Changes to legislation;
* Societal changes;
* Recent information on compliance.[[3]](#footnote-3)

The outcome of this report was a change in blood donation deferral policy, with health ministers in England, Wales and Scotland removing the permanent deferral for MSM. From 7 November 2011 this has been replaced by a one year deferral period, subject to all other criteria being met.

**International Human Rights Law**

When making a decision on any change to deferral practices, the following framework of international human rights law must be adhered to and consideration given in order to ensure compliance with best practice. The International Covenant on Civil and Political Rights, 1966, the European Convention on Human Rights, given further domestic effect by the Human Rights Act, 1998 and the European Union Charter of Fundamental Rights, 2000 are particularly relevant to this issue.

Northern Ireland is subject to the obligations contained within the International Covenant on Civil and Political Rights by virtue of the United Kingdom having ratified the Covenant without reservation of these Articles. The Committee, therefore, must act in compliance with the UK’s international human rights obligations.

The International Covenant on Civil and Political Rights recognises the principles of equality under Article 2(1) which states that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, a free standing prohibition on discrimination exists under Article 26, which states 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.

In *Toonen v Australia* the United Nations Human Rights Committee considered that sexual orientation falls within the scope of both Articles 2 and 26.[[4]](#footnote-4)

At the domestic level Northern Ireland is bound by the European Convention on Human Rights as incorporated by the Human Rights Act, 1998. These rights are binding on all public authorities and can be relied upon in the domestic courts. The relevant provisions for consideration are Articles 8 and 14;

**Article 8:**

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2)There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Article 14:**

The enjoyment of the rights and freedoms set forth in this Convention 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 non-discrimination article contained within Article 14 is not autonomous and can only be engaged in connection with another of the rights enjoyed under the Convention.

The deferral of MSM has not yet been litigated before the European Court of Human Rights and so no definitive jurisprudence is available. However, the European Court has commented that a difference of treatment based on sexuality must have “particularly serious reasons by way of justification”.

The European Court of Human Rights and the United Nations Human Rights Committee have indicated the test which must be applied to determine whether a difference in treatment is justified. Any rule, which makes a distinction on the basis of sexual orientation, can only be justified in law if there is a legitimate aim and the means are proportionate and necessary. This requires that there must be a reasonable relationship “between the means employed and the aim sought to be achieved”.[[5]](#footnote-5) The UN Human Rights Committee have identified in a recent analysis that any restriction upon rights must be “appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected”.[[6]](#footnote-6) Accordingly, with regard to this issue of the deferral of MSM, seeking to retain the status quo on the grounds of the protection of public health must be accompanied by a compelling argument as to its necessity and proportionality in the face of current scientific evidence.

**European Union Law**

The United Kingdom, including the Northern Ireland Executive, is required to implement EU Directives, although the means by which this is done is decided by the government itself. The Committee is under a duty to comply with the framework of European Union Law but must also take into consideration its obligations under Human Rights law.

Commission Directive 2004/33/EC[[7]](#footnote-7) governs the eligibility criteria for blood donors and was implemented locally by the Blood Safety and Quality Regulations 2005. The Directive refers to a permanent deferral for persons “whose sexual behaviour puts them at a high risk of acquiring severe infectious diseases that can be transmitted by blood”.[[8]](#footnote-8) No definition of sexual behaviour is expressed within the text of the Directive nor the Blood Safety and Quality Regulations 2005.

The European Commissioner for Health and Consumer Policy has distinguished sexual behaviour from sexual orientation.[[9]](#footnote-9) This directive alone cannot be relied upon to justify a blanket ban on MSM deferral as it may not be proportionate to the legitimate aim intended. He further affirmed the need to adhere to non-discrimination rights under Article 21(1) of the European Union Charter of Fundamental Rights which states that;

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

**Impact of Permanent Deferral**

The potential for serious human rights impact for the members of a marginalised community in Northern Ireland must be considered when examining the deferral of MSM. The decision to retain permanent deferral risks further stigmatisation and marginalisation for the Lesbian, Gay, Bisexual and Transgender community as a whole, with the possibility of further exposure to prejudice and discrimination. In Northern Ireland, the prevalence of homophobic crime is well documented by the PSNI and the rate of reported incidents has risen from 2009-10 to 2010-11 by 20.6%. Transphobic incidents have also risen from 14 in 2009-10 to 22 in 2010-11. Under reporting of such incidents has also been estimated at 64% in a study done by the Rainbow Project in 2009.

**Conclusion**

In order to fulfil its legal obligations under human rights law, the Committee must consider the negative impact on gay men by banning donation of blood against the actual level of risk to the general public in receiving such blood. Any decision to retain the lifetime deferral for MSM must be both proportionate and necessary.

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**Northern Ireland Human Rights Commission**

**Temple Court, 39 North Street**

**Belfast BT1 1NA**

**Tel: (028) 9024 3987**

**Textphone: (028) 9024 9066**

**SMS Text: 07786 202075**

**Fax: (028) 9024 7844**

**Email: information@nihrc.org**

**Website: www.nihrc.org**

1. The Commission’s powers were modified by the Justice and Security (Northern Ireland) Act 2007. [↑](#footnote-ref-1)
2. Advisory Committee on the Safety of Blood, Tissues and Organs (2011) Donor Selection Criteria Review, at Appendix 1: Terms of Reference [↑](#footnote-ref-2)
3. *Ibid*, at page 40 [↑](#footnote-ref-3)
4. *Toonen v Australia* (488/1992), CCPR/C/50/D/488/1992 (1994) at para 8.7 [↑](#footnote-ref-4)
5. *Ashingdane v. the United Kingdom* [1985] ECHR 8, at para 57; see also UN Human Rights Committee, General Comment 34 (2011) on Article 19: Freedoms of Opinion and Expression, 102nd Session, CCPR/C/GC/34, at para 35 [↑](#footnote-ref-5)
6. UN Human Rights Committee, General Comment 27 (1999) on Freedom of Movement, CCPR/C/21/Rev.1/Add.9, at para 14 [↑](#footnote-ref-6)
7. OJ L 91, 30.3.2004 [↑](#footnote-ref-7)
8. Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, Annex III at 2.1 [↑](#footnote-ref-8)
9. European Parliamentary Questions, Answer of Mr. John Dalli on behalf of the Commission [available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-006484&language=EN>]

   [↑](#footnote-ref-9)