



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EQUAL OPPORTUNITIES COMMITTEE

Thursday 3 October 2013

Session 4

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**EQUAL OPPORTUNITIES COMMITTEE**

**25<sup>th</sup> Meeting 2013, Session 4**

**CONVENER**

\*Margaret McCulloch (Central Scotland) (Lab)

**DEPUTY CONVENER**

\*Marco Biagi (Edinburgh Central) (SNP)

**COMMITTEE MEMBERS**

\*Christian Allard (North East Scotland) (SNP)

\*John Finnie (Highlands and Islands) (Ind)

\*Alex Johnstone (North East Scotland) (Con)

\*John Mason (Glasgow Shettleston) (SNP)

\*Siobhan McMahon (Central Scotland) (Lab)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Julia McCombie (Scottish Government)

Francesca Morton (Scottish Government)

Alex Neil (Cabinet Secretary for Health and Wellbeing)

Simon Stockwell (Scottish Government)

**CLERK TO THE COMMITTEE**

Douglas Thornton

**LOCATION**

Committee Room 4



## Scottish Parliament

### Equal Opportunities Committee

Thursday 3 October 2013

[The Convener *opened the meeting at 09:30*]

### Decision on Taking Business in Private

**The Convener (Margaret McCulloch):** Welcome to the Equal Opportunities Committee's 25th meeting in 2013. I ask everyone to switch any electronic devices to flight mode or to turn them off.

At the table we have our clerking and research team, together with official reporters. Around the room we are supported by broadcasting services and security officers. I welcome the observers in the public gallery.

My name is Margaret McCulloch and I am the committee convener. I invite members to introduce themselves in turn, starting on my right.

**Marco Biagi (Edinburgh Central) (SNP):** I am the deputy convener of the committee and the member of the Scottish Parliament for Edinburgh Central.

**John Finnie (Highlands and Islands) (Ind):** Madainn mhath—good morning. I am an MSP for the Highlands and Islands.

**Christian Allard (North East Scotland) (SNP):** Good morning. I am an MSP for North East Scotland.

**Siobhan McMahon (Central Scotland) (Lab):** Good morning. I am an MSP for Central Scotland.

**Alex Johnstone (North East Scotland) (Con):** I am a member for North East Scotland.

**John Mason (Glasgow Shettleston) (SNP):** I am the MSP for Glasgow Shettleston.

**The Convener:** Under agenda item 1, members are asked to agree to take consideration of a draft report on the Marriage and Civil Partnership (Scotland) Bill at stage 1 in private at today's meeting and future meetings. Is that agreed?

**Members indicated agreement.**

## Marriage and Civil Partnership (Scotland) Bill: Stage 1

09:31

**The Convener:** Agenda item 2 is ministerial evidence on the Marriage and Civil Partnership (Scotland) Bill at stage 1. I ask the minister and his officials to introduce themselves, and I invite the minister to make his opening remarks.

**The Cabinet Secretary for Health and Wellbeing (Alex Neil):** I will introduce myself first, convener. I am the Cabinet Secretary for Health and Wellbeing and I am leading on the bill on behalf of the Government.

**Francesca Morton (Scottish Government):** I am from the Scottish Government legal directorate.

**Julia McCombie (Scottish Government):** Good morning. I am from the family and property law team in the Scottish Government.

**Simon Stockwell (Scottish Government):** Good morning. I am from the family and property law team in the Scottish Government.

**The Convener:** Thank you. I remind members to ask questions through the chair.

The first question that I would like to ask the cabinet secretary is this. The Law Society notes that the bill expands the ways in which couples can choose to define their relationship, whether different or same-sex marriage, cohabitation or civil partnership. The Law Society suggests that, in order to help people to understand the differences and/or choose between them, further definition or explanation of the status of each would be useful. Can we have your comments, please?

**Alex Neil:** I have an opening statement to make, if that is okay, convener. Can I do that first?

**The Convener:** You certainly can. I apologise.

**Alex Neil:** Thank you. I did not want to interrupt you.

I thank the committee for the opportunity to come before you before you start to prepare your stage 1 report on the principles of the Marriage and Civil Partnership (Scotland) Bill. I promise—unusually—to be as brief and concise as I can possibly be.

The bill is essentially about addressing an inequality that exists for lesbian, gay, bisexual and transgender people. It provides the option for same-sex couples to marry and for the registration of religious and belief civil partnerships. It will also impact significantly on transgender people. A couple who are already married will no longer

have to divorce, as is current practice, before the transgender person can obtain a full gender recognition certificate.

In passing the bill, the Scottish Parliament will take a significant step to reduce inequality. However, the Government also recognises the challenges that the legislation presents to those who consider that marriage should remain a union between one man and one woman. We understand the concerns that they have, and that is why we have included in the bill strong protections for religious and belief bodies and celebrants, including an opt-in process for the religious or belief body and the individual celebrant before any solemnisation of a same-sex marriage can take place.

We have agreed with the United Kingdom Government that there will be amendments to the Equality Act 2010, and the bill also contains a provision on freedom of speech. The Lord Advocate has already produced prosecution guidance on that matter. My colleague Michael Russell, the Cabinet Secretary for Education and Lifelong Learning, is seeking views on draft guidance that reaffirms the rights of parents to opt children out of sexual health education classes.

Marriage is a key societal issue and the bill has attracted a great deal of interest and criticism. We have worked hard to balance everyone's rights within the bill. I followed the evidence in the committee's earlier sessions with great interest and I welcome your questions. Thank you.

**The Convener:** Perhaps I should repeat my question. The Law Society notes that the bill will expand the ways in which a couple can choose to define their relationship, whether different or same-sex marriage, cohabitation or civil partnership. The Law Society suggests that, in order to help people to understand the differences between them and/or choose between them, further definition or explanation of the status of each would be useful.

**Alex Neil:** My view is that, if and when the bill is passed, we will have sufficient definition. Scots law is very clear about cohabitation, on which there is a lot of case law. Civil partnerships were defined very clearly in previous legislation about eight years ago. The bill very clearly defines same-sex marriage.

The one outstanding issue is whether civil partnerships should be extended to mixed-sex couples and not confined to same-sex couples. As you know, we have announced a review on that matter, which will run concomitantly with the review that is being undertaken by the UK Government. The reason for that, as no doubt I will explain later when we get to this, is that many of the issues that need to be considered—this will

require future legislation, as there will not be time to deal with this in the bill that is before us—relate to reserved matters, in particular issues around pensions.

My view is that, if and when the bill is passed, we will have very clear definitions in Scots law. Of course, in Scotland cohabitation is recognised in a way in law that does not apply south of the border. We will have cohabitation, we will have civil partnership and we will have marriage, including same-sex marriage. My view is that the definitions will then be very clear indeed.

**The Convener:** Witnesses against the bill also had concerns that redefining marriage beyond simply one man and one woman could open marriage to further redefinitions in future. Does making a change to the definition of marriage potentially allow for further redefinition at a later stage?

**Alex Neil:** Well, we live in a democracy. My view is that this is an overdue reform of the law, but I do not envisage any further reforms to the definition of marriage, as it has been described, in terms of who can enter into a marriage legally in Scotland. My view is that, once the bill is passed, we as a Government certainly have no intention of introducing further legislation to amend marriage legislation in the future.

**The Convener:** How does the Scottish Government respond to witnesses who have argued that the bill weakens or diminishes the institution of marriage?

**Alex Neil:** I have been married for 35 years and, personally, I do not feel that allowing people of the same sex to be married in any way diminishes my marriage, quite frankly. I know that there are some people who feel that, but I think that they tend to think of that more from a religious point of view than necessarily from a legal point of view.

The bill recognises marriage between same-sex couples in law. It will be entirely up to individual churches and celebrants to decide from a religious point of view what their approach is, and obviously that has to be respected. My view is that, in many ways, the bill will actually enhance marriage because the issue of equality that I referred to in my introductory remarks will be satisfied. I think that it is unfair that people who are in love and who are of the same sex and who wish to marry are currently banned from doing so.

Of course, one reason why institutions such as the Quaker church are in favour of this change in the law is that they believe that same-sex couples should be allowed legally to marry in their church. At the moment, the law bans, for example, the Quaker church from doing what the Quaker church

would like to do, which is to administer same-sex marriages.

**John Mason:** The term “definition of marriage” has been used. Is there a definition of marriage? Can you define marriage?

**Alex Neil:** There is clearly a definition in law and there is a definition in each church about the union between a man and a woman and what rights and responsibilities are carried by marriage. The one change that the bill will make is that it will allow marriage to take place between two people of the same sex, whereas under current legislation a marriage in law in Scotland can take place only between one man and one woman.

**John Mason:** I am not sure whether that is really a definition. You and others have said that if people are in love with each other, that should allow their marriage. By the same logic, two closely related people of the same sex could presumably be married to each other, and even three people could be married to each other if they all loved one another and were willing.

**Alex Neil:** Let us confine ourselves to the provisions of the bill. In terms of marriage, the bill is doing one thing only, which is to allow people of the same sex to marry each other. Wider issues of defining marriage and so on are not the subject of the bill, which deals with one change and the consequences arising from that. Any other issues around the definition of marriage would require additional legislation, but we have no plans at the moment to introduce additional legislation around the definition of marriage.

**Alex Johnstone:** We are certainly redefining marriage with this piece of legislation. The minister concentrated heavily in his opening remarks on the issue of equality. I wonder whether we are perhaps also redefining equality with this legislation. If I was entitled to do something that someone else was forbidden by law to do because of the colour of their skin or because of their sex, that would be a fundamental equalities issue. What we are talking about here is slightly different, in that the rights that I have and those that everybody else has, whatever they may be, are in fact identical. So, we have, in effect, a degree of equality here. Do you think that the term “equality” as used in your opening remarks requires a reinterpretation of what we mean by equality?

**Alex Neil:** No. The bill deals specifically with what I would regard as an inequality, which is the right of people of the same sex to marry one another and have that marriage legally recognised in Scotland. That is the inequality that we seek to rectify through the bill.

**Alex Johnstone:** Just to recap: we are giving people a right that they did not previously have, but the people who will require that right have

always had equality of rights under the law; they had the same rights as I had and the same rights as you had. Are we defining equality in a different way in the bill from that used in previous legislation?

**Alex Neil:** You are right up to a point, in the sense that people who are gay have the same rights as you and me in most other aspects, if not all. There might be some exceptions, but generally speaking, they have the same rights as you and me. However, the one right that they do not have at the moment is the right to marry someone else of the same sex. The bill will close that gap to ensure that that part of equality is satisfied and that people of the same sex who wish to marry are allowed to do so.

The bill will not force anybody to do anything. All that it will do will be to give people more freedoms. It will give people of the same sex who wish to marry the freedom in law to marry. It will also give the freedom to churches to carry out same-sex marriages, if they wish to do so. They are not allowed to do so at the moment, but they will have the freedom to do so according to their religious beliefs.

Similarly, as with the amendments to the UK Equality Act 2010, the bill will be an opt-in piece of legislation with guarantees for organisations, churches and celebrants who do not wish to solemnise same-sex marriages or, indeed, to recognise same-sex marriages in religious terms. I think that that addresses a fundamental issue of equality and freedom. Current legislation restricts the personal freedom of people of the same sex to marry and it restricts the freedom of Quakers, for example, to administer same-sex marriages. We will therefore be giving individuals, as well as the Quakers and the minority of churches who recognise same-sex couples, the freedom to carry out same-sex marriages, which is what they wish to do.

**Alex Johnstone:** I would suggest that much of the law is about defining and restricting personal freedom.

**Alex Neil:** Sometimes it is, but sometimes the law is about expanding freedom, and this law is about expanding freedom.

**Marco Biagi:** You referred to the forthcoming review of civil partnerships. Can you give us any indication of a timeframe for that?

09:45

**Alex Neil:** I hope for it to be done reasonably speedily. I have not put a deadline on it because it would make sense that our review, which has started—we have published the remit—is not totally completed until we see the conclusions and

recommendations from the UK Government's review. That is because many of the issues that will inform both reviews are reserved matters, particularly pensions and the like. It would therefore be sensible for our review to have the opportunity to study the recommendations and conclusions from the UK review in consultation with Maria Miller, the culture secretary and lead minister for the issue in the UK Cabinet. I have agreed with her that we want to try and get the review done and dusted reasonably quickly. We need to do it properly. It will be into 2014, but the sooner it is done the better.

**Marco Biagi:** With regard to the review and the possibility of opening up civil partnerships to mixed-sex couples, is the Government minded one way or the other on the central principle of that, or is it still undecided and awaiting the evidence from stakeholders?

**Alex Neil:** The Government has no policy on that. We will wait and see what the review says and then decide what our policy should be.

**Marco Biagi:** Are you aware of the case that is before the European Court of four mixed-sex couples who are seeking the right to enter into civil partnerships? We have heard some views about that in evidence. Will the Government's review be conscious of that?

**Alex Neil:** We are always conscious of what happens in the European Court. We will wait to hear what the court says about that particular case and, if it requires us to take any action, we will consider that. Given that the issue is before the courts in Europe, it would be appropriate for us to wait to see what the court says.

**Marco Biagi:** The mirror image of the couple who are married and one of them transitions gender and they have to divorce is the couple who are in a civil partnership and one transitions gender and they have to dissolve the partnership. Will that also be addressed by the review? That is quite a glaring anomaly.

**Alex Neil:** The review's remit is wide enough that it can look at such issues. I suspect that that issue will feature in the evidence that is given to the review.

**Marco Biagi:** Another point has arisen about the difficulty that people who are in a foreign civil partnership will have with entering into a same-sex marriage in Scotland without dissolving the partnership in their home jurisdiction. That will be more difficult for them than if they had a Scottish civil partnership and wanted to change that to marriage through the administrative process. Is the Government aware of that situation from the submissions and from dealing with stakeholders? Does the Government intend to look at that issue again with the passage of the bill?

**Alex Neil:** We are not really inclined to lodge any amendments on that out of respect for foreign jurisdictions. The law in other jurisdictions could cause enormous complications, particularly if it is proposed to dissolve the civil partnership or if it is proposed to dissolve the marriage in some way, if the partnership goes on to a marriage. The law would have to be very complicated if we tried to address those intricacies. It is much more straightforward and would not delay the passage of the bill if we did not lodge any amendments on that.

If someone who is in a civil partnership comes from abroad to live in Scotland, they would be free to marry in Scotland. I think I am right in saying that.

**Simon Stockwell:** No, but we would recognise the civil partnership.

**Alex Neil:** Yes, we would recognise the civil partnership. Simon is much more au fait with the intricacies than I am.

**Marco Biagi:** We can get into some quite detailed bits of drafting there.

**Siobhan McMahon:** Following up Marco Biagi's point, I think that you will be aware that article 8 of the European convention on human rights has been engaged in the current challenge in the European Court, which means that this bill could be seen as discriminating against mixed-sex couples. Why do we have to take this review and why, given that this is a matter of equality, was the issue not covered in the first place?

**Alex Neil:** First of all, I dispute the premise behind the question that the bill could be seen as discriminating against mixed-sex couples. We absolutely do not accept that interpretation of either our law or the ECHR, so the premise—

**Siobhan McMahon:** This is not my personal view—it emerged in evidence from lawyers.

**Alex Neil:** The Scottish Government's very clear position is that the bill does not contravene the rights of mixed-sex couples.

**Siobhan McMahon:** Given the legal evidence that we have heard, why did you never think to cover this in the bill? After all, the review is taking place and you are minded to look at the issue in future. Given that, as we have heard, article 8 could be engaged, why was this not covered in the first place? Why is the review taking place now? Obviously we will have to see what happens in the European Court but, if article 8 were to be engaged, would you wait for the evidence and amend the provision in the current bill?

**Alex Neil:** The people in question can get married so we see no need to amend the bill.

Nevertheless, I will ask Simon Stockwell to go into a bit more detail on the intricacies of the matter.

**Simon Stockwell:** The cabinet secretary has already explained quite a lot of the issues. Clearly, we would need to reach agreement with the UK Government on a number of the reserved matters in relation to opposite-sex civil partnerships. When we have looked at the issue in the past, one of the big questions has been this: if you could enter into an opposite-sex civil partnership in Scotland, what would be your rights and responsibilities with regard to reserved matters both in Scotland and if you travelled outside Scotland? For example, there is no guarantee that, if you entered into an opposite-sex civil partnership with someone from overseas, you would be able to bring your partner into the country, because there is no guarantee that the UK Government would recognise the partnership for immigration purposes as it would recognise, say, a same-sex civil partner or a married person. There are also social security and, as the cabinet secretary mentioned, pensions issues to take into account, and we would very much have to work with the UK Government on the implications for reserved as well as devolved matters. Otherwise, couples could enter into mixed-sex civil partnerships thinking that they have full rights and responsibilities when, in fact, they could have quite limited rights and responsibilities, unless, as the cabinet secretary has made clear, the reserved matters followed.

**Siobhan McMahon:** Just to be clear, you are saying that the provision was not included in the bill because mixed-sex couples can get married. It is not that they are being denied a civil partnership.

**Alex Neil:** It would have made the bill much more complicated and would have had a lot of ramifications. As Simon Stockwell has just made clear, not moving in concert with our colleagues south of the border could cause a lot of problems instead of solving them. Our view is that the sensible course of action on this issue is for us to take our time and work with our colleagues south of the border and, hopefully, by some time next year, we will be very cognisant of all the challenges that might arise from that particular change in the legislation. A decision will then have to be made both south and north of the border on whether we go ahead with any recommendations that result from the two reviews.

**The Convener:** Can civil partnerships that have been performed abroad be dissolved in Scotland?

**Alex Neil:** Yes.

**The Convener:** Can polygamist marriages such as those that happen in Saudi Arabia—where, I assume, they are legal—also be dissolved in Scotland?

**Alex Neil:** Yes.

**The Convener:** That being the case, why do those in a civil partnership performed abroad have to dissolve the relationship and separate for a year before they can get married?

**Alex Neil:** Francesca Morton will explain the legal aspects of the matter.

**Francesca Morton:** That comes back to the policy position that, under the bill's changing provisions, only civil partnerships that have been registered and solemnised in Scotland will be permitted to change to a marriage. That is the position with overseas civil partnerships.

**Simon Stockwell:** We have looked at the issue of overseas civil partnerships changing to a marriage in Scotland. The cabinet secretary gave some of the reasons why we think that it is difficult. Perhaps I could outline some more of the reasons.

First, as the cabinet secretary said, there is an issue about respect for overseas jurisdictions. When we have looked at what other jurisdictions do in respect of changing overseas civil partnerships to marriages, some of them do and some of them do not. It seems to be the case that Holland and New Zealand would change overseas civil partnerships to marriages whereas Norway and Sweden would not.

In Holland, one must either be resident in Holland or a Dutch national in order to get married there. That is not the case in Scotland. Pretty well anybody can come here and get married. If we introduced a residence requirement for civil partners to change their relationship to marriage in Scotland, that would be unusual in Scots marriage law. It is not impossible, but it would distinguish between most people getting married and people changing their civil partnership to marriage. There might have to be a residence requirement for those people.

The English have their own provision in the UK act, so there is probably no need to look at English civil partnerships.

There is also a question about when we would say that the marriage would be deemed to have started. In the Scottish bill, we have provision that says that if you change your civil partnership to marriage, the marriage is deemed to have started when you went into the civil partnership. It might be hard for us to do that in respect of the overseas jurisdiction because we do not have the same sort of control over civil partnerships registered in overseas jurisdictions as we do in Scotland.

There are a number of quite complicated issues that we would need to go through before we thought about changing overseas civil partnerships to marriage in Scotland.

**The Convener:** Is that something that you will consider in future?

**Alex Neil:** We will see. Those issues may well be raised during the review—the remit is wide enough to take them on board.

You can see the complications. This is not a straightforward process and a lot of consultation and research is needed before we can decide the best way forward. However, there is no reason why the review on civil partnerships could not consider those issues.

**The Convener:** I would like to ask about pensions policy regarding same-sex spouses. You mentioned in your introduction that pensions policy is reserved, but there are devolved powers on pension policy relating to certain public sector schemes. Why, then, does the Scottish Government intend to treat same-sex spouses in the same way as civil partners for the pension schemes where the Scottish Government has devolved responsibility?

**Alex Neil:** Irrespective of the provisions in the bill, the policy of the Scottish Government, where we have devolved responsibility, is, as far as possible, to have a pensions policy that is compatible with the general principles of pensions policy throughout the UK. To do otherwise would result in many potential anomalies and difficulties. That is our general approach.

However, a review is being undertaken by the UK Government of occupational pensions in particular. We reckon that that will report in about July next year. Once we see the results of that review, we can discuss the issue with our colleagues south of the border. Of course, depending on what happens on 18 September next year, we might be able to take our own decision on the future of pensions policy in that respect.

**Alex Johnstone:** I think that you are safe enough.

**Alex Neil:** We are very conscious of the issue. We have an open mind about it and we think that the sensible thing to do would be to await the review of occupational pensions by the UK Government because it will give us a clear indication of the best way forward in this area.

**The Convener:** John Finnie has some questions on transgender provisions.

**John Finnie:** Good morning, cabinet secretary. You talked about the legislation impacting significantly on a group of people. I would like to raise a number of issues about the implications for transgender people, in particular about what has been referred to as the spousal veto. Do you see any merit in requiring a declaration of spousal

consent to continue with the issuing of a gender recognition certificate?

10:00

**Alex Neil:** We recognise the concerns. It is a difficult issue for us. The first point to stress is that spousal consent is not required to obtain a new gender; consent is required to stay in the marriage when a new gender is acquired. Both parties must be willing to stay in the marriage. In the bill, we have recognised the specific concern that some non-transitioning spouses may not wish to be in a same-sex marriage after their spouse obtains gender recognition. The point has been made that the non-transitioning spouse has at least two years to take action, given that the transitioning spouse must live in the acquired gender for two years before applying to the gender recognition panel. However, it may be the application to the panel that makes a non-transitioning spouse consider his or her options. This is quite a complicated area, but we have been listening to the concerns and we believe that we are addressing them. If the committee wants to make any recommendations on that in its report, we would obviously listen to what it has to say.

**John Finnie:** I think that the options available to the spouse during that two-year period are what give rise to a lot of concern. They are seen as punitive to the other individual.

**Alex Neil:** If the committee wants to comment on that, we will certainly take its view into serious consideration.

**John Finnie:** Thanks very much. On evidence requirements, it can be quite difficult for those who are long-term transitioned—for over six years—to assemble the same level of evidence as others. Is that something that you could look at?

**Alex Neil:** I will ask Simon Stockwell to answer that, because there are some intricate, technical issues involved, which I think he can explain to you in some detail.

**Simon Stockwell:** The short answer to your question is yes. Our bill is very similar to the UK act in this area. That is deliberate because, given that the gender recognition panel operates on a UK basis, we wanted to stay as far as possible in line with the way that it operates. After speaking to us, the UK Government decided to amend its bill at quite a late stage to introduce what is sometimes called a fast track for long-term transitioned people who possibly cannot get the full range of medical evidence. Obviously, the UK act relates to people who could not use the original fast track under the Gender Recognition Act 2004 when it was brought forward because they did not want to end their marriage. We think that we might lodge an amendment at stage 2

along similar lines to what is already in the UK act to try to address that issue.

We will have some detailed discussions with the Equality Network and the Scottish Transgender Alliance, because we have seen what they have proposed in this area. We will also speak to the UK Government and the gender recognition panel, given that the panel operates on a UK basis. In principle, we think that there is scope to introduce an amendment at stage 2.

**Alex Neil:** Again, we would welcome the committee's views on this matter. The issue has been raised with you and we will certainly take your views into serious consideration in deciding what stage 2 amendments to bring forward.

**John Finnie:** Thank you. That is reassuring. I want to ask about the use of gender-neutral language in ceremonies.

**Alex Neil:** Sorry, in what way, John?

**John Finnie:** I am asking about the use of gender-neutral language, such as "spouse", rather than "husband" or "wife."

**Alex Neil:** We think that we have probably struck the right balance in that regard, but this is a very sensitive issue obviously. There are some areas where there can be some licence in the approach and other areas where definitions need to be very clear.

As I understand it, the proposal is that both the denomination and the couple would have to agree to use the gender-neutral declaration. There might be further detail added to the arrangements for the ceremonies. I would not rule out change on that altogether. We will listen to what the committee has to say. However, I am concerned about the complexity. Any further changes to the bill in this respect would require a great deal of thought. It is not so much about the amendment or amendments that might come forward; it is about the implications and unintended consequences of any potential amendments. We would welcome comments from the committee, but it is an area that we would be quite cautious about, simply because it is particularly complex and I do not want to end up with unintended consequences, particularly if they damage the people whom we are trying to support to move forward.

**Simon Stockwell:** We would want to make certain that we would cause no problems for denominations that might not want to use a gender-neutral marriage declaration when marrying an opposite-sex couple. We would need to speak to them, too.

**John Finnie:** So that is a live issue.

**Alex Neil:** It is a live issue. If the committee wants to comment on it, we will consider that. We

are very much aware of the oral and written evidence that has been given to the committee and we are looking at all that, but it is the committee's comments that will primarily inform my view about the stage 2 amendments that we lodge.

**John Finnie:** I have a couple of other points that might be seen as technical. What protections will the bill offer those who seek to cohabit after a gender recognition certificate has been received from losing their accrued rights and entitlements?

**Simon Stockwell:** If you are talking about the scenario when a couple choose to divorce because they have decided not to live in a same-sex marriage, we have concluded that the bill provides people with considerable rights—it allows transgender people to stay married and obtain gender recognition as long as they have the spouse's consent and it allows a civil partner to change a relationship into a marriage and acquire gender recognition. The bill makes considerable provision to allow gender recognition to take place and to allow people to stay married or change a civil partnership into a marriage. We therefore do not think that further provision is needed.

If such a couple decide to divorce or dissolve their partnership, that is their choice, and the position will be similar to that of any couple who decide to divorce or dissolve. We are not looking to put further provisions in the bill to reflect the position of those who choose to divorce or dissolve and cohabit afterwards, because they are in a similar position to that of anybody else who decides to divorce or dissolve.

**John Finnie:** The Law Society of Scotland has given evidence on proposed new section 4D of the Gender Recognition Act 2004, "Application under section 4C: death of spouse", which allows a person to continue to receive a gender recognition certificate if their spouse dies before the application is complete. The Law Society suggests that that does not cover all eventualities. Would the Government be prepared to look at that if we mention it in our report?

**Simon Stockwell:** Yes.

**Alex Neil:** We are aware of the Law Society's evidence and we are looking at the issue. If the committee wants to comment on that, we will take any comments seriously.

**The Convener:** Why is the minimum age for applying to the gender recognition panel 18 when the age of consent for marriage and sexual activity is 16?

**Alex Neil:** We expected that question to come up, because it concerns a serious issue. I will give a fairly full explanation of why the age is 18 instead of 16. Before a person may apply to the

gender recognition panel, they must produce evidence that they have lived full time and exclusively in their acquired gender for a minimum of two years. That alone suggests a gap between 16 and 18.

The age for applications was set at 18 in the 2004 act to reflect the fact that people are expected to live for two years in their acquired gender. Most adolescents can be expected to have reached sexual maturity at the age of 16, which is also the age of consent to sexual intercourse. Some people mature more quickly than others, but it might be difficult to vary the age limit from case to case.

If we lowered the limit generally, practical concerns would arise about how a child would show that, between the ages of 14 and 16, they had lived full time and exclusively in their acquired gender. The panel looks at documents such as driving licences, household bills and passports with a person's gender-appropriate name on.

We would need strong medical evidence to support any change in the age limit and before we could agree to any moves to lower the limit. I would be extremely reluctant to lower the limit, for the reasons that I have outlined.

**The Convener:** It is possible that an individual could have lived in their acquired gender for two years before they were 16. They could have confirmation of that from their school or a general practitioner, who could also confirm what medication they were on.

**Alex Neil:** Theoretically, that is possible, but we have to be quite cautious about how we move forward on the issue. I would tend to err on the side of caution. As a Government and in the bill, we have shown that we are keen to ensure that transgender people have all the rights that they should have, but I think that we have to strike a balance here, because there are issues to do with the maturity of people of that age and, in particular, the ability of people who are aged between 14 and 16 to show that they have been living in that way. I take quite a cautious view. If the committee disagrees with that, I invite it to say so in its report. We will listen to what the committee has to say, but it would take a fair bit of persuading for me to decide that the bill needed to be changed in that regard. *[Interruption.]* Simon Stockwell has just reminded me that we did not consult on the matter, so I think that it would raise issues if we amended to 16 the age for applying to the gender recognition panel.

**John Finnie:** It was remiss of me not to cover that in my questioning.

I understand that there are young people at secondary school who have had their gender changed on their educational and medical records.

I have spoken to an organisation that assisted a young person with that. The education authorities were delighted to have that assistance. It is perhaps the unfortunate association between the age and the term "sex" that is unhelpful. Do you recognise that there are public bodies that are involved in recognising the lifestyle choice that people from the age of 12 and upwards have made?

**Alex Neil:** I do. You mentioned the age of 12. Should we pick 12, 14, 16 or 18? This is an area in which I am being quite cautious, because the law will apply to everyone. If we allowed waivers for different age groups or variations in what is allowed, we would end up in an extremely complex situation. If we went down that road, we would end up with a bill that was almost unmanageable. I think that it is necessary to choose between 16 and 18. For the reasons that I have outlined, our view is that 18 is appropriate, although we will listen to what the committee has to say. However, it should be borne in mind that we have not consulted on the issue.

**John Finnie:** Is there any intention to consult on it in future?

**Alex Neil:** We are going through stage 1 of the bill process and we will move on to stages 2 and 3, so I do not see us having the ability to consult widely, but it may be that we could take powers to make a future change in secondary legislation. We could make such a change by affirmative order rather than in primary legislation if there was a demand for us to do so.

**Marco Biagi:** It is my understanding that the material change happens before the GRC is issued, and that the GRC is simply recognition of what has already happened. Given that we know that such material changes in life are happening to 14 and 15-year-olds, it seems odd to withhold formal, legal recognition of that.

There is another issue that I would like to raise, which emerged from discussion with one of our previous panels. It was suggested that, by not allowing a 16-year-old person who is transgender to marry when someone who is not transgender can marry at that age, we might be treating them less favourably in law and therefore be open to a human rights challenge on that ground. Has the Government considered that?

**Alex Neil:** Everything in the bill has been human rights law proofed. We do not believe that any aspect of the bill would be open to a successful human rights challenge. However, if the committee feels strongly that we have not got things right, we will listen to what it has to say. I admit that I am being cautious on the issue—for good reason, I think—but if the committee suggests an alternative, we will take it seriously.

**Simon Stockwell:** My understanding is that what we have in Scotland and the UK is broadly in line with the position in other jurisdictions, which have similar procedures in respect of gender recognition. At the time of its introduction, our approach was seen as cutting edge, but other jurisdictions have now followed us. I was looking at the consultation documents for the Republic of Ireland the other day, and I do not think that we are out of line with what happens elsewhere.

10:15

**Siobhan McMahon:** For clarification, cabinet secretary, when you talked about 14 to 16-year-olds you used the terms “child” and “maturity”. Were you including 16-year-olds, or did you mean people younger than 16?

**Alex Neil:** I was just using the definition. Anyone under 16 is regarded as a child in law.

**Siobhan McMahon:** That means under-16s, not 16-year-olds. We are trying to see whether you would be willing to lower the age limit for gender recognition to 16. I have listened to your views on the matter and I appreciate that you are being cautious, but I do not understand how we can grant a 16-year-old the right to vote and take part in democracy but not the right to have their gender recognised in the way that they want it to be.

**Alex Neil:** There is a wider issue about variations in age limits. A person can get married at 16 but cannot drive a car until they are 17. The law says that to access alcohol in a bar someone must be 18. A person can vote in the referendum at 16, and I hope that the voting age will go to 16 more generally. The bill is not trying to solve all those problems. If we consider the general issue of the age of consent and the ages at which someone can vote, get a driving licence, get married or join the army, enter into illegal wars and get killed, we can see that all those ages vary. The bill does not address such variations; it is trying—

**Siobhan McMahon:** I was just asking about your use of the terms “child” and “maturity”. We have your response on the record—thank you.

**Alex Neil:** I was using the legal definition of a child, which is anyone under 16.

**The Convener:** If there are no more questions on the matter, we move on to the rights of religious bodies.

**John Mason:** We have questions about denominations, individual celebrants and so on. How confident is the Government that a denomination such as the Church of Scotland or the Roman Catholic Church would not be successfully challenged in court if it point-blank refused to take part in same-sex marriages? Under the Equality Act 2010, the churches appear

to be providing a public function, so it appears that a same-sex couple could demand that a church celebrate their marriage.

**Alex Neil:** There are two things to understand. First, the bill and the changes to the 2010 act, which we have agreed with the UK Government and which will be made before the bill is implemented, make the position clear and legally watertight. The advice that I have is that the position is legally watertight in respect of potential challenge under the European convention on human rights and human rights legislation.

Secondly, I think that I am right—Francesca Morton will correct me if I am not—in saying that the European convention on human rights does not include a right to same-sex marriage, so it is difficult to see under what part of the convention a challenge might be brought.

There has been a fair bit of scaremongering on the issue. The reality is that we are absolutely sure that there is no prospect of a challenge under the European convention on human rights in respect of the matter.

**John Mason:** Are you 100 per cent sure of that or 90 per cent sure? Would you put a figure on it?

**Alex Neil:** I would say that I am as sure as anyone can ever be that there is no prospect of a successful challenge. The UK Government shares that level of confidence, by the way.

**John Mason:** I am not questioning the intentions of the Scottish Government and the UK Government, but there is concern. The Catholic church and the Church of Scotland both say that they might have to pull out of marriages altogether, because the risk is so great. We have heard legal opinion on both sides.

I agree that the ECHR does not say that there is a right to same-sex marriage. However, if we create a right to same-sex marriage, what is to prevent someone from challenging the position and saying that the Church of Scotland or the Catholic church is discriminating against them?

**Alex Neil:** The key point is that the European convention on human rights also gives rights to religious organisations and to celebrants. Our clear view, which is shared by the Lord Advocate in Scotland and by the senior law officers in the UK, is that there is no realistic prospect of a successful challenge to that aspect of the bill.

**John Mason:** In the case of the adoption agencies, especially Catholic adoption agencies, strong assurances were given by the Government that the adoption law was only permissive in relation to adoptions by same-sex couples—that agencies would be permitted to undertake such adoptions. Do you accept that, despite those assurances, the position changed fairly swiftly to

one in which it became compulsory to undertake such adoptions, and we are now losing agencies that do not want to take part in that? If the same logic is followed in the case of same-sex marriages, it could become compulsory for churches to carry them out.

**Alex Neil:** Those are two different scenarios, and quite frankly you cannot compare apples and oranges. The solemnisation of marriage is a function that is carried out by churches. It is at the heart of what churches do, and the work is carried out by religious celebrants. It is plain that protection can and should be provided to denominations and celebrants. Quite frankly, the situation is not the same as in the adoption law example.

**John Mason:** Can you explain the difference?

**Alex Neil:** I will get the lawyers to explain exactly what the legal difference is.

**Francesca Morton:** The Scottish Government is satisfied that the protections in place in the bill are robust. The ECHR permits a wide margin of appreciation when it comes to balancing the rights of different bodies or different persons, which is what the bill seeks to do. The Scottish Government considers that it is proportionate and reasonable to pursue a policy that would mean that not every couple would be permitted to have a same-sex marriage ceremony of their religious or belief choice. The justification for that is that it takes into account the religious views and article 9 rights of religious bodies and celebrants. We are satisfied that that approach is proportionate and reasonable.

**Simon Stockwell:** The other point is quite simple—no public money goes into churches to solemnise marriages. As I understand it, when an adoption agency is successful in placing a child with a couple, it is paid some public money by the local authority to reflect that, and a public service generally has to be available to all. We do not provide any funding to the churches to solemnise marriages. Indeed, if we offered money to the churches to solemnise marriages, they would run the other way very quickly.

**John Mason:** A chauffeur or a photographer would not get public money, but they would be counted as a public service and required to participate, would they not?

**Simon Stockwell:** They would be counted as a public service, yes.

**John Mason:** I am not quite sure I understand why they are different from a church.

**Simon Stockwell:** The church is carrying out a religious function—which is not true of a photographer, for example—and so it is entitled to rely on its rights to say what religious service it is

providing. That is not true of a photographer, who is providing a civil function.

**John Mason:** On a slightly different point, if a denomination as a whole—the Quakers were mentioned—opts in, but an individual celebrant wants to opt out, is that not a case of the Government interfering in that religious organisation?

**Alex Neil:** As I say, this is about freedom and rights. If an individual celebrant does not want to opt in, they have that right.

**John Mason:** Some legal opinion has suggested that that would be, in effect, the state interfering in the internal workings of a religious organisation because it was stopping the denomination controlling its own members.

**Alex Neil:** Not at all. At the end of the day, we have to have a balance between the rights of the individual and the rights of the state. It is not our wish to interfere at all in the internal workings of any religious organisation. However, obviously every individual has certain rights and if a celebrant decides that they do not wish to participate in a same-sex marriage ceremony, they have the right not to do so as far as we are concerned.

The church organisation itself may decide that it no longer wishes to have a celebrant, a minister, a rabbi or a priest who takes that position participate in a whole host of things. That would be entirely a matter for the religious organisation to decide. As far as the state is concerned, the individual celebrant has the right not to participate.

**Simon Stockwell:** Another point to mention is that the bill is in line with the provisions in a number of other jurisdictions. In the second consultation paper, and possibly in the first, we referred to the Norwegian marriage act, which lays down that a clerical solemniser can refuse to solemnise a marriage. Over the past few weeks, the committee has discussed the position in Denmark, where an individual celebrant can choose not to take part in a same-sex marriage ceremony even though the church of Denmark takes part in such ceremonies. The position in England is the same under the UK Marriage (Same Sex Couples) Act 2013.

In addition, there are precedents from other jurisdictions on matters other than same-sex marriage. For example, in England there is a general obligation on Church of England celebrants to marry people who live within their parish, but that obligation is specifically disappplied in relation to divorcees.

**John Mason:** But we still have to see whether the provision will stand up in court.

**Simon Stockwell:** Other jurisdictions have had the measures in place for some time and there is no sign of any celebrant being forced to solemnise a same-sex marriage against his will in jurisdictions that are subject to the convention.

**John Mason:** Cabinet secretary, do you accept that, when cases go to court, although the Equality Act 2010 does not have a hierarchy of protected characteristics, in practice the courts tend to put sexual orientation and other protected characteristics above religion and belief?

**Alex Neil:** I do not know that I would agree with that generalisation. It is always difficult to summarise what the courts do in terms of hierarchy. Sometimes, it depends on the judge. However, on the law—and it is the law that we are addressing—we are absolutely confident that there is no serious prospect of any successful challenge to the bill.

**John Mason:** My final point is on an issue that the Jewish community has raised. There are different branches within the Jewish community, so it would find it difficult to be in or out as a whole. I do not know whether you have read the evidence from the Jewish community, but are you open to some kind of amendment along the lines that it has suggested?

**Simon Stockwell:** We have read the evidence and we will have a look at some of the detailed points that that community has raised.

**John Mason:** That is great.

**Alex Neil:** The principle remains the same, however—people and organisations will have to opt in.

**The Convener:** I will bring in Alex Johnstone on the same subject.

**Alex Johnstone:** My question refers to answers you gave to previous questions, cabinet secretary. You said that protection from prosecution under European legislation would be based on the fact that the European legislation does not grant the right to same-sex marriage, and you just used the line that you see no serious chance of a successful challenge. Is that a fair summary of the view that you have expressed?

**Alex Neil:** It is not a view but a fact that the European convention on human rights does not include a right to same-sex marriage.

**Alex Johnstone:** Earlier, you defined the right to same-sex marriage, in your view and the Government's view, as an equality issue, and you said that you wish to include same-sex marriage in Scottish law as a result of your desire to pursue your definition of equality. Is it unusual for European human rights legislation to entrench something that you see as an inequality?

**Alex Neil:** It might well be, but that would obviously require the agreement of all the signatories to the European convention on human rights. As you know, there are proposals to withdraw from the European convention on human rights circulating in the UK Government, so one cannot entirely predict the future. It will depend on whether we remain part of the UK state and, if we do, on whether the UK state remains signed up to the European convention on human rights. My view is the same as that of David Cameron, Maria Miller and our law officers. Obviously, we take our advice from senior law officers, and I think that every law officer in the UK is on record as saying that they do not believe that there is any prospect of a serious challenge to the proposed legislation here or to the equivalent UK legislation.

**Alex Johnstone:** I accept that view but, to summarise, we have got to a stage at which, in effect, the ECHR entrenches something that you have defined as an inequality. What is the prospect of European law being changed? Are there precedents for such a change happening when there is a change in the perception of what constitutes equality?

**Alex Neil:** I am not qualified to answer that, and I do not know whether the lawyers can. Given the point that Simon Stockwell made about the number of jurisdictions in Europe that now have similar legislation—in some cases quite long-standing legislation—my view would be that if the European convention on human rights is changed, the likelihood is that it would be changed to entrench the provisions in the bill rather than to mount a challenge to the fundamental principle of same-sex marriage legislation.

10:30

**Alex Johnstone:** But if European law was to change so that there was a presumption that it would grant the right to same-sex marriage, would that remove the protections that you have assumed will exist in the Scottish legislation?

**Alex Neil:** That is one of the reasons why I want there to be a yes vote next year. If there was a change of the type that you outline, it would have to build in what we are doing in this legislation and what your colleagues have done south of the border. There have to be concomitant safeguards for those religious bodies and celebrants who do not wish to participate.

**Simon Stockwell:** This jurisdiction is not unique in having this type of debate. A similar debate is going on in other jurisdictions that are party to the ECHR, so, as the cabinet secretary says, it is unlikely that the ECHR would be changed to say that people are to be forced to conduct same-sex marriages. Plenty other religious bodies in other

jurisdictions are making exactly the same points as religious bodies are making in Scotland.

**Alex Johnstone:** So you do not believe that there is a prospect of a change in another jurisdiction removing the protections that you assume will be granted to Scottish religious institutions.

**Alex Neil:** Nothing in the ECHR gives anyone the right to same-sex marriage. It does not cover the issue.

I will give you a parallel. When the convention was being drawn up, same-sex marriage was not an issue. In the same way, when the Scotland Act 1998 was written, no one had heard of climate change, so climate change is not a reserved matter. There is no reference in the ECHR to same-sex marriage.

If the signatories to the ECHR agreed or desired—and that is a big if—to change the convention, I think that the purpose of any change would be to accommodate balanced legislation such as the provisions in the Marriage and Civil Partnership (Scotland) Bill and in the UK's Marriage (Same Sex Couples) Act 2013. My view is that the purpose of such a change would not be to prevent people from having same-sex marriages.

**Alex Johnstone:** The functionality of the bill depends on the status quo in Europe.

**Alex Neil:** It is not about functionality. The question is about whether there is a prospect of a serious legal challenge, under the ECHR, to the provisions of the bill, and the clear evidence from both north and south of the border is that there is no serious prospect of a successful challenge to the provisions of the bill or the equivalent UK legislation.

**Alex Johnstone:** Under the ECHR as it stands?

**Alex Neil:** Yes.

**Alex Johnstone:** As it stands?

**Alex Neil:** Absolutely.

**The Convener:** We are running out of time so we will move on with Marco Biagi and then Siobhan McMahon.

**Marco Biagi:** Amendments have been suggested in written submissions to the committee, including from the Church of Scotland, with a suggested wording change on performing marriages and having marriages recognised. This might be a question for Simon Stockwell. Has the Government considered such a change?

**Simon Stockwell:** We met representatives of the Church of Scotland a couple of days ago to talk about that particular point and some other

issues, including the civil partnership review that the cabinet secretary mentioned earlier.

I understand that, in essence, the Church of Scotland wants the Marriage (Scotland) Act 1977 to be amended so that it is clear that religious celebrants are acting not as agents of the state but on their own behalf. The difficulty that we have with the proposed amendments—I said this to the Church of Scotland representatives—is that we are not sure that they would make much difference in practice. We would still recognise the services, which would be carried out by religious bodies and religious celebrants, as they are now, and the state would recognise them, and the rights and responsibilities would flow from them. We therefore tend to think that the Church of Scotland is proposing a drafting change rather than a change of substance.

We will certainly consider the matter further. I suggested that the cabinet secretary might want to write to the Church of Scotland once we have done so, but when we had looked at the suggestion, our view was that it probably would not make much practical difference.

**Marco Biagi:** We also heard in a submission that as well as having included a freedom of speech provision in the bill, there would be benefit in including freedom of speech provisions in other public order legislation including, I believe, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. Does the Government consider that to be necessary or are the bill's provisions covering freedom of speech sufficient?

**Alex Neil:** I am just dealing with this bill. Any proposals on amendments to other acts relating to football matches or anything like that would have to be made to my colleagues. I have no ministerial responsibility for that area of policy.

**Siobhan McMahon:** We heard evidence from Ephraim Borowski, who said:

"we have commented that it is a concern that, for example, the Lord Advocate produces guidance on the prosecution of people for expressing their opposition to the proposal in a particularly strong manner but not guidance on the prosecution of people who express their support of it."—[*Official Report, Equal Opportunities Committee*; 12 September 2013; c 1450.]

We are all aware that social media have been used as tools for making what can only be described as abhorrent comments, particularly if one expresses a view against the bill. Will you address the guidance or speak to the Lord Advocate about how we can make it stronger?

**Alex Neil:** I think that the Lord Advocate's guidance is very balanced and fair. There is a precedent for this, Siobhan. I was in Parliament at the time of the controversy over section 2A. At that

time, the then Lord Advocate published guidance of a very similar nature as a result of the change to legislation that was proposed by Wendy Alexander. The guidance is only one page and it is designed really to try to protect freedom of speech on all sides, provided that people behave reasonably and are not stirring up hatred or antagonism—the kind of things that people on both sides of the argument do not want.

Of course, the Lord Advocate does not consult on his guidance; I was not and should not be consulted on the guidance because it would be entirely wrong for it to be politically motivated. Any amendments to the guidance would need to be considered by the Lord Advocate. My view is that he has produced very proportionate, fair, balanced and practical guidance.

**Siobhan McMahon:** I turn to a slightly different topic. Has the Scottish Government included in the financial memorandum any cost to the public purse that would be associated with a decision by the Church of Scotland, the Roman Catholic church or any other faith community to stop performing the civil law aspects of weddings?

**Alex Neil:** The financial memorandum of any bill relates to the impact on the public purse and the public purse only. No financial memorandum would estimate the impact on other institutions in terms of costs. It depends how those institutions—

**Siobhan McMahon:** I am sorry, but that is not what I was asking. We heard in evidence from all the churches that they might have to do what the churches do in other European countries, including France, where people have to have a religious ceremony and a civil one. Clearly the costs of the public part of that would have to go up. Should those costs be included? We have evidence on that.

**Alex Neil:** There is nothing in the bill that would force the churches either to abandon carrying out marriages or to do things as they are done in France. It is obviously a matter for the churches, should they decide to do that. If there is a cost involved as a result of their decision, that is their affair, not mine.

**Siobhan McMahon:** It would be your cost; it would be a cost to the public purse. I understand that it would be the churches' decision, but you would have to meet the cost.

**Simon Stockwell:** That is not covered in the financial memorandum, but civil marriage ceremonies are done on a cost-recovery basis. The cost falls on the couple, so if there was a civil marriage ceremony, the couple would have to pay for it. Clearly it would be for the couple to decide whether they wish to then have a blessing in a church.

**John Mason:** We received legal opinion that the Lord Advocate's guidance does not really carry much weight. Can you confirm whether that is the case?

**Alex Neil:** I would strongly dispute that. The idea that the chief prosecutor's opinion carries no weight with the prosecution service is, I think, absurd.

**Christian Allard:** We have heard a lot of evidence on public sector workers, particularly on the issue that we have already discussed about the interaction between pieces of legislation. Views differ, with some religious groups suggesting that, in human rights terms, there is a hierarchy in which issues of gender trump issues of religion. Others have taken the opposing view and some have no view at all on the matter.

In its submission, the Law Society of Scotland expresses uncertainty about how European convention on human rights article 14 rights will interact with the public sector equality duties in section 149 of the Equality Act 2010, about which there has also been much discussion. Will you consider the suggestion that has been made by some witnesses and allow the principle of reasonable accommodation for public sector workers who provide a service? If your answer is yes, how might that be conducted in rural areas?

**Alex Neil:** As I understand it, the question is about the right of public sector workers who object to the bill's principles not to carry out their duties. That has already happened where people have objected to a particular aspect of a particular type of ceremony.

Quite frankly, our view is that there is no big issue here. We are talking, in the main, about registrars having an opt-out with regard to their work. There is a big distinction to be made between a publicly employed registrar and a celebrant in a church; after all, the former is employed to carry out a public duty. That said, if a public sector worker has specific concerns, they should, as with any such matter, raise it with their employer in the first instance.

The registration of civil partnership by civil registrars has worked well. In the eight years since the legislation was introduced, 4,800 civil partnerships have been registered in Scotland, and I do not think that there is any reason to expect that the solemnisation of same-sex marriage by civil registrars will not work as well. I have no doubt that some civil registrars had concerns and perhaps did not entirely agree with the civil partnership legislation; however, it has not presented a problem.

As you know, civil registrars in Scotland are employed by local authorities. It is for each authority to decide how best to provide services

for registering marriage, and we expect local authorities to handle with sensitivity registrars who object to same-sex marriage or civil partnership on the ground either of religion or of belief. Given that we have received no representation whatever from local authorities on an opt-out with regard to civil registrars' responsibilities, we believe that the issue is a bit of a red herring and see no problem. Common sense should prevail, as it has done for the past eight years in relation to civil partnerships.

**Christian Allard:** So, you see no need for such accommodation.

**Alex Neil:** As the employer, the local authority will always try to accommodate such things. If a civil registrar has a religious or belief objection to same-sex marriage, the local authority that employs them will, I think, come to some kind of appropriate accommodation on the matter. Common sense just has to prevail.

**Christian Allard:** What is the scope for conflict between ECHR article 9 rights of thought, conscience and religion and the public authorities' public sector equality duties?

**Alex Neil:** This is basically the same area, Christian.

**Christian Allard:** What I am talking about now is a conflict between different pieces of legislation.

**Alex Neil:** I do not think that there is a conflict, because the public sector duty is on the authority, not on individual employees of the authority.

10:45

**Christian Allard:** So you do not think that the equality duties would take precedence over a public sector employee's ECHR articles 9 and 10 rights to express and act on their own views?

**Alex Neil:** The public sector duties are clear. The authority—in this case, the local authority—has the public sector duty. The employee does not, as an individual, have a public sector duty. As an employee, he or she does have responsibilities, but if there is any clash in terms of religious belief, or non-religious but nevertheless conscientious objection, that is for the employer and employee to work out between them. In working it out, the employer must be cognisant of the legislative framework within which they are operating, and when this bill becomes an act it will be part of that consideration, as is the Equality Act 2010. The public sector duty would clearly also be part of that consideration.

We have rules on how the public sector duty is exercised. Although we do not define the public sector duty, which is a reserved matter, we define how the public sector duty is carried out in Scotland, which is devolved, and the European

convention on human rights and employment legislation also come into the mix. We do not see any conflict in the legislation. We think that there is a precedent in the legislation for civil partnerships, which has been handled sensitively and with a great deal of common sense, and has not resulted in any pressure on employees of local authorities in carrying out their duties.

**The Convener:** On the same subject, I would like to bring in John Mason and then Marco Biagi.

**John Mason:** You said that you hope that common sense will prevail on the issue, but we have the legal case—albeit not in Scotland—of Lillian Ladele, in which the local authority insisted that she take part in a ceremony. You said that employers—that is, the local authorities—have not made any representations on the matter; of course they will not, because we are talking about protecting their employees from them, so they are not going to make representations.

On abortion—another controversial issue—we have specific protection in legislation for employees who wish not to take part, and that seems reasonable to me. Would it be possible to have such a provision in the bill?

**Alex Neil:** First of all, let me say that there have been a lot of questions about the European convention on human rights. The key point about the Lillian Ladele case is that the European Court of Human Rights found that there had not been a violation of Ms Ladele's human rights, and this bill is in line with that decision. Great play has been made of the role of the European convention on human rights, but according to the European Court of Human Rights the employee's human rights were not breached in that case.

**John Mason:** So the court did not protect her and you do not want to protect her.

**Alex Neil:** I do not think that you can say that. The European Court of Human Rights, which is the protector of human rights for all of us, having heard the case, made the decision that her human rights had not been violated. That decision is not something that I am qualified to question or to undermine in any way. The key thing about our bill is that the human rights of everybody, including employees, have to be protected. In that case, the court said that Lillian Ladele's human rights had not been breached. You may disagree with the court's decision—

**John Mason:** I certainly do.

**Alex Neil:** I have to legislate according to the framework of law, and that case is now part of the framework of law.

**John Mason:** Do you accept, in that case, that you could put in a section that would give added protection?

**Alex Neil:** I do not think that such a section is necessary, to be frank. I do not see a big issue here at all, and I do not think that the local authorities do. If I had had representations from local authorities saying that there is a big issue that needs to be addressed in legislation, I would have listened to them. I have not had any such representations. I think that I am also right in saying that I have not had any representation from any registrar in Scotland on the matter. Again, it is a red herring.

**Marco Biagi:** You have slightly pre-empted my question. Have you had formal contact with the Association of Registrars of Scotland? Has AROS given a view on the bill?

**Simon Stockwell:** I met some registrars. The registrar general's office kindly organised a seminar for me with registrars from most Scottish local authorities about a year ago. We discussed the issue with them and, as the cabinet secretary has said, there was no desire around the room for any legislative opt-out. They said that when somebody is against civil partnerships, they try to ensure that the person is moved to other duties within the registrar's office.

**Alex Neil:** Common sense prevails.

**The Convener:** I have two further questions to ask you. One regards reset. It is currently a defence in Scots law that a wife is not guilty of the criminal charge of reset of goods that have been stolen by her husband. That defence will not be available to a woman in a same-sex marriage. It would appear that that provision could be discriminatory. Is the Scottish Government considering the law in that area?

**Alex Neil:** I will let Simon Stockwell answer that very specific question.

**Simon Stockwell:** Yes. Our understanding is that the defence has not been used for a number of years; we think that it is about 20 years since it was last used. It is an odd defence, and it reflects an antiquated view of marriage and the position of men and women in society. Having discussed the matter with our criminal justice colleagues, we intend to recommend to the cabinet secretary that the Government lodge an amendment at stage 2 to repeal the defence altogether.

**The Convener:** The answer to this question might be the same, but I will ask it anyway. According to our advice, the current law on impotence was not drafted with same-sex marriage in mind. If it is proved, the marriage could be declared void, which could have a different effect from marriage ending through divorce. It could be argued that, since the provision clarifies that that rule of law will apply only to different-sex couples, it is discriminatory.

**Simon Stockwell:** This will be a different answer. We discussed the matter in the policy memorandum. The ground of incurable and permanent impotency for voiding a marriage is certainly antiquated and is not often used. We had thought in the past about whether there was any scope for removing it altogether from Scots law and we have had some comments to the effect that we should.

However, some people have suggested that the concept is useful in certain circumstances, particularly for people who might wish to enter into another marriage but do not wish to get divorced because of their religious objections to divorce. Given that particular religious aspect of this issue relating to impotency, we intend to make no change and to leave the provisions in the bill as they stand.

**Alex Neil:** That said, it is the type of issue to which the Scottish Law Commission might give longer-term consideration. The committee might wish to recommend to the Cabinet Secretary for Justice that he refer the matter to the Law Commission.

**Simon Stockwell:** I am sure that the Law Commission would welcome a look at the matter. I used to be involved in sponsoring the Law Commission, and I know that it is the sort of thing that those who work there very much enjoy doing. *[Laughter.]*

**Alex Neil:** That was meant as a compliment, let me emphasise, before we get angry letters from the Law Commission.

**Simon Stockwell:** I know them well.

**The Convener:** Committee members have no more questions to ask. I invite the cabinet secretary to make closing remarks.

**Alex Neil:** Thank you, convener. We have covered many specific and technical issues. I repeat what I said at the beginning: I view the bill as being about rectifying an anomaly regarding the equality of treatment of people who, at the moment, are not allowed to marry in Scotland. At the same time, we have made it absolutely clear that we are determined to protect the rights in particular of church organisations and celebrants in the way that I have described and in the way that it is described in the bill and in the amendments to the Equality Act 2010. I think that Scotland will be a better place when we pass the bill.

**The Convener:** Thank you again, cabinet secretary, for your contribution.

That concludes the public part of the meeting. Our next meeting will take place on Thursday 10 October, and will include evidence on the Scottish Government's draft budget for 2014-15.

10:54

*Meeting continued in private until 11:13.*

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