



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

EQUAL OPPORTUNITIES COMMITTEE

Thursday 16 January 2014

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EQUAL OPPORTUNITIES COMMITTEE

1st Meeting 2014, 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 GAVE EVIDENCE:

Linda Fabiani (East Kilbride) (SNP)

Alex Neil (Cabinet Secretary for Health and Wellbeing)

CLERK TO THE COMMITTEE

Douglas Thornton

LOCATION

Committee Room 1

Scottish Parliament
Equal Opportunities Committee

Thursday 16 January 2014

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

Decision on Taking Business in Private

The Convener (Margaret McCulloch): Happy new year, everyone, and welcome to the first meeting in 2014 of the Equal Opportunities Committee. Please turn off any electronic devices or set them to flight mode.

I start with introductions. At the table we have our clerking and research team, official reporters and broadcasting services. Around the room, we are supported by the security office. I welcome observers to the gallery.

I invite members to introduce themselves in turn, starting on my right.

Marco Biagi (Edinburgh Central) (SNP): I am the Scottish National Party MSP for Edinburgh Central, and deputy convener of the committee. Good morning and happy new year.

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

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

John Finnie (Highlands and Islands) (Ind): Madainn mhath. I am a member for the Highlands and Islands.

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

The Convener: The first item on the agenda is to ask the committee to agree to take item 3 in private. Are we agreed?

Members *indicated agreement.*

**Marriage and Civil Partnership
(Scotland) Bill: Stage 2**

09:31

The Convener: The second item on the agenda is stage 2 of the Marriage and Civil Partnership (Scotland) Bill. This is our second meeting at stage 2. I welcome Alex Neil, the Cabinet Secretary for Health and Wellbeing, and his accompanying officials. Officials are not permitted to participate in the formal proceedings.

Linda Fabiani has joined us to speak to her amendments. Everyone should have with them a copy of the bill as introduced, the second marshalled list of amendments and the second list of groupings of amendments. There will be one debate on each group of amendments. I remind the committee that members who have not lodged amendments in the group but who wish to speak to them should indicate that by catching the attention of me or the clerk.

Only committee members are allowed to vote, and voting in any division is by a show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote. The committee is required to indicate formally that it has considered and agreed each section of the bill, so I will put a question on each section at the appropriate point.

After section 14

The Convener: We start with amendment 47, which was debated at our previous meeting. As members know, the Presiding Officer has determined that the potential costs that are associated with this amendment are such that they would cause the bill to require a financial resolution. No financial resolution has been lodged. Under rule 9.12.6(a), the question on the amendment may not be put even if the amendment is pressed.

I will allow the cabinet secretary to make a brief comment if he wishes to do so.

The Cabinet Secretary for Health and Wellbeing (Alex Neil): Thank you, convener, and happy new year to everybody here.

It might be helpful if I say a few words on why the Government has not produced a financial resolution as a consequence of amendment 47.

Alex Johnstone noted on day 1 of stage 2 that it was not like him

“to ask the Government to spend money.”—[*Official Report, Equal Opportunities Committee*, 19 December 2013; c 1736.]

I said on day 1 that it was unlikely that we would wish to lodge a financial resolution. Clearly, we need to take care in how we spend public money. Amendment 47 would give rise to potential costs, given that, as Alex Johnstone acknowledged, the amendment “is drawn extremely widely.”

In addition, and as we have made clear, the protections in the bill, and in the associated amendments to the Equality Act 2010, for religious bodies and celebrants are robust. Therefore, we have not lodged a financial memorandum.

I hope that that is a reasonable explanation of the Government’s position.

Alex Johnstone: I note the cabinet secretary’s comments with interest, but believe that there are still issues to be discussed. I therefore reserve my position in order perhaps to bring the matter back at stage 3. Consequently, I seek the committee’s leave to withdraw amendment 47.

Amendment 47, by agreement, withdrawn.

Sections 15 to 20 agreed to.

Section 21—Sheriff court jurisdiction in relation to declarator of marriage

Amendment 27 moved—[Alex Neil]—and agreed to.

Section 21, as amended, agreed to.

After section 21

The Convener: The first group is on review of effects of introduction of same-sex marriage. Amendment 48, in the name of John Mason, is the only amendment in the group.

John Mason: As is clear from the heading of the amendment—“Review of same-sex marriage”—it calls for a review, after five years, to see whether things have gone as expected.

Our previous understanding of marriage as a lifelong exclusive commitment between one man and one woman has been the norm in Scotland for centuries. The bill, which changes the definition of marriage, must therefore be considered radical whether or not one supports it. For many people, marriage is seen as a key foundational building block of society. Many people are unhappy about the definition being changed and have real concerns about what its implications might be—for example, in relation to civil liberties, on which many amendments have focused. For those reasons, there should be a commitment to review the legislation after five years.

Amendment 48 is not a sunset clause in the sense that the change would last only for five years—that is not the point. The point is that we should review what has happened and consider

the implications and any tidying up that needs to be done to address the bill’s impact. If its impact has been minimal, a review would still be worth our while.

If, however, the legislation proves to have had severe negative effects, as some of us fear—for example, on the civil liberties of those who believe in traditional marriage—the review would serve as a means of addressing those effects.

I move amendment 48.

Alex Neil: I do not agree with amendment 48. The Government supports post-legislative scrutiny of legislation. We have, for example, recently responded to an inquiry by the Justice Committee into the effectiveness of the Title Conditions (Scotland) Act 2003, and a parliamentary debate took place last week to discuss the outcomes of that inquiry.

I do not support amendment 48 for a variety of reasons. First, the amendment could be perceived as a sunset clause, and that is not the right thing to do. We cannot allow people to have same-sex marriages and then remove that right a few years later.

Secondly, amendment 48 concentrates only on some aspects of the bill. We will also wish to consider, in due course, the positive outcomes that the legislation will bring. The bill will allow same-sex couples to get married, and will improve the rights of transgender people. It will allow religious and belief bodies that want to solemnise same-sex marriage the opportunity to do so while protecting those that do not. So when we consider the impact of the legislation, we will want to look at its impact as a whole. I agree that we will need to monitor for impacts on civil liberties. I do not think that there will be any such adverse impacts, but monitoring is sensible. Equally, however, we will need to monitor whether there are positive outcomes; for example, a reduction in discrimination.

I suggest that amendment 48 is unhelpful. It would lay down specific requirements on what a review should consider, which could cut across what Parliament, the Government or others may want to do when considering the impact of the bill. I therefore do not support amendment 48 and invite the committee to reject it.

John Mason: I am a little disappointed that there is no sign of movement from the cabinet secretary. He says that something that is not a sunset clause

“could be perceived as a sunset clause”.

However, I wonder where we would go with any legislation if we did not look at what the wording said, but instead considered what the perception of it might be. Although I accept that perception is

important, as I said in my opening remarks, amendment 48 is not a sunset clause. Clearly it is not. Nobody is suggesting that, if the bill is passed, it should not continue. I am simply suggesting that there should be a review.

I take on board the cabinet secretary's point that a review should perhaps be wider than the focus of amendment 48, but he or anyone else could have lodged an amendment to that effect. Perhaps we can consider that issue at stage 3. In reality, Parliament has not been good at reviewing legislation. That has partly been due to lack of time and committees' other commitments. I think that there is widespread agreement in Parliament that we should go back and review our work more, especially legislation that we have passed, to examine its impacts. Such a review may well be for good reasons, or to pick up any problems. I press amendment 48.

The Convener: The question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Johnstone, Alex (North East Scotland) (Con)
Mason, John (Glasgow Shettleston) (SNP)

Against

Allard, Christian (North East Scotland) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Finnie, John (Highlands and Islands) (Ind)
McCulloch, Margaret (Central Scotland) (Lab)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 48 disagreed to.

Sections 22 to 27 agreed to.

Schedule 2—Change of gender of married persons or civil partners

The Convener: The next group is on applications for gender recognition certificates by long-term transitioned persons. Amendment 50, in the name of the cabinet secretary, is grouped with amendments 74 to 76.

Alex Neil: Amendments 50 and 74 to 76 relate to persons who are long-term transitioned to an acquired gender. Persons who are acquiring a new gender can apply to the gender recognition panel for a gender recognition certificate. Section 3 of the Gender Recognition Act 2004 makes provision for the evidence that should normally be submitted, including evidence that relates to the diagnosis of gender dysphoria.

Section 27 of the 2004 act made provision for alternative evidence requirements for persons who had been long-term transitioned, but that section has now terminated, as a sunset clause, and no

longer applies. The amendments are designed to reintroduce alternative evidence requirements for some long-term transitioned people.

Amendment 74 will make amendments to the 2004 act in order to make provision on the detailed procedure. Under the procedure, applicants can submit just one report, rather than the usual two. Because the bill that we are considering is about marriage and civil partnership, the applicant must be, or have been, in a marriage or civil partnership that was registered in Scotland.

The provision concerns persons who are long-term transitioned, so the applicant must have been living in the acquired gender for six years before the commencement of section 27 of the bill, which will introduce the schedule on gender recognition. The applicant must have, or have had, gender dysphoria, or have undergone surgery to modify sexual characteristics, or must have undergone other treatment, as laid down by an order made by Scottish ministers. The order-making power reflects the fact that some applicants may not have had surgery. Surgery may not have been available, or may not have been advised for medical reasons. Treatments may vary, so the order-making power will enable ministers to seek views on exactly what forms of treatment might be acceptable as evidence under the new procedures. Amendment 76 will ensure that any such order will be subject to affirmative procedure.

The amendments also contain an order-making power for ministers on any further information or evidence that applicants should provide under the new procedure. Amendment 75 will ensure that the order-making power is subject to negative procedure, and will make a technical change to the bill to reflect the fact that all orders under section 5D of the 2004 act, on streamlined procedures for civil partners to obtain full gender recognition certificates, will now be subject to affirmative procedure.

Amendment 50 is a consequential amendment that reflects that there will, in the future, be two parts to schedule 2 to the bill, because amendment 74 will introduce a new part 2 to the schedule.

I move amendment 50.

Amendment 50 agreed to.

09:45

The Convener: The next group is on further minor amendments and corrections. Amendment 51, in the name of the cabinet secretary, is grouped with amendments 52, 54 to 56 and 67.

Alex Neil: Amendments 51, 52, 54 to 56 and 67 relate to the change of gender of married persons or civil partners. They are, for the most part,

technical amendments that will tidy up our provisions so that they dovetail appropriately with the provisions in the Marriage (Same Sex Couples) Act 2013.

The 2013 act introduced same-sex marriage in England and Wales. It also made other changes, some of which extended to Scotland. The committee considered, and Parliament agreed to, a legislative consent motion to allow Westminster to legislate on devolved matters. However, when we introduced the bill, we could not take it for granted that the then Marriage (Same Sex Couples) Bill would be passed. As a result, there are currently some overlaps and inconsistencies between the two pieces of legislation.

Amendment 51 is a minor technical amendment. Currently, a gender recognition certificate may be issued under sections 4, 5 and 5A of the 2004 act. However, should the bill be enacted, it will also be possible for gender recognition certificates to be issued under new sections 4C and 5D of the 2004 act. Amendment 51 therefore reflects that, in the future, gender recognition certificates may be issued under more provisions in the 2004 act than is the case now.

Amendments 52, 55 to 56 and 67 relate to the provisions on statutory declaration of consent in paragraph 2 of schedule 2 to the bill. Amendment 52 will remove the definition of the term “statutory declaration of consent”. The 2013 act inserted a definition of “statutory declaration of consent” into the 2004 act, which will also extend to Scotland. However, it is slightly different from the definition in the bill. Amendment 52 will therefore remove any confusion that might arise as a result of there being two definitions of “statutory declaration of consent” that would both apply to Scotland.

Amendment 54 will remove proposed new section 3(6D)(b) of the 2004 act, which would be inserted by paragraph 3 of schedule 2. The provision would require an applicant to the gender recognition panel to provide a statutory declaration on where the marriage was solemnised. That is unnecessary, as the 2013 act already makes similar provision, which extends to Scotland.

Amendment 55 is a consequence of amendment 52. It will slightly expand proposed new section 3(6D)(c)(i) in the 2004 act to clarify that the statutory declaration that is referred to is a statutory declaration of consent by the applicant’s spouse that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate. That is in line with the provisions in the 2013 act.

Amendment 56 clarifies exactly what the applicant has to provide to the gender recognition panel by way of statutory declarations. An applicant will have to provide either a statutory

declaration that the spouse consents to the marriage continuing, or a statutory declaration that no such declaration by the applicant’s spouse is included in the application. The amendment will bring our provisions in the area more into line with the 2013 act, and will keep consistency in the application process for the gender recognition panel.

Amendment 67 is also a consequence of amendment 52 and is a minor technical amendment. It will ensure that the reference to “statutory declaration of consent” in proposed new section 4C(7) in the 2004 act refers to the updated definition as amended by amendment 55.

I move amendment 51.

Amendment 51 agreed to.

Amendment 52 moved—[Alex Neil]—and agreed to.

The Convener: The next group is on meaning of “protected Scottish marriage”: consular marriages. Amendment 53, in the name of the cabinet secretary, is the only amendment in the group.

Alex Neil: Schedule 2 to the bill amends the Gender Recognition Act 2004 to enable marriages that are solemnised in Scotland to continue when one or both parties change their gender and both parties wish to remain married.

The amendments to the 2004 act define a marriage solemnised in Scotland as “a protected Scottish marriage”. That definition includes a marriage solemnised overseas through UK consular services when the couple elect Scotland as the relevant part of the United Kingdom. Schedule 6 to the Marriage (Same Sex Couples) Act 2013 introduces new provisions in relation to such consular marriages.

Amendment 53 amends the interpretation section of the 2004 act. That ensures that marriages that are solemnised under the new provisions in schedule 6 to the 2013 act are, for the purposes of schedule 2 to the bill, included as having been solemnised in Scotland, as long as the couple elected Scotland as the relevant part of the United Kingdom.

Finally, schedule 2 to the bill will continue to cover UK consular marriages when the couple elected Scotland and that took place under the current provisions of the Foreign Marriage Act 1892. Despite the rumours, I was not around at the time of that act being passed.

I move amendment 53.

Amendment 53 agreed to.

Amendments 54 to 56 moved—[Alex Neil]—and agreed to.

The Convener: The next group is on successful applications: when full gender recognition certificate to be issued and when interim gender recognition certificate to be issued. Amendment 57, in the name of the cabinet secretary, is grouped with amendments 58 to 66, 69, 71 and 73.

Alex Neil: Amendments 57 to 66, 69, 71 and 73 are designed to ensure that the Marriage (Same Sex Couples) Act 2013, which was passed at Westminster, and this bill work effectively together.

In particular, schedule 5 to the 2013 act extends to Scotland. Schedule 5 amends the Gender Recognition Act 2004 and relates to persons who are in a marriage solemnised in England and Wales or overseas, or who are in a civil partnership registered in England and Wales. Schedule 5 extends to Scotland, as people in such marriages and civil partnerships may now live here. Therefore, schedule 2 to the bill and schedule 5 to the UK act both make provision extending to Scotland in respect of transgender people. The amendments in this group are aimed at ensuring that the provisions fit together.

Amendment 57 makes various changes to amendments to the 2004 act. The first change is that the bill no longer replaces section 4(2) and (3) of the 2004 act. That is already provided for by paragraph 3 of schedule 5 to the 2013 act, so there is no need for the bill to provide for that as well.

The second change is to add a new section 4(1A) to the 2004 act. That provides that an applicant to the gender recognition panel is to receive a full gender recognition certificate, or GRC, if the applicant is neither married nor in a civil partnership. The third change is consequential on that second change.

The fourth change is to amend for Scotland new section 4(3) of the 2004 act, as substituted by the 2013 act. New section 4(3) of the 2004 act currently lays down that an interim GRC will be provided if the applicant is in a marriage that is not a marriage that is registered in England or Wales or overseas, or if the applicant is in a civil partnership that is not registered in England or Wales. The changes will ensure that a person in a marriage that has been solemnised in Scotland who has spousal consent to stay in the marriage and a person in a Scottish protected civil partnership whose partner is transitioning on the same day can receive a full GRC.

Amendments 62 and 63 make similar changes. Amendment 62 will ensure that a person in a marriage that has been solemnised in England or Wales or overseas who has spousal consent to stay in the marriage can receive a full GRC. Amendment 63 will ensure that a person in a civil

partnership that is registered in England or Wales whose partner is transitioning on the same day can receive a full GRC.

Amendments 58, 61, 64 and 65 just change the numbers of sections that are being added to the 2004 act to ensure that there is no duplication of section numbers that were added by the 2013 act.

Amendments 59 and 60 are consequential on amendment 57, and amendments 66, 69, 71 and 73 are consequential on amendment 58.

I move amendment 57.

Amendment 57 agreed to.

Amendments 58 to 67 moved—[Alex Neil]—and agreed to.

The Convener: The next group is on issue of full gender recognition certificate by sheriff where spouse has not declared consent to marriage continuing. Amendment 68, in the name of Linda Fabiani, is grouped with amendments 70 and 72.

Linda Fabiani (East Kilbride) (SNP): Amendments 68, 70 and 72 implement one of the recommendations that the committee made in its stage 1 report. It recommended that

“the requirement for spousal consent for gender recognition is unnecessary and should be removed.”

It also noted that

“the non-transitioning spouse’s personal choice is sufficiently protected by the automatic grounds for divorce triggered by his or her partner’s seeking gender recognition.”

Amendment 68 would enable a trans person who married in Scotland to obtain legal gender recognition without needing first to get written consent from their spouse. It would also ensure that the spouse had the right, at any time, to seek a non-contestable divorce on the grounds of the trans person’s gender recognition.

The right to legal gender recognition is an established human right that it should not be possible for another person to block. The rights of the trans person and their spouse must be balanced in the bill. As the bill stands, I do not believe that the right balance has been struck. Removing the requirement for written spousal consent for gender recognition will correct the balance and will ensure that trans people have the personal autonomy to which they are entitled.

There are many circumstances in which a married person may act in a way that has an effect on their spouse but in which there is no legal requirement to first obtain the spouse’s written consent. The trans person’s decision to start living as the other gender and, later, their decision to undergo gender reassignment surgery have a huge impact on their spouse, but there is no legal

requirement for them to obtain spousal consent before taking either of those steps.

In contrast, the later issuing of a gender recognition certificate is the final administrative step of recognising the transition that has already taken place. It is an extremely important step for the trans person's practical rights, because it means that their legal gender comes into line with their lived gender, but the practical effect on their spouse is minimal compared with that of the earlier steps of transition. It is therefore disproportionate to require the spouse's written consent to be obtained.

As transgender equality develops around the world, an increasing number of European countries are treating legal gender recognition as an entirely personal administrative process. Of the nine European countries outwith the United Kingdom that have same-sex marriage, not one has a spousal consent requirement for gender recognition; and none of those countries has been subject to a human rights challenge because they do not have a spousal consent requirement. I believe that that illustrates that my amendments comply with the European convention on human rights. In fact, it is more likely that the bill could be challenged for infringing the rights of the trans spouse if the spousal consent requirement remains in the bill. It would be disappointing if we missed this opportunity to develop our laws in line with best practice.

10:00

Amendment 68 would insert new section 4E into the Gender Recognition Act 2004 and provide that a trans person in a Scottish marriage who does not have written spousal consent for their gender recognition and who therefore obtains only an interim gender recognition certificate from the UK gender recognition panel may then apply to the sheriff court to convert the certificate to a full certificate, which would bring their gender recognition into effect. The application would have to be made within six months of the issue of the interim certificate.

The route of an application to the sheriff court is proposed because the gender recognition panel operates on a UK-wide basis and it would be difficult for the panel to operate different rules for Scotland. Amendment 68 proposes a Scottish solution to the problem, and it would remove the need for spousal consent only for Scotland.

Amendment 68 would not require the sheriff to hold a hearing; in fact, that would be a very bad thing because it could turn the process into an expensive, slow and adversarial one. The role of the sheriff would be purely administrative in converting the interim certificate to a full one. The

sheriff is well placed to do that because converting an interim certificate to a full one is exactly what the sheriff does at present in cases where a person with an interim certificate obtains a divorce.

Amendment 68 would also require that the sheriff notify the trans person's spouse that the application for the full certificate has been made and that it has been granted. That would allow the spouse to apply for a non-contestable divorce if they wished to end the marriage. The amendment specifies that their right to do that would continue indefinitely, so they could take as long as they liked to decide.

Amendment 70 would provide that, when gender recognition is granted under the provisions of new section 4E of the 2004 act, a revised marriage certificate that showed the marriage as a same-sex marriage would be issued only with the spouse's agreement. That would give the spouse the space to decide whether to seek to end the marriage without updated documentation related to the marriage being in circulation first.

Amendment 72 would ensure that the continuity of the marriage would not be affected by the issue of the full gender recognition certificate. That would mean that the spouse's financial, parental and other rights associated with the marriage would not be affected in any way by the gender recognition.

I believe that these amendments would correct an imbalance in the bill and help to ensure that the bill delivers equality for transgender people and others. I ask the committee to support my amendments.

I move amendment 68.

Marco Biagi: I speak in support of this group of amendments, which as Linda Fabiani has pointed out would implement a recommendation that the committee came to unanimously in our stage 1 scrutiny.

The decision to transition gender is an intensely personal one. I have heard testimony not only from people who have transitioned but from the spouse of a trans person. I would not want to see that intensely personal decision become one that another person has a right to veto.

Marriage can lead to all kinds of changes. When you marry someone, all kinds of unforeseen circumstances can come up. The singling out of one particular change of circumstance, substantial though it is, is an unhelpful message when there are so many other things that could change as well.

Linda Fabiani's amendments would provide very strong protections, including non-contestable divorce that would be available for ever. There is also the two years during which a trans person

would have to live in the other gender before seeking the certificate, which would ensure that the partner would be aware of what was happening and would not be surprised by it. The amendments also seek to introduce the additional protection of the notification and the inability to get the new marriage certificate updated with the new details without consent.

As Linda Fabiani said, nowhere in Europe is the system proposed in the bill seen as necessary. If I was to get married, I would not want in any way to feel that I was owned by my spouse or that my spouse had any kind of veto over my personal life.

There are two separate strands in the procedures that we are talking about. There is the legal process of marriage to the other person, and then there is the very separate, personal and individual question of gender, and we must keep those two legal processes separate. That is why I will back the amendments.

John Finnie: I share the views of the two previous speakers, and I will support Linda Fabiani's proposal, which was delivered in a very measured way and which shows that there are protections such as the automatic right to divorce and consent being required before the original marriage certificate can be redrawn.

If someone wants to reassign their gender, it is essentially a human right. The timetable of likely events as laid out by Linda Fabiani shows that all sides have been considered and the proposal is proportionate. The words that I would use that people would understand are "not fair". The situation is not fair as it stands and the amendments would introduce a measure of fairness, so I hope that members will support it.

Alex Johnstone: I agree in principle with the amendments, and I wish to support that principle. However, I seek some reassurances in a key area.

My concern is that the removal of spousal consent for gender transition might, in certain cases, lead to problems. We know that there are such things as long-term estrangements and we are, of course, talking about marriage legislation, so the assumption would be that, when gender transition is taking place, a divorce will also take place. The amendments could create a situation in which gender transition taking place without a parallel arrangement relating to marriage could result in a gender transition taking place without the consent or the knowledge of an estranged spouse.

Alex Neil: I agree that Linda Fabiani introduced her amendments in a measured and comprehensive way, but I have to be honest and say that they do not reflect the Government's preferred approach.

The bill removes the requirement for transgender people to divorce before obtaining a full gender recognition certificate, or GRC. In future, when both spouses wish to remain married, the gender recognition panel will be able to issue a full GRC. The Government does not consider that to be a spousal veto, as such. Instead, the bill ensures that both parties can stay in the marriage when it changes from being an opposite-sex marriage to a same-sex marriage, or vice versa. We are balancing rights, and we have tried to do that throughout the bill.

We agree that the issues are not straightforward. We accept that, other than England, most European countries that have gender recognition legislation and same-sex marriage do not have the same provisions on the spouse consenting to stay in the marriage. Also, in most cases, the fact that the applicant has to live in the acquired gender for two years before applying to the gender recognition panel protects the non-transgender spouse from a sudden change in circumstances. Generally, the non-transgender spouse has time to decide what to do. However, as we outlined in some detail in our response to the committee's stage 1 report, that might not be true in all cases. As a result, amendments 68 and 72 do not reflect the Government's preferred approach.

There are some drafting points in areas such as divorce. Also, on a substantive point, under amendment 68 the sheriff is given no discretion at all: as the amendments stands, the sheriff would have to issue the full GRC. As a result of amendment 72, the continuity of the marriage would be unaffected by the sheriff issuing the full GRC. Therefore, the marriage would change from opposite-sex to same sex, or vice versa, even when the non-transitioning spouse has not consented to the change.

Amendment 70 relates to the proposed regulations on registering marriages following gender recognition and seeks to provide that both spouses would need to consent to this registration. I appreciate the rationale behind this amendment, but, as it is in line with what we intend the regulations to provide, it could be argued that it is not really necessary. The regulations will run along those lines anyway.

In conclusion, amendments 68 and 72 do not reflect the Government's preferred approach and, if they are agreed to, we will need to lodge further amendments at stage 3 to ensure that the proposed new procedures work effectively. That said, I am not suggesting that if the committee decided to agree to the amendments we would try to reverse them; instead, we would simply lodge the consequential amendments that we think

would be required to ensure that the new provision worked properly.

Linda Fabiani: A number of interesting comments have been made. I say to Alex Johnstone that, as there would be a non-contestable right of divorce, I do not think that the spouse would be disadvantaged in any way if the couple have been apart for a long period of their marriage.

I think that amendment 68 strikes the balance very well between the rights of the two spouses. The committee identified that such a balance has to be struck and, indeed, the evidence from other countries makes the case. I have listened to and I take on board the cabinet secretary's comments, and I am glad that he clarified that there would be no desire to reverse these amendments.

Alex Neil: If they are agreed to.

Linda Fabiani: Of course, cabinet secretary.

If the amendments are agreed to, I would be happy for the Scottish Government to tidy up the wording at stage 3. I therefore press amendment 68.

Amendment 68 agreed to.

Amendments 69 and 28 moved—[Alex Neil]—and agreed to.

The Convener: The next group is on appeals against issue of gender recognition certificate. Amendment 29, in the name of the cabinet secretary, is the only amendment in the group.

Alex Neil: I have only very short introductory remarks to make on the amendment.

The bill provides that, when an applicant to the gender recognition panel secures a gender recognition certificate by fraud, their spouse may apply to the Court of Session to have the certificate quashed. However, as the bill stands, that right is not available to an applicant's civil partner. Amendment 29 seeks to correct that and to extend the right to civil partners to apply to the Court of Session as well.

I move amendment 29.

Amendment 29 agreed to.

Amendment 30 moved—[Alex Neil]—and agreed to.

The Convener: The next group is on registration of qualifying Scottish marriages and civil partnerships: power to charge fees. Amendment 31, in the name of the cabinet secretary, is the only amendment in the group.

10:15

Alex Neil: Amendment 31 relates to the regulation-making power on the registration of marriages and civil partnerships following the issue of a full gender recognition certificate.

The amendment makes it clear that fees could be charged to applicants in respect of registration. Fees are generally charged for registration purposes. However, I recognise the sensitivities of charging fees in this area. The Registrar General's staff and the Scottish Government will discuss the issues with stakeholders representing transgender people before making any regulations in respect of fees. Indeed, my officials have already had some preliminary discussions with stakeholders representing transgender people on procedures generally in this area. We will continue those discussions if and when the bill is passed.

I move amendment 31.

Amendment 31 agreed to.

Amendment 32 moved—[Alex Neil]—and agreed to.

Amendment 70 moved—[Linda Fabiani]—and agreed to.

Amendment 71 moved—[Alex Neil]—and agreed to.

Amendment 72 moved—[Linda Fabiani]—and agreed to.

Amendments 73 to 75, 33, 76 and 34 moved—[Alex Neil]—and agreed to.

Schedule 2, as amended, agreed to.

Section 28—Renewed marriage or civil partnership following issue of full gender recognition certificate

Amendment 35 moved—[Alex Neil]—and agreed to.

Section 28, as amended, agreed to.

After section 28

The Convener: The next group is on grounds of divorce: interim gender recognition certificate followed by full gender recognition certificate. Amendment 77, in the name of the cabinet secretary, is the only amendment in the group.

Alex Neil: Amendment 77 amends the Divorce (Scotland) Act 1976. Under the 1976 act, there are two grounds for divorce in Scotland. One is the irretrievable breakdown of the marriage, which can be demonstrated through a number of routes. The other is the issue of an interim gender recognition certificate, or GRC.

The purpose of amendment 77 is to amend the 1976 act so that a divorce cannot be obtained on

the grounds of the issue of an interim GRC where the gender recognition panel has gone on to issue a full GRC. That situation can arise under the new section 4C of the 2004 act, as inserted by paragraph 5 of schedule 2 to the bill.

The scenario here is that the panel issues an interim GRC, within six months both parties consent to the marriage continuing, and an application is then made to the GRP for a full GRC. Given that both spouses have consented to the marriage continuing following gender recognition, it would not be appropriate for the issue of the interim GRC to be used in such cases to obtain a divorce. Amendment 77 amends the 1976 act accordingly.

If a spouse subsequently wishes to end the marriage, divorce on the grounds of irretrievable breakdown would continue to be available.

I move amendment 77.

Amendment 77 agreed to.

Section 29 agreed to.

After section 29

Amendment 36 moved—[Alex Neil]—and agreed to.

Section 30 agreed to.

Section 31—Ancillary provision

Amendment 37 moved—[Alex Neil]—and agreed to.

Section 31, as amended, agreed to.

Section 32—Commencement

The Convener: The next group is on no commencement of same-sex marriage provisions until certain amendments to Equality Act 2010 in place. Amendment 49, in the name of John Mason, is the only amendment in the group.

John Mason: Amendment 49 relates to the UK Equality Act 2010, which is a major player in the debate that we are having. The amendment ensures that the commencement of the same-sex marriage elements of the bill would be conditional upon the Equality Act being amended to specify that the protected characteristic of religion or belief includes the belief in marriage as presently defined and to make clear that compliance with the public sector equality duty requires ensuring that no one should suffer any detriment as a result of holding or expressing the view that marriage is between a man and a woman. That is necessary because many of the concerns about the bill stem originally not from the bill but from how it will interact with the Equality Act, which is of course Westminster legislation.

The committee discussed earlier in its consideration of the bill the fact that although the Equality Act lists a number of protected characteristics, it neither says that they are all of equal value nor ranks them in any particular order. That has left it open to the courts to interpret that list of protected characteristics as they see fit. It is certainly the feeling of some people that that has meant a hierarchy, with religion and belief somewhere near the bottom.

Government ministers—both the cabinet secretary and his predecessor—have indicated that the concerns of those who do not favour same-sex marriage should be properly addressed. In order to address those concerns, it is not only this bill that requires to be amended but the Equality Act itself.

I know that the Scottish Government has been working with the UK Government to prepare amendments to the Equality Act but I think that that has related mainly to religious bodies and celebrants who do not wish to take part in the solemnisation of same-sex marriages. However, concerns with the Equality Act go beyond just the issue of celebrants and what happens inside religious buildings. The wider issue relates to ordinary people, especially perhaps to those who work in the public sector. The Equality Act is meant to protect such people against discrimination on the grounds of religion or belief. However, the feeling is—as I have said already—that if cases go to court, religion and belief are treated as less important and so protection for such people is less.

That is why the Equality Act needs to be amended to specify that the protected characteristic of religion or belief includes the belief in marriage as presently defined, thereby making clear that beliefs about marriage are covered by the religion or belief ground of discrimination law.

Similarly, the public sector equality duty that is contained in section 149 of the Equality Act puts public authorities under a duty to have regard to the need to

“eliminate discrimination ... advance equality of opportunity”

and

“foster good relations”,

all of which, on the surface, we would certainly welcome, including the need to

“tackle prejudice”.

Although in theory the Equality Act, including the public sector equality duty, protects religion or belief just as much as it protects sexual orientation, in practice the local authority can choose which rights are more important in the

event of a clash. I believe, therefore, that we need a further amendment to the Equality Act to make it clear that compliance with the public sector equality duty requires ensuring that no one should suffer any detriment as a result of holding or expressing the view that marriage is between a man and a woman.

Ultimately, nobody in the public sector in Scotland should have their equality and diversity credentials—and, presumably, their suitability for employment—disputed merely because they hold to the existing view of marriage. That is why amendments 48 and 49 are needed.

The cabinet secretary stated in response to a written question:

“public sector appointments should be based on merit and not on any views which applicants and staff may have on same-sex marriage.”—[*Official Report, Written Answers*, 12 November 2013; S4W-17756.]

Accepting that the proposed changes be made to the Equality Act 2010 is an opportunity to put that position beyond doubt.

I move amendment 49.

Alex Johnstone: Following on from what John Mason has said, right through the stage 1 inquiry, I and others expressed concern that, although we fully accept that those who promote and support this legislation do so on the grounds of furthering equality and tolerance, there is a concern that, in doing so, the rights of others are being infringed. In terms of how we apply equalities legislation, although we talk about this bill on its own, it must be taken in a broader context. I believe that amendment 49 gives us the opportunity to consider the legislation in that broader context and ensure that, as we progress towards the objective of the promoters of the bill, we do not do so at the expense of the liberty and freedoms of others. That is why I will support the amendment.

John Finnie: I think that John Mason said a number of commendable things. We should always have ordinary people at the forefront of our deliberations, rather than becoming involved in some sort of academic parliamentary exercise. It is commendable that John Mason feels that there is a need to tackle prejudice. The sensitive matters that we have discussed have been areas of great prejudice over the years.

John Mason seems very concerned about a hierarchy of equality characteristics. I do not know whether he wants things to be more uniform, and I do not know whether he wishes to intrude into judicial decisions. It seems to me that he wants preferential treatment and a blank cheque with respect to people whose views many would find unacceptable. For that reason, I will not support the amendment.

Alex Neil: I do not support amendment 49. First, the amendment involves amending the Equality Act 2010, which is reserved. Therefore, it might give rise to competence issues. In any event, I do not consider that the suggested amendment to the protected characteristic of religion and belief in the 2010 act is necessary. There is nothing in the introduction of same-sex marriage in Scotland that would mean that that protected characteristic does not cover the belief that marriage is between one man and one woman, and an amendment of the type that is proposed could raise questions and cast doubt about which other beliefs are covered under the protected characteristic.

In addition, section 14 of the bill makes it clear that existing rights to freedom of thought, conscience, religion and expression are unaffected by the introduction of same-sex marriage. Similarly, I do not agree with the proposed amendment to section 149 of the 2010 act, on the public sector equality duty, which is a duty to have due regard to the need to

“eliminate discrimination ... advance equality of opportunity”

and

“foster good relations”,

rather than a duty to achieve a particular result.

The effect of the amendment is unclear. It could be very wide reaching and is capable of being interpreted in many ways. It is unclear what public authorities would need to do to comply with the new subsection (9A) of section 149 of the 2010 act. As a result, it casts doubt on how a public authority would perform its duty under the public sector equality duty. The suggested amendment seems to go beyond the duty to have due regard and would require public authorities to ensure that there is respect for certain views, and no detriment. Achieving that might, quite simply, not be possible. The duty would be very onerous, and local authorities and other public authorities do not have the power to guarantee what is proposed. An amendment in this area could cast doubt about whether other beliefs are covered under the public sector equality duty.

We are aware of concerns from religious bodies that a local authority may use the public sector equality duty to prevent a church that is against same-sex marriage from using a local authority community centre. However, we consider that a local authority that uses the public sector equality duty to refuse to let premises to a body on the basis of the religious beliefs of the body risks a successful claim of discrimination.

Given that I do not support the proposed changes to the 2010 act, I also cannot support an amendment that would ensure that provisions on

same-sex marriage in the bill must come into force the day after those suggested amendments to the 2010 act have been brought into force. Therefore, I do not support amendment 49 and invite the committee to reject it.

10:30

John Mason: The issue of hierarchy, which I mentioned in my speech and to which Mr Finnie refers, is very much the key to all this. The basic problem is the weakness in the Equality Act. As I have mentioned before, I was a member of the committee that scrutinised that act and the subject was discussed at the time, was expected to be a problem and has since proven to be a problem. The Equality Act is a very good act in many areas but it does not deal with the question whether all protected characteristics should be equal or whether there should be a hierarchy, and some of us feel that a hierarchy has been created by the courts because the courts were given too much freedom by the act.

We are now moving into the same territory with the bill. Because certain powers are reserved, we cannot fully encompass the protections that the cabinet secretary would like to give, and we know the weaknesses of the Equality Act. I am certainly not asking for a hierarchy with religion and belief at the top of it; I am just suggesting that, given that there is a hierarchy, religion and belief should not be at the bottom of it. I accept that my proposal is an untidy way of doing things, but that is because this Parliament has limited powers.

The concern is that a public authority such as a council might be particularly zealous in pursuing one angle of its public sector equality duty and that that could be used against people of a religious persuasion. I do not for a minute question the good intentions of the cabinet secretary and others who think that the bill is robust at the moment, but I am afraid that I and others are not convinced. Therefore, I press amendment 49.

The Convener: The question is, that amendment 49 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Johnstone, Alex (North East Scotland) (Con)
Mason, John (Glasgow Shettleston) (SNP)
McMahon, Siobhan (Central Scotland) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Finnie, John (Highlands and Islands) (Ind)
McCulloch, Margaret (Central Scotland) (Lab)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 49 disagreed to.

The Convener: The question is, that section 32 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Allard, Christian (North East Scotland) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Finnie, John (Highlands and Islands) (Ind)
McCulloch, Margaret (Central Scotland) (Lab)

Against

Johnstone, Alex (North East Scotland) (Con)
Mason, John (Glasgow Shettleston) (SNP)

Abstentions

McMahon, Siobhan (Central Scotland) (Lab)

The Convener: The result of the division is: For 4, Against 2, Abstentions 1.

Section 32 agreed to.

Section 33 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank you all very much.

10:34

Meeting continued in private until 10:53.

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