JUSTICE 1 COMMITTEE

Wednesday 12 May 2004
(*Morning*)

Session 2

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JUSTICE 1 COMMITTEE
† 20th Meeting 2004, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Mr Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Marlyn Glen (North East Scotland) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Margaret Smith (Edinburgh West) (LD)

*attended

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

THE FOLLOWING GAVE EVIDENCE:

Michael Clancy (Law Society of Scotland)
Morag Driscoll (Law Society of Scotland)
Kirsty Finlay (Scottish Executive Legal and Parliamentary Services)
Sarah Fleming (Law Society of Scotland)
John Fotheringham (Law Society of Scotland)
Hugh Henry (Deputy Minister for Justice)
Louise Miller (Scottish Executive Justice Department)
Professor Kenneth Norrie (University of Strathclyde)
Paul Parr (General Register Office for Scotland)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Douglas Thornton

LOCATION

The Hub

† 19th Meeting 2004, Session 2—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Wednesday 12 May 2004

(*Morning*)

[THE CONVENER *opened the meeting at 10:06*]

Items in Private

The Convener (Pauline McNeill): I welcome everyone to the 20th meeting in 2004 of the Justice 1 Committee. We have received no apologies. I ask members to switch off their mobile phones. I will try to ensure that mine is switched off this time.

I invite the committee to consider whether it wishes to take item 3, which is a discussion of the committee's approach to its draft report on the Civil Partnership Bill, in private. Is that agreed?

Members *indicated agreement*.

The Convener: I also ask the committee whether it agrees to meet in private for any future meetings that are required to discuss the draft report.

Members *indicated agreement*.

Civil Partnership Bill

10:07

The Convener: Item 2 is the Civil Partnership Bill, which is United Kingdom legislation. Now that they are sitting comfortably, I welcome the representatives of the Law Society of Scotland. I apologise for the discomfort of the surroundings. The acoustics are a wee bit difficult at times, but I am sure that you will let me know if you cannot hear at any point. I welcome Morag Driscoll, the convener of the family law sub-committee; John Fotheringham, who is its vice-convener; Michael Clancy, the director of the Law Society; and Sarah Fleming, who is head of international relations in the law reform department.

I will begin by asking whether you believe that the Civil Partnership Bill is based on Scots law and does not import English law into devolved Scottish areas.

Michael Clancy (Law Society of Scotland): We have taken a look at the bill, which is an extremely complex measure. It covers many areas of private law. It also covers a number of areas of reserved law. Considering those provisions in the bill that apply exclusively to Scotland—in other words, part 3—we have come to the conclusion that it represents Scots law, rather than being an importation from any other system. However, one should not underestimate how difficult a job it is to create in the bill the new status of civil partners throughout the three jurisdictions.

The Convener: So the Law Society is satisfied that we are dealing with Scottish law in the Scottish part of the bill.

Michael Clancy: Yes.

Mr Stewart Maxwell (West of Scotland) (SNP): With some minor exceptions, the bill appears to mirror marriage provisions. To what extent does the bill create civil partnership as something with equal status to marriage?

Morag Driscoll (Law Society of Scotland): As you say, many of the provisions in the bill are lifted from other provisions in Scots law that deal with marriage. In many ways, therefore, it is a mirror image. Some issues need to be addressed by the bill—my colleague will be dealing with that later. There are provisions missing, to do with succession law.

Michael Clancy: In that connection, when we consider issues such as the strict requirement for consent that is found in marriage law, there is only an inference in clause 81 that consent is required. However, the requirement is not made explicit and instead we must jalouse—to use a good Glaswegian word—that people have agreed to

enter into the civil partnership. That is one of the principal provisions that do not square entirely with marriage. There might be policy reasons for there being no explicit provision for consent. However, our view is that there should be something that indicates the agreement of the parties, rather than its simply being inferred that they have agreed. Further, if there were such a measure, one could interpret its provisions in such a way as to identify circumstances when agreement between the parties was not present—for example, if there had been error or duress.

Mr Maxwell: In its evidence to the Executive's consultation, the Faculty of Advocates said:

"The simplest approach from a technical point of view would be to amend the Marriage (Scotland) Act 1977 s 5 to extend marriage to same sex couples."

Is that a reasonable point of view?

Morag Driscoll: I do not believe that that is necessarily something for the Law Society to comment on. We have been asked to comment on the bill. I believe that the Faculty of Advocate's comment is much more about policy. We are more prepared to comment on how the bill fits into Scots law as a whole than on whether it is the ideal solution to a particular problem.

Mr Maxwell: Okay. I will rephrase my question, then. In the technical sense, do you think that the bill reflects Scots law on marriage? Would it not have been more sensible technically just to amend section 5 of the 1977 act, rather than to go through the process that the Executive has suggested?

Morag Driscoll: The bill is more comprehensive because it deals with aspects of family law that are not included in the 1977 act. Other pieces of legislation, such as the Matrimonial Homes (Family Protection) (Scotland) Act 1981, would have had to be amended, so you would still have ended up having the bill, which is at least a one-stop shop for people entering into a single-sex partnership in that it covers most aspects of such partnerships in a single bill. In addition, we have been pushing for the 1977 act to be amended, and I believe that that is in process, so you would have ended up amending your amendments. It is perhaps simpler to do it in this way.

Mr Maxwell: I am interested in that response. I am curious about your statement that the bill is a one-stop shop.

Morag Driscoll: To a certain extent it is.

Mr Maxwell: It seems to me that that description does not apply to the bill, given the amount of subordinate legislation that will have to be approved to bring all the other pieces of legislation into line with the bill. Initial indications are that, to facilitate the changes made by the bill, the number of Scottish statutory instruments that will have to be created or amended amounts to at least 35.

Morag Driscoll: For many issues, such as pensions and benefits, the bill is not a one-stop shop, but that is similarly the case with existing legislation. However, the major issues for the lives of civil partners—how they get registered and how they dissolve the partnership—are included in the bill. All those issues are in one piece of legislation rather than two or three.

Mr Maxwell: Okay. In what areas of family law is there a justification for having provisions in civil partnerships that are different from those in marriage?

John Fotheringham (Law Society of Scotland): Again, I believe that that is largely a policy issue. However, one provision that occurred to us is the area of the forbidden degrees, which refers to people whom one is not allowed to marry. There are two broad categories: consanguinity, which refers to people who are related by blood; and affinity, which refers to people who are related by marriage. In an opposite-sex relationship, there are good reasons for having forbidden degrees in marriage. Such relationships can produce children, so one does not wish people who are closely related to marry one another. However, that issue simply does not apply in a same-sex relationship. It might be appropriate to make a particular difference in the forbidden degrees by excluding the grounds of consanguinity for same-sex relationships.

10:15

Mr Maxwell: Do you have any views on the way in which the bill is constructed? Do you think that it is likely that case law developments in marriage and changes in marriage law will read across to civil partnerships?

John Fotheringham: There will be no automatic read-across, but when considering dissolution of a civil partnership on the ground of behaviour we can examine how unreasonable behaviour has been interpreted in relation to marriage and draw on the parallels that exist. For marriage, the case law relating to behaviour is dynamic—it moves on as society moves on and attitudes change. The same will be the case for civil partnerships.

Mr Maxwell: I am concerned that if case law in marriage changes and there is no read-across to civil partnerships—automatic may be the wrong word, but I cannot think of another—although we start from the position of rough equivalence, there could be a divergence between the two over time.

Morag Driscoll: That is less likely, as we are dealing with the breakdown of a domestic

relationship. In many ways, the parallels between relationships are stronger than the differences. For example, we are dealing with the reasons for the breakdown of a marriage and the provisions in law relating to such a breakdown and demonstrating that it has taken place. Also, in dealing with property division, there is likely to be a parallel between the types of property owned and collected during a civil partnership and those collected during a marriage. There is a rich body of case law on the dissolution of marriage. Of course, there is no case law on the dissolution of same-sex registered partnerships. It will be natural for practitioners, sheriffs and judges to use the existing case law on the dissolution of marriage as a guide, especially as the provisions of the bill have been lifted to a great extent from existing legislation.

You asked about areas in marriage that are different. One area to which I draw the committee's attention is the provision for judicial separation, which is used comparatively rarely. Normally, it is used when people's religion is such that divorce is not an option for them but they need to be separated in all ways short of divorce. That provision is less likely to be applicable to persons who are in a same-sex relationship. We believe that it is not necessary for that group of people to have the option of a judicial separation. I cannot imagine a situation in which a person in a civil partnership would take up such an option.

Mr Maxwell: I may again be straying into policy, rather than the legal aspects of the bill, but I notice that in civil partnerships adultery is not a ground for dissolution. To me, that seems rather strange. Do you have an opinion on the issue?

John Fotheringham: Adultery must be set in the context of an opposite-sex relationship. The same issues may not apply in a same-sex relationship. However, the bill includes the concept of unreasonable behaviour. Infidelity can certainly form part of unreasonable behaviour. In theory—although I have never seen it happen—even in an ordinary divorce adultery could be cited as unreasonable behaviour. There is no reason for not including that provision in the bill. It is not necessary for there to be a complete parallel between the grounds for dissolution of marriage and those for the dissolution of civil partnerships. Given that infidelity can be a ground for dissolution if it has caused the breakdown of a relationship, we do not need an extra ground.

Morag Driscoll: I draw the committee's attention to the fact that in the document "Family Matters: Improving Family Law in Scotland" consideration is being given to removing adultery as a ground for divorce, because it can be subsumed by unreasonable behaviour. The fact that adultery is not a ground for dissolution of civil partnerships was not a matter of concern to the family law sub-committee. We did not think that that would disadvantage same-sex partners, because there is another way of dealing with the matter.

Mr Maxwell: In effect, the issue is covered by the ground of unreasonable behaviour.

Morag Driscoll: A door is not being closed.

Sarah Fleming (Law Society of Scotland): Members will have noted that there is no sexual element in the creation of a civil partnership under the bill. That is why the bill does not deal with adultery. However, the matter could be dealt with in the dissolution of a civil partnership under the provisions to which my colleagues have referred.

The Convener: Morag Driscoll mentioned that the bill raised various issues to do with succession law. The committee is aware of a conflict between the bill's proposal to extend prior rights to civil partners and the existing legal rights under Scots law, and the Executive has sent us a letter saying that the matter is being examined. Do you share that concern in relation to succession law?

Sarah Fleming: We noted that the bill seeks to amend the Succession (Scotland) Act 1964. It appears that most elements—apart from the legal rights that would normally apply to a person whose spouse had died—have been carried over to the Civil Partnership Bill, and it would be an anomaly if that particular omission were not changed in future. However, if the Executive intends to do so, we would not want to take the matter any further.

The Convener: You mentioned that the requirement for consent was absent from the Civil Partnership Bill. Should it be included?

Morag Driscoll: Given that consent is a requirement in so many different areas of Scots law, it is somewhat of an anomaly that it has not been included. I should point out that we have used the term "agreement" rather than "consent", because the civil partnership is not marriage but a completely new status of relationship. If the bill does not include a concept of consent or agreement, it raises questions for people who have entered into a civil partnership through fear or in error. Technically, it makes things more difficult.

The Convener: What is the status of a civil partnership? Marriage is a contract—

Morag Driscoll: To which one is required to give consent.

The Convener: That is right. So what is a civil partnership?

Morag Driscoll: It is a new kind of contract.

The Convener: If that is the case, is the implication not that consent is required, given that it forms the basis of contract law? I suppose that that could be made more explicit by putting it in the bill.

John Fotheringham: Indeed, that is the implication and it should be stated in the bill.

Margaret Smith (Edinburgh West) (LD): You are suggesting that because two people have made themselves available for a civil partnership, consent is implied. That is the bill's current position. However, you also feel that the bill should make it explicit that the relationship can be made void if it becomes clear that one of the partners is in the partnership under duress.

Morag Driscoll: Obviously, doing so would leave the door more open to the people to whom it would apply.

Margaret Smith: I want to move on and raise the question of whether a civil partnership can be made void. I should say in passing that yesterday Baroness Scotland of Asthal mentioned that a partnership could be seen as void if it had been contrary to the bill's provisions from day one. One of the examples that she cited involved a 16-year-old; obviously such a situation would not apply in Scotland, but a number of others that she highlighted would apply.

Section 23A of the Marriage (Scotland) Act 1977 stipulates that a marriage is not void if there is a failure to comply with certain procedural requirements. However, the Civil Partnership Bill does not contain a similar rule for civil partners. The Equality Network and others have suggested that, as a result, it might be easier to challenge a civil partnership than it would be to challenge a marriage. Do you have a particular view on that?

Morag Driscoll: Section 23A of the 1977 act protects people by allowing them to remain married when a technical error might have made their marriage void. As a result, it would be advantageous to make the same provision available to persons entering into a civil partnership. Although the bill contains provision to make a civil partnership void if the parties are not eligible—because, for example, one of the partners is married at the time—it contains no provision to make a civil partnership voidable. However, I do not think that we are particularly concerned about that.

Margaret Smith: So such a provision protects individuals if there has been a technical problem or a mistake that, for example, might have been made by the registrar or someone else.

Morag Driscoll: Yes.

Margaret Smith: And such a provision is not included in the bill.

The Convener: But what about the situation in which a marriage might be either void or voidable because someone is still married?

Morag Driscoll: There is a difference between a marriage being void and a marriage being voidable. Voidable means that someone can choose to have a marriage made void on certain grounds. However, a marriage is not automatically void. Sometimes, a marriage might be void because it did not legally exist. For example, some fatal error might have been made: one of the parties might already be married or the partnership might come under one of the exceptions outlined in clause 82, which concerns eligibility.

Margaret Mitchell (Central Scotland) (Con): During the consultation, concern was expressed about the recognition of civil partners as next of kin. Do you have any comment on the provision in part 4 of schedule 21 to the bill for civil partners to be recognised as a relative or nearest family member?

Michael Clancy: The bill is extremely complex and I am not sure that our committee got to schedule 21 when we were examining it. We shall come back to you on that after we have taken a closer look at it.

Margaret Mitchell: Schedule 21 provides for civil partners' rights in respect of mental health, tenancy, succession and registering births and deaths. However, it does not mention specifically their ability to be recognised as next of kin for the purposes of hospital or prison visiting. Do you think that that should have been specifically provided for in the bill, for the sake of completeness?

Michael Clancy: When we responded to the consultation we were of the view that the provisions of the bill should be extended in that regard. Those rights should certainly be included in the bill.

Margaret Smith: I have a series of questions about registration and approved places. The Marriage (Scotland) Act 2002 amended the Marriage (Scotland) Act 1977 to allow marriage at "approved places." However, that is subject to statutory regulations on the kind of places that can be approved and considerations that the local authority has to take into account. There is also provision for appeal to the sheriff against a local authority decision. In contrast, clause 89 of the Civil Partnership Bill provides that the approved place is agreed with the local registration authority and explicitly excludes places of reverence. There is no provision for statutory regulation or appeal. That issue is obviously exercising gay people of faith, of whom there are more than people would think.

There are a number of causes for concern here. We are probably on the cusp of the majority of people in this country thinking that registration of civil partnerships or gay marriage—or whatever we might want to call it—is a good idea. There is some unease about people not being able to appeal the decision of the local registration authority and about places of reverence being excluded—and excluded in a way that is different from how they are excluded in the Marriage (Approval of Places) (Scotland) Regulations 2002. What is your assessment of the level of discretion given to local authorities to agree the approved place for civil partnerships? What risk do you think there is of an inconsistent approach being taken across local authorities and compared with their approach to marriage?

Michael Clancy: That is a grave issue for many people. Those who would wish to avail themselves of the legislation and who wish to have some form of religious blessing might find themselves in a difficult position, given clause 89. To a certain extent, clause 89 mirrors clause 6, which applies to England and Wales and which excludes what are termed "religious premises" in England and Wales. Clause 89(2) takes that to a different interpretive level by saying:

"the place must not be one where persons are known to meet for public worship or one known to be regarded by persons of a religious faith as a place of reverence."

There is a slight difference between what happens south of the border and what happens north of the border.

10:30

One could regard the issue as one of religious freedom. If a church decides that it is happy to allow civil partnerships to be registered on its premises, it should be allowed to do so. On the other hand, some churches do not want religious involvement in civil partnerships and, in terms of freedom of religion, their right to that disengagement should be respected. It is a difficult issue; it boils down to the fact that clause 89 gives no discretion to local authorities. It uses the words "must not be"; it will not be within the province of the City of Edinburgh Council or Scottish Borders Council to say that it thinks that it should be permissible for partnerships to be registered in a church—that will be prohibited. That might not answer your question, but it gets us to a place in which a dialogue can be opened up.

If the provision were deleted, a question would arise: could someone who wanted to register a civil partnership in a church but was refused take the issue to court? That is a possibility; it is a dense issue, which relates to the European convention on human rights and questions of freedom of religion. It might be a question on which the Executive should open a dialogue with the churches about where they want to go.

Margaret Smith: Some people have said that, under articles 9 and 14 of the European convention on human rights, clause 89(2) is a challenge to people's religious freedom. It is a unique situation, in that the Executive and the Government are prescribing what churches can do on their premises. We are creating legislation that might stand for 20 years. Given where we are at the moment—in the social attitudes survey that came out last year, only 33 per cent of Roman Catholics were opposed to gay marriage—would it not be more sensible to delete the clause that refers to places of reverence? From your comments, it seems that some churches do not want to do civil partnerships but some churches do. Is there not a case that leaving out the reference to places of reverence will allow case law to develop and allow churches to make decisions on the matter instead of those decisions being imposed by the state?

Michael Clancy: The relationship between church and state is not an easy one. For example, the Church of Scotland is an established church, but other churches are not. There might be differences in approach if we consider the matter from the perspective of establishment. Clause 89 prevents registration of civil partnerships in a place of worship or a "place of reverence", but it does not prevent a subsequent blessing from taking place there. One can imagine circumstances in which people of faith who have entered into civil partnerships will approach their church, whatever church it may be, and ask for a blessing. That is not prohibited in the bill, so the issue of religious freedom is not as clear cut as one might assume.

My other observation is that if a situation arose in which registration was followed by a blessing, civil partnerships would be in much the same place as the marriages and partnerships that one finds in other European countries. For example, in France or Austria, no matter what one's religion or the nature of the partnership that one is entering into, one has to register it civilly before engaging in a religious blessing. One is presented with a number of options. Removing clause 89(2) would certainly restore opportunity to local authorities, but dialogue is required with those who are most keenly affected—the churches in whose premises the blessings may take place.

Margaret Smith: Do you agree that there is a split? Certain churches are happy with the prospect of civil partnerships, whereas other churches are not happy. Mr Fotheringham described the situation as a dynamic one that would evolve over time, so it would be sensible to allow dialogues to continue. We should allow

churches to make their own decision, rather than prescribe to them.

There is no right of appeal as there is in marriage, even for a couple who want to get married on a golf course or wherever. That seems to be a diminution of rights.

Another point to do with registration is a little bit more ethereal and philosophical rather than connected with hard law, if I can put it that way. Registration as described in the bill will simply mean that two people will turn up at a building—with another person standing in front of them and a couple of other people dragged off the street to be witnesses—before signing their names on a schedule to be put in a register. Nothing in the bill actually says what this is about—

The Convener: Margaret, do you have a question?

Margaret Smith: Yes. Is there a need to put something in the bill to say that guidance from the Registrar General for Scotland on these issues should be binding, so that we do not have a complete mismatch of different views among local registrars on what ceremony can or cannot take place for a civil partnership registration?

Michael Clancy: Binding guidance sounds to me like something that a clever lawyer might say, but I am not sure that I would go down that road. If the elected representatives in a council area want things to be done in a certain way, they can have them done in a certain way. Guidance is certainly there for those who want to take it but I do not think that one should prescribe binding guidance.

The issue of whether things should be left open to allow a dialogue with the churches to continue is one that vexes many people. I am aware of only one petition from one church, which I believe the Public Petitions Committee is considering this morning in the room next door to this one; I am not aware of a large number of churches declaring themselves on either side of the divide. The committee might be able to correct me on that.

With the English provisions, the Northern Irish provisions and the Scottish provisions in the bill, we do not want any form of anomaly. If clause 89(2) were to go for Scotland, one might want to think hard about what the position in England and Northern Ireland should be. That would require some swift debate. The fact is that the position is still open; the bill is only at the committee stage in the House of Lords. I would encourage those who want to engage in that debate to do so sooner rather than later.

Marlyn Glen (North East Scotland) (Lab): In the Matrimonial Homes (Family Protection) (Scotland) Act 1981, "child of the family" is defined in section 22 as including a child or grandchild of either spouse and any person treated as though they were a child of either spouse, whatever their age. In the Civil Partnership Bill as drafted, clause 97(7) limits acceptance as a "child of the family" to persons under 16. Can you explain the apparent difference in the definition of "child of the family" as it applies to marriage and to civil partnership?

Morag Driscoll: That question should be addressed to the Executive. We did not choose the wording, so we are unable to explain the reason for the choice of words.

Marlyn Glen: Can you explain to us what the consequences of the different wording might be?

Morag Driscoll: I am not sure that I can give you an answer off the top of my head.

John Fotheringham: The purpose of the existing legislation is to protect young children. It is not designed to protect an adult child living in the house. If the child is aged 24, the provisions on the protection of children will not be as necessary. It might have been better if the existing legislation had given an age limit. The provision in the bill is a better provision. The intention is not to give people too much protection, because if you give one lot of people too much protection you take away the rights of others. One can try to provide for the continued occupation of what I might call a matrimonial home in the interests of a child, but we are all somebody's children, no matter how old we are. The protection required for a young child is not the same as the protection that is required for an older person who happens to be biologically related or who is treated as being biologically related. The bill's provision is an improvement.

Michael Matheson (Central Scotland) (SNP): I am sure that you are familiar with clause 126, which deals with the civil partner of an accused being called as a witness and their compellability in civil and criminal cases, between which there currently is a distinction. Are the bill's provisions similar to existing Scots law?

Sarah Fleming: I think so. The position in Scots law is that a spouse is not normally compellable by the prosecution or a co-accused, although if the spouse chose to give evidence and commenced doing so, they would be obliged to keep on going thereafter. They would not be able to say, "I can tell you about this, but I won't tell you about that." I think that the intention of clause 126 is to provide an analogous situation, such that the civil partner will be uncompellable by the prosecution or a co-accused. I think that the clause covers the same ground, unless there is an issue that you think needs to be dealt with.

Michael Matheson: No. I am looking for your expertise on the matter.

John Fotheringham: The situation is the same.

Bill Butler (Glasgow Anniesland) (Lab): You will be aware that many regulations and rules make specific provisions for spouses. For example, the Representation of the People (Scotland) Regulations 1983 make particular provisions for spouses with regard to local council elections. A quick search on Her Majesty's Stationery Office's website for the word "spouse" in statutory instruments came up with more than 800 results, and there were 35 results for Scottish statutory instruments. Should subordinate legislation that makes provision for spouses be amended to include civil partners?

Morag Driscoll: On the whole, yes. If you do not make provisions for people who have a domestic contract that are parallel to those for people who have a matrimonial contract, you can disadvantage people simply on the basis of the fact they are in a same-sex partnership rather than a heterosexual marriage.

Bill Butler: So in your view appropriate amendments should be made.

Morag Driscoll: No lawyer ever likes to make blanket statements—it goes against the grain.

Bill Butler: But they should be made in appropriate circumstances.

Morag Driscoll: Yes. You would have to examine the provisions to ensure that you did not disadvantage same-sex partners.

Bill Butler: What volume of legislation do you envisage requires to be amended? Do you have any idea of the extent?

Michael Clancy: I am afraid that we have not surveyed that.

Bill Butler: Would it be considerable?

Michael Clancy: The bill is a weighty piece of legislation that stretches into every area of private law and most areas of public law. We all know that the size of the statute book has increased tremendously in the past 20 years—the amount of subordinate legislation could be described as a torrent. We must find a way to deal with that flood. That will certainly be a big job that I do not relish for the unfortunate civil servants who will have to prepare the instruments.

10:45

Margaret Smith: The bill seems to lack consistency in relation to cohabitation by same-sex couples who decide not to register a civil partnership. They are taken into account in some provisions but not in others. For example, paragraph 38 of schedule 21 will extend the rules in the Administration of Justice Act 1982 on damages for personal injuries, which apply to spouses and mixed-sex cohabitants, to civil partners but not to same-sex cohabitants. Will that create an ECHR compliance problem? You just talked about parallel treatment. Do you agree that same-sex cohabitees should be treated in a parallel way?

Michael Clancy: The question is interesting. As we examined the schedules, we noticed that the provisions that relate to the Social Security Contributions and Benefits Act 1992 and various other aspects of schedule 17, such as the pension provisions, could apply to two people of the same sex who are not civil partners but who live together as if they were civil partners. We worried about that a little, because that could produce much litigation as people try to establish that they live together as if they were civil partners. We queried how that could be dealt with adequately.

Equality of treatment in entitlement to benefits throws up other anomalies as one progresses through the bill. We must examine closely how those two aspects coalesce. If by habit and repute a person can be a civil partner for some purposes but not for others, that could be a difficulty.

Margaret Smith: What does the phrase "as if they were civil partners" mean? How would it be proved that somebody was a civil partner? A bit of common sense says that people are civil partners if they are having sexual relations, but the bill contains nothing about that, so that does not make people civil partners under the bill.

John Fotheringham: That would be a matter chiefly for the courts. Difficult cases will arise on the margin. If people in a same-sex couple have lived together for many years and are civil partners in all but registration, not much of a problem will arise. The difficulty will arise from the couple who might live together as civil partners and who are on the cusp, if I may use your phrase, of qualifying.

Litigation will take place and the courts will tell us the meaning. That is appropriate, because social attitudes are changing and will continue to change. The interpretation of what does or does not amount to cohabitation that is akin to something else will also change as the years go by. Litigation and reported cases are the best way to regulate that. If the Government decides that the courts are going badly wrong, it can always introduce further legislation.

The Convener: Is it the Law Society's view that, in law, discrimination would occur if we did not take account of same-sex cohabitants, or are you simply saying that it is a matter of seeing what happens with the law?

Michael Clancy: The bill takes account of people who have not registered a civil partnership. It does not use the word "cohabiting", but it refers to people who live together as if they were civil

partners. Under clause 81, civil partners are under no obligation to cohabit. Formation of the partnership is not based on cohabitation but on entering into the partnership and registering it. What we are saying is that there are issues about discrimination that will inevitably be worked out through the courts. One can see that it is quite a difficult area. No doubt the debates in the House of Lords later this week and next week will elucidate that point.

Michael Matheson: I have a general question. Is it the Law Society's view that, if the Executive did not introduce such legislation, it would be in breach of the ECHR and, if so, on what grounds?

Morag Driscoll: That is a complicated question.

From the point of view of people who enter into a civil partnership, the immediate problem is that it would instantly create what are called limping partnerships. If you enter into a partnership in England and then move up to Scotland, are you considered to be a civil partner? Do you have to move back to England to get your partnership dissolved? The English courts might say that, because you live in Scotland, they do not have jurisdiction. Limping partnerships are a nightmare for the people involved. We already have them at the moment in cases in which people who have been legally married as same-sex partners in other countries have subsequently come here.

Whether limping partnerships should be recognised raises a whole series of questions. Does the fact that people can be single-sex partners in England and Wales but not in Scotland breach their human rights? Does it breach my human rights that I could move to England and enter into a partnership there but I cannot do that in Scotland? It is not just as simple as ECHR. Whole levels of problems would be created if civil partnerships existed in parts of the United Kingdom but not in others.

Michael Matheson: Let me rephrase my question. Is it the society's view that, if the bill was not introduced in the United Kingdom full stop—Scotland, England, Wales and Northern Ireland—the UK Government would be in breach of the ECHR?

Michael Clancy: Under article 12, the ECHR provides that

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

That has already been adjudicated upon by the court in Strasbourg. In the case of Rees v UK in October 1986, the court adjudicated to the effect that a bar on marriage between two people of the same sex does not infringe article 12. Therefore, there would be no contravention on the basis of article 12.

However, other people would argue that such a bar would contravene the right to a private life, so whether there would be discrimination is still an issue of argument. However, it has already been adjudicated that such a bar does not constitute discrimination under article 12.

The Convener: I want to return to the question how the grounds for dissolution of a civil partnership compare with those for the dissolution of marriage. It occurs to me that the bill strives to provide a similar level of protection. Does the Law Society think that there should be a simpler way to dissolve civil partnerships? The Executive is currently consulting on whether to change the grounds for dissolution of marriage. Throughout history, some extraordinary laws have grown up around marriage law, especially over the grounds for divorce, which have changed over the years. Given John Fotheringham's comment to Marlyn Glen that the law tries to do the sensible thing for the sake of any children, is there a case for saying that we should just make the grounds for dissolution of civil partnerships simpler?

Morag Driscoll: That issue exercised our committee quite a lot. One of our main concerns is that, apart from adultery, the grounds for dissolution of civil partnership are a mirror image of current divorce law. However, divorce law is at the forefront of the things that need to be changed and attention is being given to that. We were concerned that, if the grounds for dissolution in the bill stay the same as the grounds for dissolution of marriage but divorce law is then changed, the bill will have imported a piece of legislation that needs to be changed almost immediately.

For some time now, lawyers have found that the requirement for two years' separation with consent and five years' separation without consent does not really reflect modern life. We advocate that the grounds for dissolution should be changed to behaviour, one year's separation with consent and two years' separation without consent. If people had the right to dissolve their partnership after two years without the consent of their partner, there would no longer be a need for the ground of desertion. We advocate that the bill should be amended in keeping with the way in which we are hoping to reform divorce law. If that does not happen, we will end up having two things that need to be reformed and the new piece of legislation would be as well coming with a sticker saying "Warning: reform this soon." We advocate a more simplified approach to dissolution than the cumbersome one that exists at the moment.

Mr Maxwell: What would be the implications of a civil partnership in terms of immigration? If someone from outwith the European Union entered into a civil partnership with a UK citizen, would they have the same rights of residency and

entry into this country that they would have if they had got married?

Sarah Fleming: I think that they would have.

Morag Driscoll: That is another reason why it is important to have consent as part of the registration of the partnership.

The Convener: Obviously, large parts of the bill relate to reserved matters that we are not required to comment on. However, I would be interested in the Law Society's view on a question relating to pensions, which is a reserved matter.

You will be aware that, when the bill is passed into law, we will be able to eradicate discrimination in the future. However, it is not possible to ensure retrospection for benefit that someone gains from their partner's pension. The committee is advised that that is the case because, otherwise, a precedent would be set in relation to benefit gained from a partner's pension with regard to previous changes to pension law. I would like to hear your view as to whether there might be an element of discrimination in that and whether the matter should be considered further at some point.

John Fotheringham: The difficulty about making the provision retrospective—and in doing so in a non-actuarial manner—is that the interests of the people who are already members of that pension fund would be prejudiced. The question is actuarial rather than legal. We have not discussed the matter in great detail but it is important to remember that you must take into account the interests of the other people who are members of the fund. If you increase the potential burden on the fund, you decrease the pensions of those who have contributed to it already.

Morag Driscoll: Further, you would be giving an advantage to same-sex partners that is not available to people who marry after having been co-habitees for some time. In that circumstance, there is no retrospective effect on rights over a partner's pension in the period before the marriage. There is a parallel in that regard.

Margaret Smith: The key difference is that cohabitees who have cohabited for 10 years or whatever had the legal right to marry—as soon as they had freed themselves from their previous marriages, if any—and chose not to do so. That is not the situation that same-sex couples have been in.

John Fotheringham: Perhaps those cohabitees did not have that right because one of them was already married to somebody else.

Margaret Smith: That is what I said. As soon as they had freed themselves from their previous marriage or whatever, there would then have been a period in which they were free to marry legally but chose not to. The difference is that same-sex couples have not had that choice. The bill that we are discussing is trying to deal with that discrimination for the future. However, in not making the provision retrospective, the very people who are being used as an example of why the legislation is needed—Jimmy and Bert who have lived together for 20 years and whose commitment should be recognised legally—will continue to be discriminated against. The pensions of people who are currently 20 years old will be dealt with by the legislation but, because the legislation applies only to the future, older couples who are approaching retirement will still be faced with the discrimination that has always existed because, in the past, they have not had the option of marriage. There is not a direct parallel.

11:00

Morag Driscoll: Such a piece of legislation would be exceedingly complex to draft, because it have to be restricted to a specific group. It would be necessary to consider the stage at which people would have entered into a partnership and whether they had been living together for three years. People in their 50s—even people in their 60s, 70s and 80s—form new relationships. The piece of legislation would also have to be UK-wide. We cannot comment on the issue, except to say that it would be a very big job.

Margaret Smith: I take on board the points that you have made about the practical problems. However, in my view the issue is not the bill or the fact that the Government does not want to deal with a relatively small number of people, a minority of whom would enter into civil partnerships and are in public sector pension schemes—many private sector pension schemes allow people to nominate who should get their pension benefits. I think that the issue is with the fact that a precedent would be set for groups such as mixed-sex cohabitees and single people who are paying into pension schemes and not receiving the same benefits as married people. Fear of setting such a precedent may stop the Government doing what I contend is the right thing to do and making this arrangement retrospective. Is that a reasonable premise?

John Fotheringham: We would still be prejudicing the interests of the people who are members of the fund and have been contributing to it. There would also be the evidential problem of establishing which long-term cohabiting same-sex couples would have registered their relationship had it been possible to do so. It is possible for people to live together heterosexually for years without getting married, because they choose not to do so. How could one prove that Jimmy and Bert would have entered into a civil registered

partnership? If they would not have done so, why should they have the benefit of the pension?

Margaret Smith: That is a good point.

The Convener: We must leave the matter there. I thank the Law Society for its time, evidence and expertise, which have been extremely helpful to the committee. As you know, we get only a short opportunity to examine the bill. We will start to draft our report today.

Our next witness is Professor Kenneth Norrie, who is head of the law school at the University of Strathclyde. I welcome you to the Justice 1 Committee and thank you for attending this morning's meeting. Two of your former students are on the committee. We will, of course, remember absolutely everything that you taught us. Any questions that we ask will be simply for the record.

I begin by asking you the same question that we put first to the witnesses from the Law Society of Scotland. Do you think that the Civil Partnership Bill is based on Scots law and does not import English law?

Professor Kenneth Norrie (University of Strathclyde): The bill as currently drafted is a remarkable achievement, as it ensures that the provisions that apply in Scots law in relation to marriage are replicated as much as is possible—and as much as is appropriate—for civil partnerships. In a number of provisions, there are slight differences between marriage and civil partnerships, some of which are appropriate and some of which are not. I have found only one provision that has inadvertently imported a rule of the English common law.

The Convener: Can you tell the committee what that is?

Professor Norrie: It is a relatively complicated rule. It is a question of recognition of capacity to enter into a relationship in a foreign country, and it is contained in what was clause 157—I do not know whether it is still the same clause.

The rule for marriage in Scotland is that, if a Scottish person in Scotland is of an age to marry, they can marry anywhere abroad as long as they are of an age to marry abroad. Their partner—a foreign person—has to satisfy their own country's age requirement, but they do not have to satisfy the Scottish requirement. For example, the age of marriage in Spain is 14 and, as a 45-year old Scottish person, I can go to Spain and marry a 14-year-old girl. However, the English rule is different. In English law, the age of marriage is 16, and if an English person wants to marry someone abroad, that person has to be over the age of 16.

Clause 157 imports the English provision into Scots law with the result that, although I, as a 45-year-old Scottish person, can marry a 14-year-old Spanish girl, I cannot go to Spain and enter into a civil partnership with a 14-year-old Spanish boy.

The Convener: But you think that that might be by accident rather than by design.

Professor Norrie: I do not know. I suspect that it is by accident. It is a rule of common law that is not contained in any statute. However, it may be by design if the feeling is that civil partnerships have to be limited to over-16-year-olds. The problem is that the bill imposes our perception of an appropriate age worldwide. There may well be reasons for that—I am not necessarily defending the Scottish rule over the English rule—but a distinction is drawn between marriage and civil partnership that I do not think is justified.

The Convener: Thanks for drawing that to the committee's attention. We will put questions to the minister later and we will have the opportunity to ask him about that.

Mr Maxwell: I would like to ask something out of curiosity before I move on to my main question. How would that provision of English common law be enforceable abroad?

Professor Norrie: It would not. It would lead to what one of your earlier witnesses described as a limping marriage—one that would not be recognised here, although it may be recognised abroad. As the witness correctly described it, that is a nightmare for individuals, as they are married in one country but not in another.

Mr Maxwell: I was interested in one of your first comments, about your admiration for the relatively good handling of the bill although it is a complex and difficult piece of legislation to have produced. I return to a question that I asked of one of the earlier witnesses. Would not it have been easier just to amend section 5 of the Marriage (Scotland) Act 1977 to provide an equivalence for civil partnerships? Could not section 5 of that act, which provides the legal impediment to marriage when both parties are of the same sex, have been removed?

Professor Norrie: It would have been much easier simply to have opened up marriage to same-sex couples. Clearly, that is not what either the British Government or the Scottish Executive wanted to do, although it would have been an infinitely easier approach. When the Netherlands opened up marriage to same-sex couples, all that it took was the removal of a single sentence from that country's marriage code. The bill creates a new institution.

It would also have been easier if, instead of replicating all the provisions for marriage, the draftsmen had simply written "marriage (or civil partnership)" into all the provisions. That would

have been a much easier approach, but the draftsmen decided not to do that—I presume on the instruction that it is better to show that we are creating a quite separate institution that is governed by a quite separate piece of legislation. That has made it more complex.

Mr Maxwell: It certainly is more complex. Do you accept that, although there are, of course, differences, in effect, civil partnership has equal status to marriage? Is it a case of the Scottish Executive and the British Government taking a stance for public relations purposes, because they do not want to be seen to be creating gay marriage, whereas the reality is that we are creating that?

Professor Norrie: That is a political question, rather than a legal question. There are different views on what the appropriate approach is, even within the gay and lesbian community. My own view, for what it is worth, is that it is important to recognise that same-sex couples are, in some small respects, different from opposite-sex couples. Therefore, there is a sense or a logic to creating a different institution for same-sex couples, which is focused on their needs and aspirations. That view is not universally shared among the gay community, but it is mine.

Mr Maxwell: What are the areas of family law in which you think that there is a justification for creating differences between marriage and civil partnerships?

Professor Norrie: Anything to do with sex. For example, opposite-sex couples have some peculiar, ancient rules relating to impotency. Someone can get out of a marriage—not by divorce, but simply by pretending that the marriage never occurred—if one of the parties is impotent. Impotency is defined in a very heterospecific way. Even if we were able to define it in a same-sex way, we would not want to do so. We would not want to design a relationship in which the sexual act was so definitional.

Another example is the presumption of paternity. If a married woman gives birth, there is a presumption that her husband is the father. Clearly, it would be entirely inappropriate and ludicrous to assume that the female partner of a woman in a same-sex relationship was the father of her child. Adultery is another example. It is a ground for divorce, but it is not a ground for the dissolution of a civil partnership. That is probably appropriate, because marriage is a sexual relationship, and the law has always seen it as such. I suspect that civil partners would not like to see their relationship purely as something so minor.

Mr Maxwell: Do you have any views about how the bill is constructed in relation to the development of case law on civil partnerships? As case law develops, do you believe that there will be or should be a straight read-across from the case law of marriage to the case law of civil partnerships?

Professor Norrie: That is a really interesting question, which ties in with a point that Margaret Smith raised with your previous set of witnesses. She asked what people living together as if they were civil partners would mean. There is a series of cases on what living together as husband and wife means, and the courts have developed that concept. We might develop a concept of living together as civil partners. There will be cases in which people attempt to define what that means. The two concepts might run in parallel, but I suspect that, because same-sex couples lead their lives slightly differently from opposite-sex couples, the concepts will separate. The really interesting question is about the extent to which the courts that are dealing with one scenario will look to cases in the other scenario.

Mr Maxwell: Is that likely? On the face of it, that seems an obvious thing to do, but is it?

Professor Norrie: I think that the concepts will separate. I would have much preferred the use of a gender-neutral phrase. The English Parliament invented a much more user-friendly phrase in the Adoption and Children Act 2002, which defines a couple as

"two people (whether of different sexes or the same sex) living as partners in an enduring family relationship."

That brings harmony to the concept and I would have much preferred it if that approach had been taken in the bill. However, it has not been, even in the English provisions.

11:15

The Convener: You said that the bill would create a new institution. What will be the legal status of that institution? Will it be a contract, as is the case with marriage, or will it be an agreement? Is there a difference between the two?

Professor Norrie: The civil partnership will be a new institution, but it will have the characteristics of marriage. Marriage is a contract, to some extent, although it is clearly not a contract in the traditional legal sense of the word because it is an agreement that creates a status that affects an individual's relationship, not only with the person with whom they enter into the agreement, but with the rest of the world. The new institution will do exactly that. A couple will have to agree to get together and to register their relationship and a status will be created that will affect the individual's relationship with the rest of the world.

The civil partnership will be a new, parallel institution and its status will, in effect, be the same as that of marriage. Legally, it will be different from marriage, but I wonder how many people will regard it as different. We have already seen the newspaper headlines that say that the bill will create gay or same-sex marriages. Same-sex couples will talk about "getting married". They will not ask each other, "Shall we register a civil partnership?"; they will ask, "Shall we get married?" They will use the word "marriage" in a non-legal, but perfectly legitimate sense.

The Convener: The Equality Network prepared a paper for the committee, in which it expresses concern that the bill does not expressly mention consent. Should consent be included in the bill?

Professor Norrie: My basic premise is that the bill should replicate the rules that are contained in the laws on marriage, which talk about an individual's capacity to consent. The bill does not mention consent, perhaps because most of the rules on consent have been developed in common law. It would be more helpful if the bill included rules on consent.

The Convener: We are grateful to you for sharing your expertise with the committee. The law of succession has been mentioned. For the record, will you briefly summarise the difference between prior rights and legal rights? Legal rights are not incorporated in the bill, but the Executive has told the committee that it is aware of that and is considering the matter.

Professor Norrie: Prior rights are statutory rights and they have been replicated in the bill. Legal rights are common-law rights; there is no statute that describes legal rights and they have not been replicated in the bill. In a sense, legal rights are more important than prior rights. Prior rights are rights that people have if a spouse dies without leaving a will, as many people do. If a civil partner dies without leaving a will, the surviving partner will have prior rights under the bill.

The law of Scotland provides that whether or not someone leaves a will when they die, their spouse has what are called legal rights, which entitle them to a third or half of the moveable estate—whether they get a third or half depends on whether there are children. That is an extremely valuable right. It is legally impossible for a person to disinherit their spouse; their marriage partner always gets a third or half of their moveable estate and there is nothing that the person can do about it. That situation is not replicated for civil partners. A civil partner who leaves a will is quite entitled to leave all their property to their child, their mother, their ex-partner, a charity or whomsoever they will. That creates a huge difference between civil partnership and marriage. I cannot imagine what the justification for that distinction would be; I hope that it is simply a matter of common law that has been forgotten about.

The Convener: As I said, we have been told that the Executive will address the question. In your view, what is the best way to remedy the omission in the bill?

Professor Norrie: The rule about legal rights is relatively simple: the surviving civil partner is entitled to half the movable estate, or a third of the movable estate if there are children of the deceased. The rule can be specified in one subsection.

Margaret Smith: On registration, there has been a lot of debate and discussion about the Marriage (Scotland) Act 2002, which amended the Marriage (Scotland) Act 1977 to allow marriage to take place at "approved places". The bill excludes civil partnership registration from "places of reverence", yet people can choose to have a religious wedding ceremony with civil marriage input, and ministers are able to perform such ceremonies. A political decision has obviously been taken not to allow that in the case of civil partnership; clause 89 provides that the place should be agreed with the local authority and that it must not be "a place of reverence". What level of discretion, if any, has been left with local authorities on where registrations can take place? Is there any discretion for registrations to take place in religious places of reverence? Also, it appears that there is a right of appeal against such decisions in the case of marriage but that there is no such right in the case of civil partnerships.

Professor Norrie: The words in clause 89 are so woolly that they stack up trouble. What does "a place of reverence" mean? Is Stonehenge a place of reverence? For a lot of people, it is. Church buildings are places of reverence, but what about buildings that are no longer churches, such as the Hub, the building that we are in today? Are such buildings places of reverence? Some religious people think that they are. The clause stores up the possibility of an infinite number of challenges by people who are irredeemably opposed to same-sex unions, who might challenge civil partnerships on the basis that they were conducted in places in which the legislation does not allow them to be conducted.

My main problem with clause 89 is the distinction that it draws with the marriage rule, which stops civil marriages from being conducted in places if they are incompatible with the religious belief of the place. For example, one could not hold a civil marriage on the doorstep of a Roman Catholic cathedral because to recognise civil marriage is against Roman Catholic doctrine. That satisfies the need not to interfere with the rights of particular faith organisations, but the clause that we are talking about is much wider and much

more woolly. It will lead to challenges by malign people who are against civil partners who happen to have registered their partnership in a place that one district registrar thinks appropriate but which another district registrar thinks inappropriate. It is a disaster.

Margaret Smith: To turn that on its head, does the fact that the clause is so woolly leave the way open for couples who wish to register as civil partners but are told that they cannot do so in a place that was formerly used as a church hall, for example, to challenge that decision? If so, how would they challenge the decision? What right of appeal would they have?

Professor Norrie: The appeals situation is important. If the marriage legislation contains appeal provisions, those must be replicated in the civil partnership legislation. If they have been omitted, that omission can be resolved relatively easily.

Same-sex couples can challenge the decision of the district registrar, but why should they have to raise an action if opposite-sex couples are allowed to marry in exactly the same place? If nobody in that particular church opposes either form of marriage, why should same-sex couples have to make more effort than opposite-sex couples?

Margaret Smith: I put to you the same premise that I put to the Law Society. Given the fact that we are in a dynamic situation that has altered significantly over the past 20 years and is likely to alter significantly over the coming 20 years, would it not be better simply to leave out prescription on this matter and to allow the situation to develop over time? Under the guidance from registrars, there would still be a requirement for consent on all sides, and people would not be able to enter into a civil partnership on church premises if the church did not want them to be there. Would it not be possible to leave the matter open, allowing dialogue to take place over a period of time so that the situation could evolve, without setting something in statute that, it might be argued, could infringe on someone's religious freedom?

Professor Norrie: A rule for marriage is set in statute that is relatively straightforward and which addresses religious sensitivities if those religious sensitivities exist. By far the easiest approach would be simply to replicate, word for word, what is in the marriage rule for civil partnerships. A church that disapproved of civil partnerships would not need to have anything to do with them and would not have to open their premises for them. If someone wanted to have a civil ceremony on that church's doorstep, they could not. The situation is exactly the same for marriage. It would be perfectly simple to do that.

Margaret Smith: Are you talking about regulation 7(2)(b) of the Marriage (Approval of Places) (Scotland) Regulations 2002?

Professor Norrie: Yes. That provides the rule for marriage.

Margaret Smith: You are saying that that allows people to enter into a civil partnership on religious premises as long as they had the agreement of the particular church.

Professor Norrie: It allows people to marry civilly in a church or church hall if the church accepts the concept of civil marriages. It allows churches that disapprove of civil marriages to say, "No. We do not want that here."

Margaret Smith: In Scotland, we have churches with specific views on divorce, polygamy and other matters. The state's law is not driven by that. We decide what is right for people across the board in society, and the churches are left to make up their minds on whether they sanction or bless that in their own places of worship and in relation to their own church law. My perception is that, in this case, statute is being set on the basis of the views of certain churches that are against the concept of civil partnerships in principle. There is no obligation on any church to enter into this—they can observe their own rules, just as the Catholic church does in relation to divorced people. It seems to turn the whole thing on its head if the whole of society and all other churches are being told what to do because there are certain churches that have a problem with civil partnerships. Is that correct? Is it a unique legal situation, or is it the case anywhere else?

11:30

Professor Norrie: You are absolutely correct. The provisions allow a member of one faith to tell a member of another faith, "You cannot have these ceremonies in your churches, even though your church approves of them." That is unique. The law is often sensitive to religious beliefs and feelings. It sometimes creates some quite peculiar rules for those of us who have no religion, which are intended to deal with people who do believe. For example, there is the concept of judicial separation, which is divorce in all but name. It satisfies people who do not believe in divorce but who, nevertheless, want a judicial statement that they are allowed to separate. Those who do not have a difficulty with divorce do not need to go down that route, but the law allows people who do have a difficulty with divorce to do so. That shows appropriate sensitivity to particular beliefs, although it does not impose it on other faith groups, which is what clause 89 does.

Margaret Smith: Would that be unique in Scots law?

Professor Norrie: I know of no other example.

Margaret Smith: Do you have any comments or concerns about the lack of ceremony involved in what is described when two people enter into a civil partnership?

Professor Norrie: I have no concerns whatever about that. The law does not lay down any particular ceremony that must occur for marriage. It is for different churches to decide what ceremony is appropriate for them, and it is for different district registrars, in negotiation with the parties, to decide what is appropriate in each case. There are, of course, some requirements: both parties must be present; both parties must give consent; and there must be two witnesses. That is all replicated in the bill. The lack of a legal requirement for a ceremony simply reflects what exists in respect of marriage.

Margaret Smith: Have you no worries about the fact that we are discussing a group of people who have historically been discriminated against, or about the possibility that different approaches may be taken, which might to an extent reflect that discrimination?

Professor Norrie: Different approaches may be taken, but those might reflect individual wishes, needs and aspirations. Same-sex couples have been undergoing ceremonies of commitment for decades—that is not going to stop. I suspect that the situation will be quite similar to that which applies to Muslim or Hindu marriages now. Those marriages have no legal effect. Members of ethnic minorities in Scotland have their religious marriages, which reflect their religious beliefs and their social aspirations, then they go to the district registrar and sign on the dotted line—they do what is legally necessary. They have no problem with that. Same-sex couples ought not to have a problem with it, either.

Marlyn Glen: I turn to provisions for children. Could you comment on the apparently different definitions of "child of the family" in marriages and civil partnerships?

Professor Norrie: Yes. I hope that that difference is an accident, and I hope that it came about because somebody was using an old version of the marriage statute.

I heard the question being asked of the Law Society witnesses, and I am not so concerned about the matter of the age limitation, which was answered. There is, however, still a difference. The bill states:

"'child of the family' means a child ... who has been accepted by both civil partners as a child of the family".

In all existing marriage legislation, that is expressed as children who are "treated" as members of the family. The reason why I think that might be a mistake is that, until 1995, all the various bits of marriage legislation mentioned children who were "accepted". The Children (Scotland) Act 1995 changed all that—except in one situation. It changed the word from "accepted" to "treated". Those two words are different. To accept is a state of mind; to treat is an act.

When there is a dispute, it is always much more difficult in a court of law to establish a state of mind than it is to establish that an act has been committed. There are often witnesses to an act, who can say, "Yes, I saw that person acting in that way." To use the word "accepted" makes it more difficult to establish that the child is entitled to protection than it would be if the word "treated" were used.

Michael Matheson: Clause 126 deals with the civil partner of an accused being called as a witness. Currently, there are differences between civil and criminal law with regard to a spouse giving evidence. Are the provisions in the bill similar to those in current legislation on married couples?

Professor Norrie: There is different legislation for criminal procedure and civil procedure. The bill more or less replicates the criminal provisions in the Criminal Procedure (Scotland) Act 1995. That is fine and is no cause for worry. However, the bill omits the provisions that relate to civil court cases. There is a much more limited spousal privilege in civil cases, as laid out in the Law Reform (Miscellaneous Provisions) Act 1949. Those provisions have not been replicated in the bill. The relevant section of the 1949 act is not particularly easy, and the extent to which it applies has always been open to doubt, but the fact remains that we have limited spousal protection in civil cases.

To give an example, the spouse in a civil case does not need to answer questions about sexual relations between the parties; he or she can just refuse to answer. That provision is not replicated in the Civil Partnership Bill. Usually such a situation arises only if there is a question of paternity, which obviously will not apply with civil partners because they will not, although they may have children, both be parents of the child. There will be no question of that. The legislation is wider than that and could apply in any case in which sexual relationships between the parties were relevant to the court case. Those provisions need to be replicated in the bill. As far as criminal law provisions are concerned, the situation is more or less the same.

Bill Butler: Good morning, professor. You will have heard the question on subordinate legislation that I asked the Law Society of Scotland witnesses. A search of statutory instruments found 800 results that referred to "spouse", and there were 35 results for Scottish statutory instruments.

Should subordinate legislation that makes provision for spouses be amended to include civil partners?

Professor Norrie: Yes. I start from the position that civil partners ought to have the same rights and be subject to the same duties and responsibilities as spouses, unless there is some very good reason why the rule—whatever it is—is inappropriate for them. However, the starting point must be equality. It would be difficult and time consuming but relatively straightforward to go through all the provisions and simply add in after the word "spouse" the phrase "or civil partners" in brackets and thereby include civil partners, unless there is some good reason why it would be inappropriate for the legislation to do so.

Bill Butler: So you would just include that phrase in parentheses in the appropriate legislation.

Professor Norrie: Yes—to do so would be essential. Every jurisdiction in the world that has introduced the institution of civil partnership has done that. The legislation of the Canadian provinces, which I am quite familiar with, amended 800 or 900 pieces of subordinate legislation without differentiation.

Bill Butler: You said in your reply that you would amend the subordinate legislation where appropriate, which would be in almost every case. Can you think of any examples in which it would not be appropriate?

Professor Norrie: No—in subordinate legislation I cannot think of an example, because most subordinate legislation deals with tax, social security and such issues. It would be iniquitous to tax same-sex couples differently from opposite-sex couples. As I said earlier, the justifiable differences tend to revolve around sex and the sexual act, which tend not to be dealt with in subordinate legislation.

Bill Butler: As a former member of the Subordinate Legislation Committee, I can confirm that.

The Convener: I asked the Law Society of Scotland about the grounds for dissolution and what will happen in the event of a partnership breaking up. Do you have any views on whether the grounds for dissolution of a partnership should be the same as the grounds for divorce? Does that matter?

Professor Norrie: Again, I start from the view that the rules for civil partnership should be the same as those for marriage unless there is a good reason why they should not be the same. Adultery has been omitted as a ground for dissolution; I think that adultery ought to be abolished from the law of marriage. In the most recent family law consultation, the Scottish Executive seems to have decided to keep adultery as a ground for dissolution of marriage. That may be too sensitive to religious belief—although not the Roman Catholic belief because, of course, Roman Catholics do not believe in divorce at all, which means that adultery is legally irrelevant for them. I have problems with adultery as a ground for dissolution and I would like to keep it away from same-sex unions, because that would define the make or break of the union in sexual terms. That may be appropriate for non-gay people—I do not know—but it is not appropriate for gay and lesbian people. I am content that adultery has not been included as a ground for dissolution.

Other than that, the grounds for dissolution should be identical. The grounds in the Marriage (Scotland) Act 1977 are likely to be changed in a year or so—we just have to live with that. The principle of equality tells us to enact now to reflect the provisions on marriage and that, if those provisions are altered, we should alter the civil partnership legislation shortly thereafter. That legislative process would be time consuming. It would be much easier if amendments on marriage and divorce were added to the bill, but that will not happen.

The Convener: There was a suggestion in the consultation on family law that we may not need the principal of judicial separation. That principle is not in the Civil Partnership Bill—

Professor Norrie: It is.

The Convener: Right. Do we need it?

Professor Norrie: No, of course not. As I said in answer to an earlier question, judicial separation is designed for people who do not approve of divorce because of their religious beliefs. It is self-evident that a church that does not approve of divorce will not approve of civil partnership. I cannot imagine a religious faith existing in Scotland that approved of civil partnership and wanted people to enter into it, but that would not allow them to escape from it. Judicial separation is designed to deal with a religious sensitivity that is entirely irrelevant to same-sex couples. I would get rid of the provision, because it is totally unnecessary.

The Convener: I assume that you think that the provisions on the division of property after dissolution should be exactly the same as those for marriage.

Professor Norrie: They should be, and as far as I can tell from the bill, they are.

The Convener: I had concerns because the consultation talked about a 50:50 division, whereas we talk about a fair division, but I think that we have clarified that that is what the bill is

driving at. If a person can show an economic advantage, the situation will be identical.

Professor Norrie: That has been clarified.

The Convener: I would like to return to a question that my colleague asked earlier. I am sorry to confuse matters, but we have also considered the Gender Recognition Bill, which obviously has a connection to the Civil Partnership Bill. If someone acquired a new gender and then moved their marriage on to a civil partnership, would they still be able to claim their division of a pension for the duration of the marriage, albeit that the divorce was on the ground of acquired gender?

11:45

Professor Norrie: I do not know whether the bill makes that clear. The position that you described is the situation as it should be. Another problem with the requirement under the Gender Recognition Bill for divorce before a recognised new gender can be acquired is that the divorce court can divide up the matrimonial property. It would be extremely clumsy if one partner decided on divorce that they wanted to claim a financial readjustment, only after which would they consent to re-establishing the relationship as a civil partnership. The process is unfortunately clumsy. That arises from the British Government's absolute requirement that civil partnerships be limited to same-sex couples.

Can I make a different point on that issue?

The Convener: Yes—but slowly.

I do not want to go into the Gender Recognition Bill, which is another matter. I agree that the arrangement is clumsy and could be simpler. We were a bit concerned about the connection to civil partnerships. Are we right in thinking that the people about whom we are talking would not lose the pensions or rights that they had in marriage as a result of acquiring a new gender and entering a civil partnership?

Professor Norrie: I do not know.

The Convener: You wanted to make another point.

Professor Norrie: A much easier way of interlinking the Gender Recognition Bill and the Civil Partnership Bill would be through converting a marriage automatically into a civil partnership or vice versa once a partner had changed their gender.

Clause 156 will require people in foreign registered partnerships to be of the same sex before they will be recognised as registered partners here. The Netherlands and Belgium—and Germany, I think, although I may be wrong—allow opposite-sex couples to enter into registered partnerships. That has been remarkably popular in the Netherlands, where more than one third of civil partnerships have been entered into by opposite-sex couples.

Clause 156 would mean that, if a Belgian opposite-sex couple in a registered partnership came to Scotland, they would not be registered partners here, because they were of opposite sexes. If that couple were not in a registered partnersip here, what would they be in? The bill does not say that such people are married. They are not married, because under their country's system, they have decided not to marry. That is another gap in the bill. It does not tell us what an opposite-sex civil partnership from another country will be in Britain. All we are told is that such an arrangement will not be recognised as a civil partnership.

The Convener: Could that be remedied in European law?

Professor Norrie: I am not sure whether that would be the appropriate route to take. Recognition in this country of a relationship concerns domestic law or, at best, international private law. We have a set of rules to recognise marriage, but the people whom I described would not be married. We have a rule for recognising civil partners that would exclude such couples, who will be in a limping relationship, which is always a nightmare.

The Convener: I confess that I have heard the term "limping relationship", which keeps cropping up, for the first time today.

Mr Maxwell: When Margaret Smith asked her questions, I thought about the places of reverence issue. In a remote rural area, such as an island community in remote north-west Scotland, the same premises might be used for many functions because of a lack of facilities. A village hall could be used for all sorts of ceremonies, some of which would be religious, and for parties and village social activities. In such circumstances, would it be the case that that hall, which would be the only place available for a civil registration ceremony to take place, would be excluded, because of the "place of reverence" issue, given that it was also used for religious ceremonies?

Professor Norrie: We could have a case where someone from Cornwall with a religious belief had a claim to stop a civil marriage going ahead in a hall on a remote island in the northern or Western Isles, because they regarded it as a place of reverence given that religious ceremonies were conducted there. What is worse is that, even if the civil marriage went ahead, the person from Cornwall could go to a Scottish court and say, "That civil partnership is invalid, because the

ceremony was conducted at a place that I revere", which would be ludicrous.

Margaret Smith: I seek quick answers to a few questions that you probably heard us ask the witnesses from the Law Society of Scotland. On the principle of equality, should there be equal treatment for same-sex couples who are cohabiting but who have not registered a civil partnership? Are there gaps in the bill in that regard?

Professor Norrie: There are a lot of gaps, some of which have already been identified. Every jurisdiction that has introduced civil partnerships has gone through its rules of cohabitation with a fine-toothed comb and has amended every single one to include same-sex couples who do not register their partnership and has put them in exactly the same position as opposite-sex couples who do not register their partnerships as marriage.

Margaret Smith: Do you think that we would have an ECHR problem if we did not do likewise?

Professor Norrie: I think that there would be a clear ECHR problem, because we would be treating cohabitants of the same sex differently from cohabitants of opposite sexes. The British Government would be obliged to show that it was necessary in a democratic society to treat them differently—which it is not.

Margaret Smith: I turn to the question of the validity of the civil partnership. Do you think that we should include the provisions of section 23A of the Marriage (Scotland) Act 1977 in the Civil Partnership Bill to cover the question of mistakes?

Professor Norrie: Yes, we would certainly have to do that. Section 23A is designed to preserve a marriage that might be challengeable because there has been a little flaw, such as that the marriage schedule says that the couple will be married in one place, but they marry next door, which is not relevant to whether a marriage should be regarded as valid. Without an equivalent to section 23A, the example that I gave of the person from Cornwall coming up to challenge a partnership could apply.

Margaret Smith: My final question refers back to Jimmy and Bert and their 20-year relationship. Do you think that the survivor should be able to get the other's pension retrospectively?

Professor Norrie: You have identified the flaw using the analogy of unmarried couples, but Mr Fotheringham was right to say that we would be affecting the rights of other pension contributors. To me it is a question of balancing the disadvantage to other pension contributors with the disadvantage to Jimmy and Bert, who have lived together for 20 years. In that scenario, the balance of disadvantage comes down heavily against Jimmy and Bert and there should be some sort of retrospective action. That is complicated; the whole bill is complicated, but it is not beyond our capabilities to deal with it. We would have to produce a rule whereby couples claiming retrospectivity were able to claim that they had been living together as if they were civil partners from a particular date. The onus would be on them to show how other people perceived them, and to say whether they shared houses and whether their lives and economies were melded together in the way that married couples and civil partners meld theirs together. If they were able to prove that, the balance would clearly be in favour of allowing them retrospective pension rights.

Margaret Smith: Indeed, as you said earlier, many people have blessings for their relationships, even though there is no legal basis to them.

Michael Matheson: If the UK Government were not to introduce the legislation, would it be in breach of the European convention on human rights? If so, on what basis?

Professor Norrie: It would not yet be in breach of the ECHR. We are talking about a new institution to deal with same-sex couples in this country. If the British Government did not introduce the legislation, it would be among a majority of countries that are member states of the Council of Europe that do not have civil partnerships. The European Court of Human Rights in Strasbourg is unlikely to hold the British Government in breach of the ECHR convention for doing what this country has always done and what the majority of countries still do. When I said that we are "not yet" in breach, I mean that more countries every year introduce such legislation.

It is the same in respect of gender recognition. In the days when the United Kingdom was held not to be in breach by refusing to recognise a person's new gender, it was in the majority. By last year, when the European court changed its mind, and held that Britain was contravening the ECHR by refusing to recognise a person's new gender, it was in a stunning minority, involving only the UK and Liechtenstein. In five or 10 years, the majority of countries in Europe will recognise civil partners. At that stage, countries that do not will have a much more difficult task in justifying their refusal to treat same-sex couples equitably. At the moment, however, even though I might be disappointed to say so, I do not think that the UK would be held to be in breach of the ECHR by refusing to introduce the bill. Where we are incompatible with the rest of Europe is on cohabitants; we have rules for cohabitants, which need to be interpreted in a way that does not discriminate.

The Convener: We have run out of time. I thank Professor Norrie for his evidence. It has been extremely useful and we are grateful for his

expertise. We are even more confused now than when we started off. I did not mean that. You have given us a lot of information for our report.

Minister, would you mind if we took a break before we get started?

The Deputy Minister for Justice (Hugh Henry): No, that is fine, convener.

11:58

Meeting suspended.

12:04

On resuming—

The Convener: I welcome our final panel of witnesses. Hugh Henry, the Deputy Minister for Justice, is here with officials from the Executive: Claire Monaghan, who is head of the family law team; Kirsty Finlay, who is senior principal legal officer; and Louise Miller, who is head of private international law. I also welcome Paul Parr, deputy registrar general in the General Register Office for Scotland. I apologise to you all for the late start time; this has been a long meeting. We will go straight to questions.

Margaret Mitchell: Good morning—or rather, good afternoon. Will you briefly outline the reasons for adopting the Sewel motion approach to the Civil Partnership Bill?

Hugh Henry: We are dealing with a complicated situation in which some Scottish issues and provisions are firmly intertwined with a number of complex reserved matters. Proposals on civil partnerships did not feature in the Executive's legislative programme, so when the bill was proposed we regarded the Sewel motion as an appropriate way of introducing legislation for which there would not otherwise have been a slot. More important, we considered that that approach would enable Scottish provisions to be dealt with at the same time as fundamental issues that are the responsibility of the United Kingdom Government. The bill is a good example of a situation in which a Sewel motion is the appropriate approach, which will enable us to make necessary changes to Scots law fairly quickly. If we did not take that approach, we would find ourselves in a complex and unwieldy legal situation in which we would have to introduce our own legislation and try to harmonise it with what is happening in Westminster.

Margaret Mitchell: What will happen if new provisions that deviate considerably from what is agreed to in the Sewel motion are included in the bill during its passage through Westminster? Will the Executive return to the Parliament with a further Sewel motion?

Hugh Henry: Yes. In line with the commitment that we have given in relation to other issues, if anything significant is agreed to at Westminster, we will bring the matter back to the committee for consideration.

Margaret Mitchell: That is helpful.

The Convener: If it is necessary to bring a matter back to the Parliament, how will that happen? What will be the timing? Will our consideration have to take place at a specific point in the Westminster timetable, before the bill receives royal assent?

Hugh Henry: As soon as an amendment at Westminster is agreed to with the net effect that the bill deviates from what the Scottish Parliament has agreed, we will bring the matter back. Clearly, we cannot anticipate what will happen, but I assure you that, as soon as we become aware of anything significant or fundamental, we will bring the matter back.

Mr Maxwell: For clarification, will you define what you mean by "anything significant"?

Hugh Henry: I mean anything that fundamentally changes the nature of Scots law or that will have an impact that the Parliament has not considered. We will not bring back to the Parliament minor or technical amendments that do not change policy. However, if, for example, a provision is agreed to that unintentionally imports aspects of English law into Scots law or that deviates from what we have set out in relation to our consultation, we will bring the matter back.

Mr Maxwell: The committee heard evidence today that an aspect of English common law on marriages that take place abroad might have an impact on Scots law, probably as an accidental and unintended consequence of the bill being drafted in London. Do you regard that as a significant matter that it would be appropriate to bring back to the Parliament?

Hugh Henry: Yes, if that is the case. However, our understanding is that that is not the situation. We will be happy to clarify the matter—perhaps Louise Miller can do so now.

The Convener: The point that Stewart Maxwell raises was made by Professor Norrie. Scots law recognises the age of capacity in a foreign state, whereas English law does not.

Louise Miller (Scottish Executive Justice Department): There has not been an oversight in the drafting. To explain why the provisions on overseas relationships have been drafted in the way that they have been, I will probably need to explain a little of the background. That area of the bill does not mirror the rules that apply to marriage. A policy decision was taken to have a different starting point.

What we call the antenuptial domicile rule applies to marriages abroad. I will not go into the technicalities, but "domicile" basically means the place where someone's long-term home is. If a couple who get married abroad come to Scotland and a decision has to be taken about whether their marriage can be recognised, a court will decide on their capacity to marry on the basis of the law of their domicile at the time of the marriage.

For example, if a Scotsman marries a French woman in Hawaii, his capacity to marry her is governed by Scots law and her capacity to marry him is governed by French law. Professor Norrie is right: the way in which that rule works means that someone who is more than 16 has capacity according to Scots law, so their marriage will be recognised in Scotland even if the other party is only 15, provided that the other party's country allows people aged 15 to marry.

The Civil Partnership Bill does not replicate the antenuptial domicile rule. Under clause 155, the courts would not be concerned with the parties' domicile at the time when they entered into the civil partnership. Capacity would be governed by the law of the country of registration. That is a completely different rule. The bill went down that road because, although marriage is a worldwide institution—everybody has it—the majority of the world's population live in countries that have no concept of civil partnership. Therefore, by definition, the law of those countries will not confer any capacity on people to enter into a civil partnership.

A decision was taken that it would be too onerous to apply the laws of the parties' domiciles to their capacity to enter into civil partnership. If we applied those rules, we would not recognise many overseas couples, so we decided on the alternative route, which was to apply the law of the place of registration instead.

That instantly raises a problem about our domestic eligibility rules—what does one then do to prevent 15-year-old Scots from going abroad and entering into civil partnerships in other places? Does one have to recognise those relationships? That is why in clause 157 we refer back to the domestic eligibility rules in clause 82, which in turn say that, to enter into a civil partnership in Scotland, both partners must be 16.

It would have been possible to draft the bill differently. We could have included law of place of registration plus the Scottish domestic rules, which cannot be evaded, plus another get-out that says that, if the Scottish partner is over 16 and the other is not, that is okay. We could have done that, but that would have been a complex provision and the rules have to be applied in the real world by decision makers who decide whether people are entitled to things. As we do not have the antenuptial domicile rule—we have a different starting point and the rules are not the same anyway—we decided not to draft the bill in that way. That is the background—it was not an unwitting importation of English common law.

Mr Maxwell: Thanks, that clears up Professor Norrie's point. [*Laughter.*]

Margaret Smith: We will have to read that over several times in the *Official Report*.

Mr Maxwell: You have clarified that the provision was the result of policy intention rather than an accidental importation of English common law.

To what extent does the bill give civil partnership equal status to marriage? The provisions for both are very similar.

12:15

Hugh Henry: Civil partnership is a different status and relates to people living in different circumstances. We have not created marriage by another name, but we recognise that there are rights and responsibilities in a relationship between committed people. We believe that it is appropriate that such people are not just given the rights and are then able to exercise the responsibility, but that they are given a degree of protection and support that does not currently exist. We are making a different proposal for people living in different circumstances.

Mr Maxwell: I accept that civil partnership is different, but given that many of the provisions have been cut and pasted across and that the intention is to provide some degree of equality of rights and access to partnership—although we do not call it marriage—does the bill create an equal status?

Hugh Henry: It creates a different status.

Mr Maxwell: Is that status equal?

Hugh Henry: That is for those who exercise their rights under the bill to determine. As for a legal definition—if that is what you are looking for—equality of status is not possible. We are talking about people living in a different type of relationship who, for the first time, will have legal rights conferred on them appropriate to their circumstances. It is neither here nor there to argue whether the status is equal—people will draw their own conclusions. The important aspect is the element of commitment and the legal protection that is given to people who make that commitment.

Mr Maxwell: I wonder about the non-religious nature of civil partnerships and civil ceremonies. What were the policy considerations behind the decision to make the nature of civil partnerships specifically non-religious?

Hugh Henry: We are not legislating to create marriage.

Mr Maxwell: Surely you accept that people of faith have a right to express that faith in all matters in their life, including in civil partnerships.

Hugh Henry: Yes. Those who wish to have a religious blessing can take steps to have that. However, we would be creating marriage if we went down that route and we have said that we are not creating marriage. We are creating a legal, civil recognition of a relationship between two people and we are giving rights, responsibilities and protection. To introduce a religious dimension would bring us into a totally different scenario and one that we do not support.

Mr Maxwell: Why do you not support it? Why has the Executive decided to oppose, for want of a better term, gay marriage? What is the problem with using the term "marriage" rather than "civil partnership"?

Hugh Henry: Civil partnership registration is a secular process. We are trying to address needs, rights and responsibilities; we are not talking about introducing different dimensions or forms of marriage, because civil partnership registration is a secular and legal recognition of the situation in which many couples live. We feel that that recognition, because it is secular and legal, is the appropriate way in which to proceed. In policy terms, we do not believe that interfering with the notion of marriage and creating a different form of marriage would be an appropriate way of advancing the rights of people whose rights have been overlooked for too long.

Mr Maxwell: The Executive's policy is to create a different status—the new status of civil partnership—from that of marriage. Given that there is a difference between those two states, are there any areas of family law in which the justification for that different status is acceptable? In what way do you think the differences are acceptable in terms of family law?

Hugh Henry: If you are asking whether there are differences between civil partnerships and marriage, the answer is that there are. There are differences in relation to dissolution, adoption, religious ceremony and habit and repute.

Mr Maxwell: Yes, but I am asking you what the justification behind those differences is.

Hugh Henry: For example, in the case of a marriage, adultery could be a ground for divorce, but, for a civil partnership, adultery would not be an appropriate ground for dissolution, because the definition of adultery is concerned with sexual infidelity in the context of sexual intercourse between a man and a woman. For civil partnerships, it would be possible to talk about sexual infidelity as unreasonable behaviour, which could be a ground for dissolution. That is one area in which there is a clear difference.

The Convener: I will ask some questions on legal rights. I welcome the bill. The similarities in protection, rather than the differences, are notable, but there are some areas that the Executive has already identified as being in need of amendment. One of those concerns legal rights. I do not know whether you heard Professor Norrie's evidence, but he suggested that the anomaly in relation to those rights could be rectified simply by making provision in statute to ensure that the surviving partner is entitled to receive a third or half of the moveable estate on the death of the other partner. I understand that the problem stems from the fact that legal rights are a matter of common law rather than statutory law and that that area of law is complex, but do you agree that the problem could be rectified by simply putting in statute the common-law provisions that already exist?

Hugh Henry: Our intention is to find a way of creating legal rights. We are still considering the issue that you have raised—I believe that Cathy Jamieson, the Minister for Justice, has written to you about it. As I think her letter indicated, that area of the law is complex and we need to consider carefully how the provisions in common law can best be represented in the Civil Partnership Bill, but we will certainly follow up the matter and come back to you.

Kirsty Finlay (Scottish Executive Legal and Parliamentary Services): Our parliamentary draftsman is in the process of drafting clauses, which will be before the committee before too long.

The Convener: So it is fair to say that the Executive acknowledges the importance of the provision of legal rights.

Kirsty Finlay: Absolutely, yes.

Marlyn Glen: I want to ask about the prohibited degrees of relationship, which appear to be as complicated as I thought that they would be. The forbidden degrees of relationship are not on a par with those for marriage, nor do they follow the rules of logic. I understand that there is disagreement on the issue. The Equality Network has suggested that half-blood relationships should be included, whereas the Law Society of Scotland wants to remove consanguinity conditions all together. Could you go through the issues again?

Hugh Henry: A number of issues need to be examined. When it comes to marriage and the potential for procreation, significant issues need to be considered in relation to who can and cannot enter into a relationship and have children. In the case not just of marriage but of civil partnerships, other social conventions need to be reflected. The

issue is not just about eugenics and it is not just about having children; it is also about what people think is appropriate and inappropriate. That is the case for marriage as well as for civil partnerships.

People with certain relationships are prohibited from marrying not necessarily because there might be a damaging consequence in relation to having children, but because socially people would frown on such a relationship—for example, a man cannot enter into a relationship with his ex-wife's daughter from a previous relationship. That is as much about social convention and concerns that flow from the closeness of a relationship over the years as it is about any physical consequences. The issue is complicated. We have tried to define it as best we can. It is fair to say that we have tried to reflect some social values and social norms as much as anything else.

Marlyn Glen: I accept that the area is complicated and that there are different opinions, but am I right in thinking that for marriage half-blood and adoptive relationships are explicitly excluded, whereas for civil partnerships that is not the case? I wonder why there is a difference.

Hugh Henry: We think that the issue is properly covered, but we will take it away and consider it again. If we did not adopt some of the same protective measures, we could have a situation in which a woman who had two children from a previous relationship—a boy and a girl—got married and, if that marriage broke up, the man from that marriage could enter into a civil partnership with the son of his ex-wife, although he would be unable to marry the daughter of his ex-wife.

Marlyn Glen: You are saying that there should be parity.

Hugh Henry: Yes, because without it certain anomalies could be created. However, we will examine the issue that you have raised to see whether there are any unforeseen consequences.

Margaret Smith: I have some questions on the registration of civil partnerships. The Marriage (Scotland) Act 2002 amended the Marriage (Scotland) Act 1977 to allow marriages to take place in approved places. However, statutory regulations specify the kinds of places that are to be approved and the considerations that are to be taken into account by the local authority in doing so. Crucially, the Marriage (Scotland) Act 2002 included a provision to allow appeal to the sheriff against a local authority decision. By contrast, clause 89 of the Civil Partnership Bill provides that the place should be agreed with the local registration authority, but it excludes places of reverence and makes no provision for statutory regulation or appeal.

What assessment has been made of the level of discretion that local authorities will be given for agreeing approved places and for the types of ceremonies that might take place? My understanding is that the laws on civil marriage do not provide details about the ceremony that should take place, so we have exactly the same situation in the Civil Partnership Bill. There will be a need to be creative and things will evolve over time. Given that the bill deals with a group of people who are still in some cases discriminated against, are you content that local authorities will not be able to discriminate against people while still being able to act in a way that suits them?

12:30

Hugh Henry: A number of different issues are contained in that question, but let me deal with the last one first. Yes, we believe that the process will work in a non-discriminatory way. Technically, one could argue that, currently, there is nothing to prevent a local authority from deciding not to allow a ceremony for civil marriages. Through the registrar general, we issue guidelines on the parameters within which such ceremonies should be conducted and we intend to do that for civil partnerships. The alternative would be to be prescriptive for civil partnerships, but that would involve changing our approach so that we were prescriptive about marriage ceremonies as well.

I believe that the present situation works well. The ceremonies have evolved over the years and we have not legislated for them. It is not for me to say how registrars and those who participate in civil partnerships or local authorities will want things to develop. We believe that sensible arrangements will be made if appropriate guidelines are issued, so I would not be unduly worried about potential discrimination. If the question is whether such discrimination could happen in theory, the answer is yes, just as in theory it could happen at the moment. However, that is a matter of speculation.

I accept that whether there should be provision for an appeal is an issue. We believe that judicial review would be an option, but we will certainly examine any issues that the committee raises and consider whether we need to instruct that there should be a specific appeal provision. It is not our intention to create a problem or anomaly. We think that the judicial review process would be satisfactory, but we will consider the issue again and if, after reflecting on the committee's view, we believe that something needs to be done, we will come back with something.

Margaret Smith: I welcome that.

My second question has already been touched on by Stewart Maxwell. The Executive and the

Government have obviously taken the position that civil partnerships should be secular.

Before asking my question, let me ground it in the fact that 86 per cent of responses to the Executive's consultation were in favour of civil partnerships. Also, last year's social attitudes survey showed that only 33 per cent of those who identified themselves as Roman Catholics were against gay marriage—not civil partnerships, but gay marriage. Although the majority of churches take the view that they would not officiate at gay marriages, the churches are split. Churches such as the Metropolitan Community Church, as well as the Quakers and certain reformed synagogues, officiate at gay marriages. We heard from Professor Norrie this morning that accepting the views of certain religious groups and putting them into statute is a unique act in Scots law. We do not do that for issues such as divorce, polygamy or abortion. For those issues, the state takes a legal position and the church falls in with that, whereas, for this bill, the position is the other way round.

Do you agree that, given that the bill deals with a dynamic situation that will change over time, it might be better to delete clause 89(2) and leave the situation open so that dialogue can continue over the decades with the churches and others about something that will evolve, rather than be prescriptive now by putting in place a provision that states that a civil partnership cannot be registered in "a place of reverence" if a gay marriage is not allowed in a church? Would it not be better to leave the situation a little bit more fluid so that it can evolve over time, with the consent of the churches, rather than allow one or two churches to dictate to the whole country what happens?

Hugh Henry: To some extent, the law needs to be precise, but that is not to say that the bill cannot be amended. If your position is that we should protect ourselves and wait to see what social attitudes evolve, there is nothing in the bill that would prevent our changing aspects of Scots law in future legislation. Even within the lifetime of this parliamentary session, if appropriate changes needed to be made, or if we wanted them to be made, we would have the right to make them. Indeed, there is nothing to stop us coming back with changes to Scots law that we believe are appropriate in future parliamentary sessions. You said that 86 per cent were in favour of civil partnerships, but we need to put that in context. The figure refers to 86 per cent of those who responded, which is not necessarily the same as 86 per cent of the total population. I simply make that comment in passing.

On Margaret Smith's reference to clause 89(2) of the bill, registrars are not able to conduct ceremonies in churches. We are not amending or changing the current situation; we are bringing in a new relationship and a new set of rights and responsibilities. If clause 89(2) was removed from the bill, registrars would be able to go into religious settings to conduct ceremonies for civil partnerships, but they would not be able to do so for marriages, because registrars cannot conduct marriages in religious settings at present.

Margaret Smith: With respect, you have just said in answer to my colleague that you are not necessarily replicating marriage and that a civil partnership is not marriage but a totally new set of circumstances. A civil partnership might have some crossover with marriage in terms of rights and responsibilities, but the fact that registrars are currently not allowed to go into churches to officiate is irrelevant. There is no need for registrars to do that because the law allows ministers to officiate at a marriage—which is itself both a civil and a religious state—in a religious and a legal sense. However, advocates of religious freedom would argue that there is a need for registrars to be able to officiate in religious settings for the new civil partnership that the bill will create.

Hugh Henry: No. We are not taking away or changing any of the current arrangements in relation to registrars and religious organisations. We are creating a new status. We are not creating anything that could be construed—or misconstrued—as marriage. We are creating a secular civil relationship. We are not creating a religious relationship. If people want to have a religious blessing on top of the secular acknowledgement that society would be able to give, it would be entirely for those individuals and any willing minister of religion to make the appropriate arrangement, which is different from conferring a legal ability for that to happen.

We are introducing formal steps. The couple would sign the civil partnership schedule in the presence of an authorised registrar and two witnesses. The ceremony would be carried out in a registration office or a place agreed by the couple and the local authority. We do not intend to introduce any measures that would authorise a registrar to conduct a ceremony in a place of religion. This issue is specifically in the civil sphere and that is where we think it should stay.

Margaret Smith: I do not think that anybody asking these questions—certainly not me—is suggesting that a civil registrar should be able to go into a place of worship or reverence and not only watch over the legal signing but conduct a full marriage ceremony. Earlier, the example was given of a church hall being the only place in a village on an island where a community gathering could take place. I am suggesting that a registrar should be able to conduct the same part of the

ceremony there as they would in a registrar's office, after which a blessing or whatever could immediately take place, conducted by a separate person. However, the situation is not the same as a marriage. You have decided that ministers will not be able to undertake such a ceremony, even if they and their churches want to. Because of certain people's religious beliefs, you have taken a decision to go down a secular route. Other people with religious beliefs are actually quite relaxed about undertaking these ceremonies, but you are not happy that they should do—

The Convener: Can I just stop you there? We are getting into repetitive arguments here. Minister, is your answer going to be any different from—

Margaret Smith: I am not asking for registrars to be able to conduct a full ceremony; I am simply asking for registrars to be able to conduct the legal part—the signatures and so on—and then go and do what they like.

Hugh Henry: With your permission, convener, I will ask Paul Parr to clarify some of those points. However, first I say, yet again, that we are creating a new civil, secular relationship that gives protection, rights and responsibilities that did not exist previously. We are not being dictated to by the churches. What we have done is not—I repeat, not—because certain churches have said that they do not want certain things to happen. We believe that the proper way to give the recognition that is required is through a civil and secular process, conducted by the registrar. That has nothing to do with ministers of religion.

Paul Parr (General Register Office for Scotland): I will comment on a specific point of detail, going back to the earlier reference to a village hall. When we were working on the regulations for the Marriage (Scotland) Act 2002, the then Local Government Committee considered the issue in this very room. A question that was put was whether this building, which resembles a church—it formerly was a church—could be approved for civil marriages, and whether a registrar could attend such a place. Our clear answer was that we would not have a problem with that. We would be focusing on the primary purpose of the place. In producing the provision that is now in clause 89(2) of the Civil Partnership Bill, we had the same intention. In essence, if the village hall is a community hall, religious events might be carried out in it because it is the only available place. However, hosting such events may not be the hall's primary purpose. Our clear policy intention is that, if the primary purpose of a place is of a continuing religious nature, it would not be an appropriate place for a civil registrar to attend and conduct the formalities of the civil process. That is certainly the policy intention of clause 89(2), and our advice is that it will be delivered. If there are contending views, we will examine them to see whether they are valid and advise the minister accordingly.

Margaret Smith: I have a question that is based on something that Kenneth Norrie said, rather than on my suggestion that clause 89(2) be deleted completely. He said that importing the wording of the Marriage (Scotland) Act 2002 would improve matters and give local authorities and others more leeway. You have said that you want the bill to mirror the provisions for marriage, but why does it not mirror regulation 7(2)(b) of the Marriage (Approval of Places) (Scotland) Regulations 2002?

Paul Parr: In essence, our legal advice was that this form of words delivers the policy intent.

Margaret Smith: What is the policy intent?

Paul Parr: The policy intent is essentially the same as that of regulation 7(2)(b), which is that a place cannot be approved if its primary purpose relates to religion. I understand that there are different ways of reading both constructions, but the policy intention is that if the primary purpose of a place is religious it would not be approved by a local authority under the marriage regulations and, under the bill, we would not expect a local authority to agree with couples that such a place could be used.

Hugh Henry: If there are technical issues relating to designated places that we need to consider in order to clarify matters, we will do so. I want to be clear on this point. We will probably have to agree to disagree, but the policy intent is not to support a situation in which registrars can participate in a ceremony in a place of religious worship.

12:45

Margaret Smith: Paul Parr said that the policy intent of the bill is exactly the same as that of regulation 7(2)(b) of the Marriage (Approval of Places) (Scotland) Regulations 2002. If the policy intent is the same, why is the wording not the same? Why have you invented a new form of wording that, it has been argued, is tighter than the previous wording, unless the policy intent is not the same as in the 2002 regulations and is rather to nail down once and for all the fact that civil partnership registration cannot happen in a place of worship?

Hugh Henry: If an issue needs to be clarified to ensure consistency, we will do that. However, I have said clearly on the record what we intend to achieve in policy terms and we will not deviate from that. If there is legal tidying up to be done to make it easier to explain what is required, we will consider that.

The Convener: The committee would find that helpful.

Michael Matheson: My question relates to the same issue. Minister, have you received many representations from local authorities or churches on this issue? Have they expressed concern about the provisions of the bill?

Hugh Henry: No, we have received few, if any, representations.

Mr Maxwell: I return to the question that I asked Professor Norrie earlier about a village hall in a remote rural area. I understand that the policy intent is that civil partnership registration should not happen in places whose primary purpose is religious and I accept what you have said on the issue. However, Professor Norrie said that the term "place of reverence" was woolly. Effectively, if a place such as a village hall in a remote rural area were used for both religious and other community purposes and people wanted to hold a civil ceremony there, that would be open to challenge, because in some people's eyes the hall would be a place of reverence. Do you accept that?

Hugh Henry: Not entirely. However, we will consider the matter in order to be absolutely sure. If we feel that changes are needed, we will make them. We are not necessarily persuaded of the argument, but it is worth our considering the matter.

Marlyn Glen: I want to ask about provisions for children. Can you comment on the apparent difference between the definition of "child of the family" as it applies to marriage and to civil partnerships? A "child of the family" is defined in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 as being the child or grandchild of either spouse and any person treated as if they were a child of either spouse, whatever their age. Clause 97(7) of the bill says that "child of the family" is limited to

"a child under the age of 16 years who has been accepted … as a child of the family".

Hugh Henry: The bill gives full protection to young people so I am not sure what the areas of concern would be in that regard.

Kirsty Finlay: Throughout family law, there are numerous definitions of who is regarded as being a child of the family. The definition that is used in the bill captures the essence of what we were trying to achieve, which was to say that a child who is living in the family as a member of the household is accepted as being a child of that family. When you asked the same question of the Law Society, Mr Fotheringham, I think, said that he accepted the differences but thought that the bill represented an improvement. Further, he said that, effectively, we are all children. That also lay behind our drafting of that clause. It would be ridiculous to have legislation that went about protecting 24-year-olds in the same way as seven-year-olds. In the hope that everybody would be clear about what is meant, we decided to go for the definition that is in the bill.

Marlyn Glen: In terms of the age limit, it seems to be acceptable to use the word "child". However, Professor Norrie highlighted difficulties relating to using the word "accepted" instead of "treated".

Kirsty Finlay: I heard Professor Norrie's arguments. That is his view.

Marlyn Glen: You do not agree with that view.

Kirsty Finlay: At the end of the day, it would be for the courts to decide on the matter if there were a challenge.

Marlyn Glen: Can you give us details of how the adoption review is taking civil partnerships into account?

Hugh Henry: The adoption review will examine a range of issues and it would be wrong to pre-empt its consideration. Clearly, however, this is one matter that will be considered as part of that review.

Marlyn Glen: When do you expect that review to report?

Hugh Henry: We anticipate that it will report by the end of this year, but it would be wrong of me to say that that is a firm date.

The Convener: I return to the answer that Kirsty Finlay gave. She said that it would be for the courts to decide whether "treated" or "accepted" was the preferable term. Professor Norrie suggested that the use of the word might have been accidental because "accepted" was used until 1995, whereupon "treated" became the preferred term.

Professor Norrie's argument, which struck me as valid, was that "accepted" is a term that relates to the way in which someone thinks about a child, and that "treated" is a much more objective term as it relates to someone's actions and how the child is, in fact, treated. I ask you to reconsider the suggestion that the matter should be fixed at this point rather than being left for the courts.

Hugh Henry: I did not hear Professor Norrie speak about that point. The issue is a technical and legal one rather than a policy one. We will re-examine that part of the bill to determine whether, as you suggest, the situation should be addressed now rather than later.

Michael Matheson: Clause 126 of the bill, with which the minister will be well acquainted, relates to the law of evidence. I would like to ask the

minister a question that I asked the previous witnesses. At the moment, in criminal law, a person cannot be compelled to give evidence against their spouse unless he or she is the victim, whereas, in civil cases, they can be. Where does the bill reflect that situation?

Hugh Henry: I will bring Kirsty Finlay in on that point.

Kirsty Finlay: Clause 126 deals with the criminal side. We require to amend the Law Reform (Miscellaneous Provisions) Act 1949 to deal with the civil side. You have seen the size of the bill, and Bill Butler alluded to the number of amendments to primary and secondary legislation that are likely to be forthcoming. We intend to amend the 1949 act, along with a raft of other pieces of legislation, through Scottish statutory instruments. There is provision in the bill for Scottish ministers to make secondary legislation, and the amendments will come before the Scottish Parliament in due course—that will be timed so that everything commences together.

Michael Matheson: Are you saying that the criminal aspect is the same but the civil aspect is not the same?

Kirsty Finlay: The criminal aspect is the same. The civil aspect is not the same yet, but it will be.

Michael Matheson: Are you also saying that the Executive intends to lay SSIs to deal with that?

Kirsty Finlay: Yes.

Margaret Smith: Will the SSIs come to the Scottish Parliament after the bill has passed through Westminster but before enactment?

Kirsty Finlay: Yes. The power in the bill that gives Scottish ministers the power to make the SSIs in devolved areas will be commenced on royal assent. We will then be able to draft the SSIs, which will be laid before the Scottish Parliament.

Margaret Smith: I suppose that my questions are tidying-up questions. I do not know whether the minister heard the questions that we asked about the validity of civil partnerships and whether they could be declared void. Section 23A of the Marriage (Scotland) Act 1977 provides that a marriage is not void because of failure to comply with certain procedural requirements. That provision does not appear in the Civil Partnership Bill. Is that an omission?

Hugh Henry: I ask Paul Parr to answer that.

Paul Parr: It is not an omission; we considered the matter. Section 23A was inserted into the Marriage (Scotland) Act 1977 because of some procedural irregularities that had occurred in some religious marriages. It was felt that couples' marriages, having been registered, should be recognised and valid despite those irregularities. There is no specific reference in section 23A to errors caused by religious celebrants, but that was the focus of the amendment to the 1977 act. The Civil Partnership Bill focuses solely on the secular sphere; we examined the matter, but we did not think that it was an issue because partnerships will be registered by district registrars, who are subject to a regime of inspection and instruction by us. Indeed, over the years, the provision has been required and taken into account in only a handful of cases. In terms of proportion, and given that we are focusing on a civil process, we did not think it necessary in this case.

Margaret Smith: With the greatest respect to your colleagues in the registration service, you are, in effect, saying that we do not need the provision because you do not make any mistakes.

Paul Parr: I would love to say that my colleagues do not make any mistakes, but inevitably some mistakes occur. There is a high percentage of accuracy in the work of the registrars of Scotland—I am happy to make that public. However, the intention of the provision in the 1977 act was to minimise the opportunity for a slip between the marriage ceremony being conducted by a religious celebrant in a place away from the registration office and the delivery of the documentation back to the registrar. In this case, the registrar will have the civil partnership schedule and all the supporting documentation with him or her, will conduct the civil partnership and will then immediately go back and register it. We think that the opportunity for error is remote.

Margaret Smith: The likelihood probably is remote, and probably only a handful of people would be affected, but you can imagine that you and your family life would be affected quite negatively if you were one of that handful of people who suddenly discovered that, because of a technicality, they were not in fact in a partnership. Why would there be a problem with slipping the remedy for that into what is already a considerably large bill?

Paul Parr: That is partly because we did not want to add to this large bill, and it is partly to do with the issue of proportionality. The cases that have occurred since section 23A was inserted into the 1977 act by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 have been such that the provision is almost becoming redundant in marriage legislation. We did not feel that we wanted to replicate what is a redundant provision.

Hugh Henry: That issue is not fundamental to the bill. However, if we think that the provisions need to be changed, we will certainly have a look at them. If we decide to stick where we are, it will be a matter for an individual or the committee to pursue any change by way of an amendment as

the bill progresses through Westminster. We will have another look at the provisions, but it is—

The Convener: We would like to be clear about the current position. If the current provisions are becoming redundant and will not be needed, then they will not need to be included in the bill, but this is the first that I have heard about that. Lots of witnesses have suggested that the provisions need to be rectified. If the provisions do not in fact become redundant, it would seem that some civil partnerships will be challengeable. Perhaps you could clarify precisely what the position is now.

13:00

Hugh Henry: We will take another look at the matter.

The Convener: On the matter of consent, we have been trying to establish what the new institution is in law and what the nature of the relationship is. Is it akin to a contractual relationship? Is a requirement for consent implied? It probably is, but do you think that, as others have said, there should be something in the bill that means that if there was a lack of consent or if there was duress, the civil partnership would be voided or voidable?

Hugh Henry: I would need to check the full details, but people need to be free to enter into a commitment and they need to understand the commitment into which they are entering.

Part 3 of the bill deals with civil partnerships in Scotland. Clause 82(1)(e) deals with eligibility. It states:

"Two people are not eligible to register in Scotland as civil partners of each other if … either is incapable of understanding the nature of civil partnership."

The Convener: There is reference to consent in the Marriage (Scotland) Act 1977, but the question of consent does not appear in the Civil Partnership Bill. Unless you can offer us a view on the matter now, we cannot be clear about the legal nature of the relationship, apart from the fact that it is something that is similar to marriage, yet different from marriage. What does that make the institution of civil partnership? If it is an agreement, then I accept that it may be applied for, that the two parties must be free to enter into it and that neither of them should be under duress to do so—in which case it would not be a proper agreement. It is a matter of nailing things down.

Paul Parr: There are a couple of pieces of paper that the couple will find of interest, neither of which we have produced yet, as they will be produced by secondary legislation. The first one is the notice of a proposed civil partnership, which is provided for by clause 84. The process will essentially be modelled on that for a notice for marriage, but a particular declaration will be incorporated in the notice form. The matter is covered in clause 84(6), which states:

"The necessary declaration is a declaration that the person submitting the notice believes that the intended civil partners are eligible to be in civil partnership with each other."

That makes it clear in the first instance that the people signing and making a declaration in a document are eligible to be in a civil partnership.

That covers the issue of eligibility, but the act of entering into a civil partnership as delivered by clause 81 will be the signing of the civil partnership schedule in the presence of two witnesses and the civil registrar. Clause 90 allows for the civil partnership schedule to be prescribed, so if there is a doubt about consent in prescribing that civil partnership schedule, it could be made clear that the signing of it is the giving of appropriate consent.

The Convener: So the Executive would be satisfied that a person whose life was threatened if they did not enter into a civil partnership and who was under duress—in other words, they were unwilling to enter into such a partnership—would be covered by the legislation.

Paul Parr: That goes back to the same situation of people being forced into a marriage. Both systems—marriage and civil partnership registration—could be abused if people were sufficiently minded and able to control other individuals in such a way. It would then be for the courts to examine whether there was a question of a person being forced into a marriage or a civil partnership.

Hugh Henry: I will ask Kirsty Finlay to say something but, before I do, I emphasise that we are not talking about a legal contract in the traditional sense. We are talking about a couple creating an obligation to each other and, in a sense, to the state, and about a new legal status that—as I have previously said—confers rights and responsibilities. Perhaps Kirsty Finlay can tease out that matter.

The Convener: I think that we understand that. The new concept is not really definable. If there was a contract, the matter would be dead simple, as there must be consensus in contract law. However, as we are not talking about a contract, I think that the legislation should say that consent is a necessary part of the agreement.

Kirsty Finlay: I understand the points that you are making. Our understanding is that the legislation would be sufficient, but we would certainly be willing to consider things again to clarify matters beyond all doubt.

Bill Butler: I want to turn to subordinate legislation. You will be aware that many regulations and rules make specific provisions for spouses. A quick search of UK statutory instruments on the HMSO website for "spouse" came up with 800 results. There were 35 results for Scottish statutory instruments. Is it intended to amend subordinate legislation that makes provision for spouses to include civil partners? Professor Norrie suggested simply adding the words "and civil partners" in parenthesis in all appropriate cases. Is that the intention?

Hugh Henry: We will certainly need to consider that matter, but our intention would be to introduce appropriate subordinate legislation in relation to spouses at a suitable time.

Bill Butler: What volume of legislation do you envisage requires to be amended?

Hugh Henry: In a sense, the volume is neither here nor there. It could be large, but the question is whether it needs to be done. If it does, it will be done.

Bill Butler: Are you saying that the Executive intends to amend legislation wherever that needs to be done?

Hugh Henry: Yes.

Bill Butler: Thank you.

Margaret Smith: My question is about the cohabitation of same-sex couples who have not registered a civil partnership. Do you agree that, for reasons of consistency and ECHR compliance, where the bill extends to civil partners legislation that currently applies to spouses and mixed-sex cohabitees, it should also cover same-sex cohabitees? There seem to be some examples—the Administration of Justice Act 1982 has been pointed out to us with regard to damages—of legislation applying to such people at some times but not at others. Should there be a consistency of approach?

Hugh Henry: There seems to be some misunderstanding on that point, so perhaps I should put something specific on the record. Where existing legislation makes provision for same-sex cohabiting couples, schedule 21 clarifies the definition to refer to people who live together as civil partners. In any legislation where that is an issue, changes will be made, and that is being attended to. Anything other than that is outwith the scope of the bill, which is about providing rights and responsibilities arising from the formation of civil partnerships. We are not addressing the wider issues of cohabitation in the bill. Where that is already identified as relevant, it will be attended to. Where it is not relevant, that is a matter for another time.

Margaret Smith: I would like to ask you a question on something that you would definitely think was a reserved issue—pensions. Given that—

The Convener: Margaret, could you make this brief, please?

Margaret Smith: Yes. Given that Scottish ministers have a position on public sector pensions in Scotland, and given that your consultation on the issue did not mention the fact that pensions would not be made retrospective, do you agree that there is some concern on the issue? Is it something that you might address in the public sector pension schemes over which the Scottish Executive has control?

Hugh Henry: There must be consistency throughout the UK. You asked whether I agree that concerns have been expressed. Well, concerns have been expressed by some people, so it is patently obvious that there are people with concerns. I am quite happy to feed back to our colleagues in the UK Government the fact that those concerns have been expressed, but the question of pensions is a reserved matter for the United Kingdom Government and it is not one that I intend to enter into. However, we shall certainly feed that information back to our colleagues at Westminster, and I know from other discussions that there will be a full debate on pensions at Westminster. We are quite happy to keep the committee apprised of the outcome of that debate.

Michael Matheson: First, what estimates has the Executive been able to make on the number of individuals or couples who will make a registration? I know that there were some estimates in the original consultation document, which have been revised. I presume that you have been able to get to the point at which you have a rough idea, given international experience, about the number of people who may choose to register a partnership.

Secondly, what will be the cost of introducing the legislation in Scotland?

Hugh Henry: I shall answer the question on cost first. We do not anticipate any significant cost pressures from the bill.

To answer your other question, it is hard to know the numbers. We have an estimate of the number of people who are living in partnerships of that nature. Whether people would want to firm up the legal status of those relationships is another matter. In that respect, it is interesting to observe that more and more opposite-sex couples are choosing not to register their relationships. I do not know whether same-sex couples would be more inclined to enter into that form of legal recognition.

We have considered other European jurisdictions and made some estimates. For example, we estimate that, in a low take-up scenario, 700 people could be in such relationships by 2008 and that, in a high take-up scenario, there could be 1400. However, to be honest, we are only guessing. After all, we do not know what social attitudes or trends will be. It is important that we create a framework that gives the necessary rights to those who choose to exercise them.

Michael Matheson: But the regulatory impact assessment that was published with the bill states:

"overall, around 3.3% of the lesbian, gay and bisexual population aged 16 and over will be in registered civil partnerships".

Hugh Henry: Well, yes. Those would mirror some of the—

Michael Matheson: Do you have a similar estimate for Scotland?

Hugh Henry: Probably, but it is hard to be precise.

13:15

Mr Maxwell: Minister, you mentioned other European examples. In his evidence, Professor Kenneth Norrie said that the Netherlands and Belgium, in particular, allow civil partnership registration not just for same-sex couples but for opposite-sex couples. Was the non-recognition in this country of opposite-sex civil partnerships registered in those countries intentional or accidental? Professor Norrie pointed out that such limping relationships would be in something of a limbo state. Given that we recognise marriages and will soon recognise the civil partnerships of same-sex couples, would it not be reasonable to recognise opposite-sex civil partnerships from other European countries?

Louise Miller: The omission is not unintentional. In fact, it is a logical consequence of the policy decision not to make civil partnerships available to opposite-sex couples. If we do not allow opposite-sex couples in this country to register as civil partners, it would be difficult to justify the recognition of equivalent relationships from overseas. In effect, we would be discriminating against our own citizens.

The couples in question would be treated as if they had been cohabiting in the Netherlands, Belgium or wherever and then continued to live together in this country. The legal provisions that confer rights and responsibilities on couples who simply live together would obviously apply to those people. However, they would be treated neither as married, because they have decided not to get married, nor as civil partners, because we do not have opposite-sex civil partnerships. As I have said, that position flows from the decision not to make the institution available to people of the opposite sex.

Hugh Henry: In policy terms, we have consistently been clear that we do not intend to open up civil partnerships to opposite-sex couples. After all, a legal framework and form of civil recognition are already available to them. If they choose to cohabit, that is a matter for them. We do not think that it is necessary to extend civil partnership provision to them. As Louise Miller said, it would be anomalous to recognise couples in civil partnerships registered in other countries without doing the same for our own citizens.

The Convener: That ends our questioning. Witnesses from the Law Society started us off this morning by saying that the bill is very complex and that statement has certainly been borne out.

I thank the minister and his team for their evidence this morning and for their careful consideration of committee members' points. I am sure that you will get back to us in the usual way on the points that have been made. For our part, we are going to attempt to draw up our report today and next week.

Hugh Henry: We will revert to you as soon as we reasonably can on the detailed points that we have undertaken to consider. Obviously, you need to consider the broader issue. I also repeat our commitment that if any changes made at Westminster require to be brought back to this Parliament, we will do that as quickly as possible.

The Convener: Thank you very much. We will now move into private session.

13:18

Meeting continued in private until 14:05.

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