JUSTICE 1 COMMITTEE

Wednesday 23 November 2005

Session 2

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JUSTICE 1 COMMITTEE
38th Meeting 2005, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Karen Gillon (Clydesdale) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Brian Adam (Aberdeen North) (SNP)
Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)
Hugh Henry (Deputy Minister for Justice)

THE FOLLOWING GAVE EVIDENCE:

Louise Miller (Scottish Executive Justice Department)
Alex Mowat (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

Scottish Parliament

Justice 1 Committee

Wednesday 23 November 2005

[THE CONVENER *opened the meeting at 09:54*]

Family Law (Scotland) Bill: Stage 2

The Convener (Pauline McNeill): I open the 38th meeting in 2005 of the Justice 1 Committee and welcome to the committee Brian Adam and Fergus Ewing, who are joining us for the stage 2 debate. I welcome again the Deputy Minister for Justice, Hugh Henry, and his officials, Carol Duncan, Moira Wilson, Kirsty Finlay and David McLeish.

Section 18—Meaning of "cohabitant" in sections 19 to 22

The Convener: Amendment 34, in the name of Brian Adam, is grouped with amendments 35 to 38.

Brian Adam (Aberdeen North) (SNP): This has been a very long and difficult process. It has gone on not just for a few weeks in the committee, but for many years. There have been many arguments about it, and a considerable amount of evidence has been laid before the committee to study. Looking at some of it, I cannot help but admire the work that the committee has done, although I cannot agree with some of the conclusions in its report. I would like to acknowledge the help with my work that I have received from my assistant Emily Tueller.

Some of the arguments that were made in the evidence questioned whether cohabitation was a valid relationship. I suggest that that is not the proper question. No one is questioning the validity of relationships. There is, however, a question about the value that is attached to various relationships, and that is where the committee and I may part company—certainly, it may be where the minister and I part company.

There is no doubt at all that the changes brought in by successive pieces of legislation and the changes that are proposed in the bill alter the value that society places on marriage. I do not suggest for a minute that one should not offer protection to vulnerable people. However, some folk have chosen not to enter marriage, and people in same-sex relationships have been given the opportunity in legislation to have their commitment to each other acknowledged, if they so wish. If we accept what is in the bill, we would put a similar value on relationships that have not made that commitment.

Sometimes there is confusion about the principles involved. I have been engaged in the debate about equality for many years. Before I was elected to the Parliament I served for many years on Aberdeen City Council's equal opportunities committee. However, there is a major difference between equality and equity. I would have no problem whatsoever if we were trying to be fair to everybody—to have an equitable arrangement. However, one cannot make people the same when they are not the same. As a society, we should value all relationships, but not necessarily equally.

If people who enter a relationship do not give it the same commitment as people who enter a marriage, is it reasonable for them to expect to get protection? The answer is no, they should not. Much of the evidence that was laid before the committee supports that argument.

In particular, two types of evidence support that argument. One was the faith-based evidence from churches and other groups. Sometimes, we are in danger of devaluing the evidence of faith-based groups merely because it comes from those groups. I am sure that the committee will not fall into that trap. We should not devalue evidence because of where it comes from; it should be measured against all the other evidence equally.

We also have evidence from some of the practitioners who will have to deal with the law as it will be if the bill is not amended. I would like to highlight some of the concerns that have been raised.

10:00

John Deighan, on behalf of the Roman Catholic Church, said:

"We believe that marriage should be encouraged and those who choose not to marry make arrangements to protect their interests using existing legal means."

There are legal means by which protection can be offered and, as I understand it, the Executive is likely to bring forward changes to succession law that might also help in that area.

John Deighan went on to say:

"The scenarios chosen in the consultation paper engender sympathy for individuals who are so affected but the reality is that in changing the law to help an individual in such a situation requires a dilution in marriage. The Church"—

on this occasion, I assume that he means the Roman Catholic Church—

"recognises in any such proposals 'a series of legal subtleties that erode the very meaning of the institution of the family.'"

The Free Church of Scotland says that the idea that the law must reflect the reality of families is seriously flawed on logical grounds:

"It suggests that we must change our laws to favour those who opt out of established practices and the legal system. On this basis we should change our laws to favour racists, thieves and vandals. If the reply is that we must protect and support co-habitees we may ask why? They are free to entitle themselves to all social and legal benefits simply by getting married. We would suggest that in the majority of cases cohabitation indicates a lack of commitment and a desire by individuals not to assume the responsibilities which legal marriage brings and which the majority of the population undertakes."

When I took part in the stage 1 debate, Patrick Harvie perfectly fairly asked me whether we should give a degree of protection in relation to the degree of commitment. I am happy to accept that, but I believe that we will go too far if we accept the proposals on cohabitation because we are in danger of giving all the rights without expecting the responsibilities in return. People make choices when they enter relationships. I will not rehearse the arguments from the debate on relationships that we had last week, but that debate reflects the Executive's difficulty in getting clear-cut definitions.

I move on to the objections that have been raised by practitioners. Mr James Hotchkis, who is a solicitor, said:

"Cohabitees are generally well aware that they do not have legal protection and each should make their own arrangements."

There is nothing to prevent people from making their own arrangements. He went on to say:

"Any safeguards that are established for cohabitees will undermine marriage."

I certainly share that view.

Daniel McManus tells us:

"Calls for more rights for cohabiting couples threatens to weaken the importance of marriage. What is the difference between relationships of marriage, cohabitation and civil partnerships, if they are to be treated the same?"

Civitas says that, often,

"cohabitation is viewed as an alternative to marriage rather than a preparation for it",

although the evidence shows that two thirds of people who cohabit go on to marry and a third of relationships between cohabitees break up. Civitas also says:

"Cohabiting relationships are fragile. They are always more likely to break up than marriages entered into at the same time, regardless of age or income. On average, cohabitations last less than two years before breaking up or converting to marriage. Less than four per cent of cohabitations last for ten years or more … The more often and the longer that men and women cohabit, the more likely they are to divorce later."

During our discussion on a previous series of amendments, the convener asked the minister—and indeed me—whether the bill is more likely or less likely to lead to divorce. That is a pertinent question. Civitas's view is that, if we go down the route of giving similar rights to cohabitees and married couples there is likely to be more divorce.

Civitas also states that

"children born to cohabiting parents are more likely to experience a series of disruptions in their family life, which can have negative consequences for their emotional and educational development. Children living with cohabiting couples do less well at school and are more likely to suffer from emotional problems than children of married couples."

Marriage has a particular status in our law and society. Traditionally, it has been a special relationship that developed to provide stability for families and for all of society. Marriage is a declaration of commitment that has private and public consequences. Cohabitation has none of those characteristics, yet the bill will grant cohabitees similar, if not the same, benefits or protections.

Amendment 34 seeks to delete section 18. There are concerns about the meaning of cohabitation. People cohabit for all sorts of reasons, and one partner's attitude to and expectations of the relationship may differ a lot from the other partner's. Some people may choose to cohabit for the specific reason that they do not wish to share their property with anyone else. They may choose to cohabit because the cohabitational relationship is a more fluid way to share a property. As Mr McFee was trying to tease out in last week's meeting, it may be difficult to establish the commencement and termination dates of a relationship. Cohabitation does not have the same status as an established relationship, and if we grant rights we will grant it that status. Whether a particular status is important is moot, but people who enter cohabitation arrangements have different expectations.

It is difficult to legislate for cohabiting couples because it is difficult to ascertain when the relationship was established—and that will have to be done retrospectively, once the relationship has broken down. How will we produce evidence when no legal commitment has been made? It is open to people to make such commitments.

Section 19 relates to sharing household goods. The presumption that all goods acquired during the period of cohabitation are jointly owned is problematic. For example, one party in the relationship may have paid to upgrade the residence using money that he or she saved before the relationship was established. Under the current proposals, any upgraded items would be divided 50:50. On the face of it, that does not seem just, because no bargain has been made. People who get married or enter civil partnerships

do so with their eyes open—they know what the consequences will be. However, that is not necessarily the case for people who choose to cohabit, as individual expectations might be different.

Section 20, on "Rights in certain money and property", introduces financial provisions that would place cohabiting couples on an equal footing with married couples. That is detrimental to the institution of marriage. The Executive should not send out the signal that marriage is merely one lifestyle choice among many. That may well be the nub of the argument between us. Mortgage repayments are a problematic practical consideration, particularly when the non-owner has not acquired any property rights to the house but has contributed jointly to the payments. One partner may have had the property before the cohabitation started—their arrangement may not necessarily be a fresh start for which they have both decided that they will start somewhere new. There may have been an existing mortgage arrangement involving one person, but when the couple started to cohabit, they may have made a private arrangement to pay the mortgage jointly. How can we separate out those issues?

As for section 21, on "Financial provision where cohabitation ends otherwise than by death", there is no matrimonial property to divide because there is no marriage. How can the principles of section 9(1)(b) of the Family Law (Scotland) Act 1985 be used in those circumstances? It is very difficult to tease out what belongs to each of the partners; it is more difficult to do so in a situation in which there has been no legal understanding at the beginning. If there had been such a legal understanding at the beginning, there would be no requirement for section 21.

I would also like to speak about section 22, on "Application to court by survivor for provision on intestacy". At the moment, although the law on succession creates unfairness on certain occasions, it has the advantage that prior and legal rights are stated with certainty. If people are given the right to make an application for a discretionary award, that certainty will be removed. In many circumstances, executors and family members will not know whether a cohabitee is going to make an application. That would lead to circumstances in which the estate could not be wound up until any potential claim became time barred. Equally, experience tells us that, if a cohabitee makes an application to the court, the action will not be quick to resolve and may go to appeal, which could lead to further stress and acrimony.

How will courts be able to make appropriate decisions? The problem with the provisions on financial provision on the death of a cohabitant is that of how the court can be expected to determine the intention of the deceased. The intention is clear if a legally binding contract has been entered into or if a will has been drawn up. In such cases, we do not need this legislation. However, if there is no will and legal intent has not been made clear, how are we to know what a cohabitant's intention was before his or her death, given that no commitment has been made beyond the sharing of lives?

The deceased might have chosen to cohabit rather than marry because he or she did not wish his or her partner to have any rights and the relationship was one of no ties. The rules of intestacy have been in place for many years and therefore the courts do not have to try to ascertain what the intention of the deceased was. Asking the court to do so in respect of such an informal arrangement as cohabitation puts it in a very difficult position.

I will leave it at that. I am happy to respond to members and to the minister on the amendments.

I move amendment 34.

The Convener: You talked about equity in the treatment of cohabitants and married couples. Do you think that the bill provides the same protection for both? There are differences.

Brian Adam: I would be delighted to have those detailed differences pointed out to me, as that is certainly not the view of many of those who submitted evidence. I acknowledge that the bill does not provide identical protections for married couples and cohabitants, but the protections are similar. The bill would introduce significant change in the relative protections for people who are married and those who choose to live together.

One of the other difficulties in relation to the idea of fairness is that all the fairness that has been introduced in this bill and in other legislation that has come before the Parliament in the past six years has been about addressing inequity in relationships that are sexual in nature. It has not addressed any of the inequities in relationships that are not sexual in nature. These matters would be better addressed under the law of succession where it may be possible to deal with them more broadly.

I have no desire to treat people unfairly, but the changes in the bill are driven by the wrong motivation or driver. It is as much about status as it is about the reality of—

The Convener: I wanted you to clarify that point, because I understand that you have an objection in principle to section 18, which is why you want to remove it. You are right that it might be helpful to set out the differences in the bill between the situation for cohabitants and the

rights that exist within marriage. There are differences, and for the purposes of clarity we can draw them out in our debate.

10:15

Stewart Stevenson (Banff and Buchan) (SNP): I have been impressed by the breadth and depth of the arguments that Brian Adam deploys. I have a great deal of sympathy with many of the points that he makes, but I say at the outset that I draw different conclusions. He has taken the opportunity to have a number of chats with me on the subject. Although we agree on many of the potential difficulties, my balanced judgment is that we must at some point address in law the subject of cohabitation and that the proposals in front of us are, on balance, just about adequate.

I will address some specific points that Brian Adam raised and some challenges that he laid down to us as members of the committee. The fundamental issue is whether legislating on the subject of cohabitation gives people who cohabit a status that is broadly equivalent to the status of marriage. He expresses serious concern on that subject; it is a legitimate concern, but it is one that we can deal with by thinking about the matter in a slightly different way.

We should consider two phases when we apply the test. The first is that if we legislate in the way that the bill proposes, how will that affect the rights, responsibilities, obligations, duties and so on of people who are in the various forms of relationship—be it marriage, civil partnership or cohabitation—that exist? Secondly, we should consider the effect of what we are doing today after the end of the relationship—be it marriage, civil partnership or cohabitation. Of course, the relationship can end in two ways: it can end on the separation of two people or it can end on the death of one person. I am not clear that the bill has any effect at all during the existence of the relationship; I am not sure that it makes any difference. Other members might want to develop that point in the discussion. What are the differences between what happens in a marriage or civil partnership and what happens in a cohabitation?

Before I go on, I will pick up on a point that Brian Adam drew out of the evidence that has been given to the committee. He pointed to evidence that most cohabitants are aware of the implications of cohabitation as compared with those of marriage or civil partnership. That statement was certainly made to the committee, but I have to say that it has failed to convince me. From my personal experience and from what was said by other witnesses, I am pretty convinced that most people who cohabit do not realise their lack of protection. That is one of the issues that drives my conclusions.

I return to the issue of what happens during cohabitation, a marriage or a civil partnership. The first and obvious point to cover—we have to talk about some fairly basic matters—is that of financial arrangements. As I worked for a bank for many years, members will forgive me if I talk about money when we should be talking about romance and love in relationships. Money is something on which relationships can founder and it can certainly cause a huge number of problems after the end of a relationship.

Couples can transfer, freely and without any immediate tax implications, assets between each other if they are married or are in a civil partnership. However, that is not true for cohabiting couples. For example, gifts between cohabiting couples will fall to be considered under the appropriate tax legislation that covers both immediate gifts and lifetime accumulation of gifts.

Capital gains tax on assets that are subject to that tax can be transferred between people in a marriage or civil partnership without incurring tax implications at the point of transfer. People can transfer the tax liability as well as the money, but they do not fall to pay at that point. Those are quite significant examples of the way in which the assets of a relationship are treated when the relationship is legally recognised.

People who are not in such a relationship or who are not in one that can be recognised on application to the court as a marriage by cohabitation with habit and repute—which status the bill seeks to remove—are treated differently. We can start to see that quite significant differences in terms of tax liability arise during the existence of a relationship simply because of the different ways in which the relationship exists in law.

Of course, Brian Adam made the point that the parties to cohabitation can contract with each other. However, they cannot do so in a way that will address those differences. If I have a contract with a cohabitant, it does not alter the fact that the taxman might come along and take money off us. Also, as a footnote, contracts do not have to be written down in law. Based on the behaviour of the people who are in the relationship, they can be deemed by the courts to have contracted with each other. In business relationships, it is possible to have deemed contracts. We should not get too hung up about whether things have to be written down in contracts; in law, people can enter into contracts without ever realising that they have done so.

What happens after the end of a relationship, be it a marriage, civil partnership or cohabitation? Again, there are clear differences between those relationships. The differences largely fall into the area of tax liability, albeit that the bill—which, I am

fairly confident, will become an act—narrows them. Why should it do that? Brian Adam put his finger on it when he said that it was to protect the vulnerable.

When such a relationship involves children, there is no case for denying them protection through legislation such as the bill that we are considering today. There is more of a case for asking whether we should address the issues if children are not involved. Nowadays, the man is not automatically the more powerful person in a relationship. That said, he generally turns out to be, for a variety of sociological reasons that relate to where we are today—it may not be the case in future; I rather hope that we have greater equity in relationships in future. However, the reality at the moment is that, in most relationships, there is a significantly stronger partner. In introducing the sort of measures that are in the bill, we will be providing some protection for the partner who is likely to be disadvantaged in the cohabitation.

I agree with Brian Adam that, having looked at a number of the issues that relate to the way in which assets are distributed after the death of a partner, the response that has been given is pretty crude. I am not clear that the bill contains the best available answer, if we were to look at succession law as a whole. In that sense, I have considerable discomfort about the response that has been given. Nonetheless, on balance, the measure will end up delivering more benefit than harm. However, I hope that the Executive will consider the whole picture and bring forward, as early as it can, revisions to succession law to ensure that the unintended consequences of piecemeal legislation are not too severe.

On balance, unless someone comes up with persuasive arguments in the next few minutes, I am likely to support the retention of the sections that Brian Adam, supported by Fergus Ewing, seeks to delete.

Mr Bruce McFee (West of Scotland) (SNP): In response to Stewart Stevenson's comments, I say that I hope that marriage and relationships are founded on something a bit stronger than the tax consequences that may occur somewhere down the line. When we get to that level, we have devalued what was supposed to be achieved in the first place.

It is obvious that there are different views in the committee and in society about whether we should change the status of cohabitees and, if so, how we should do that. During our evidence-taking sessions, a number of scenarios were outlined. If somebody is left with nothing after they have spent 20 or 30 years in a relationship, one would have to be pretty hard hearted not to be moved or to think that that was a good outcome.

However, the proposal that is before us in the bill is only superficially attractive. It appeals to us because it helps to salve our consciences and it makes us think that we are doing something about the situation. As legislators, we have to get out of the habit of thinking that we can provide a cure for every situation that someone has put themselves into or a method of alleviating the consequences of decisions that people wish to make.

If we accept the libertarian argument, the bill will remove a choice. At the moment, people can choose whether to marry or form a civil partnership, but we are talking about imposing something on people who wish, for whatever reason, to take another route. The bill will impose on those people, perhaps retrospectively, a new set of terms and conditions that they may or may not have agreed to when they decided to cohabit. They might find that, even though they both said when they entered into the cohabitation, "I do not want to get anything out of this after 10 years", one of them does indeed want something out of it when it comes to fisticuffs after five or 10 years. That is the reality of the situation when relationships break down. Sometimes, people want to extract a price. I hear the argument about the protection of weaker people in a relationship, but can we always protect such people? Will we do them a favour by saying, "There is another, easier route out of this"? We should ponder that for a moment.

We must be aware that we do not legislate in a vacuum. Somehow, in the debate on this aspect of the bill, the impression is being given that we can change the position of one group of people without having an effect on another group of people. However, for every action there is a counteraction and a consequence. We can argue about whether the proposal will give cohabitees the same status as married couples, but it is not possible to change the status of the former without changing the status of the latter.

The bill does not give cohabiting couples the same rights as married couples, but it starts off down that road. That is the nub of the matter. If members believe that marriage has special status in our society, they cannot realistically support the proposals in the bill in the belief that they will not change that status and that there will not be another bite at the cherry later to take the remaining rights that are not dealt with in the bill.

10:30

However, if members do not believe that marriage has special status, they can vote for the provisions. That is no problem; it is dead easy. They should also know that there will be another bite at the cherry not too far down the road. It is a question of whether we believe that marriage has

special status—and that is a matter for each individual to determine for themselves. Please do not pretend, however, that the provisions will have no effect on the status of marriage, because they will.

Leaving aside the issue of whether one believes that marriage has a special status or whether we should proceed with the provisions at all, there is another point. We have a duty when legislating to be clear, and what is clear is that the bill lacks certainty: it introduces uncertainty by the barrel load. When does cohabitation begin? When does it end? What is the length of cohabitation before it has any relevance in law? Last week, we had to give due recognition to when a relationship began. I have yet to hear a definition of a relationship, much less a definition of when one could possibly begin.

Some members have commented on the effects that the bill's provisions would have on the laws of succession, which, I understand, are under review. However, one cannot change the law of succession in this way. We are told that the provisions are motivated by the desire to protect children. However, the provisions will disadvantage the children of a marriage, if one of the spouses cohabits after that marriage breaks up. We should be clear that there are children who could be disadvantaged by the provisions, which will take away certain rights that those children had if one of their parents should die while in a cohabiting relationship.

There will be effects on the law of succession, although we do not know all the ramifications that the bill will have in that regard. At the moment, the laws on marriage are pretty clear, but the bill will create a mess that we will regret in the long term.

The Convener: I support the Executive's position on the bill and have done from the beginning. However, I have some detailed questions about its provisions.

In the 21st century, we cannot ignore the numbers of people who decide to cohabit. Many of those relationships are long lasting and are made up of people who are committed to each other. It is important to recognise that. It worries me that many of the people whom we are trying to protect with the bill think that they are already protected. We know from the surveys that we looked at that people believe that there are provisions in Scots law that protect cohabitants. That is very worrying. Notwithstanding the amendment that we agreed to several weeks ago on the abolition of marriage by cohabitation with habit and repute, cohabitants have very little protection in law.

I am very much in favour of protecting relationships, particularly long-term ones, whether or not there are children involved. That does not matter to me: couples who are committed to each other and who are in it for the long term should have some legal safeguards. That does not undermine marriage. Apart from anything else, the benefits from marriage are still stronger in law than the benefits that the provisions on cohabitation rights will introduce.

It would be helpful if the Executive could go through the provisions with us. I will go through what I think they mean; if I am wrong, I am sure that the minister will correct me. If one is married, one can divorce at any time on the grounds that are laid out in the bill—whatever they may turn out to be by the end of the bill's passage through Parliament. Cohabitants, however, have one year after the relationship ends in which to go to court to argue for any rights. Once that year has passed—I know that we will discuss an amendment later on whether that period should be extended—cohabitants cannot claim any rights. That is unlike the situation for married people.

No property rights are attached to cohabitation, apart from certain rights in relation to household goods or those that apply if one of the cohabitants makes an application to a court having suffered economic disadvantage. My reading of the bill is that there are no pension rights other than what the pension scheme itself would award, although that depends on the nature of the scheme. Some schemes allow cohabiting couples to benefit, but others do not. Nothing in the bill provides a fair division as is the case in marriage. There is no concept of the matrimonial home: if both parties have a title in the property they would share in it, but there is no equivalent to the provision that exists in marriage.

Of course, marriage is more easily defined, but the court will define what is meant by cohabitation. Members are concerned about the need for certainty in the law on that issue, but a person who is cohabiting is certainly in a weaker position because they have to put up a challenge and provide their evidence to the court. The duration of a marriage is important in relation to the definition of pension benefits, but as far as I can see that is not the case for cohabiting couples. It is not possible to go back the way—someone cannot say that they cohabited four years ago and forgot to claim, but people can do that in respect of marriage.

On death, there is an upper limit to what a cohabitant can claim; we are about to discuss an amendment on that issue. In that regard, I am not sure what is meant by

"in respect of legal rights and prior rights".

There are one or two minor differences in relation to the existence of children, but broadly the positions are the same.

For the sake of clarity, it is important to go through the differences, but it is clear that differences exist. The bill will not give cohabitants the same rights that married couples have. Some people may think otherwise, but as far as I can see the bill will not do that.

Brian Adam is right to bring to our attention the variety of views on the matter. However, as a Christian, I think that there is a Christian basis for considering that some people in cohabiting relationships are extremely vulnerable—many are women; some are men—and as a politician that concerns me sufficiently that I think we should do something about it. Members are right to point out that we are trying to strike a balance between upholding the rights of a person who does not want to share their property and who has opted out of marriage and providing some legal safeguards for the person who may walk away from the relationship in a very vulnerable situation, having got nothing out of it.

The bill is the right place to deal with the law of succession. I do not support the idea that we should wait until the Scottish Law Commission considers how the whole gamut of succession is dealt with in Scots law. If we go down the road of providing legal safeguards for cohabitants, we cannot address only separation; we must also address protection on death, whatever form we think that should take. The bill is the right place for such provision to be made and I would be unhappy to wait. I do not see the committee having another opportunity in this session to deal with the matter, even if a bill was available for that purpose.

To Bruce McFee and others, I say—as I said last week—that what I want out of the sections on cohabitation is clarity. I would like to be clearer about who is protected by the provisions in the bill. Couples who live together should have an element of clarity; they should have some understanding of whether they will be covered by the provisions.

Marlyn Glen (North East Scotland) (Lab): I was very pleased that the committee's stage 1 report on the bill was accepted by Parliament. Amendments 34 to 38 would change the bill fundamentally. In accepting the principles of the bill, Parliament accepted its central tenet, which is to give legal protection to cohabitees. I support the convener's remarks on the bill and on the fact that it is not there to undermine marriage.

It has been interesting to listen to the debate today, since we have spent such a long time talking about the bill. A decade before we started our consideration of the issue, there was discussion of the necessity to change family law so that it would reflect life in Scotland. It was interesting to hear Bruce McFee mention the libertarian argument, but I repeat that this is not a time to halt and ponder further: the bill has been a long time in the making.

I would describe Brian Adam's view as fairly individual. He picked out different parts of the large amount of evidence that was given to us. I understand that his beliefs are strongly held, but the population in 21st century Scotland does not share them. The bill must consider how people live in Scotland today. It is widely accepted that it is necessary to protect the vulnerable. However, the bill is not about status or giving some couples higher status than others. From an equal opportunities point of view, it is important that we value every individual. As I said last week, it is important that we value every family as well.

I invite Brian Adam to clarify one particular point. I think he said that changing legislation in favour of cohabitants was like changing it in favour of rapists, thieves or bandits. That sounded to me like an outrageous comparison, and I hope that it is not what he meant. I will let him correct that.

Brian Adam: I was quoting evidence from the Free Church of Scotland.

Marlyn Glen: In that case, I do not like your choice of quotation.

Brian Adam: I am not suggesting that the committee, or indeed the Executive, is going out of its way to give effect to that comparison; it was lodged as part of the evidence.

Marlyn Glen: I am glad to hear that you do not hold to that comparison yourself. There are lots of different kinds of families in 21st century Scotland, and it is important that we protect them, particularly the children. When people enter a cohabiting relationship their expectations are moot, but I am absolutely certain that they do not expect that one of them will be left destitute if their partner dies, or left solely responsible for their children if the relationship founders. Cohabitees share lives, and that is one of the biggest commitments that a couple can make to each other. You may have beliefs that others do not share, and you cannot impose them.

I will not support amendments 34 to 38. It is very important that we support families in Scotland as they are and that we ensure that we protect vulnerable people. I support the Executive's line on the bill.

Mrs Mary Mulligan (Linlithgow) (Lab): I support the status of marriage. It is unfortunate that I have to say that at the beginning of my comments, because I have heard nothing from committee members, the Executive or witnesses to suggest that anybody is trying to undermine the status of marriage. We all recognise the advantages of the security and stability that marriage provides for the individual and for

society. We must make that clear right away. By making it clear that we recognise that people choose to cohabit, we as legislators have an obligation to recognise their choices and their needs. That is why we are considering the bill.

I recognise that some people will choose not to be married. For that reason, we should not insist that they take on the responsibilities of somebody who is married and, as Bruce McFee said, they should not have all the rights of the married. The bill as it stands does not do that. Stewart Stevenson gave a comprehensive account of the legal position on the bill's financial aspects; I know that this is not just about finances, but he was right to say that finances are one way of showing that there is a difference in status and practice.

There is a reason to protect people who have chosen not to be married but to cohabit, particularly when they are vulnerable. At the moment, people who cohabit often think that they have rights as a result of that cohabitation. The term "common-law marriage" is frequently used as if it were a fact, which it is not in Scotland, where no such protection is granted.

In some ways, we have to be careful today that we do not inadvertently send out a message that we are now providing that common-law marriage arrangement. We are not doing that; we are protecting the vulnerable. We are not introducing a status that is the same as marriage in the way that has been suggested.

10:45

Mr McFee: I hear what you are saying. I read the results of the social attitudes survey and you are right to say that a number of people—the majority, I think—believe that the concept of common-law marriage applies in Scotland, although it does not.

Will the measures that we are debating help to strengthen the belief that there is such a thing as common-law marriage or will they disabuse people of that belief? Would it be better if the Scottish Parliament made people aware of our decisions in a way that would disabuse them of the belief that something exists when it does not?

Mrs Mulligan: It is important that we are honest with people. The committee agreed that, once the bill is passed, we must ensure that information is given to people about what they can expect in terms of their rights. By introducing the sections on cohabitation rights, we are saying not that someone who cohabits will have the same rights as someone who is married, but that, because of what they have contributed to that relationship, they will have some protection if the relationship ceases to exist through either break-up or death. However, we need to be clear that what the bill proposes is not a replica common-law marriage.

However, there is still some room for uncertainty, even in the bill. Section 18(4) says that

"the court shall have regard to … the length and nature of the cohabitation … the extent, if any, to which one cohabitant is financially dependent on the other"

and so on. There is room in that for inconsistency, depending on how the courts interpret it.

Mr McFee: Correct me if I am wrong, but I think that, at our last meeting, we changed the wording of section 18(4)(a) to say that the court should have regard not to

"the length and nature of the cohabitation"

but to

"the length and nature of the relationship".

Further, I think that we deleted section 18(4)(b), which says that the court has to have regard to

"the extent, if any, to which one cohabitant is financially dependent on the other".

Mrs Mulligan: I did not think that we had deleted that paragraph, but I stand to be corrected.

The Convener: We did not delete section 18(4)(b). We agreed to change the wording, so that the section would no longer talk about people being dependent. I cannot remember what we changed it to. We will check.

Mr McFee: Did we change "cohabitation" to "relationship" in section 18(4)(a)?

The Convener: Part of the problem is that, last night, we did not have the *Official Report* of our previous meeting to refer to.

The Deputy Minister for Justice (Hugh Henry): My understanding is that the wording of section 18(4)(b) was changed to:

"the nature and extent of any financial arrangements subsisting, or which subsisted, during the relationship."

That made the section broader.

The Convener: That is correct. Is that the clarification that Bruce McFee was looking for?

Mr McFee: I am sorry to do this in the middle of another member's contribution, but I think that it is important—

The Convener: It is up to Mary Mulligan to accept your intervention.

Mrs Mulligan: I will accept the intervention if Mr McFee can be brief.

Mr McFee: I am obliged, as I realise that this is an interruption to your contribution.

My understanding is that in section 18(4)(a), the words

"the length and nature of the cohabitation"

were changed to

"the length and nature of the relationship".

Further, I understand that, with regard to section 18(4)(b), the minister is saying that the concept of financial dependence has been replaced by the concept of financial arrangements, which means something entirely different.

We need to be clear what we are offering people, because that is not necessarily what has been stated. I accept that one of the reasons for that is that we did not have the *Official Report* of last week's meeting in time.

Mrs Mulligan: It is important to clarify the point. I raised the matter today partly because there is still some uncertainty about it. It will be helpful to clarify the situation when we have the *Official Report*. I do not want to give people the impression, wrongly, that we are introducing marriage rights by the back door.

I support the bill as it stands. I recognise the value of marriage, but I also recognise that, as legislators, we have a responsibility to recognise the circumstances in which some people are left vulnerable. The bill strikes a balance. It recognises that cohabitation is different from marriage, but it allows us to protect vulnerable people. That is why I will not support Brian Adam's amendments 34 to 38.

Mike Pringle (Edinburgh South) (LD): I agree with much of what has been said; in particular, I agree with the beginning of the convener's contribution.

Bruce McFee asked whether marriage has a special status. Marriage has a special status to me as an individual, because I have been happily married for 35 years. When I got married, most people got married and they did so in church, but that was 35 years ago and society has moved on. Now, people who are in a committed relationship are committed to each other regardless of whether they are married or cohabiting. Society has changed.

Brian Adam talked about the church. Thirty-five years ago, I went to church regularly, but I have not been in a church for five or 10 years. People, too, have changed. Fewer and fewer people go to church and many people do not regard the church as important. My two sons have hardly ever been in church. I am not saying that that is true of everybody. Some people are committed and still go to church, but whether people go to church or not and whether they are married or cohabiting, they are no less committed to their relationship.

At one point—it may have been in evidence on the bill, but I cannot remember—we heard that nearly 50 per cent of children are born to couples who are not married. In my view, the main thrust of the bill is to protect children. Some people say that the provisions that we are considering will not protect children as much as we think they will, but the bill is a start. We are trying to protect children and to protect relationships, so the provisions must stay.

Stewart Stevenson talked about the financial consequences. He is right, but if someone is cohabiting and they want to ensure that they can pass on their pension or their estate, they have a choice to get married. People know the consequences of getting married or remaining in a cohabiting relationship. The bill seeks to protect people who are in a slightly different position and it is the right way forward.

Margaret Mitchell (Central Scotland) (Con): I congratulate Brian Adam on lodging his amendments and I welcome the opportunity that he has given the committee fully to debate the matter. Section 18 is an important section and Brian Adam explained his concern about it well. He is concerned that the bill will give cohabitation the same status as marriage.

That is not an assertion that I share, and I will explain why. In the first instance, we consider marriage as having a special status in society, and I think that that is accepted—I do not agree with Marlyn Glen on that. It does. It is a public and legal commitment by two people to the sharing of life together for life to the exclusion of all others—I think that that is the Christian definition. There is no value judgment on cohabiting relationships there. The cohabiting relationship that we are considering is different, in that it is more easily walked away from. Therefore, there is no question but that we are considering two very different types of relationship.

However, it is accepted that many people do cohabit. They cohabit and enter a relationship in good faith with the intent of sharing their lives together for however long. The bill seeks to ensure that, in the case of dispute, they have a right to get out of a relationship in financial terms what they put into it and no more. The rights are discretionary and they are not conferred automatically as they are in marriage and are nothing like the same as the rights that people have in marriage.

I would like to go through them systematically. Household goods were mentioned. Section 19(2) states:

"It shall be presumed that each cohabitant has a right to an equal share in household goods"

However, section 19(3) states that subsection (2) "shall be rebuttable". The provision would kick in only in the case of a dispute. If the parties are

happy to make their own arrangements for whatever dissolution of the cohabitation that they want, that is fine. However, if there is a dispute, the provisions of the bill will protect the vulnerable—if they can prove their claim, which is the next thing that they would have to do. That does not happen in marriage; in marriage, there is an equal sharing of goods, assets and property. The right that we are giving cohabitants is the right to get out of a relationship what they put into it in good faith. That is good law that most people would accept and want to promote.

The same applies to property rights. Unless there has been a declaration or an agreement that a couple is buying a house jointly as cohabitants, cohabiting couples will not have property rights.

Section 22 deals with intestacy. The problem with intestacy is that the person who has died has left no clear statement of intent. We have agonised over the provisions in section 22, but what it says is that there are prior rights—and marriage is right up there; legal rights; children and wives will have an interest; and the cohabitee will fit in, further down the line. That will alter the share of the cake and could alter the children's share, but if the deceased cohabited with another person, it is fair to assume that they had some regard for that person and that, on their death, they would like that other person to benefit in some way and for some recognition to be given to the respect that they had for them. As so many people die intestate and do not think of these things, it is right that we address the matter in the bill.

The other matter that Bruce McFee brought up is duration. This is more or less a case of: if it barks, wags its tail and looks like a dog, it is a dog. We cannot say, "A relationship must be of a year's duration," or whatever. People could be cohabiting for a year but living quite separate lives. It is almost as if Bruce is saying, "You kind of lived together, but you didn't share anything, so is that really cohabitation? Really you were more like flatmates." We have to consider the nature of a relationship and leave it to the discretion of the court to say whether there was an intent to pool finances and to spend money on the proposition that the couple would be together in a stable relationship.

I hope that that answers some of the questions that have been raised and leaves people in no doubt that I certainly would not support keeping these sections if I thought that they undermined the institution of marriage. If anything, they make it much clearer that marriage has very special rights and responsibilities.

11:00

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): In principle, I support the arguments that Brian Adam advanced at the beginning of the debate. I believe that the institution of marriage has served us well, that it is the bedrock of our society and that it has the best potential for bringing up children. In saying that, I do not specifically castigate, condemn, chastise or criticise those who choose other forms of relationship. A single mother may well bring up children better than some married couples do. What I am saying is that marriage seems to me to be the proven framework within which to bring children up. I say that on the basis that, as Margaret Mitchell said, the legal commitment of marriage is that man and wife stay together "till death us do part". Therefore, to me, marriage and cohabitation are not different types of the same thing.

No one has mentioned the point, which the Scottish Executive made in its evidence, that cohabitation is a transient state. The minister put forward evidence that suggests that the average length of a cohabitation is two or three years, compared with a commitment in marriage of more than 30 years in the case of Mike Pringle or a mere 22 years in my case, as I am rather younger than Mike.

One member—I am sorry, but I cannot remember who it was—referred to discrimination. Of course, we are all against discrimination. However, although we do not want the law to discriminate against cohabitation, what about children's right not to be discriminated against by their parents? Where are their rights if their parents stay together for only two or three years—although there is no guarantee that the situation would be different if the parents were married? Margaret Mitchell and Marlyn Glen say that the purpose of the bill is, in whole or in part, to give rights to cohabitants, but I am pleased to say that the fact is that two thirds of those who cohabit go on to get married. In case anyone thinks that this is a moral lecture, I should confess that my wife and I were in that category—I felt that I should share that with you this morning, convener. Therefore, we are talking about the one third of those who cohabit who choose not to get married.

My first point is: what about the children? Is that in their best interests? Further evidence has been put to me—this might be disputed by the minister and I will be interested in what he says if he does dispute it—that three quarters of children who commit criminal offences have cohabiting parents and just 25 per cent have married parents. I am not in a position to judge whether that evidence is correct or is the best evidence and it is difficult to study such things.

The bill will give cohabitation a new status—one cannot create a new entity in law without creating a new status. The bill provides that one is a cohabitant if one can prove to the court that one satisfies certain extremely vague criteria.

Stewart Stevenson: Is it your view that the bill will have no impact of any kind during the cohabitation? In other words, do you believe that the bill addresses the situation only when the cohabitation no longer exists, or that the bill will have an effect during the cohabitation?

Fergus Ewing: That is a fair question, although it is perhaps a legalistic one. If the question is, "When does the new status of cohabitation arise?", the answer is, "When it is judicially declared by the court." In other words, that status will be declared only once a court has said, "Under the Family Law (Scotland) Act, I hereby declare you cohabitants," when the couple will legally be cohabitants. However, the point is that the bill will engender an expectation that when two people cohabit and are committed to each other and presumably in a long-term relationship, they are cohabitants. In fact, there will be no such status unless and until it has been judicially declared or one of them dies and the sheriff declares that that was the nature of the relationship.

Mr McFee: Fergus Ewing has referred to the fact that the committee has been told repeatedly that the bill is aimed at securing the best interests of the child. However, last week, section 18(4)(c), which required the court to pay attention to

"whether the cohabitants have a child of whom they are the parents"

in determining rights under section 19 on "Rights in certain household goods", section 20 on "Rights in certain money and property", section 21 on "Financial provision where cohabitation ends otherwise than by death" and section 22 on "Application to court by survivor for provision on intestacy" was, in fact, deleted.

Fergus Ewing: My recollection is absolutely clear: in section 18(4)(a), the word "cohabitation" was changed to "relationship" and section 18(4)(c) was deleted for technical reasons. I could be wrong, and no doubt the minister will clarify that.

If the committee is confused, how on earth can there be clarity in the country? If we do not know what we are doing, how on earth do we expect people in Scotland to have a cat's chance of understanding what we have done?

Cohabitation is not like Diet Coke is to Coke; it is a different type of relationship, and one that, if it is enshrined in law—as I believe it will be—may create a view among those who live together that they will be protected as though they were man and wife. That is the worry.

I will address the main points in members' contributions, moving from arguing in principle to practical terms. Those who advocate a radical departure in the law do so for two fundamental reasons, and I shall use members' phraseology and wording to describe them. They believe that the measures will protect, first, the vulnerable and, secondly, children. While that is well intentioned, neither objective will be achieved. In fact, there is a strong argument to suggest that the vulnerable and children will be more disadvantaged.

I spent some of the weekend reading the evidence from stage 1, thereby staying out of my wife's hair for much of the time. In doing so, some arguments occurred to me that I hope I can share with the committee. First, the Family Law (Scotland) Act 1985 sets out a clear framework for protection. As a practitioner in family law and as someone who is fairly familiar with that act, I can say, without a shadow of a doubt, that it protected the vulnerable and children. How? It states that, on divorce, a spouse should be entitled to a capital sum payment or a transfer of property and to a periodical allowance. Section 9 of the 1985 act sets out principles that are to be applied. Section 9(1)(a) states that

"the net value of the matrimonial property should be shared fairly"

and section 10(1) goes on to say that fair sharing will be presumed to be equal sharing. The act also makes other principled provisions.

The position is very clear. Married couples know where they stand; they know that there will be equal sharing. They know that all the property of the marriage will be shared, with very few exceptions—they are gifts and property acquired by succession before the marriage was entered into. The house is shared. The husband's pension is shared. My goodness me, in the early days, some husbands I advised got a seismic shock when they realised that their occupational pension was up for grabs and would be divided, but that was right and that protected the vulnerable.

The existing law does what members want to do. It protects the wife—as it is almost always the wife who has the rough end of the deal and who is left needing the protection of the law. Moreover, as the minister will know from his advisers, in many cases, the court will go out of its way to ensure that when there is a matrimonial home and children under 18, the matrimonial home will not be sold and the husband will not be able to take his money out of the marriage. The home is preserved so that the children can be brought up in and have the security of staying in the family home, sometimes until they are aged 25. The long-stop date until which potential parental financial responsibility continues is the age of 25 if a child is in pursuit of further education or training.

The Convener: Will the member give way?

Fergus Ewing: Certainly.

The Convener: Are you finished?

Fergus Ewing: I was just giving way—I am by no means finished, I am afraid.

The Convener: I was not sure—I just wanted to check.

The argument that you make about the benefits that marriage confers is not dissimilar to the argument that we have heard that, although marriage has significant benefits, that should not necessarily exclude having some legal protection for cohabiting people. As a practising family lawyer, you must be aware of notable cases of women who have been in cohabiting relationships for 20-plus years with lots of children, who have walked away from the courts with no periodical allowance, no share in the pension and no share in the property, because the law does not confer rights on cohabiting couples. In some such cases, what is not known is whether one party would have been willing to marry to take the benefits that you describe, because of course—and rightly so—marriage requires the agreement of two parties. Is it not fair to say that there are notable cases in Scots law of very vulnerable women and some men who have walked away having had no benefits conferred on them?

Fergus Ewing: The example is a fair point. I am no longer a practising solicitor; I find that the job of being an MSP makes full use of whatever wits and so on I possess. Lawyers tended not to see people in the categories that you described, perhaps because they did not have rights, although they will do so now. However, I am not persuaded that a huge number of people are in the categories that you describe. I do not subscribe to the idea that if people cohabit, that means that they have a lower moral view or commitment to their partner. I suspect that the vast majority of cohabiting couples will struggle through and make an agreement. They might have chosen to make a property agreement.

In response to your point, the question for me is whether the bill, which is what we are talking about, will do what it—or the minister—says on the tin. Will it protect the vulnerable and children? The reason why I described briefly some central principles of the 1985 act is that what it says on the divorce tin is clear for a married couple: it means that the wife is protected. I know that that legislation absolutely operates—although it is not perfect in every case, and the committee is sorting out the situation in respect of Wallis v Wallis and so on—but it does not apply to cohabiting couples.

In paragraph 193 of its stage 1 report, the committee said that the Executive intended to make provision

"where, on the break up of a committed cohabiting relationship, one party finds themselves in a position of financial vulnerability."

However, the bill does not refer to vulnerability or hardship. At the moment, in property disputes, legal aid will be applied for and obtained. As soon as a right to legal aid is created, one cannot deny someone the chance to vindicate that right. The Executive estimates that, over the three years of the first application of the measures, £9 million will be spent in legal aid for cohabitant couples.

A separate argument in that respect centres on the minister's statement to the committee on 2 November that the total commitment to mediation in Scotland was £630,000.

11:15

The Convener: Will you please begin to wind up?

Fergus Ewing: I really have many more entirely new points to make, convener, and I am trying to cover as much ground as possible. I am sorry that this is taking such a long time, but I feel fairly strongly about the issue and I hope that I will be permitted to continue.

If the committee and the Parliament agree to the provisions, £630,000 will be spent on mediation and £9 million will be spent on legal aid for lawyers to deal with these new disputes.

The Executive has chosen to allow what I think Mary Mulligan called a discretionary approach instead of a rules-based approach. I have described the rules-based approach that applies in divorce. The problem with a discretionary approach is that, if it is decided that a couple are cohabitants, the court has no guidance about the amount to award. I assume—perhaps wrongly—that the court will have no power to relate the award to any house, pension or car that might be involved. That appears to be the case, although it is not explicitly stated, because the provisions are contained in separate sections. If sheriffs do not have any guidance, how can they decide what amount to give to what couple?

That raises a fundamental problem. How can the Executive on the one hand say that the provisions will protect the vulnerable but, on the other, be unable to set out in a public information campaign what people's rights will be? It is saying, "We are deliberately not going to tell you how these capital sums of recompense will be calculated because that will be up to the sheriff." If the Executive is going to have an information campaign—as I believe it has said it will—

Margaret Mitchell: Will the member take an intervention?

Fergus Ewing: Could I just—

The Convener: Before anyone takes an intervention, I ask the member to wind up, because we are going to run out of time for this debate.

Mr McFee: On a point of order, convener. I understand that time is pressing, but I suspect that Fergus Ewing's points are important and probably go to the heart of the matter. Frankly, I do not know whether cutting someone off in mid-flow is the right way of conducting the meeting. It might be easier and better for us to hear all the evidence if we are to make an informed decision. I understand about the time constraints—

The Convener: Okay, Bruce. First, I cannot allow someone who is not a committee member to have more time to speak than a committee member. Secondly, the points that Fergus Ewing is now making were made by Mary Mulligan and me when we asked for certain issues to be clarified. As a result, I certainly think that, if the debate is to continue, new points should be raised. After all, I want to allow some time for the minister to come back on the points that have already been made.

I believe that Margaret Mitchell wanted to intervene on Mr Ewing.

Margaret Mitchell: Does the member accept that we are talking about a rebuttable presumption? In other words, someone who has the receipt for, say, a stereo can say, "I paid for that stereo—it's mine."

Fergus Ewing: I accept that. In fact, it strengthens my point and brings me to a new point that I wanted to make. Because, under the provisions on household goods in section 19, property rights will be preferred to the rights of children, any possible protection is further reduced. If the protection provided under section 19 is negated simply by the male cohabitant saying, "I paid for this sofa, this fridge and all these things. Here are my receipts; I own all of them," what protection does the provision provide?

Margaret Mitchell: That is the whole point.

Fergus Ewing: Well, thank you—

Margaret Mitchell: No. The whole point is that you get out of a relationship what you put into it.

Fergus Ewing: It means that there is no protection for the vulnerable or for children in circumstances in which the presumption can be rebutted by proof of purchase, property rights and expenditure of money by the stronger, financially better-off, higher income earner of the couple, who will be able to say, "You'll have had your cohabitant's rights now, because they don't apply. I bought those things, so you don't have any claim." That could put somebody in a worse position.

This point has not been made: how can the Executive square the circle in relation to rights in intestacy? At the last meeting, the minister gave the example of a couple who are not married and who have cohabited for a long period. If they are to be protected, the Law Society of Scotland's recommendations will have to apply, because there is no protection when one party to a couple makes a will cutting out the cohabitant, even if they have lived together for 40 years. Also, as the Law Society pointed out, it is quite possible that someone might have made a will at the beginning of a marriage and forgotten about it, so unwittingly the will might take preference over the new rights under section 21.

As the minister knows, the Law Society—supported, I think, by the Scottish Law Commission—recommended that there should be rights even when a will cuts out the cohabitant. I do not support that, but if there were such rights, at least people could say that the vulnerable would be protected; one cannot say that when one party can cut out the other from his will with regard to property rights.

Convener, I am grateful for the time that you have given me. I conclude with the following points. If we create a law that is impossible to define, impossible to interpret, impossible to understand even here, impossible to explain, and horrendous to enforce, we are going down the wrong road. The danger is not just that we will create meaningless law, but that people out there will think that it will protect them and that if they enter into cohabitation, they will be protected. They will think, because the minister has told them, that the vulnerable will be protected; they will think, because the minister has told them, that their children will be protected; and none of those things will be true.

The Convener: Minister, would you like to attempt to reply?

Hugh Henry: It is difficult to reply to such a long and wide-ranging debate. There have been nine speakers, all of whom have made different points, although on some occasions they have reinforced one another's points. I repeat a point that was also emphasised by Margaret Mitchell and Mary Mulligan: we have made it clear that the Scottish Executive values and supports marriage and we recognise the special place that marriage has in Scottish society. Nothing that we are doing will undermine marriage. The convener outlined some of the key differences, as did Stewart Stevenson, between cohabitation and marriage. I do not have time to do so today, but I will provide a note to reinforce some of the points that were made, which will look at some of the issues and spell out clearly the difference between marriage and cohabitation.

It is also right to put on record that we value and support families throughout Scotland, in whatever shape or form they come. We recognise that families are important to children and that they are important to how our society works. Fergus Ewing touched on the fact that there are people in different forms of relationships who make an immense contribution to good families, and therefore to good society. It is right that we recognise the special role that marriage has had and continues to have, but it is also right that we recognise the contribution that people who choose not to marry make when they form relationships and have children.

It is right to pause for a moment to think. It has been suggested that what we are doing in the bill perhaps misinforms people or allows them to draw the wrong conclusion. We are not suggesting to people that if they cohabit they will have exactly the same rights as if they marry—we are not saying that, because it is clearly not true. As I said, I will spell out for the committee the differences between marriage and cohabitation.

It has been suggested that the bill will help not only to undermine marriage but to accelerate the number of people who choose not to marry. Let us stop to ask what the situation will be if we do nothing about cohabitation in the bill. If we remove the part of the bill that gives new rights to cohabitants and go back to where we were, will marriage be enhanced, encouraged and become more prevalent? The facts show that the opposite will be the case. For whatever reason, more people are choosing to cohabit and more people are choosing to bring up children in relationships other than marriage.

Even if we do not pass the proposals in the Family Law (Scotland) Bill and take out the sections that Brian Adam suggests we should remove, that will not take us back to a situation in which the prevalence of marriage increases and cohabitation reduces. For whatever reason, as things stand the trend is in the opposite direction; more and more people are choosing to cohabit. Some evidence suggests that 30 to 40 per cent of all adults have experience of cohabitation—many are in the same situation as Fergus Ewing. Given that cohabitation is more common among younger people, some commentators expect that both the incidence and duration of cohabitation may well increase. Even if we do nothing, that is the reality.

Brian Adam: You have set out the Executive's position. A series of different fixes have been put into the law in relation to changes in family circumstances in Scotland, but what steps has the Executive taken to enhance the rights that accrue to marriage in order to make it a more attractive proposition? You have said that you are in favour of marriage and that it is important to you. That has also been said by committee members, but we do not have evidence that the Executive is taking any steps to make marriage a more attractive proposition.

Hugh Henry: We have made it clear that what we seek is to protect children. The bill is not intended to promote marriage: it is not a marriage (Scotland) bill. The bill is about families and what happens to families. I am not sure that it is the function of Government to make marriage per se more attractive to people who do not wish to be married, although I acknowledge that the Government does things that recognise the status of marriage.

I have said twice and I will say a third time that we will spell out the differences between marriage and cohabitation. The purpose and function of the bill is not to promote marriage. It is not a marriage bill; it is a bill to cover the impact on families of relationships of whatever nature. Measures in Scottish legislation and in legislation that has been passed at Westminster give significance to the special status of marriage, but it is for others to take responsibility for promoting marriage if they believe in its fundamental value. It is perhaps for others to ponder why, despite their best endeavours—either in families of people who subscribe to those views or through whatever organisation or church they subscribe to—they are not succeeding. If that is the reality, as some members have said, it is for us to draw a conclusion about what we should do in the laws that we pass.

We all have our views, whether religious or not, but it is not our role as legislators to promote our views or to ensure that others live in the way that we might choose. We have to look beyond that and consider what is in the best interests of all the people of Scotland, whom we represent.

11:30

Margaret Mitchell: The minister is right to point out that the bill is about family law rather than about marriage. Inherent in the bill is the well-being of the child. Does the minister agree that because marriage is a lifelong commitment—people say "till death do us part"—it is the most stable relationship in which to bring up children, as opposed to cohabitation, which might or might not last a lifetime and is open ended? That is the difference, which is why we are talking about different rights. We are considering the rights that are conferred automatically on marriage and the discretionary rights for cohabitants, such as the provision to take into account the joint pooling of assets so that the vulnerable partner or the partner who is left with the children has some recognition of what they have put into the relationship. That is what we are trying to achieve.

Hugh Henry: I agree with much of what Margaret Mitchell says. It is right to confirm that children who are brought up in long-term stable relationships generally benefit much more than those who are brought up in a series of transient relationships. As Fergus Ewing said, we have pointed out the transient nature of many cohabitations. However, it is also right to reflect, as the committee has done in some of the evidence sessions and in other work that you and the Justice 2 Committee have done, that it is sometimes better for the children to be removed from certain relationships—marriage or otherwise—if there has been abuse or violence.

We are attempting to provide security and support for children. The Executive would much prefer that when people enter a relationship, in whatever form, they make a long-term commitment that can provide stability. I would prefer that people enter relationships consciously with knowledge and information, rather than drifting into them. However, we need to recognise what is happening in Scotland today and to legislate accordingly.

I think it was Mary Mulligan who pointed out the numbers involved. Some 326,000 adults might be affected and about 100,000 children currently live in cohabiting households. Is it right for us to say that those 326,000 adults and 100,000 children should have no protection?

We are not talking about introducing marriage-equivalent rights and responsibilities or equating cohabitation with marriage. The bill is not about creating a new status of cohabitation with an attendant automatic set of responsibilities and rights akin to those in marriage. We have set out to provide a set of basic safeguards relating to the sharing of household goods, money and property; to financial provision on relationship breakdown where economic disadvantage can be shown; and to discretionary provision for a surviving cohabitant when a partner dies without a will.

Mr McFee: Do not you accept that those are not safeguards and that they do not give the protection that you tell us that you would like to give? They are not safeguards: they are rebuttable and are dependent on the length of the relationship and what the court says. Present the measures as one thing or another, but please do not say that they are one thing when in fact they are something entirely different.

Hugh Henry: The protection of our courts is a safeguard for people. Margaret Mitchell explained the courts' role well. For Bruce McFee to say that the courts offer people no safeguards—

Mr McFee: I did not say that.

Hugh Henry: That is the conclusion that can be drawn from what you said. Your suggestion was that allowing the courts to come to a conclusion is not the same as providing a safeguard. The courts can and do provide a safeguard, which is an important factor in Scots law. The new package is on a presumptive basis—applicants will have to prove to the court that the relationship that has just ended had the characteristics of a long-standing and enduring co-habitation that entitles them to consideration. The factors in section 18 will aid the courts in making that decision. We are not talking about the introduction of marriage-equivalent rights; we seek to protect vulnerable adults and children when relationships break down. In producing that package of safeguards, we have borne it in mind that it is just as vital to protect the rights of adults to live unfettered by financial obligations to partnerships as it is to protect those who are vulnerable. We have achieved that balance. There are no absolutes in the issue.

Fergus Ewing: Can I ask a question?

Hugh Henry: I want to press on.

We set out to achieve greater certainty and, despite what has been said, to introduce more fairness. I do not agree with all that has been said. The bill will provide more clarity and a firm statutory foundation for disentangling the shared life of cohabitants when relationships end. As, I think, Fergus Ewing mentioned, provisions exist in relation to tenancy rights, damages and occupation of the marital home, but the distribution of cohabitants' property on relationship breakdown or the death of a partner is not prescribed. That vulnerability sits uncomfortably alongside the increasing number of cohabiting couples in Scotland and the significant number of children who are involved.

The bill will provide basic safeguards. I note some of the comments that have been made, such as those that the convener made about greater clarity. I will consider that; I have already given a commitment to spell out the differences that she mentioned. Notwithstanding the fact that the process has been long and difficult—not just for the committee—the measures are the right ones.

Fergus Ewing: I will give an example and ask how you would expect the courts to deal with the situation. Say that John and Jean have cohabited for 10 or 20 years, they have children who are under 18 and John owns the house and has a substantial occupational pension. If they split up, what will the court do? Will it have the power to award Jean anything more than household goods? Will the court be able to make provision in respect of the net value of the house or the pension, or must it disregard those? How will the court go about that task, given that there will be no rules to guide it?

Hugh Henry: Section 21 spells out in detail the issues that will be considered. It is not for me to

judge how a court would interpret that, but section 21 will assist in the process.

I hope that the committee will continue to support the principles that it has supported since stage 1. I ask members to reject Brian Adam's amendments 34 to 38 and allow us to make progress.

The Convener: In answering Fergus Ewing's question, you referred to section 21. Do you mean that the court would look at the principles of economic disadvantage and shares in household goods but not at substantial property rights, and that the capital sum, if the court thought it appropriate, would relate to household property, for example?

Hugh Henry: No. We will lodge further amendments, but you should also look at section 20, which refers to "Rights in certain moneys and property". It states:

"In this section "property" does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together."

The Convener: The answer to Fergus Ewing's question is therefore that the court should not seek to divide up the property.

Hugh Henry: Yes—current property law already provides for that.

Stewart Stevenson: I ask about a technical point. Section 21(6) describes economic advantage as "capital … income" and "earning capacity". Would a pension fund, in advance of being paid, be considered as capital?

Hugh Henry: I think that the convener touched on the rights that some pension schemes already confer on named individuals. That could well be covered. We will consider the question and write to the convener thereafter.

The Convener: A number of members are looking for clarity about what the term "economic disadvantage" covers. There could be different implications if it means, for example, that in consideration of economic disadvantage one could weigh up the pension in the same way as one would under the section 9 principles.

I seek further clarification. Is it the case that as the bill is structured, the court has no power to order the transfer of title to a property? If the court felt that there was economic disadvantage to one of the parties, could it deal with that?

Hugh Henry: My understanding is that that could happen only after the death of one party, but I will clarify that for you.

The Convener: No guidance is provided to the courts on the length of the relationship or whether they are looking for longer rather than shorter lengths.

Hugh Henry: That is correct.

The Convener: Where the bill talks about the nature of the relationship, is that to be read as meaning people who are living together as husband and wife or in a civil partnership?

Hugh Henry: Yes.

The Convener: In relation to the succession provisions on intestacy, when an estate is divided up and there was a former marriage prior to more recent cohabitation, is it correct that the former spouse's rights would still come first?

Hugh Henry: That is correct.

The Convener: As there are no further points of clarification, I invite Brian Adam to wind up, although it is such a long time since he moved his amendment, he has probably forgotten that he did so. He gets the last word in this debate.

Brian Adam: I would love to wind up. I am glad that we have had the opportunity to debate a range of issues. However, I am not utterly convinced at the conclusion of the debate that matters are much clearer.

I am pleased that we have received a commitment from the minister to spell out the differences between rights that might accrue to cohabitants as a consequence of the bill becoming law and the rights that currently exist for people who are married.

We did have a range of different views about what might or might not happen. The convener has asserted that pension rights are not involved in this issue and that there is no new entitlement to pension rights, but the minister has said that he will consider whether the pension pot is actually to be considered to be capital, so that matter is not clear.

Putting aside the principled position which, to be fair, has been dealt with by the fact that Parliament has agreed to the general principles of the bill, a lot of the debate really ought to focus on the practicalities. Fergus Ewing dealt with a number of the practicalities and highlighted the fact that we will struggle to give guidance to sheriffs on how the provisions will apply in practice.

The protections that are to be offered to vulnerable people and children might be difficult to ascertain in reality, so the convener should ask again for some issues to be clarified before we come to the final stage of the bill.

I want to make it clear that at no point did I say that the bill would grant cohabitants the same rights as married people—I accept that it will not do that. I said that it will grant similar rights in what appear to be limited areas. Mr Stevenson suggested that taxation will continue to offer differences, but I do not think that we quite have

power over capital gains tax or inheritance tax. It might be that that power will come to Parliament in the future and that those areas could be included in a future family law bill. I accept Stewart Stevenson's point in that sense. However, it is not at all clear what the bill will deliver for people who are cohabiting, however good the intentions.

I am concerned that we will end up creating a new legal status along with some uncertain rights and that the message that will be sent is that, despite what is being said, marriage is no longer important. The minister has acknowledged that the bill is not about marriage—that is the essence of what he said.

11:45

Hugh Henry: Will Brian Adam allow me to clarify that point?

Brian Adam: I am more than happy to do so, but I would like to finish this point first.

I asked what steps the Executive had taken to enhance the rights accruing to marriage, in response to which the minister said that the bill is not about marriage. However, if we have a bill concerning family law that is not about marriage, that is a sad state of affairs and an indictment of where we are.

You say that, as legislators, we cannot tell people what to do, and that is perfectly valid. People are entitled to make choices, but we ought to be aware of the consequences of those choices. If the minister wants to clarify what he said earlier in relation to that, this would be a highly appropriate time for him to do so.

Hugh Henry: I apologise if I gave the impression that the bill was not to do with marriage. What I was trying to say was that the bill is not designed to promote marriage. Clearly, it has to do with marriage, because there are implications all the way through it for married individuals, particularly with regard to what happens to their children.

Brian Adam: I thank the minister for that clarification and I apologise if I misrepresented in any way what he said earlier. I do not think that I did but, nevertheless, I would not want to give that impression.

I believe that we have a range of options available to us in terms of our relationships and the choices that we make. We need not have a faith-based arrangement; indeed, these days, only a small minority of people make that choice.

Many people choose to enter a civil contract of marriage, to which accrues exactly the same rights as any faith-based marriage. In that sense, the issue of faith can be put to one side. There is no doubt that the relative value of that state of affairs will be eroded by the provision to give rights to cohabitants. That measure's lack of clarity means that it will not necessarily deliver the protection that the Executive and the committee are making well-intentioned efforts to achieve. I hope that more clarity will have been provided by the time we reach stage 3. If this morning's discussion has achieved nothing else, it has allowed us to publicise what the differences might be under the proposed arrangements.

I wish to press amendment 34 and I commend it to the committee.

The Convener: The question is, that amendment 34 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 34 disagreed to.

Section 18, as amended, agreed to.

Section 19—Rights in certain household goods

Amendment 35 moved—[Brian Adam].

The Convener: The question is, that amendment 35 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 35 disagreed to.

Section 19 agreed to.

Section 20—Rights in certain money and property

Amendment 36 moved—[Brian Adam].

The Convener: The question is, that amendment 36 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 36 disagreed to.

Section 20 agreed to.

The Convener: Before we move on to section 21 and the next group of amendments, I propose that we take a short comfort break. Is that agreed?

Members *indicated agreement*.

The Convener: Members will acknowledge that the debate that we have just had was extremely important. I allowed quite a bit of time for it because I felt that the provision that we were discussing was one of the most significant in the bill. That means that it is not likely that we will complete our stage 2 consideration today. In view of that, I think that a five-minute break is allowable. The committee will be meeting next week.

11:53

Meeting suspended.

12:05

On resuming—

Section 21—Financial provision where cohabitation ends otherwise than by death

The Convener: Amendment 48, in the name of the minister, is grouped with amendments 49, 83 and 50 to 56.

Hugh Henry: The Executive amendments in this group are technical amendments that address an issue that was raised during stage 1. I am aware of the concerns that have been expressed to the committee that section 21, as currently drafted, does not address the issue of jurisdiction. The amendments address that concern by specifying court jurisdiction in the bill.

Amendment 51 addresses a need that has been brought to the attention of the Executive. Under the bill as introduced, in considering making an order under section 21(2)(a), the courts are directed to take account of whether the defender has derived economic advantage from contributions made by the applicant, and of whether the applicant has suffered economic disadvantage in the interests of the defender or in the interests of a relevant child. Amendment 51 is a balancing provision, which further directs the court to take into account the extent to which any such economic advantage gained by the defender is offset by any economic disadvantage that they have suffered in the interests of the applicant or a relevant child—and vice versa for the applicant.

Turning to amendments 49, 50 and 54 to 56, section 21 provides for two related, but distinct, awards. First, it provides for awards to cover the net economic disadvantage that has resulted from the relationship. That involves the court taking a look at the whole of the duration of the relationship. Secondly, it provides for future child care costs. That is of course quite separate from children's alimentary needs, which are already fully and adequately addressed under the Family Law (Scotland) Act 1985 and the Child Support Act 1991.

It is appropriate that different tests are to be applied to those different situations. In both instances, the courts are invited to consider whether children were a part of the cohabiting couple family. In their retrospective look, the courts are rightly invited to consider whether the applicant has suffered net economic disadvantage, either on their own account, as a result of the relationship, or in the interests of children who are, or were, accepted as children of the family, as well as children of whom the cohabitants are parents.

As regards future child care costs, the Executive is applying the principle that cohabitants who have a child together should remain jointly responsible for meeting expenses incurred by the adult who, after separation, cares for the child. We are not setting out to introduce additional alimentary provisions for children, but to reflect the principle that is defined under section 9(1)(c) of the 1985 act, which states:

> "any economic burden of caring, after divorce, for a child of the marriage under 16 years should be shared fairly between the parties."

Our intention has always been to limit that to children of whom the cohabitants are the parents. The reasons for that distinction have been well rehearsed in the policy memorandum and in a number of exchanges with the committee.

Amendments 49, 50, 54, 55 and 56 better define children within the different contexts of section 21.

They are designed partly to establish the policy rationale behind the section and partly to avoid uncertainty over which children are protected by it. We recognise that the provisions exclude certain circumstances, for example where children are conceived by artificial insemination by couples who do not use a licensed clinic, or indeed by lesbian mothers. I know that Marlyn Glen is attempting to address that issue through amendment 83.

It could be argued that people who choose to have a child together in whatever circumstances owe a moral responsibility to one another and to the child. I do not argue with that, but the amendment goes beyond that, as it seeks to impose an on-going legal responsibility on someone who has no legal relationship with either the parent or the child concerned. That is not appropriate. The question of establishing a new legal relationship between the adults and the children is not for the bill. In these particular circumstances, the remedy lies within the human fertilisation and embryology legislation, which is a reserved matter and outwith the remit of this Parliament. It would not be competent for us to do what Marlyn Glen seeks to do. Should the legislation change at Westminster in future, there may well be a need for us to review our legislation, but as things stand it would not be proper or competent for us to agree to amendment 83. I hope that Marlyn Glen will reconsider and will not move her amendment.

I move amendment 48.

Marlyn Glen: I support the other amendments in the group and wish to clarify that the intention behind amendment 83 is not to go into reserved matters or to consider the Human Fertilisation and Embryology Act 1990.

Amendment 83 does not seek to challenge the basis of section 21(2)(b), which is that future child-rearing costs should not normally be claimed by one cohabitant against the other if the child is not a child of both cohabitants. The amendment seeks only to introduce a limited exception in a situation that is in reality indistinguishable from the basic rule, but which is distinguishable by a legal quirk. The committee discussed this change at some length. It is complicated, but we need to consider the protection of children of couples.

Section 21(2)(b) allows one ex-cohabitant to claim future child care costs from the other ex-cohabitant when they had a child together. If a same-sex couple have a child together, the problem is that they could not access the section without the amendment. The couple can have a child together, but not genetically. They can do it by accessing infertility treatment, although, at present, only one of the couple will be the legal parent. Amendment 83 would not affect that rule, but it goes behind the law to the reality that the couple chose to create a life together and both undertook lifelong obligations to the child. The one who is not legally the parent should not be allowed to step away from those obligations. The bill is about parental rights but, importantly, it is also about parental responsibilities. The amendment does not give same-sex couples any benefits over opposite-sex couples. It does not allow a claim against a person who moves in with a partner who already has a child.

Amendment 83 tries to extend the scope of section 21(2)(b) beyond "parent". If it is agreed to, the section would effectively read that an order can be made to include the future sharing of any economic burden of caring for a child in cases in which both the cohabitants are its parents and—the extension in amendment 83—in cases in which both the cohabitants are not the parents yet the child has been brought into existence by a mutual decision of both cohabitants. Amendment 83 says that there are others, as well as parents, who should share child-rearing costs.

There is a similarity to a provision on married couples in the Family Law (Scotland) Act 1985, section 9(1)(c) of which provides for a sharing of future child-rearing costs by parents and step-parents, but that sharing does not convert the step-parent into a parent for any purpose. We need to consider the issue from the point of view of the child rather than from any other point of view. Amendment 83 is crucial to put same-sex couples on the same basis as opposite-sex couples.

Amendment 83 is justified because same-sex couples create families in different ways from opposite-sex couples, for whom section 21 is primarily designed.

12:15

Stewart Stevenson: The minister did not say much about amendment 53. If I can, I would like to interact with him on it. I want to be clear about whether courts other than Scottish courts can hear an action of divorce in the case of a marriage that was effected in Scotland. That is self-evidently true in the first instance.

Hugh Henry: That would not change where we are at the moment; it would depend on the circumstances of each case. Issues of jurisdiction would need to be determined, as different rules apply in different jurisdictions.

Stewart Stevenson: I pose the question not because I am trying to resist the amendment—let me say that at the outset—but because I want to be clear about the effect, if not the intention, of the amendment. Would the effect be that if one of the cohabitants of a cohabiting couple leaves Scottish

jurisdiction on the separation of the couple, he or she could use the provisions that apply in Scotland to raise court action of divorce in another jurisdiction against someone still resident in Scotland?

I do not necessarily oppose that, but we should be clear about whether that is the effect or intention of the amendment.

Hugh Henry: That is neither the intention nor the effect of the amendment. I am struggling to think of the circumstances in which Scottish jurisdiction can be transposed to another court, particularly if another jurisdiction did not wish to recognise Scottish jurisdiction. I suppose that one could conceive of another jurisdiction's wanting to embrace such a situation for whatever reason, although I am not clear what that might be. Such a contingency is neither the intention nor the effect of the amendment.

Stewart Stevenson: Therefore, it would be necessary for a court other than a Scottish court to pass legislation to create such rights for Scottish cohabitants.

Hugh Henry: Yes.

Stewart Stevenson: Right. I just wanted to get it technically clear.

I would be interested to hear the minister's comments on Marlyn Glen's amendment 83 when he sums up—or Marlyn Glen might intervene. The phrase

"in pursuance of a joint decision by them"

occurs in the amendment. How are we to know that there is a joint decision?

Hugh Henry: That is for Marlyn Glen to answer.

Stewart Stevenson: How are we to know, since, biologically, carrying a child can be the responsibility of one of the cohabitants without reference to the other?

Marlyn Glen: I feel like falling back on what the minister usually says: "It's not up to me to say how sheriffs would look at this." However, one could imagine a situation in which a couple have made it public that they want to have a child together. Their friends, relatives, and perhaps even their lawyers, would know about it. Their decision would be accepted and there would be no difficulty finding it out. However, that is not in the amendment.

Stewart Stevenson: I will conclude by agreeing that there will be circumstances when the existence of a joint decision is clear and unambiguous. I am more concerned about the circumstances when there is ambiguity or perhaps when a claim is made in the absence of a joint decision. The way in which the amendment is presented presents a bit of a difficulty for me.

Mike Pringle: I would like to speak in favour of all the amendments in the group. I support amendment 83.

I return to the question: what are the driving principles of the bill? One of its driving principles is to make things better for children. It does not matter who the child is; the aim is to make things better for any children, anywhere. We have constantly heard during the progress of the bill that that is one of its fundamental aims.

Elsewhere, the bill gives people parental rights and responsibilities, but I believe that amendment 83 recognises a substantial change in society. Thirty-five years ago, when I got married, this would not have been an issue, but times change and it now is an issue. It was Kenneth Norrie, our adviser, who brought that to the committee's attention.

Let us take the example of two women who decide to have a relationship. One is the breadwinner and a substantial earner, the other is not, and the two of them decide to have a child. After 20 years, 15 years or 10 years, one person—the person who is bringing a salary into the house—will have acquired pension rights. They can probably prove, too, that they have paid for everything in the house. Indeed, the house might be in their name. If they decide to leave the relationship and the couple have had two children in the meantime, where does that leave the children? They need to be protected. It is as simple as that. Amendment 83 tries to address that problem, and I think we ought to support it.

Margaret Mitchell: Marlyn Glen said that it is not her intention that amendment 83 should take in embryology or refer to the Human Fertilisation and Embryology Act 1990, but I share the minister's reservations about it, because it is treading on reserved territory. For that reason, I will not support it.

I seek some assurance from the minister that the reference in amendment 51 to the "relevant child" of a couple would not have the unintended consequence of leaving the door open for involvement in embryology arguments, which I do not believe we should be concerning ourselves with in this devolved Parliament.

Mr McFee: I find myself in the unusual position of supporting Marlyn Glen for the simple reason that, as soon as we open the door and go down this route, we will end up with the logical conclusion that she presents: that there should not be discrimination against a couple, or against a couple's child, based on the method of insemination or on the sex of the couple. I might not agree that we should go down this route in the first instance, but if we are going to do it we should do it. Stewart Stevenson raised the question of the

burden of proof and ambiguity. I see nothing but problems with the burden of proof and ambiguity throughout section 21, so adding one more subsection will not really make much difference.

I do not believe that the level of protection that has been trumpeted will actually be delivered, but if people do believe that a certain level of protection will be delivered, why discriminate against a child because of the sex of the couple who are bringing up that child? That is the difficulty, so if we are going to go down this route I think amendment 83 should be supported.

Mrs Mulligan: The difficulty that we face is that we are dealing with a situation that has not yet been given a solid basis, although that will come at some stage. As has already been said, technical and medical improvements are going on all the time and they will change the basis on which children are born. The legislation that deals with that will have to catch up, but it has not happened so far. Marlyn Glen's amendment 83 responds to a situation that is not legislated for at this stage, and we cannot legislate for it because it is a reserved matter.

Mike Pringle: Will you take an intervention?

Mrs Mulligan: I will progress with my point for a minute and then I will let you in.

I appreciate what Mike Pringle said. We should be seeking to protect the rights of the child, but that has to be done in an ordered fashion. We cannot make such a decision at this stage. We must therefore give the issue further consideration.

In his summing up, will the minister say whether there will be an opportunity for us to reconsider the issue when further legislation is being made at Westminster?

Mike Pringle: I think that you have just answered part of my question, but for how long will we have to wait? We have no idea. It might be 10, 15 or 20 years. The truth is that society is changing quickly and we do not know how long it will be before something happens with the current situation. We have the opportunity to do something now.

Mrs Mulligan: I cannot answer that question. If the minister can give any indications, I would be grateful. However, at this stage, we cannot take the decision that Marlyn Glen seeks, so I cannot support it, although I will be interested in the minister's comments.

Mr McFee: Will the member take a short intervention?

The Convener: She has finished, but you may make your point anyway.

Mr McFee: The argument has already been led that we should not wait for any changes to the law of succession, which we control. So what is the argument to say that we should wait for legislation from another body about an issue that we do not control?

Marlyn Glen: Yes, particularly when those children are already born.

The Convener: I will not support amendment 83. I need some time to think about it because, if I understand it correctly, it would cover any cohabiting couple who use artificial insemination or something equivalent. It would therefore not just cover same-sex couples; it would cover opposite-sex couples where one was not the biological parent. I take Mike Pringle's point—

Marlyn Glen: May I intervene, convener?

The Convener: Okay.

Marlyn Glen: Opposite-sex couples are already covered; that is the point of the amendment. The only people who are excluded are people in same-sex couples. Opposite-sex couples who go for assisted pregnancies are covered so that such a couple with a child can make a claim. The only people who cannot access the provisions of this part of the bill are people in same-sex couples.

The Convener: That is my concern about step-parents and other people who are not biological parents. I need time to think about the financial obligations that we place on anyone who has no parental responsibilities or rights. We talked about a child of 15; the financial burden usually ends when a person reaches 16, so I am more concerned about the situation with younger children.

We have to balance the interests of the child with the interests of an adult who has decided to walk away and whose connection with the child is not biological, but is based on an agreement. If we agree to the amendment, we will be saying to that adult that they will have to take on the financial burden of a child that is not biologically theirs until the child is 16, or older if they are in full-time education. That is a big economic burden and I think that what the amendment proposes is quite substantial. I want to get the balance between adults and children right, so I want more time to think about it.

I hear what Marlyn Glen is saying about opposite-sex couples. I had not quite appreciated that what she described is the case. I will need to think about that.

12:30

Marlyn Glen: I have one more point to make. In fact, step-parents are liable in that situation. A claim for sharing child-rearing costs can be made even though the step-parent is not the actual

parent of the child. The only people who are excluded are same-sex couples.

The Convener: That is not the point I was making. The point I am making is about the rights, obligations and responsibilities that we give to all adults. Mike Pringle made a good point about step-parents. I am torn about that too, particularly where younger children are involved. Should we confer parental rights and responsibilities on people who have stepped in as parents but are not biological parents? It is a difficult question. We must strike the right balance in conferring obligations on adults who have no biological connection with the child. Anyway, that is my opinion, for what it is worth.

Hugh Henry: Some of what you say about definitions is right and some of what Marlyn Glen says is right, but the key question is whether we have the competence to deal with the matter. We do not. Bruce McFee asked why we cannot deal with it. The answer is that it is a reserved matter.

You are right, convener, in that the issue does not apply only to same-sex couples. It will also apply to opposite-sex couples. The key point is where the artificial insemination took place and whether the clinic was licensed or unlicensed. Another important point is whether same-sex couples have access to courses of treatment at licensed clinics—at present, they do not.

Marlyn Glen: A single person can use a licensed clinic, so the place where the assisted pregnancy happens is not the point. The baby may or may not be conceived in a licensed place.

Hugh Henry: Marlyn Glen is correct, but she is not talking about an individual who seeks treatment in a licensed clinic and has a child; she is talking about two people who consciously, overtly and publicly decide to enter into a relationship and have a child and who turn to an unlicensed clinic because they cannot access treatment in a licensed clinic. That situation is not covered in the bill and it is for Westminster to resolve the matter. Because there is no legal status, Marlyn Glen is trying to convert what could be argued to be a moral responsibility into a legal responsibility, but we do not have the power or competence to do that.

Members asked when we can deal with the matter. It is for the United Kingdom Government to decide whether to deal with the issue when it considers legislation on human embryology and fertilisation. If the UK Government brings forward legislation on the matter, there might be no need for us to do anything because the legislation that it introduces for the whole of the UK may well be adequate. However, if we need to do anything that is not covered in the UK legislation, it will be up to the Scottish Parliament to seek to amend or update our existing legislation by using an appropriate bill. At the moment, that is speculation. As things stand, the problem is that we are unable to legislate to give legal status to something that is the responsibility of the UK Parliament.

Mr McFee: Convener, I seek clarification on an important point in relation to amendment 83. The minister seemed to say that we could not agree to the amendment because we do not have the competence to do so. Is that the case and, if so, why are we considering the amendment?

The Convener: The admissibility of amendments is a matter for me and there is no question but that amendment 83 is admissible. The minister might want to say why such a measure should not be included in this bill, but in a bill at Westminster.

Hugh Henry: To some extent, it would be competent for the committee to agree to amendment 83, but the issue that I am trying to clarify—not very well—is about the legal status of the child. We cannot confer legal status on such children because that is a matter for Westminster under the Human Fertilisation and Embryology Act 1990. The situation for same-sex couples is complicated by the fact that, under the current law, we have no means of recognising as children of the relationship children whom such couples wish to have jointly. The legal definition of a parent in that respect is not an issue for the bill but for the Human Fertilisation and Embryology Act 1990. To some extent, the issue may relate to adoption legislation, which we may consider at some point. However, it is not competent for us to try to give in the bill a legal definition about the children of such relationships.

Marlyn Glen: Amendment 83 does not attempt to change the legal definition of the term “parent”; it aims to extend the scope of section 21(2)(b) beyond parents. It would broaden the responsibility to share the economic burden of caring for children, but it would not change the definition of the term “parent”, as the minister suggests. The trouble with waiting longer for the measure to be introduced is that such children have already been born and are in the situation that the amendment aims to address. The 1990 act is a completely different issue. I am talking about children who are already among us and who need to be protected.

Mike Pringle: I have a question on an issue on which I am left confused. What is the current legal status of a child who is born to a lesbian couple? The minister implied that, in Scotland, such a child does not have any legal status, but they must have some status.

Hugh Henry: The legal status is that they have one parent—the mother. I am not talking about moral issues.

Some of what Marlyn Glen says is correct, but amendment 83 seeks to give a determination of the term "parent" that is outwith legally recognised definitions.

Margaret Mitchell: As Marlyn Glen says, it is not her intent that amendment 83 should delve into the 1990 act, but the potential exists for that to happen, which is why I will vote against it.

I again ask the minister whether amendment 51 will have any unintended consequences for the Human Fertilisation and Embryology Act 1990. Should we go a little further and mention specifically that the measure will have no such unintended impact?

Hugh Henry: I can give that assurance. The answer is no.

The Convener: No further points of clarification arise. Do you want to say anything in winding up, minister?

Hugh Henry: No. The issues have been well argued. The matter is confusing and complex. I can well understand Marlyn Glen's motivation in lodging amendment 83, but I am not persuaded that the amendment will achieve her intention.

Amendment 48 agreed to.

Amendment 49 moved—[Hugh Henry]—and agreed to.

Amendment 83 moved—[Marlyn Glen].

The Convener: The question is, that amendment 83 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 83 disagreed to.

Amendments 50 to 56 moved—[Hugh Henry].

The Convener: Does any member object to a single question being put on amendments 50 to 56.

Mr McFee: Yes.

The Convener: Is your objection to all the amendments in the group being taken en bloc or does it relate to just one amendment?

Mr McFee: It relates to amendment 51.

The Convener: In that case, I propose to put separate questions on amendment 50 and 51 and to put the question on amendments 52 to 56 en bloc. Are we agreed?

Members *indicated agreement*.

Amendment 50 agreed to.

The Convener: The question is, that amendment 51 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

McFee, Mr Bruce (West of Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 51 agreed to.

Amendments 52 to 56 agreed to.

Amendment 37 moved—[Brian Adam].

The Convener: The question is, that amendment 37 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 37 disagreed to.

Section 21, as amended, agreed to.

Section 22—Application to court by survivor for provision on intestacy

The Convener: Amendment 57, in the name of the minister, is grouped with amendments 60, 61 and 63 to 68.

Hugh Henry: The purpose of section 22 is to allow the courts to make a discretionary award to a surviving cohabitant and to award to the cohabitant an amount up to the value that they

would have been entitled to if they had been a spouse, but no more than that. The Executive accepts that the provisions have the potential to have an impact on the deceased's estate. If a surviving cohabitant is to be able to pursue a claim, there has to be a net intestate estate. This is defined as the intestate estate of the deceased cohabitant after the prior rights and legal rights of any surviving spouse and certain other liabilities are met.

If the legal rights of children and the distribution of the free estate in terms of section 2 of the Succession (Scotland) Act 1964 are to be automatically met, there would be no estate on which a claim could be mounted. The policy intention is that the succession rights of surviving children are not automatically satisfied but are taken into consideration when deciding whether to make a discretionary award to the surviving cohabitant. These rights will no longer be postponed to the spouse's prior rights only, but in future will be postponed to the spouse's prior and legal rights and to any discretionary award to a cohabitant.

To assist the judge in making such a determination, he will refer to the meaning of cohabitant in section 18 and the matters to be considered in section 22. I emphasise that that will not be an exercise by the court to determine who is more worthy or deserving. Instead, section 22 provides for legal safeguards for the vulnerable, and, potentially, for compensation for a surviving cohabitant who has contributed materially to family life with the deceased.

The amendments spell out in a clear and cogent manner the factors that require to be taken into consideration by the court. They make provision for civil partners and they fix at six months the period in which a claim can be made.

12:45

Stewart Stevenson: Have you considered the effect of removing the words "on cause shown" from section 22(7)? I am thinking of the case of a cohabitant lost at sea; the date on which it is likely that they died will be clear, but the declarator of their being dead will not be made until six months have elapsed. Their cohabitant will not be able to get the death certificate in order to exercise their rights as granted under section 22 until the six months have elapsed. It might be, of course, that you will explain that such a case would not be affected by the changes proposed in amendments 63 and 64.

Hugh Henry: You describe very unusual, if not unique, circumstances.

Stewart Stevenson: It is a purely technical point.

Hugh Henry: I will reflect on your point and if we think that a further amendment is required at stage 3, we will lodge one.

Stewart Stevenson: You understand that my constituents have particular concerns in that regard. Although I speak of small numbers of cases, I suggest that such circumstances are not all that unusual.

Hugh Henry: I will certainly reflect on that point, but we are attempting to provide legal safeguards for vulnerable people and, potentially, compensation for the surviving cohabitant.

It appears that six months is a sensible and workable period that will afford the cohabitant sufficient time to lodge a claim without causing undue prejudice to the surviving family.

We are amending section 22(11) because as drafted, it did not meet the policy intention. I hope that it has now been put beyond doubt that it is only the legal and prior rights of the spouse that have priority over the cohabitant's claim and must be met before any distribution is made to the cohabitant.

There are some outstanding technical issues relating to court processes that require to be considered and I will include Stewart Stevenson's point in that consideration. It might be the case that an amendment to deal with them will be lodged at stage 3.

I move amendment 57.

Mr McFee: I am concerned that here we are again amending the law of succession in a piecemeal fashion. The—possibly unintentional—effect of the bill seems to be that there should be only winners but, unfortunately, if one individual gets more money when somebody dies, someone else gets less.

Although the legal and prior rights of the spouse will be protected, there could be situations in which, for example, a man who had been married and who had children from that previous marriage goes on to cohabit with someone else. It is clear that the provision in amendment 57 would affect the rights of the children from his previous marriage. Is that the policy intention?

Hugh Henry: The intention is to postpone the exercise of rights until other matters have been determined.

Mr McFee: Clearly, there is the potential for the estate that the children would otherwise have inherited to be reduced considerably, depending on the court's decision.

Hugh Henry: Yes, that might happen, but it might not. It would be for the court to determine.

Mr McFee: That is fine. I just wanted to establish that the provision could mean that part of the estate is taken from the children of the

marriage. It is up to members whether they want to support that.

The Convener: We received considerable correspondence on that point. The Executive has now made clear the effect on section 22(2) and on rights in relation to the free estate. If part of the estate is going to be given to a new person it naturally follows that there will have to be a reduction in others' shares.

Minister, on amendment 60, you told the committee why you want to remove from section 22 the phrase:

"in respect of legal rights and prior rights."

Does that mean that the court could say that the upper limit could be more generous than the amount that would be available in respect of legal and prior rights? Section 22(4) states:

"An order or interim order under subsection (2) shall not have the effect of awarding to the survivor an amount which would exceed the amount to which the survivor would have been entitled in respect of legal rights and prior rights had the survivor been the spouse of the deceased."

I am concerned about the effect of removing the phrase:

"in respect of legal and prior rights."

What would the upper limit be?

Hugh Henry: The purpose of amendment 60 is to ensure that the survivor has entitlement to the free net intestate estate. It is not about increasing limits per se, but about ensuring that we clarify exactly what is involved. The amendment deletes the references to "legal and prior rights", because we think that we have to consider the whole net intestate estate that is available to the survivor and, accordingly, the residue of the estate that is available after legal and prior rights have been met. It is about the net intestate estate.

The Convener: So the effect of removing the phrase from section 22(4) is that the upper limit could be higher than the amount that would have been derived in respect of legal and prior rights. The amount would include the amount that would have been available in respect of legal and prior rights and anything from the free estate, so the upper limit would be higher.

Hugh Henry: Our view is that a cohabitant would not be any better off than a spouse would be. It is not about trying to increase limits for a cohabitant in comparison with those of a spouse.

The Convener: Including the phrase means that a cohabitant would not get anything from the estate that was greater than the amount in respect of legal and prior rights. The upper limit is the amount in respect of legal and prior rights, because the bill does not mention the free estate. Removing the phrase does not put the cohabitant in the position in which they would have been if they had been the spouse, but it increases the upper limit in section 22(4). It is now not exclusively about legal and prior rights. Is that right?

Hugh Henry: At the moment the spouse could get the whole estate, but we recognise that there could well be another claim. We are trying to ensure that a balance can be struck. It is for the courts to determine the amounts.

The Convener: If the spouse could have had the whole estate, under amended section 22(4) the cohabitant could also get the whole estate.

Hugh Henry: Yes.

Margaret Mitchell: It was my understanding that as things stood, the wife would still have legal and prior rights, which are the first two bites of the cherry.

Hugh Henry: Yes.

Margaret Mitchell: Does removing the phrase about legal and prior rights mean that the wife is disadvantaged, in that she is then considered to be on a par with the cohabitant? The cohabitant will not get more than the wife, but she will be on a par with her. In other words, will amendment 60 remove any protection that was provided by the previous wording that the wife had prior and legal rights?

Hugh Henry: No. Spouses' rights would still take precedence.

The Convener: If there is a pre-existing spouse, they come first. They get their entitlement in respect of legal and prior rights. Do they get something from the free estate?

Hugh Henry: They could.

The Convener: If there is a cohabitant, they come next. They get something from the estate. In the bill as drafted, the cohabitant can get no more than they would have been entitled to get in respect of legal and prior rights, but amendment 60 would mean that they could get no more than the spouse would have got. Amendment 60 means that if there is no spouse—in other words, there is no one else in the picture—the cohabitant stands to get from the estate no more than they would have got if they were the spouse.

Hugh Henry: That is correct.

The Convener: The proposal is that the cohabitant should be able to get not just what they would have been able to get in respect of legal and prior rights, but anything else from the rest of the estate. That is what amendment 60 means.

Hugh Henry: You are right, convener.

Mr McFee: I go back to the cake analogy. If someone will get a bigger slice, someone else will

get a smaller slice. In other words, any extra amount that is awarded to the cohabitant could come from what the spouse would have got, had the law not changed.

Hugh Henry: No.

Mr McFee: So who will make up the difference? Where will that extra money come from?

Hugh Henry: We are talking about the free estate, some of which could go to other relatives. If Bruce McFee is looking for potential losers in such circumstances, myriad relatives, including siblings, could lose out.

Mr McFee: Could the spouse lose out?

Hugh Henry: Siblings could lose out. The spouse would already have been dealt with—the spouse is guaranteed to get what they are entitled to. We are talking about the free estate, which could go to others. As was said a few weeks ago when we were discussing another section, if we want to give people new rights to someone's estate, there will be losers. No one is denying that people who may have benefited in the past may not benefit to the same degree in future.

The Convener: Do you think that it would help the courts to give them a guide in the form of a list of who comes where as regards succession? The Succession (Scotland) Act 1964 lays out who comes first; it might be the mother, the father or a sibling. Would it be helpful for the purposes of clarity to provide such a list in the bill?

Hugh Henry: I am not sure that we need to do that. You are right that it would be helpful to spell things out in that way, but you should remember that the bill will be read alongside the 1964 act, in which such matters are spelled out. We would simply be duplicating what is already there.

The Convener: Okay.

Hugh Henry: A body of judicial knowledge has developed on the subject since 1964.

The Convener: No other member wishes to speak. Do you want to say anything to wind up, minister?

Hugh Henry: No thanks, convener.

The Convener: The question is, that amendment 57 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

McFee, Mr Bruce (West of Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 1, Abstentions 0.

Amendment 57 agreed to.

Amendments 60, 61 and 63 to 68 moved—[Hugh Henry].

The Convener: Do members object to a single question being put on those amendments?

Mr McFee: I would like a separate question to be put on amendment 60.

13:00

The Convener: Since Bruce McFee has objected to a single question being put, I will put the question on amendment 60 and a single question on amendments 61 and 63 to 68.

The question is, that amendment 60 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

McFee, Mr Bruce (West of Scotland) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Against 1, Abstentions 1.

Amendment 60 agreed to.

Amendments 61 and 63 to 68 agreed to.

Amendment 38 moved—[Brian Adam].

The Convener: The question is, that amendment 38 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 5, Abstentions 0.

Amendment 38 disagreed to.

Section 22, as amended, agreed to.

Section 23—Administration of Justice Act 1982: extension of definition of "relative"

Amendments 69 and 70 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 39, in the name of Brian Adam, is in a group on its own.

Brian Adam: We had a long debate on the general principle earlier. I choose not to press amendment 39, nor amendment 40, to leave out section 24, in order to expedite the committee's business.

Amendment 39 not moved.

Section 23, as amended, agreed to.

The Convener: I propose to end stage 2 consideration for today, because we have some Scottish statutory instruments to deal with, and because we will have to meet next week anyway.

Mike Pringle: Have we had a response to the letter that you sent to Hugh Henry on 18 November, regarding sections 2 and 28?

The Convener: No, we have not had a response yet.

Subordinate Legislation

Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005 (draft)

13:04

The Convener: Hugh Henry is remaining with us for item 2, which is subordinate legislation. I refer members to a note that the clerk has prepared on the draft order. I ask Hugh Henry to speak to and move motion S2M-3547.

Hugh Henry: The draft order makes consequential amendments to primary legislation to take account of civil partners. The reason for making the order is to ensure parity of treatment between spouses and civil partners. That was the policy of both the Executive and the United Kingdom Government in framing the Civil Partnership Act 2004.

The committee will be aware that the Civil Partnership Act 2004 will come into force throughout the UK on 5 December. The act affords greater social and legal inclusion to couples in same-sex relationships by creating a mechanism through which they can register their relationships. Registration will bring with it a package of responsibilities and rights that parallel those that are available to opposite-sex couples through marriage.

Schedule 28 to the act makes consequential amendments to Scottish primary legislation that are required to take account of the new relationship of civil partners but, as is usually the case with significant pieces of primary legislation, consequential subordinate legislation is required to give full effect to the act. The order amends primary legislation that is not covered by schedule 28 to the Civil Partnership Act 2004. In most cases, it is simply a matter of adding the term "or civil partner" alongside existing references to "spouse".

The order, along with the Family Law (Scotland) Bill, consequential regulations that amend secondary legislation, regulations passed at Westminster on reserved matters and a number of sets of regulations in particular subject areas such as occupational pensions, will ensure that the Civil Partnership Act 2004 in Scotland is given full effect when it comes into force on 5 December.

I move,

That the Justice 1 Committee recommends that the draft Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005 be approved.

The Convener: Thank you. Does any member want to speak?

Mrs Mulligan: The Executive note states:

"This instrument has no financial effects on the Scottish Executive, local government or on business."

My colleague Stewart Stevenson, who is sorry that he cannot be here to raise the point himself, suggests to me that in fact there is a financial effect, for example on the collection of council tax. Can you clarify whether he is right or you are right?

Hugh Henry: An effect on the collection of council tax in what respect?

Mrs Mulligan: For example, if there is a recognised partnership, a discount will not be available. I have to admit that I do not fully understand the point, but it has been suggested to me that there is an effect, so I want you to clarify the situation.

Hugh Henry: I presume that what Stewart Stevenson is saying is that civil partners will now be treated as a married couple, so there will be a difference between what they will contribute and what two single people who live together will contribute.

Mrs Mulligan: Possibly.

Hugh Henry: I am not very familiar with the position—it is a while since I looked at the provisions on that in local government legislation. Any such difference would have a minimal effect.

Mrs Mulligan: The issue will not change my mind about supporting the Scottish statutory instrument but, as the point had been raised, I wanted to know that we were voting for the right thing.

Hugh Henry: As I said, I am not sure about the precise details, but any change to the total income stream for local government will be so small as to be inconsequential.

The Convener: We will let Stewart Stevenson pursue the matter through parliamentary questions to Tom McCabe or whoever the relevant minister is.

I welcome the order. It was not clear to me until I read the Executive note how many acts of Parliament would have to be amended. Little did I think that we would have to amend the Anatomy Act 1984, the Land Reform (Scotland) Act 2003, the Crofters (Scotland) Act 1993 and the Mortgage Rights (Scotland) Act 2001. Suffice it to say that a great deal of work has clearly gone into this. When we drew up our report on the Civil Partnership Bill, which was the subject of a Sewel motion, we made it clear that the Scottish Executive would have to carry out a lot of work to ensure that it interacted properly and complied with other aspects of the law. I welcome what you and your officials have done to amend the other pieces of legislation.

Members have no further questions. Minister, do you wish to say anything in conclusion?

Hugh Henry: No, thanks.

Motion agreed to.

That the Justice 1 Committee recommends that the draft Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005 be approved.

The Convener: We will report to Parliament in the usual way, and include the *Official Report* of our comments to let MSPs decide how they want to vote. A draft report will be circulated by e-mail for comment and the deadline for comments is Wednesday 7 December. We will aim to publish by Friday 25 November—that cannot be right. [*Interruption.*] As you have probably gathered, I am reading from a script. The dates must be the wrong way round; the publication date must be 7 December. Suffice it to say that members should look out for an e-mail containing the draft report, because anyone who wants to make any final comments should do so immediately.

I am sad to say that that brings to an end the minister's time with us this morning. Thank you very much. Unfortunately, you will have to see us again next week.

Marriages and Civil Partnerships (Fees) (Scotland) Regulations 2005 (SSI 2005/556)

Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Separations) (Scotland) Regulations 2005 (SSI 2005/567)

Civil Partnership (Relationships Arising Through Civil Partnership) (Scotland) Order 2005 (SSI 2005/568)

Civil Partnership (Modification of Subordinate Legislation) Order 2005 (SSI 2005/572)

Civil Partnership (Overseas Relationships) (Scotland) Order 2005 (SSI 2005/573)

The Convener: Item 3 is also on subordinate legislation. I welcome from the Scottish Executive Justice Department Louise Miller and Alex Mowat, who have come along to answer any questions that members may have about the statutory instruments.

I inform members that the Subordinate Legislation Committee has nothing to draw to the committee's attention in relation to these negative instruments, so it is a matter for the committee to make comments or ask questions. The committee

may want simply to—[*Interruption.*] I should add that there is one exception, which is the first instrument—the Marriages and Civil Partnerships (Fees) (Scotland) Regulations 2005, for which the General Register Office for Scotland is responsible. Members should have a note of that.

Do members have any comments to make?

Members *indicated disagreement.*

The Convener: As they are here, do Louise Miller and Alex Mowat want to draw to our attention anything on any of the instruments?

Louise Miller (Scottish Executive Justice Department): No.

Alex Mowat (Scottish Executive Justice Department): No.

The Convener: Okay. The committee is otherwise content to note the instruments. We will report to the Parliament in the usual way that we have noted the contents of the instruments.

Before we leave this item, I just want to check that members are content to note all the instruments.

Members *indicated agreement*.

The Convener: In that case, I remind members that we will meet next week on 29 November to complete stage 2 of the Family Law (Scotland) Bill. The deadline for lodging amendments is Friday 25 November at 12 noon.

Meeting closed at 13:14.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

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