The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

EQUAL OPPORTUNITIES COMMITTEE

Thursday 19 September 2013

Session 4

Thursday 19 September 2013

CONTENTS

EQUAL OPPORTUNITIES COMMITTEE
23rd Meeting 2013, Session 4

CONVENER

*Margaret McCulloch (Central Scotland) (Lab)

DEPUTY CONVENER

*Marco Biagi (Edinburgh Central) (SNP)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alex Johnstone (North East Scotland) (Con)
*John Mason (Glasgow Shettleston) (SNP)
*Siobhan McMahon (Central Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor John Curtice
Dr Kelly Kollman (University of Glasgow)
Karon Monaghan QC
Aidan O'Neill QC
Lynn Welsh (Equality and Human Rights Commission)

CLERK TO THE COMMITTEE

Douglas Thornton

LOCATION

Committee Room 2

Scottish Parliament

Equal Opportunities Committee

Thursday 19 September 2013

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

Marriage and Civil Partnership (Scotland) Bill: Stage 1

The Convener (Margaret McCulloch): I welcome everyone to the 23rd meeting in 2013 of the Equal Opportunities Committee. I ask that electronic devices be set to flight mode or switched off.

We will start by introducing ourselves. To my left are our clerks, our research team and the official reporters and around the room we are supported by broadcasting services and the security office. I also welcome observers in the public gallery.

I am the committee convener. I invite members and witnesses to introduce themselves in turn.

Marco Biagi (Edinburgh Central) (SNP): I am the deputy convener of the committee and MSP for Edinburgh Central.

Alex Johnstone (North East Scotland) (Con): I am an MSP for North East Scotland.

John Finnie (Highlands and Islands) (Ind): I am a Highlands and Islands MSP.

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

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

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

Dr Kelly Kollman (University of Glasgow): I am from the University of Glasgow.

Aidan O'Neill QC: I am a member of Matrix Chambers in London and also practise in Scotland. I suppose that I practise in European Union and human rights law, and I have a particular interest in the relationship between law and religion.

Lynn Welsh (Equality and Human Rights Commission): I am head of legal at the Equality and Human Rights Commission.

Karon Monaghan QC: I am a barrister at Matrix Chambers specialising in equality and human rights law.

The Convener: Thank you. Our only agenda item is evidence taking on the Marriage and Civil Partnership (Scotland) Bill at stage 1, and perhaps I should start by telling our witnesses that, if they wish to speak, they should indicate to me or the clerk on my left.

I welcome our first panel of witnesses to the meeting. Marco Biagi will begin the questioning.

Marco Biagi: My first question concerns the opt-in protections in the bill and whether any attempt on human rights grounds to require a faith group that had not opted into performing same-sex marriage to do so would succeed. I already have Ms Monaghan's opinion on the record from what has been supplied to Liberty, but I would be grateful to hear the two other legal views.

Lynn Welsh: In short, the commission believes that the opt-in provision will work and will not be open to human rights challenge. Obviously, anyone can challenge it but, for many of the same reasons that Ms Monaghan has previously set out, we do not think that they would be successful.

Aidan O'Neill: I never like to say that a human rights challenge will not be successful. Constitutionally, one difference between England and Scotland relates to the Church of England and its effective position as department of marriage for the English state. It could be argued that, at a certain level, the Church of England is a public authority when it carries out marriage functions because of its duty in law to marry anyone, no matter their faith, within its parish boundaries. That is not a matter of church law; it is a matter of English common law and is backed up by the statutes that created the reformation.

In Scotland, there is a different relationship between church and state. The Church of Scotland is not and has never been a department of the state; indeed, we have always had what might be described as a Calvinist notion of the separation of church and state and in Scotland marriage law has a completely different history. Because, unlike the Church of England, the Church of Scotland cannot be seen as a public authority, the arguments that have been advanced on this issue are perhaps more plausible in the English situation and are less likely to have as much sway in Scotland.

Marco Biagi: Would article 9 of the European convention on human rights offer strong protection to a church against such a challenge?

Aidan O'Neill: Yes. Article 9, which stipulates

"the right to freedom of thought, conscience and religion",

is a rather overlooked ECHR provision. In addition to those absolute rights, there is also a right to manifest religion either

"in public or private ... in worship, ... practice and observance."

That right to manifest religion can be modified or subject to interference if there are good reasons for that, but the other rights—

"to freedom of thought, conscience and religion"—

cannot. There would therefore be quite a hurdle and a strong protection under article 9 if churches can prove that they are not part of the state. That is the issue, and it is why there is the possibility of challenge with the Church of England, because of its peculiar status, and the Church in Wales, which also has a duty to marry anybody within its boundaries. We then get the paradox that, in England, a churchgoing and believing same-sex couple who have been attending Anglican parish services throughout their lives would not be able to marry, whereas the twin brother who has never crossed the church door in his life would have an absolute right to do so, although he would have to be marrying a woman rather than a man.

Marco Biagi: Dr Kollman, are you aware of challenges in other countries that have similar protections for churches to opt out that have sought to require religious authorities to perform same-sex marriages against their doctrinal views?

Dr Kollman: As I said when I responded to the invitation to attend the committee, I am not a legal scholar, so I do not know the ins and outs of any kind of legal challenges. There has been controversy in some other countries where there have been religious celebrations, particularly where the church can perform marriages with legal effect. However, those controversies died out relatively quickly. I certainly know of no case where a church has been forced to carry out a marriage. In fact, particularly in the Scandinavian countries, where marriage has been opened relatively recently and the churches have the ability to marry with legal effect, similar types of opt-outs and protections for the churches exist. Actually, most of the churches have opted in, but they were allowed to opt out. As far as I understand it, that has worked relatively well.

Marco Biagi: I want to move on slightly, so if anybody else wants to comment on the issue, this would be a good time.

John Mason: I have a question for Dr Kollman on that point. It has been suggested that churches in Denmark do not have the freedom to opt out. Is that the case?

Dr Kollman: I have heard that on several occasions. Again, I qualify my comments by saying that Denmark is not one of the cases that I have studied in depth, but my understanding from having looked at the case is that the law there has protections. As far as I know, most of the controversy happened when the church itself decided that it wanted to do blessings, which was not part of the original legislation that was passed in 1989. There was a lot of internal controversy in the church and a number of members of the church were not happy with those blessings. However, as far as I know, on marriage, there was far less controversy.

Aidan O'Neill: As I understand it, in Scandinavian countries, the established church, which is the Lutheran church, has been seen as a department of state, in a similar way to the Anglican settlement. There is a minister in the Government who is in charge of church affairs. There is therefore a different relationship from the traditional relationship in Scotland, particularly because the Church of Scotland is not an established church. It is recognised as the national church under the Church of Scotland Act 1921, but it is most certainly not a department of state. That would be completely contrary to the whole reformation settlement and Calvinist ecclesiology.

Christian Allard: That has answered part of the question that I was going to ask. I am interested in the relationship between church and state. Is there the same kind of relationship in other countries that have accepted same-sex marriage? Are there other churches that are linked with the state in the British or Danish way?

Aidan O'Neill: I think that the Scandinavian countries are the only ones that have that Erastian settlement, as it is known, whereby, at the time of the reformation, the king or monarch decided what the church should be and it was subordinate to them. The reformation in Scotland was different, because it was against state authority and the wishes of the reigning monarch, who was Mary, Queen of Scots. There was a different relationship in Scotland. I cannot think of many countries that have a national church that is absolutely and fundamentally separate from the state.

Dr Kollman: On a point of reference, Sweden is the one Scandinavian country that has de-established its church. Not all the Scandinavian countries have an established church.

Christian Allard: If there is a legal problem with the bill, is the relationship between church and state a bigger issue than equal marriage?

Aidan O'Neill: I think that that is a problem. I am anticipating an issue that might arise. The bill is rather unusual in that it purports to give to dissenting ministers of a church that has opted in the option of personally opting out. It seems to me to be a breach of article 9 that an opting-in church can decide what it wants in that way. The bill says, "This is not for the state or the Parliament to determine; we will allow individual ministers to exercise some kind of freedom of conscience, against the wishes of the church body." That is a peculiarity of the Scottish bill, and I think that it is

the one thing that is problematic about it, in the context of that church-state relationship.

Karon Monaghan: I agree with Aidan O'Neill that the issue creates a difficulty. Of course, article 9 protects religious organisations and churches as well as individuals—it is unusual in the convention rights that protection is given to institutions. There is a difficulty in saying that an opting-in church is required, as a matter of law, to permit a minister to exercise a conscientious objection to carrying out same-sex marriage. That is really a question for the religious organisation—the church—itself and not for the state. To the extent that there is a vulnerability, that is where it lies.

Marco Biagi: How does that work for denominations such as the United Reformed Church, or the Unitarians, which have no specific creed in a lot of areas and might, as a matter of their faith, want the decision to rest with individual ministers? Is there a distinction between that situation and, for example, a Quaker celebrant objecting to performing same-sex marriage, when the Quakers want all their celebrants to do so?

Karon Monaghan: Yes, I think so. I think that if the church or religious institution itself said that it was a matter of conscience for all its ministers, that would be permissible. The issue arises where the state permits an individual minister, contrary to the wishes of his or her own church, to opt out, notwithstanding that the church has opted in.

John Mason: Mr O'Neill, I hope that you will not mind if I refer to advice that you have previously given on the subject. You have said that, although there is no hierarchy of protected characteristics in the Equality Act 2010, some characteristics are more equal than others. Will you expand on what you meant?

Aidan O'Neill: Well, clearly I was quoting George Orwell. I think that one of the unresolved issues in the Equality Act 2010 is that there is a bit of an omnium gatherum of various protected characteristics—it is rather difficult to count them; sometimes there are six and sometimes there are seven—which, in theory, because they are all lumped together in the same act, are said to be equally worthy of protection.

However, the idea that there is no hierarchy is rather difficult when two rights appear to come into conflict. The problem is that when the European Court of Human Rights is faced with a particular issue, such as the growing case law around sexual orientation, it starts using the language that we might have associated with the United States Supreme Court. First it talked about the need for particularly weighty reasons to justify discrimination on grounds of sex. In subsequent case law, it talked about the need for particularly weighty reasons to justify discrimination on grounds of race. Then it started applying that to sexual orientation. At the same time, it has applied it to religion. There are always heavy phrases going around and it is not entirely clear what happens if there is a conflict.

09:45

This is perhaps where Lynn Welsh and I would part company, but I sometimes think that there is not a feel for religion in equalities law. Religion has somehow got in there. The problem is that one can understand the idea of people saying, "You can't discriminate against me because of my religious faith," or because of sectarianism in Scotland, or because I am Catholic, or whatever. That makes sense. On the other hand you might have a religious faith that says, "In conscience, I feel that there is a distinction between heterosexual relations—married relations—within an opposite-sex marriage and same-sex relations. That is what my religion tells me." How do you not discriminate against a religion that, at some levels, could be said to be discriminatory in its intent? That is the big problem with equalities law. It has not really faced up to that yet.

John Mason: The feeling among religious people is that, up until now, when the courts in Scotland, the United Kingdom or Europe have faced that kind of choice between sexual orientation and religion, religion normally comes off worse. Is that just their mindset or is it actually the case? I would be interested in the views of the other witnesses, too.

Aidan O'Neill: We are still feeling our way. The court judgments have not been particularly good on the religious front. Part of the problem is that most of those judgments have been in English cases. As I said earlier, the English approach to that residual Anglicanism is that the state tells the church what to do, so the church is used to the idea of religious beliefs being subordinated to the general law. The Scottish tradition is completely different. The Calvinist tradition is of two separate kingdoms, in which the religious have integrity and are worthy of respect within their sphere.

It appears that there has been a sort of deafness to what makes a religious view important for the religious. The problem is that the religious are bundled up and told in effect, "Your views aren't really worthy of respect because ultimately they are homophobic, and if you're homophobic, you're probably or possibly racist, sexist or whatever." It is rather difficult for the religious to explain that it is not quite like that, or that it certainly does not feel like that. To have labels like that is not really to appreciate the world view that the religious try to articulate and hold on to. It is a view that was, paradoxically, a fairly traditional one for the past few hundred years if not the

occasional millennium. There is a mismatch, I think.

John Mason: Okay. That is helpful.

Karon Monaghan: I would not accept the idea that somehow religion has been subordinated, if that is the message that Aidan O'Neill is trying to convey. Much of the carving out of how to manage the conflicts has already been done in the Equality Act 2010. As you will know, there are numerous exceptions protecting religious organisations more broadly than the church and permitting them to discriminate—if that is the word that we are using—against sexual minorities and indeed against other groups in certain circumstances, such as those who have undergone gender reassignment, where that is in conformity with their religious beliefs.

It is also right that domestically, in our law, religion is given very particular weight. As the committee will perhaps know, the Human Rights Act 1998 requires courts to "have particular regard" to religion. I do not accept that there is a hierarchy, but to the extent that one can discern one, the exceptions lie in favour of religious organisations. It is perhaps oversimplistic to suggest—if that is what Aidan O'Neill is doing—that religion is in some way subordinated. I certainly do not accept that.

Lynn Welsh: Possibly unsurprisingly, I agree with Karon Monaghan. When the bill that became the Equality Act 2010 was being drafted, a great deal of thought was given to religion. It was recognised that there might be conflicts in the future, and an attempt was made to avoid that and to make clear how all the provisions should work. It is never possible to legislate for every eventuality, but a real attempt has been made to ensure that there is balance across the legislation.

John Mason: I would like to press Ms Welsh on that point. I was on the committee that dealt with the Equality Bill at Westminster. The Government at the time refused to say that all protected characteristics were equal, so the legislation has not addressed the issue of whether there is a hierarchy. Is that not the case?

Lynn Welsh: No. You might be right that the Government would not say that they were equal, but I am not sure—

John Mason: The legislation left it up to the courts to decide whether there is a hierarchy.

Lynn Welsh: No, I do not think that that is right, either. I think that the intention of the Equality Act 2010 was to ensure that all the protected characteristics were protected and—as Karon Monaghan has set out—given specific protection in certain areas. It was recognised that more protection might be necessary when two areas come into conflict. I do not think that any attempt was made to establish a hierarchy.

John Mason: But you would accept, at least, that the act does not say that the protected characteristics are all equal—it makes no reference to that.

Karon Monaghan: No, the 2010 act does not do that, but it creates exceptions in respect of particular characteristics, such as religion—Parliament decided that it was necessary to record appropriate respect to religious organisations. There are many other exemptions in the act that address other protected characteristics. For example, in relation to gender, Parliament thought that, in certain circumstances, it was appropriate to allow discrimination in gender-specific organisations such as domestic violence facilities. It is certainly the case that the 2010 act carved out pretty wide exemptions for religious organisations without addressing the question whether there is a hierarchy.

Dr Kollman: I want to make a more general point. I would hate to leave the impression that the European Court of Human Rights has worked its way through sexual orientation, particularly as it pertains to family policy. It leaves a large amount of room for states to decide how they want to recognise same-sex couples. There are very few mandates from that court on the issue. I hate to break into the middle of a lawyers' debate, but I think that Mr O'Neill left the impression that there is strict scrutiny of sexual orientation in the US Supreme Court and the European Court of Human Rights. That is absolutely not correct.

Aidan O'Neill: I have two points to make. There is not strict scrutiny of sexual orientation in the US Supreme Court, but there are developing cases before the European Court of Human Rights. At the moment, jurisprudence of the Court of Human Rights says that it is still lawful for a state to prefer opposite-sex marriage—it is not contrary to the European convention on human rights to do so. However, if marriage is extended to same-sex couples, it will become a human rights requirement that there be equality of treatment and regard. In a sense, that is what is important about the Marriage and Civil Partnership (Scotland) Bill—it shifts the position in that regard.

On the issue of religious organisations being protected, when a religious organisation tries to rely on the protections that are provided by paragraph 2 of schedule 23 to the Equality Act 2010, the argument is always put forward that that paragraph must be interpreted as narrowly as possible, because it allows discrimination. In addition, no provision is made for religious individuals—people with religious conscientious objections—as the paragraph applies to religious organisations. Therefore, I think that the Equality

Act 2010 leaves open the possibility of conflict and does not necessarily answer all the concerns of those who consider themselves to be religiously motivated.

The Convener: I will bring in Karon Monaghan, after which we will move on to the next question.

Karon Monaghan: Aidan O'Neill said that once we introduce same-sex marriage—if that is what we do—the position in the European courts will alter, because we will have marriage for both groups and there will be an expectation that there will be equal treatment. In my view, that is so prima facie, but whether that will intrude on the rights of a religious organisation under article 9 of the convention will be a significant question.

Again, as I have said, in my view, article 9 will be given particular weight. Therefore, even in circumstances in which the state legislates for same-sex marriage, it is extremely unlikely—indeed, I would go so far as to say that it is inconceivable—that the European Court would say that religious organisations must conduct same-sex marriages even if they find that objectionable because of religious belief.

Christian Allard: I have a question for Kelly Kollman—other witnesses may also comment if they wish to. It is about the other countries that have adopted policies on same-sex unions in recent years. In particular, I want to ask about the pace of policy change, how the bills came to fruition, whether there was enough consultation in different countries and whether the process of bringing the bills to fruition caused any problems. Some countries went through the process faster than others. What are your views on all that? That is what I would like to know after reading your submission.

Dr Kollman: It is a good question. So many different countries have such policies now, it is hard to categorise or to paint with a broad brush, but generally the countries that introduced those policies earlier probably had more controversy around them. However, in almost all the countries—there may be a few exceptions—it was the case that a majority of the public supported the policy when it happened. These have tended to be very high-profile debates and high-profile policy processes. That means that they have gotten a lot of scrutiny in Parliaments and also in the wider public debate.

It is amazing to look at the media coverage, for example, of same-sex unions as opposed to the media coverage of anti-discrimination laws that included sexual orientation. There were 10 times as many articles on same-sex unions or same-sex marriage as on anti-discrimination laws in some of those countries. Same-sex unions or marriages have a lot of symbolism; they tend to be something that the media covers a lot and therefore they tend to be something that Parliaments scrutinise a lot.

As to whether such policies have caused problems in countries—there is always opposition. Oftentimes it is from religious organisations that have a particular cultural definition of marriage and feel uncomfortable about same-sex marriage. However, I have looked at the situation in most of the European countries and in the one North American country that has a national law, and I think that public opinion—with one exception—became more tolerant of homosexuality rather than less after same-sex unions came in, although that increase in tolerance was a year or two afterwards. I would not say that that increase in tolerance is necessarily causal always—there are general long-term trends towards an increase in tolerance for homosexuality. However, such policies have brought great visibility to lesbian, gay, bisexual and transgender communities and, in general, it has been positive visibility.

Christian Allard: In your experience—because I did not get an answer to this question from reading your submission—do you think that bringing about those changes has been more people led or more led by institutions such as the European Court or Parliaments?

Dr Kollman: By people led, do you mean social movement led?

Christian Allard: Yes.

Dr Kollman: Social movements have played a very important part in this. Having said that, when you open marriage to same-sex couples—or even, certainly in the early years, introduce same-sex unions—it is the case that it brings Governments a great deal of attention and generally, as I said, it has been quite positive attention, so it really depends on where you are looking and on what countries you are looking at.

In Spain a new Government came in in 2004—it was not expected to win that election—and the policy change was seen as being very Government led, although, of course, the LGBT groups were on board. In the Netherlands, the Labour Party supported that change quite a bit, but, in Germany, the SPD—the social democratic party there—was much more reticent. The change there was really led by the minority Green party and it was much more of a grass-roots movement, so the answer is that it depends on the country.

However, the debate has always been a very public debate in any country that has looked at it and therefore there has been a lot of public scrutiny and a lot of involvement of public groups on both sides. In that respect, I think that it has been a good debate; it has been aired in most of those countries. Also, as I said in my

submission—this may be the point that you are getting at, Mr Allard—it is one of those policy areas in which the international realm has been very important but it has not really been led by legal mandates.

Politics sometimes matters, and what really matters here is the power of human rights arguments. They get translated in different ways—in the UK we often talk about equalities, while other countries talk about anti-discrimination or equal treatment—but ultimately, at this point in history, the power of human rights arguments is transformative, and much more so than legal mandates from international courts or EU policy.

10:00

Marco Biagi: The final comment in your written submission is about the different approaches that have been taken to civil partnerships or the equivalent arrangements in other countries in Europe. You say that the only way in which to achieve real equality is to open them up to mixed-sex couples or to get rid of them entirely. Will you expand on why that is the case?

Dr Kollman: I do not think that I quite said it in that way. I will explain what I was trying to say, perhaps more strongly. Many countries have created same-sex unions that are not marriage, which was seen as politically expedient in a large part of the late 1990s and early 2000s, but most national LGBT rights groups would always say that their ultimate goal is marriage, and that argument has largely been made on equalities issues.

What sometimes gets lost in the debate is that, if we go back in history and look at the Scandinavian countries, part of what was going on was a pluralisation of family policy. The ways in which people live their intimate lives these days have become much more complex and pluralistic, and there was all this talk about different ways in which the state can define and recognise couples. That is a different argument from the equalities one.

In some ways, however, the discussion and debate that we are having about same-sex unions can allow us to look at both issues. If we want to open marriage, that will help to solve the equalities issues between same-sex and different-sex couples, but, in doing so, especially as we have had another, non-marriage type of same-sex union before, we might want to start thinking about the other side of the debate as well—the one about pluralising family policy. If a Parliament opens marriage but then closes off civil partnerships, as they are in this country, it might be going against the second part of the debate, which is about pluralising family policy. I would encourage all Parliaments to think about that second goal as well, as some have done.

Marco Biagi: I ask for legal views on whether maintaining civil partnerships for same-sex couples only might be subject to challenge. In fact, I know that it is already subject to challenge, so I ask for a view on whether such a challenge would have merit.

Aidan O'Neill: This is a part of the debate that I really do not understand. I am in a civil partnership and I did not realise that it was a second-class relationship until equality campaigners told me that it was. As I understand civil partnerships—and I should understand them, because I am in one and I am a lawyer—they give people exactly equivalent rights to marriage. They are just not called marriage, and not calling them marriage gives those who would dissent some kind of wriggle room. At some levels, they were a compromise, but they are a compromise in favour of tolerance and pluralism.

On the issue of equality requiring that we rename all relationships as marriage or that we have opposite-sex civil partnerships, I do not understand what the difference would be between an opposite-sex—

Marco Biagi: My specific question was about whether an opposite-sex couple who feel aggrieved that they cannot enter a civil partnership could challenge that.

Aidan O'Neill: I am trying to say that I do not see how they could, because an opposite-sex civil partnership is a marriage. The name is different, but the legal consequences are exactly the same.

Karon Monaghan: Actually, the legal consequences are not quite the same because, importantly for many couples who have been together for a long time, there is a significant exclusion in relation to pension benefits. That is important for people with valuable pensions who may have worked for a long time.

Leaving that aside, I think that somebody could challenge the unavailability of civil partnerships to opposite-sex couples, but it would be unlikely to succeed because the state has a wide margin of appreciation in this area. Also, because there is, for an opposite-sex couple, no material distinction between a marriage and a civil partnership—that is, they can marry and get all their pension benefits—I think that the courts would say that this is an area where the legislature has some margin of discretion.

The Convener: The Netherlands, Belgium and France have all kept their non-marriage schemes in place. Can you confirm whether they are comparable to the one that we have just now in the UK?

Dr Kollman: The registered partnership schemes?

The Convener: Yes.

Dr Kollman: They differ quite a bit. The scheme in the Netherlands is relatively comprehensive in terms of the rights that it gave to different-sex non-married couples and same-sex registered partnerships. The French PACS is much less comprehensive. It is easier to get into and to get out of and does not include a lot of the benefits, duties and obligations that are associated with civil marriage in France.

Karon Monaghan: I am afraid that I cannot help with that.

Siobhan McMahon: My question is for Lynn Welsh first, but anyone else can comment. The equality impact assessment that has been carried out by the Scottish Government when it did the consultation states that any reassurances cannot be guaranteed at this point. Do you have a view on that?

Lynn Welsh: I think that it is honest and I applaud the Scottish Government to that extent. Equality impact assessments are supposed to gather all the information—positive and negative—and to recognise possible difficulties and attempt to mitigate where they can. The Scottish Government is obviously attempting to mitigate possible difficulties with the changes to the 2010 act, for example, and the opt-in process.

Siobhan McMahon: Absolutely, but do you not have concerns? Your submission leaned more towards same-sex couples rather than protections for religious groups and their concerns—one question about concerns was missed. Have you or, indeed, the group looked at the equality impact assessment in depth from both sides of the argument? Your submission does not make it clear that that is the case.

Lynn Welsh: When we drafted our submission we considered the issues both for churches and for people of various sexualities, if that is what you are asking. We think that, as far as it is possible to do so, both sides have been addressed.

Siobhan McMahon: I come back to Mr O'Neill, I am afraid. I think that your submission—at least the one that I have—was drafted before the final bill was published, so some of my questions might not matter any more. Let us know if that is the case. Your submission states:

"details about the impact on freedom of conscience in the workplace, in schools and other areas of everyday life have been overlooked."

Do you still think that that is the case?

Aidan O'Neill: I do not remember writing that, but it was all done a long time ago.

It is not that that has been overlooked, it is just that the notion of freedom of conscience as an individual right—it is one of the rights that is an individual right in article 9—is not something that legislatures generally, or even the courts, have taken on board, because it is a slightly odd position. It is conscientious objection when some individuals say, "I am sorry, but at some level this general law shouldn't apply to my particular situation." In Canada they have developed an approach whereby they establish whether they can get some kind of reasonable accommodation between competing views. The legislation and the courts allow that to happen. They ask, "What is happening in this specific situation? Is there some way that people can rub along while still disagreeing?"

Our legislation does not do that. There is an element of saying, "This is the law and you all have to obey the law." There is no wriggle room or even the possibility of just letting things be. Currently, because there is a differentiation between marriage and civil partnership, and because the European Court says that you are allowed to favour opposite-sex marriage, there is, at least in theory, a bit of wriggle room to allow people to maintain their views, even if they are different.

Karon Monaghan: There has certainly been a great deal of domestic and European case law on the question whether conscientious or individual objection to certain rules should be permitted in circumstances in which those beliefs derive from religion. Indeed, there has been recent case law on the issue from the European Court of Human Rights. Domestically, we deal with the issue by saying that if someone objects to a particular rule that disadvantages them because of their religious belief—if, say, they do not want to conduct a civil partnership or comply with a uniform rule that prohibits them from wearing a cross—that view, whether reasonable or not, should be accommodated, unless the rule or restriction is justified.

You will probably have heard of the recent set of cases in the European Court of Human Rights in which two women—a British Airways check-in worker and a nurse—objected to a uniform rule that prohibited them from wearing a cross. The British Airways check-in worker was refused permission to wear a cross because it conflicted with the company's corporate image; in the case of the nurse, the prohibition on the wearing of the cross was for health and safety reasons—it might, for example, get caught. The European court said that the BA check-in worker should have been allowed to wear her cross and that commercial uniform reasons were not a good justification for prohibiting it. With regard to the nurse, however, the health and safety considerations were found to

be good reasons and justification for the prohibition.

These issues have already been worked out, and it has been recognised that religious belief and its manifestation through dress, expression and so on should be accommodated unless some interference is strictly justified. That is a matter of domestic and European court law, and there is much guidance from the courts on the matter.

John Mason: With regard to Mr O'Neill's comments about wiggle room and the fact that there is a bit more scope in some countries than in others, I have to say that we did not see that kind of wiggle room in the case of the registrar Lillian Ladele. However, there is wiggle room for abortion, the legislation on which says that, although the state provides the service, an individual can opt out of it. Is that a good or possible route for this legislation?

Aidan O'Neill: Interestingly, the one case that Karon Monaghan did not mention with regard to recent European Court of Human Rights judgments was the Ladele case, in which a person who had been employed for a number of years as a registrar in a local authority said, when civil partnerships came in, that she did not feel that she could participate in them on religious grounds. Initially, she was rerostered to ensure that she did not have to participate, but when her colleagues objected, it was decided that her position was incompatible with the council's equal opportunities policy and ultimately she lost her job. The case went to the European Court of Human Rights, which said that, although it would carry out a proportionality analysis, the employer's equal opportunities policy was sufficient reason for the woman to lose her job. As I have said, we are still working out the notion of reasonable accommodation. It is a very recent development from the European Court of Human Rights and, as such, has not yet properly percolated through to the domestic courts.

As far as abortion is concerned, a case going to the UK Supreme Court—Doogan v NHS Greater Glasgow and Clyde Health Board—relates to the width of the application of the conscientious objection provision in the Abortion Act 1967 and whether it applies to nurses or midwives in charge of wards who might not be directly involved in providing abortion but might see themselves as facilitating it because they are running wards in which such procedures are being carried out. The conscientious objection in the abortion legislation was a specific carve-out for religious reasons; it has not really been tested in the courts and the case in question will look at it a bit more. However, you are right to highlight it as an example where religious grounds have to be protected for individuals, which is different from the protection for religious organisations that we have already discussed.

Siobhan McMahon: I will use an example from Mr O'Neill, which is that a Church of Scotland minister is also the chaplain at an NHS hospital. On Sunday, he preaches in his church that marriage is only for one man and one woman. His NHS bosses find out and he is later disciplined for breaching the NHS equality policy. I understand, Mr O'Neill, that you have advised that NHS managers would have a high chance of successfully justifying that action, even if a chaplain was preaching in his own church outside of work time. Do others on the panel share Mr O'Neill's opinion? If so, is there something that the committee could put into the bill? Obviously, we understand that things can be challenged and we accept that the actions shown in the example can happen. Is there something that the committee could put into the bill to lessen the chance of that?

10:15

Lynn Welsh: I do not agree with Mr O'Neill's view on that. There was a recent case involving the Trafford Housing Trust in which a gentleman who worked for the housing association put a comment on his personal blog on Facebook giving his views on same-sex marriage. They were not abusive views. He simply stated his position on same-sex marriage. It was found that to then demote him and discipline him in his job was a breach of his contract and that the employer was not entitled to look to something that was not egregious, discriminatory or harassing but simply a statement of his position in his private life, which could not be taken account of in his employment. However, I think that that case came after Mr O'Neill originally gave his example.

Siobhan McMahon: But what you are talking about is private life, whereas Mr O'Neill's example is about workplaces.

Lynn Welsh: It is outwith employment, which I think is the important issue.

Marco Biagi: If the bill passes, there will be same-sex marriages. Given the equality duty, what is the material difference between someone saying that they do not agree with same-sex marriage and someone saying, for example, that homosexuality is sinful, which I assume a lot of NHS chaplains would do at the moment?

Lynn Welsh: I think that what you are trying to ask is whether it matters what the comment actually is as opposed to someone's right to make the comment. Is that right?

Marco Biagi: No. I imagine that at present there are probably NHS chaplains who would get up on a Sunday and say that homosexuality is sinful. Are

they in the same position right now as they would be after the legalisation of same-sex marriage if they got up and said that same-sex marriage should not be allowed? Is that the case irrespective of the bill?

Lynn Welsh: Yes, in my view.

Karon Monaghan: I agree.

Lynn Welsh: They are allowed to say what their religion's view on the issue is, and that position will not change because of this legislation.

Karon Monaghan: I agree with Lynn Welsh's view. As I have said before, there are carve-outs in the Equality Act 2010 that would protect a minister in that position so that there would be no obligation to change in the context of a church. Things might be different in the workplace, but certainly within the scope of ministering in a church there would be no difference at all, and article 9 would offer very significant protection in that respect.

Aidan O'Neill: Every case depends on its facts, so we can always come up with a new case and say that there is an issue. However, there clearly is an issue because what is said outside the workplace is not divorced from what can be done in the workplace. In the Smith case, which is the Trafford Housing Trust case that was just mentioned, the man was demoted for saying "Equal marriage a step too far?" on his Facebook page, and he never got his job back. His only remedy was something like four weeks' notice pay, and he is still in that demoted position.

In terms of NHS chaplains, the case of Ladele from the European Court of Human Rights appears to say that the idea of equal opportunity within the workplace is so important that it can result in people who do not fit in with that ethos being no longer welcome in the workplace unless they change their views. There is most definitely a tension. Each case will depends on its facts, but you cannot isolate what happens outside—

Marco Biagi: Just to look at the specific—

Aidan O'Neill: Sorry, I have not finished.

You cannot isolate what happens outside the workplace from how one might be treated within the workplace.

Marco Biagi: Can we look at the specific question of the NHS chaplain who gets up on a Sunday at the moment and says that homosexuality is sinful? Would they be subject to the same potential problem at present that you advise would be the case if they got up after same-sex marriage was legalised and said that same-sex marriage was unacceptable?

Aidan O'Neill: That is a particular legal issue. We could say that they are in that situation anyway because the employer would already have an equal opportunities policy. There is wriggle room at the moment on the basis that one can say that favouring opposite-sex marriage is permitted under European convention jurisprudence but, if we were to equalise and allow for marriage regardless of gender or sex, that would change and the situations would have to be treated in exactly the same way. Therefore, the bill changes the position in that it strengthens the position for employers' equal opportunities policies and weakens the arguments that a minister might have in those circumstances. There is a definite change.

John Finnie: I was going to ask about article 9, which concerns

"the right to freedom of thought, conscience and religion",

but much of that has been covered. I will pick up on something that Mr O'Neill said about those with conscientious objections. We have touched on chaplains, foster carers, teachers, registrars and religious groups wishing to use public facilities. Would an unfettered, unlimited discretion be afforded an individual regarding what they say are their religious beliefs?

Aidan O'Neill: Are you asking whether anybody can say whatever they want if they say that that is what their religion tells them?

John Finnie: Yes.

Aidan O'Neill: That is where the notion of reasonable accommodation comes in. There are understood to be limits. It is clear from article 9 that it is possible to limit manifestation of religion if it is in accordance with the needs of a democratic society, so one can justify in convention terms limits on what is called hate speech, which is speech that is specifically aimed at whipping up hatred against a particular group. It is most certainly not an unlimited right.

John Finnie: I accept that lawyers do not like to be given scenarios and give definitive positions on them, but would there be a limit to the range of people who could apply religious belief as a conscience issue? Could, for instance, a local authority painter and decorator say that he did not want to decorate a room because it was used for same-sex marriages? Would that be a reasonable accommodation?

Aidan O'Neill: It depends greatly on the facts. There was a case two weeks ago from New Mexico involving a photography studio that was phoned up and asked whether it would cover a wedding. The studio said, "Of course we will," and then, when it was told that it was a same-sex wedding, said, "I don't think we're going to. I think we're suddenly busy that day." That issue was taken to the Supreme Court of the United States

and it was found to be unlawful for the photographers not to offer their services even though they had religiously based objections to same-sex marriage. They could not discriminate on those grounds.

It depends on the facts. It could well be that a painter and decorator would fall outwith the reasonable range of those who can expect an exception from the law.

John Finnie: Abortion has been alluded to and the term "reasonable accommodation" has been used. I represent a large landward area, where there are challenges with the delivery of public services and a limited number of people to deliver them. Do you imagine that that factor could be taken into account in determining whether a reasonable accommodation should be made?

Aidan O'Neill: Do you mean too many people potentially objecting to carrying out abortions?

John Finnie: I was thinking more about registrars and the bill.

Aidan O'Neill: Oh, sorry. Are you asking whether a body could say that it could not carry out a service that it had to carry out because it did not have the people?

John Finnie: No. I mean that if, for argument's sake, there were registrars who claimed that they had a conscientious objection and were not prepared to carry out same-sex marriages, there would be challenges with delivering the service in the Highlands and Islands.

Aidan O'Neill: Again, everything depends on the facts. If all the registrars had conscientious objections, it might be that registrars would have to be flown in from the central belt for the occasional mass same-sex wedding. I am not quite sure. We will just have to see what happens but, if we consider that individual conscience is an important value that ought to be respected even if we disagree with it, what is reasonable might well involve such scenarios.

John Finnie: Some of our witnesses, including those from the Law Society, have suggested that the position could be open to challenge. It is certainly the case that anything could be open to challenge, but the question might be whether the challenge is reasonable or frivolous.

Karon Monaghan: Anybody can go to court and challenge anything at all. I suspect that Aidan O'Neill and I have done that ourselves. However, that does not mean that the challenge will be successful. Ultimately, some of the questions that we have both been asked from time to time do not really help the debate, because we can always construct an argument one way or the other. The real question is, of course, whether that argument will succeed. Many of the objections to same-sex marriage that rely on legal arguments that are put together by various people do not help us very much because, in all probability, challenges based on those arguments would be unsuccessful.

Marco Biagi: I would like to ask about two more potential scenarios. One concerns transgender young people who, at the moment, can live as transgender people—that is, live as the other gender—but are unable to get formal recognition of that until the age of 18, when they can get a gender recognition certificate, whereas a non-transgender young person can marry and participate in the issues that we are discussing at the age of 16. Is there an issue in terms of less favourable treatment?

Karon Monaghan: Yes, probably, and the position would require justification. Certainly, there would be potential for that to be the subject of a discrimination claim. Whether it was justified would depend on issues such as whether transgenderism is something that takes a level of maturity on the part of an individual to be clear about, such as they might be expected to attain by the age of 18. I do not know the answer to that question. However, potentially, it could violate the convention—article 8, for example—and it would require justification if it were to be lawful.

Marco Biagi: I see nodding from others.

Lynn Welsh: Yes, we would agree with that.

Marco Biagi: In a situation in which a church or a faith organisation has decided not to opt in but has within its members a plurality of views, could a celebrant, rather than leaving their church to perform same-sex marriages, challenge their church's decision as being a violation of their personal religious rights?

Karon Monaghan: In my view, no. Not if the complaint is with the church's position. That would be an internal matter for the church, which would be entitled to regulate its own affairs, as a matter of convention law, under article 9, and domestically.

Lynn Welsh: I would agree.

Aidan O'Neill: For once, Karon Monaghan and I are as one. It is absolutely not for the state to interfere in internal church affairs. The specific case law from the European Court of Human Rights states that you do not side with dissenters. If they want to dissent, they should leave the church and set up their own church, or join a body that is more sympathetic to their views.

John Mason: As has been mentioned, the EHRC did not answer the committee's question 12, which was,

"Would you like to comment on the wider issue of protections for those in society who may have concerns about same sex marriage?"

Lynn Welsh, you said that you had considered all sides of the issue. Why did you not answer that question?

Lynn Welsh: I think that we thought that we had already answered it when we made it clear that we were in favour of the bill, as long as churches and religious bodies were fully protected, which we dealt with in another part of our response.

10:30

John Mason: Reference has been made to the Lord Advocate's guidelines, which I think came out in June. I seek guidance from you as legal experts on what weight we should give to that guidance. From my understanding as an accountant, guidance could change tomorrow, so should we give it any weight at all? How definite is it? It states:

"Views expressed or comments made in relation to same sex marriage in ways which do not incite hatred or violence towards a particular person or group of people ... will not be the subject of criminal prosecution."

The phrase "incite hatred" strikes me as fairly vague, but perhaps the witnesses could guide us as to whether it is actually more solid.

Karon Monaghan: I am afraid that I do not know the guidance, so I cannot discuss it specifically. Certainly, hatred is a strong word, but I am not familiar with the guidance and I am not sure that I can answer that.

John Mason: As a general principle, how much weight does guidance have?

Karon Monaghan: Non-statutory guidance that is promulgated by the Law Society of Scotland or another similar body does not carry any weight at all. It is a view. It might guide the professionals in a particular profession and give them some help on how to approach the law, but in relation to reaching a final decision on the meaning of a particular law, it will be no more than a helpful way into it. It will not carry any particular weight.

Aidan O'Neill: The Lord Advocate's guidance is different because, in effect, the Lord Advocate has a monopoly on prosecutions in Scotland. However, the courts never review what the Lord Advocate does so, as John Mason suggests, the Lord Advocate can change the guidance. I do not think that someone would have great success in saying that they cannot be prosecuted because that would be contrary to the guidance, as that would involve a civil law or judicial review function. Traditionally, the courts in Scotland very much stand back on that. If the Lord Advocate thinks that a prosecution is in the public interest, that is the Lord Advocate's prerogative.

It is slightly interesting—to say the least—that the Lord Advocate felt that he had to produce guidance on what can be said in public about same-sex marriage and that making such comments might actually be a criminal offence. To an extent, that is to do with our incredibly broad notion of what constitutes breach of the peace, which can include insulting behaviour. Somebody can feel insulted by somebody else's conscientious views. However, Karon Monaghan is correct. I do not see the courts enforcing the guidance, which is very much at the discretion of the Lord Advocate.

Lynn Welsh: The guidance has some value, in that it makes clear the Lord Advocate's view of when the powers that he and his office have should be used, so, although he might not be able to be tied to the guidance if it was ever challenged, it is at least helpful in setting out where he thinks his powers will be used.

Christian Allard: I have a brief question. I would like some reassurance on an issue. We have had a lot of witnesses, and we have heard more evidence today. My impression is that a lot of the answers that have been given in evidence are more to do with the Equality Act 2010 than with the bill. Do you share my view? Do you think that, whatever happens—if the bill is passed or not passed—the same questions and challenges will still arise?

Karon Monaghan: Sorry, but I am not sure that I understand the question. If the bill does not go through—

Christian Allard: If the bill does not go through, will we have the same challenges that we have talked about today? Many of the examples that we have been given are about challenges under other legislation, not the bill.

Karon Monaghan: Yes, we will.

Christian Allard: So, in fact, we have wasted a lot of our time talking about the act.

Karon Monaghan: Probably—although I hope not.

Aidan O'Neill: Mr Allard is right that we are really talking about the Equality Act 2010, and equal opportunities are a reserved matter. However, as I have said, I believe that allowing gender-neutral marriage will actually change things, in that it will remove the wriggle room. However, the issues arise primarily because of the Equality Act 2010.

The Convener: As members have no further questions, I thank our witnesses for their contributions.

10:34

Meeting suspended.

10:40

On resuming—

The Convener: I welcome our witness for today's second evidence session and invite him to introduce himself.

Professor John Curtice: I am Professor John Curtice of the University of Strathclyde and ScotCen Social Research. I should say that I am not representing either organisation and that any views that I express this morning are mine and should not be attributed to either of them.

The Convener: Thank you very much. I invite Marco Biagi to start the questioning.

Marco Biagi: Thank you for that unexpected honour, convener.

Professor Curtice, you have highlighted the rather substantial change in public attitudes towards homosexuality more broadly. Are you aware of how that compares with other countries?

Professor Curtice: The short answer is no, as I do not have that degree of expertise. The longer answer is that my understanding is that it is not particularly exceptional. You have heard the evidence from Dr Kelly Kollman on the substantial international moves. One would presume that such moves were not taken entirely in the teeth of public opinion in the countries concerned.

Marco Biagi: Have you seen any changes of similar magnitude in other areas?

Professor Curtice: Yes. The biggest change in public attitudes in Great Britain since the early 1980s is towards our banks. In the early 1980s about 90 per cent of people trusted banks and now about only 10 per cent do.

That aside, the principal secular change—by which I mean a change that has pretty much kept on going in a consistent direction during that 30-year period—has been in the area of sexual mores. As well as there being changes in attitudes to same-sex relationships, there has undoubtedly been a substantial change in attitudes towards sex outside marriage, particularly premarital sex. There have also been changes in attitudes towards abortion.

British society has experienced a more general apparent liberalising trend in attitudes towards sexual mores. Not all the changes have gone at the same pace, but they have all been going in the same direction. The change in attitudes that you refer to seems to be part and parcel of a similar liberalising phenomenon whereby society is taking a very different view of these things from what it did a relatively short time ago.

Marco Biagi: This is a "quantitative methods 101" question. Which is more accurately representative of Scottish public opinion: an open website-published Scottish Government consultation or a properly weighted scientific study such as the ones that you are quoting?

Professor Curtice: I note the terms of your question, which I suspect that not everybody would agree with. If anybody thinks that the purpose of a consultation is to find out the balance of public opinion, they do not understand that the value of a consultation is to come to some understanding of the arguments that people put forward on both sides, which you might not necessarily get out of a survey, and to uncover possible technical difficulties and objections to the detail of a bill that civil servants or ministerial colleagues might not have understood.

It is to be regretted that with respect to both this consultation and the consultations on the referendum there has been a tendency by protagonists on both sides of the debate to encourage people to send in standard replies, which add no value at all to that kind of exercise. To that extent at least, you should not look to consultations as a way of understanding the balance of public opinion as opposed to understanding the structure of public opinion and possible technical difficulties with any particular form of legislation.

The Convener: Thank you for that. I call John Mason.

10:45

John Mason: Mr Curtice, you are very respected by many of us and indeed the public for your understanding of how all of this is done. Can you comment on the notion that people get softened up with certain questions before the big question gets asked? Does how you ask questions make a big difference to the result you get for your key question?

Professor Curtice: Any survey researcher will be extremely sensitive to the possibility that the context within which a question is asked and the way in which the question is phrased can affect the response. In my submission, I have tried to be quite open with the committee by indicating how differences in a question's wording can make a difference. I think that that is absolutely the case.

Some of the questions that I highlight in the submission are worded better than others, but I know that in the British or Scottish social attitudes surveys we are certainly very careful to avoid creating a context that leads in one direction or

another. We might not always succeed, but our wish is to understand public opinion as accurately as possible and not to promote one or other cause. Clearly some of the other questions that I have highlighted have been commissioned by one side or another, and one might feel that as a result they might or might not have got the answers they were looking for.

In the end, you have to make a judgment. We do not have a fantastic amount of evidence on this area—it has certainly not been polled intensively, particularly as far as attitudes in Scotland are concerned—but, looking at the variety of question wordings and the evidence across the piece, I think that on the simple question, "Should same-sex marriage happen or not?", there seems to be a majority in favour, although I have to say that it does not necessarily look overwhelming.

Beyond that, if you ask people to choose between same-sex marriage, civil partnerships and doing nothing, it might not be the case that a majority of people would choose the introduction of same-sex marriage as their first choice but, equally, it seems pretty clear from follow-up questions that many of those for whom civil partnerships might be their first preference are not necessarily particularly opposed to the idea of same-sex marriage. That is simply an attempt to come up with a reasonable judgment of where public opinion seems to lie, given the variety of such opinion.

The only other thing that I would say is that, given the very strong relationship between age and attitudes towards same-sex relationships and given that each new generation of adults entering adulthood has been consistently more liberal on this subject than its predecessor, unless some dramatic event happens in this area—as happened in the 1980s—it is a reasonable supposition that public opinion is probably going to become more liberal on the subject. Even if one has question marks about how big or firm that majority might be at the moment, it is probably only going to get bigger and firmer over time.

John Mason: In that respect, you also point out that as society has become less religious—or as people have started to attend religious services less often—it has also become more liberal. Has there been any research on whether those two aspects are connected? Is society becoming more liberal because people are going to church less?

Professor Curtice: As you can see from some of my evidence, it is perfectly clear that those who regularly attend religious services are more likely to take a conservative view on these subjects. However, it is also clear that that difference has widened.

Back in the 1980s, for example, the attitudes of secular Scotland/Britain and those of religious Scotland/Britain were rather similar. The liberalisation of attitudes has occurred predominantly at the secular end of Scottish society but, that said, I also point out in my submission that there has been something of a liberalisation of attitudes even among regular worshippers. The decline of religious observance is undoubtedly one of the reasons why our society has become more liberal, but it also seems pretty clear that attendance at religious services and, indeed, religious organisations, many of which would adopt a conservative stance on these issues, seems to help to frame people's attitudes.

Of course, the other liberalising thing that is going on is the expansion of university education. I have not made this point in the submission, but it is clear that those with a relatively high level of educational qualifications tend to be more liberal on these subjects than those with no educational qualifications. Therefore, as we become a better educated society, that tends to encourage social liberalism. That is another phenomenon that has tended to push our society in that direction.

John Mason: This is just a minor point. In line 5 of paragraph 16 of your submission, I see that independence had crept in. I had not really expected independence as part of this debate.

Professor Curtice: I am sorry. That is an error. You can imagine what else I was thinking about as I was writing the submission. It should read "same-sex marriage". Since you have asked about that, I should say for the record that in the penultimate line of paragraph 3, "they same" should read "that same", and in line 5 of paragraph 10, after the word "religious", insert the word "service". I hope that we have caught all the typographical errors.

John Mason: That is great. I knew that independence was on the minds of many of us but I had not expected it here.

The Convener: Is there any evidence that attitudes within religious organisations—within the clergy—are becoming more liberal?

Professor Curtice: We do not have enough members of the clergy, or anybody in any kind of religious order, to know the answer to that question. What we do know, which adds slightly more colour, is that there is a difference between members of different religious denominations or religions. Perhaps contrary to the general impression, the section of Scottish society that seems to be most conservative on this subject is those of a Presbyterian faith—particularly, it seems, those Presbyterians outside the Church of Scotland. The numbers are relatively small, and we therefore have to be careful, but Episcopalians

are probably towards the liberal end of the spectrum, with Catholics somewhere in between.

Alex Johnstone: Sometimes in politics, you know what you are going to say next but you just cannot help yourself. I am going to take on John Curtice on an issue in which I am sure that he can quite easily make a fool of me, but I am going to try it anyway.

You were talking about the liberalisation of views. I fully accept that the information that you quoted is the case and that views are becoming more liberal. When people's views are polled, that information is very obvious. I want to look a little deeper into that. What does the public think about liberalisation? What is their motive? Is there an increased tendency over time for people to go with the flow, or is it a deliberate action?

Professor Curtice: My answer is to remind you what public opinion was in the mid-1980s. The idea that society has, in some sense, gone with the flow is difficult to believe given the degree to which, little more than 25 years ago, we as a society pretty much unanimously adopted a critical attitude towards same-sex relationships. It looks to me very much as if there has been a genuine, quite dramatic but substantial change in attitudes, which, in a sense, has been a society not going with the flow. Society has reversed itself.

I can remember when male same-sex relationships were still illegal. What is certainly true is that the views of those of older generations have changed over time. One suspects that that is, in part, as a result of being influenced by the greater liberal views of, for example, their own children. Equally, it is almost undoubtedly the case that the views of many older people with regard to cohabitation and heterosexual relations outside marriage have changed as a result of the behaviour of their own children.

As attitudes have begun to change, those who are of generations for whom these attitudes were not the norm have probably reacted to social pressure, but that is just people changing their views because they see the world changing. I do not think that it in any way undercuts the reality of the change that we have witnessed.

Alex Johnstone: Is the liberalisation of views genuinely because people at large care more about these issues and want to deliberately change their position, or is it perhaps that people simply care less?

Professor Curtice: This is an interpretation of the data, but it is probably true that people who say that there is rarely or never anything wrong with same-sex relationships are not necessarily saying that they feel strongly about the matter. They may be saying, "What's all the fuss about? Why are we worrying about this? Of course it's fine."

There is probably therefore an asymmetry of feeling. It is probably true to say that those who feel that same-sex relationships are wrong, let alone those who are opposed to same-sex marriage, feel that view more intensely than many of the people who adopt the opposite view. To that extent, we have an asymmetry of passion in the debate.

It is probably also true that it is not the case that the vast majority of people in Scotland and Britain think that changing the law in this area is a major priority. It is simply a case of people thinking, "If it's going to happen, that's fine. Why didn't we do it a few years ago?"

Alex Johnstone: That is what I meant by the phrase "go with the flow." Is that—

Professor Curtice: I think that there is a misunderstanding of going with the flow. What I am saying is that most people are saying, "What are you on about? What is the issue here?"

When we talk about independence, most people understand that there is an issue and a real choice that matters. People can understand why some people are for and some are against. I suspect that, in relation to same-sex marriage, people's views have changed such that many people are just saying, "Oh, you mean that there's an issue?" That is probably particularly true of younger people. Because they have grown up in a society where the predominant view in recent years has been that same-sex relationships are okay, they are probably wondering what some older people are arguing about. The norm among younger people is very much to say, "Fine—whatever."

It therefore follows that those who are passionately arguing in favour of the bill have a problem in the sense that I do not think that many people are doing that. Equally, I do not think that, if the majority of the public are saying, "Okay, this is going to happen and it's fine—it's what we should be doing", we should necessarily presume that that is an argument for ignoring public opinion.

Although public opinion on the death penalty has begun to change, it has long been in favour of restoring the death penalty. Many a legislator would say, "I can think of an ethical argument why, on this occasion, I'm not going to follow public opinion." Given that the role of legislators is, other things being equal, to take serious cognisance of public opinion, if you are going to say, "No, we're not going to follow public opinion in this area" and if you accept my reading of public opinion, you have to come up with ethical arguments as to why following the public view is not necessarily in the public interest.

Alex Johnstone: Thank you.

Marco Biagi: In your written submission, you mention some variables that predict people's attitudes to same-sex marriage, namely age and church attendance. You have also alluded to level of education being another variable, although that is not mentioned in your submission. Is there anything else that is statistically significant?

Professor Curtice: Gender is a factor. Men are usually less liberal than women on the subject.

Marco Biagi: And those are the only things that have been found through the—

Professor Curtice: Yes. You can look at the full detail in various reports that have been done for the Scottish Government more generally about attitudes towards discrimination, but the crucial ones in this area are gender, age, education and religious observance.

11:00

Marco Biagi: When everything else is controlled for, is there an urban/rural divide?

Professor Curtice: I would have to go and check the data—I am happy to do so. It is a little while since I engaged with the data at that level.

Marco Biagi: I think that I was asking more out of curiosity than for the purposes of scrutiny of the bill.

Professor Curtice: I simply remind you that this is a predominantly urban society, albeit that it has a distinctive rural hinterland.

Siobhan McMahon: Professor Curtice, you said that people are becoming more liberal and that, even if they do not regard changing the law as a priority, they wonder what the fuss is about the bill. Are you aware of studies that the committee can consider that have drilled down, so that rather than just ask whether same-sex marriage should happen—yes or no—they have considered the consequences of having same-sex marriage, in the context of other protections and freedoms, which we have discussed with previous panels?

Professor Curtice: The honest truth is that I am not aware of anyone who is trying to gauge public opinion in that way. The only thing to which I can point you, which will give you some guidance, is the question in the Ipsos MORI poll that I mention in paragraph 15 of my submission. As far as I am aware, that is the only poll, north or south of the border, that has drawn a distinction between religious and civil marriage. It seems pretty clear from the poll that the majority of people think that civil marriage, rather than religious marriage, should be legislated for.

There might have been the odd question on Britain-wide surveys during the passage of the equivalent bill at Westminster—I would have to check. I am pretty sure that the majority of people say that religious organisations should not be forced to perform marriage ceremonies if they do not want to do so.

You will appreciate that some of the conversation that I heard from the previous panel as I arrived in the committee room today will go way above the heads of the average person. We cannot ask in surveys about detailed legal arguments, as opposed to the principle of whether someone should or should not be required to do something.

If you want me to check, get the committee clerk to write to me and I will happily check my data file.

The Convener: Thank you.

John Mason: Professor Curtice, you said that there is a move throughout society to being more liberal. You mentioned capital punishment. Is society changing on that, too?

Professor Curtice: Yes. I looked at the UK-wide data recently. Support for the death penalty is now below 50 per cent—it is somewhere in the 40s. That is another area in which attitudes have become somewhat more liberal.

There is one area in which society has definitely not become more liberal. If anything, we have become more conservative—if that is the right word—about people who have a regular sexual partner having sexual relationships with someone else. In other words, society is even more critical of infidelity than it used to be.

When we talk about liberalisation and sexual mores, it is not the case that society thinks that anything goes. For the most part, we seem to be in favour of monogamous relationships at any one point in time. It is simply that we have become much more relaxed, first, about whether the relationship takes place within marriage and, secondly, about the genders of the people who are engaged in the activity.

The committee must be aware that there is a certain irony around the bill, in that we talk about enabling people in same-sex relationships to enter an institution that relatively large sections of the heterosexual community no longer get involved in, at a time when society does not think that sexual relationships should necessarily take place within marriage. That is also part of the liberalising trend of the past 25 years.

John Mason: I was interested to hear that you think that society still supports monogamy.

Professor Curtice: Yes, that is very clear—I refer you to the British social attitudes survey.

Indeed, I give the reference in paragraph 17 of my submission.

A person's partner and the quality and nature of the relationship are what seem to matter to people now rather than a sense of obligation, let alone some religious teaching. Therefore, cheating on one's partner is now, if anything, regarded as even less acceptable because we value the quality of the relationship more than we value the formal institutional position.

John Mason: That is interesting. Thank you.

Alex Johnstone: We have heard the words "liberalisation" and "conservative" used in their true sense—nothing to do with the political parties.

Professor Curtice: Absolutely. There is no normative political involvement.

Alex Johnstone: Indeed. However, my instinct is that neither description describes how I have, for most of my life, dealt with the issues surrounding this and similar subjects. The word that I would use, which has not appeared during the evidence that we have taken so far in the committee, is "tolerance". It is about tolerance of the different choices that people make and learning not to impose one's own views on other individuals or to see people through that prism. During a period when public opinion has become more liberalised, has Scotland become more or less tolerant?

Professor Curtice: I am happy to accept the word "tolerance".

As I pointed out, we have much less evidence on this north of the border, but I have two points to make. First, the evidence that we have collected since 1999 in the Scottish social attitudes surveys shows, as you have seen from the evidence on attitudes towards same-sex relationships, that Scotland has largely shared in the trend to be liberalising or more tolerant.

Secondly, whereas even in 1999-2000 Scotland remained a more religious society than England and Wales in terms of levels of religious attendance, that is no longer the case. I argue in my evidence that attitudes in Scotland are now very similar to those south of the border on a whole load of other areas—I can happily send you the chapter on that if you want. On social issues, Scotland, England and Wales now look very similar to each other. That inevitably raises an issue for this institution. Given that England and Wales have legislated first in the area, and given the similarity of outlooks on the two sides of the border, you would have to come up with good reasons for why Scotland should adopt a different perspective.

Alex Johnstone: I want to compare the concept of liberalisation with the concept of tolerance, as I perceive a number of differences. Although society as a whole is becoming more liberal, levels of tolerance and intolerance have changed radically among those who hold strong views. For example, I find that those who seek greater tolerance are themselves likely to be the least tolerant of those who do not share their views. I am basically suggesting that tolerance is now a one-way street.

Professor Curtice: The difficulty with this issue is that we are talking about changing the character of an institution in which religious organisations have long played a significant role, and many of those organisations do not agree with the change that is taking place. Inevitably, we are talking about a political conflict—welcome to politics.

There are interesting arguments to have outside the committee about whether, if society comes to believe that same-sex relationships are okay, it is acceptable to use the force of the law to stop people expressing contrary views. We see those debates going on particularly in the area of race relationships, which lead on to arguments about what harm is or is not done to those with a minority view.

It comes back to the question that Mr Allard asked. My reading of opinions is that it is not clear at the moment that society wishes to force—if that is the right word—this change down the throats of the religious organisations that do not want to go down this path. That seems to be the position from the evidence, particularly in paragraph 15 of my written submission. To that extent, we seem to be tolerant rather than liberal, although most people seem to be willing to accept that, if that is what someone feels, that is okay. We are not necessarily willing to use the law to force organisations to do something.

It is an interesting question whether, given that society is liberalising and there is evidence that attitudes—even among those who regularly attend religion—are liberalising, in 20 years' time we will discover that most religious organisations have decided to take advantage of the legislation that allows them to perform such ceremonies. Thinking about what is good for society, given that we are talking about trying to manage a dramatic social change whereby a section of society find themselves living in a climate that is very different from that which they are used to and what they believe in, it is in the interests of society to manage that change in a way that minimises conflict. I think that you, as legislators, want to do that. To that extent, having tolerance as your watchword in this area—in so far as it can be pursued, given that there is genuine conflict—is probably a good mantra to follow.

The Convener: The committee has no further questions. Thank you very much for coming along, Professor Curtice.

Our next meeting will take place on Thursday 26 September and will include further oral evidence on the Marriage and Civil Partnership (Scotland) Bill.

Meeting closed at 11:12.

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

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-78351-682-7

Revised e-format available
ISBN 978-1-78351-698-8

Printed in Scotland by APS Group Scotland