The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

EQUAL OPPORTUNITIES COMMITTEE

Thursday 19 December 2013

Session 4

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EQUAL OPPORTUNITIES COMMITTEE
32nd 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:

Richard Lyle (Central Scotland) (SNP)
Alex Neil (Cabinet Secretary for Health and Wellbeing)

CLERK TO THE COMMITTEE

Douglas Thornton

LOCATION

Committee Room 2

Scottish Parliament

Equal Opportunities Committee

Thursday 19 December 2013

[The Convener *opened the meeting at 09:00*]

Decision on Taking Business in Private

The Convener (Margaret McCulloch): I welcome everyone to the Equal Opportunities Committee's 32nd meeting in 2013 and I ask all who are present to set any electronic devices to flight mode or turn them off.

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

My name is Margaret McCulloch and I am the committee's convener. I invite members to introduce themselves.

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

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

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

John Finnie (Highlands and Islands) (Ind): Good morning; madainn mhath. I am an MSP for the Highlands and Islands.

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

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

The Convener: Agenda item 1 is a decision on taking business in private. Do members agree to take items 3 and 4 in private?

Members *indicated agreement.*

Marriage and Civil Partnership (Scotland) Bill: Stage 2

09:01

The Convener: Item 2 is day 1 of the committee's stage 2 consideration of the Marriage and Civil Partnership (Scotland) Bill. I welcome to the meeting Alex Neil, the Cabinet Secretary for Health and Wellbeing, and his officials. The officials are not permitted to participate in the formal proceedings. Richard Lyle will join us later to speak to his amendments.

Everyone should have a copy of the bill as introduced, the first marshalled list of amendments and the first list of groupings of amendments. We will not go beyond chapter 4 of part 1 today. There will be one debate on each group of amendments. Any amendments that we do not reach this morning will be dealt with at our next meeting, on 16 January.

For each debate, I will call the member who lodged the first amendment in the group to speak to and move that amendment and to speak to all the other amendments in the group. All other members with amendments in the group, including the cabinet secretary, if relevant, will then be asked to speak to them. Members who have not lodged amendments in the group but who wish to speak should indicate as much by catching my attention or the attention of the clerks.

After the debate on each group, I will check whether the member who moved the first amendment in the group wishes to press it to a vote or to withdraw it. If they wish to press it, I will put the question. If a member wishes to withdraw their amendment after it has been moved, they must seek approval to do so. If any member objects, the committee will immediately move to the vote on the amendment.

If any member does not want to move their amendment when it is called, they should say, "Not moved." Members should also note that any other MSP—by which I mean not just a committee member—may move the amendment. If no one moves it, I will immediately move to the next amendment on the marshalled list.

Only committee members are allowed to vote. As voting in any division is by a show of hands, it is important that members keep their hands clearly raised until the clerk has recorded the vote.

As the committee is required to indicate formally that it has considered and agreed to each section of the bill, I will put the question on each section at the appropriate time.

We now move to consideration of amendments.

Sections 1 to 3 agreed to.

Section 4—Meaning of marriage and related expressions in enactments and documents

The Convener: The first group of amendments is on operation of rules of law concerning purported marriage. Amendment 1, in the name of the cabinet secretary, is grouped with amendments 2 and 3.

The Cabinet Secretary for Health and Wellbeing (Alex Neil): Amendments 1 to 3 were lodged at the suggestion of stakeholders, and I will explain why. Section 4 ensures that references to marriage in existing legislation generally refer to both opposite-sex and same-sex marriage. In addition, section 4(6) ensures that, when being married or having been married is relevant to the operation of a common-law rule, any such rule will apply equally to opposite-sex and same-sex marriage.

It was suggested to us that section 4(6) needed to be extended to refer to "purported marriage". In particular, that could be relevant in relation to marriage by cohabitation with habit and repute, which is the last form of irregular marriage that is still recognised in Scotland. Marriage by cohabitation with habit and repute has largely been abolished in Scotland, but we still recognise cases in which a couple erroneously believe themselves to have been married overseas and, after one of them dies, it transpires that the marriage was not valid. We proposed the complete abolition of such recognition in the consultation on the draft bill, but consultees raised concerns and, as a result, we did not proceed with the proposed abolition.

The amendments ensure that the concept of marriage by cohabitation with habit and repute in certain overseas cases extends to any same-sex marriages. Having decided to keep the concept, we need to ensure that it covers same-sex marriages and opposite-sex marriages.

I move amendment 1.

Alex Johnstone: I take the opportunity to ask the minister to explain in greater detail the meaning of the word "purported" and to indicate clearly that there is no possibility that an interpretation of the word might take the effect of the amendments beyond what is intended.

Alex Neil: The word "purported" refers only to the description that I gave. It is recognised in law for when people think that they have been married overseas and the surviving spouse of someone who has died still believes that the marriage took place. The definition that I gave when I moved amendment 1 is tightly worded.

The Convener: As there are no other questions, I ask the cabinet secretary to wind up.

Alex Neil: I do not think that that is necessary. In the interests of time, I waive my right to wind up.

Amendment 1 agreed to.

Amendments 2 and 3 moved—[Alex Neil]—and agreed to.

The Convener: We move on to powers to make subordinate legislation—power to make different provision for different purposes, consultation, procedure etc. Amendment 4, in the name of the cabinet secretary, is grouped with amendments 5 to 7, 16, 28, 32, 34, 36 and 37.

Alex Neil: I will explain why we lodged the group of amendments, all of which are fairly technical. First, I will deal with amendments 4 to 7. Section 4 ensures that references to marriage in existing legislation generally refer to opposite-sex and same-sex marriage. The bill contains an order-making power to enable ministers, when necessary, to make contrary provision. In some cases, ministers might need to amend primary legislation and make different provision for different purposes. For example, we might need to use the powers in relation to devolved matters in public sector pensions and, when doing so, we might need to make specific provision to ensure that the spouses of transgender people do not lose out when their spouses acquire a new gender.

Amendment 4 will ensure that any order under section 4 may make different provision for different purposes. Amendment 5 will ensure that an order can amend primary and secondary legislation. Amendments 6 and 7 will ensure that any order to amend primary legislation is subject to the affirmative procedure, which is in line with usual practice.

Amendment 16 relates to regulations on the procedures for the administrative route for changing civil partnerships that are registered in Scotland into marriages. When the administrative route is used, the couple's identity may need to be checked. The amendment allows different provision to be made for different purposes so that the regulations have the flexibility to apply different procedures to identity checks when the couple now live outwith Scotland.

Amendments 28 and 34 relate to the order-making powers in proposed new section 5D of the Gender Recognition Act 2004, which paragraph 6 of schedule 2 to the bill will insert. Those powers relate to establishing a more streamlined procedure for persons in a civil partnership to obtain gender recognition.

The amendments follow comments by the Delegated Powers and Law Reform Committee.

Amendment 28 extends the current consultation requirement in relation to any order and inserts a more detailed procedure. Amendment 34 ensures that the affirmative procedure will apply to all orders that are made under proposed new section 5D of the 2004 act.

Amendment 32 amends the regulation-making power on the registration of marriages and civil partnerships following the issue of the full gender recognition certificate. The amendment ensures that regulations can make different provision for different cases or circumstances. For example, different provision might be needed when the person who is receiving the full gender recognition certificate was married or entered a civil partnership in Scotland but was not born here.

Amendment 36 amends section 54 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965, on regulations about matters such as the form of registers for marriages. The amendment ensures that regulations that prescribe the form of a register of marriages may make different provision for different cases or different circumstances.

Amendment 37 amends the order-making power at section 31 of the bill on ancillary provision so that an order under that section can make different provision for different purposes. That might be needed for cases in which persons who married or entered a civil partnership here now live outwith Scotland, for example.

I move amendment 4.

Amendment 4 agreed to.

Amendments 5 to 7 moved—[Alex Neil]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Same sex marriage: further provision

The Convener: Group 3 is on abolition of spouse's defence to charge of reset. Amendment 8, in the name of the cabinet secretary, is grouped with amendment 9.

Alex Neil: Amendments 8 and 9 remove the existing provision on reset and abolish the defence that currently exists in certain circumstances for wives. Reset is a crime that relates to the handling of stolen goods. Currently, a wife cannot be charged with reset for receiving or concealing goods that have been stolen by her husband unless she makes a trade of the crime and has taken an active part in the disposal. That defence for wives appears to come from the view that a wife has to cherish and protect her husband and it appears to be based on an old-fashioned view of the relations between the sexes.

Originally, we considered that we should just not extend the defence to cases in which two women get married but, on reflection, it seems to be more sensible and straightforward to repeal the defence altogether. In case anybody is relying on the defence, the repeal will take effect only from the day after the relevant provision in the bill comes into force.

I move amendment 8.

09:15

The Convener: Do members have questions?

Alex Johnstone: I have a quick one, for my own comfort. Is it true to say that, in such a circumstance, a straightforward defence of lack of knowledge or implication could be used? I want to ensure that we do not simply incriminate wives by repealing the law.

Alex Neil: The assumption is fair.

Marco Biagi: I welcome amendment 8. I think that we were all surprised by the anachronism when we read the bill. I am glad that the initial approach has been changed and that we are getting rid of the provision entirely.

Amendment 8 agreed to.

Section 5, as amended, agreed to.

Section 6 agreed to.

Schedule 1 agreed to.

After section 6

Amendment 9 moved—[Alex Neil]—and agreed to.

Section 7—Marriage between civil partners in qualifying civil partnerships

The Convener: The next group is on changing civil partnerships to marriage—civil partnerships registered outside Scotland. Amendment 10, in the name of Marco Biagi, is grouped with amendments 11 to 14, 17, 18 and 20 to 24. If amendment 19, in the subsequent group, is agreed to, amendments 18 and 20 will be pre-empted and cannot be called.

Marco Biagi: The bill will allow people who are already in civil partnerships to replace their civil partnership relationship with a marriage. However, that applies to people whose civil partnerships were registered in Scotland. During the consultation and the committee's deliberations, we were made aware of a couple from New Jersey who are now resident in Scotland and who had registered, in their home jurisdiction, a domestic partnership, which is recognised here as a civil partnership. Such couples would be excluded from replacing their civil partnership with marriage,

even though they are resident in Scotland. The amendments in my name would give people with foreign civil partnerships the option of marriage here.

I am glad that the Government has taken a similar view and has lodged amendments that have the same flavour. The changes to the bill—that is, to primary legislation—that I propose represent a do-it-now approach, whereas the Government's proposal on order-making powers is a do-it-later approach. I am well aware that it can be wise to delay so that we get things right, so I look forward to hearing what the cabinet secretary will say about his approach.

I want to cover a few aspects of the amendments in my name. I think that the concern about the order-making approach is that an order might be incomplete; it might include requirements about residence in Scotland or exclude people who have the option of replacing their civil partnership with a marriage in their home jurisdiction. The Government response to the committee suggested both examples. I have difficulty with the idea of making someone go back to their home jurisdiction to replace a civil partnership with marriage.

Similarly, we offer marriage and divorce to anyone in the world, regardless of their residence, so I would be concerned if there were an exception in terms of civil partnerships. I hope that the cabinet secretary will address that and tell us what he intends to do if the committee agrees to amendment 14 and the order-making approach.

It would be important for changes that were made under an order-making power to come into force at the same time as the rest of the bill, so that the couple from New Jersey who live in Scotland could get married at the same time as the same-sex couple from Scotland who live next door.

As the bill stands, a same-sex couple who have a civil partnership under Irish law who came here would not be able to get married, whereas a couple from Poland, who cannot have a civil partnership in their home jurisdiction, could come here and get married. That seems to be an arbitrary distinction, which we should address. Anyone can marry and anyone can divorce, but we have no guarantee of recognition by other jurisdictions of same-sex marriages that have been conducted in Scotland. To use the Ireland and Poland example again, should the Irish couple be able to get married here, they could go back to Ireland, and their relationship would be recognised as a civil partnership; the Polish couple could get married here and go back to Poland, where their relationship would not be recognised.

There are inevitably complications with anything associated with the cross-border recognition of same-sex marriages. There will be people who are not in foreign civil partnerships who live in Scotland and get married here, and who then have issues with recognition when they go abroad. That is another area that the Government has addressed, and about which I hope the cabinet secretary will talk when he has his moment.

We have two options for finding a solution. Let us ensure that we do not get into greater complexity just for the sake of it, and that we find the most efficient solution. We have just taken up a very efficient solution to get rid of reset: rather than create an extra exception, we got rid of it entirely. If, however, greater complexity is needed, I am open to the cabinet secretary's arguments, so I hand over to him to make the case for his approach.

I move amendment 10.

Alex Neil: As Marco Biagi has just said, his amendments relate to couples who are in civil partnerships that have been registered outside Scotland changing the relationship to marriage. Amendment 14, in my name, relates to exactly that issue. As it stands, the bill will create two ways for a couple who are in a civil partnership that is registered in Scotland to change their relationship to a marriage. The couple will be able to have a marriage ceremony or to change the relationship through an administrative route, the details of which will be laid down in regulations.

The committee took evidence to say that couples in civil partnerships that have been registered outwith Scotland should be able to change their civil partnership to a marriage here, and recommended that that be made possible. The Government has great sympathy with that suggestion, but a number of detailed points need to be considered. First, couples in civil partnerships that are registered outwith Scotland could not change their relationship to marriage through the administrative route because, quite simply, we do not hold the original paperwork.

On the detailed points that were made to the committee, we agreed that it would be odd to have to dissolve a relationship that had not broken down in order to change that relationship to a marriage. On the other hand, we are concerned about the risk to the couple themselves of having a dual status of being in a civil partnership and being married. There is no guarantee that other jurisdictions will accept that a civil partnership has been changed to a marriage in Scotland, so the couple might be married here but in a civil partnership elsewhere.

John Mason: Will the minister give way?

Alex Neil: Could I finish this introduction? I will then take questions.

It is not clear how such a marriage would be recognised in the United Kingdom. For example, if a couple in a civil partnership from Northern Ireland changed their relationship to a marriage in Scotland and then moved to England or Wales, the UK Government might face the difficult choice whether to recognise the relationship as a Northern Ireland civil partnership or as a Scottish marriage. In addition, if the couple subsequently divorced in Scotland, it is uncertain whether that divorce would be recognised in the home jurisdiction, which might continue to recognise the original civil partnership.

It is also possible to imagine a scenario in which a couple split up, with a divorce action taking place in Scotland and an action to dissolve the original civil partnership taking place in the home jurisdiction. The Scottish Government needs to consider the views of the home jurisdiction. The wishes of the couple and the views of the home jurisdiction may be different, and both are entitled to have their views heard. If Scotland were to allow marriages of persons in non-Scottish civil partnerships and the other jurisdiction objected, that might—at least in theory—raise issues about the general recognition of Scottish marriages outwith Scotland. There is also a need to consider whether Scotland should be prepared to allow all same-sex partners from anywhere in the world to marry here, or just those who are ordinarily resident here.

One option might be just to change non-Scottish civil partnerships to marriages when a couple who are resident in Scotland are unable to do so in the jurisdiction in which they registered their partnership. A couple wishing to change their civil partnership to a marriage would be best doing so in the home jurisdiction for the civil partnership, where possible. That would avoid the potential complication of having two civil partnerships.

Our approach to addressing the complex issues that I have just outlined is amendment 14, which will allow ministers to extend by order the categories of civil partners who could change their civil partnership in Scotland by having a marriage ceremony here. That will enable civil partners in a partnership that is registered outwith Scotland to marry in Scotland. The order-making approach will enable the Government to consult fully and to consider all the issues in detail. It will also give us the opportunity to discuss the issues with other relevant jurisdictions. Any such order would be subject to affirmative procedure. The Government will consult in 2014 on whether to make such an order and on whom it should cover.

I stress that if we decide after we have consulted that all civil partners should be covered, then the power in the order will be wide enough to allow us to do that. The consultation will form part of our work on the review of civil partnerships. We will give the consultation priority next year, given the evidence that has been presented to the committee and the points that the committee has made. Regardless of whether an order is made, the Government will report to Parliament on the outcome of the consultation.

For those reasons, I invite Marco Biagi to seek to withdraw amendment 10 and I invite the committee to support amendment 14.

The Convener: Thank you, cabinet secretary. John Mason has a question.

John Mason: I tried to intervene on the matter during the cabinet secretary's speech. This is not an area of which I have detailed knowledge, but as I understand it Marco Biagi's argument is that there will always be inconsistencies and that there will always be cases in which a relationship is recognised on one side of a border but not on the other. The cabinet secretary seemed to argue that we want a much tidier solution, but I am not entirely convinced by his argument that a tidy solution is possible. Will not it always be the case that some relationships will be recognised in some jurisdictions but not in others?

Alex Neil: First, this is a very complex issue that requires further consideration so that we get it right. It clearly requires further consultation not just in Scotland but with jurisdictions outwith Scotland.

Secondly, I have some sympathy with John Mason's point that looking at every possible scenario in every country of the world would be difficult to do, so from that point of view the area might never be totally tidy. However, I think that it could be a lot tidier than it is at present.

In terms of volume, we know that most issues will be cross-border issues within the United Kingdom and, next, they will be issues with Europe and transatlantic jurisdictions. Very few cases will involve African or Asian countries. We never know what laws will be passed in any other country in the world, but the vast majority of people whom the legislation will affect will be from UK, Europe, and north Atlantic jurisdictions. It is important that we take the time to get what we propose as right as we can.

Christian Allard: I would like reassurance about the consultation that you have spoken about. Can we ensure that transgender communities are involved in it? We heard from James Morton of the Scottish Transgender Alliance about particular issues regarding civil partnerships in Scotland.

Alex Neil: The consultation will be very wide. In fact, we will consult widely with the committee as

well. My task all along with the legislation has been to take people with us, if we can.

I know that some of the principles that the legislation contains are somewhat controversial, but we have moved on and are now looking at the practicality of how we apply the principles that were approved at stage 1. I hope that we can maximise the consensus throughout Scotland, including all the various interest groups and the committee.

09:30

John Finnie: Good morning, cabinet secretary. My colleague Marco Biagi used a couple of phrases to describe our options. The first was "do-it-now", which would be my general preference, given that we are dealing with the situation now. He also referred to people going home; given the association of the phrase "go home" with a pernicious campaign by another Administration, that does not seem to be an attractive option, if it means that people whom we would welcome in Scotland would have to return home. I accept that there are administrative difficulties in that regard.

My inclination is that we should do what we think is right. Given the range of people whom you would require to consult, and given that there are some countries in Europe in which the approach to lesbian, gay, bisexual and transgender people is not at all positive, can you give an undertaking that the general policy approach on the matter will be, as far as possible, to enable all same-sex couples with foreign civil partnerships to marry in Scotland?

Alex Neil: Absolutely, and that is why I need time to get the approach right. It is very tempting to do it now, but if we get it wrong, we will defeat the purpose that you just outlined in your last sentence, which is to ensure that we maximise the opportunity in law for most of the people who wish to convert to be able to do so. That is why a further period of consultation is required. The objective is not just to allow the conversion, but to ensure that we minimise barriers, either in terms of interaction with other jurisdictions or our own internal law, for those who wish to convert their civil partnership to a marriage.

John Finnie: Can you help me on the process, cabinet secretary? If we are going to do it, does it matter what the other jurisdictions say, or is the consultation about the administrative arrangements that will be associated with facilitating the change?

Alex Neil: Let me clarify. The purpose of consulting other jurisdictions is not that they will dictate to us what we are going to do. That is not what we mean by consultation.

There are two broad areas in which we need to consult. The first concerns other jurisdictions' interpretation of any change in the law in Scotland, because we want to ensure that we do not do something in our law that makes it more difficult for people from elsewhere to achieve their objective of converting a civil partnership into a marriage.

Secondly, we want to identify whether other jurisdictions have plans to change in the immediate future their laws in any way that might impact on the changes that we would make through primary legislation in Scotland. If we identify changes in other parts of the UK or elsewhere in Europe that are relevant to what we are doing, we can ensure that we try to accommodate them and ensure as widely as possible that we take down any barriers to achieving our objective, which is to allow people in Scotland to convert their civil partnership to a marriage.

John Finnie: I am trying to imagine what might hold up that process.

Alex Neil: There are loads of things. I have given examples of what might hold up the process, including couples marrying or having civil partnerships from elsewhere in the UK or in Europe where the law is applied differently with regard to recognising couples in Scotland who have lived outwith the country for a period, or who have not been here for a long time but have a civil partnership here and want to convert.

As I outlined in my introductory remarks, it is a very complex issue, but my objective is exactly the same as Marco Biagi's: to maximise the opportunity not just for a civil partnership to be converted to marriage but for that to be widely recognised, and not to create unforeseen or unnecessary difficulties either in Scotland or elsewhere for couples who want to do that. I am just asking for time to consider the complexities, to consult more widely—including with the groups that Christian Allard mentioned—and to come back to the committee to see whether, between us, we can get it right. I intend to do that quickly.

The Convener: I have concerns about people who have been living in Scotland and are in a civil partnership, but who were not born here or did not have their civil partnership conducted here. They may have been living here for 10 or 15 years, and might not have the financial means to go abroad to be married.

Concern has also been expressed that people who are in civil partnerships here who want to get married would have to live apart for a year before they could do so, which would cause all sorts of problems. The issue certainly needs to be tidied

up, but could it be tidied up and a decision made before the bill is passed?

Alex Neil: I point out the distinction between the bill being passed and its implementation. I do not think that it is realistic to say that we could get the complexities sorted out before stage 3 without substantially holding up the bill's progress, which I do not want to do. However, I can give the committee a commitment that if we get the order-making power in place we will complete the process and lay the orders before the committee for approval before we implement the bill. As I have said, I give the committee an absolute guarantee that it will be done quickly. I do not want the matter hanging around for months or years on end.

The Convener: So, do we have your definite assurance that you will reach a decision on this?

Alex Neil: Absolutely.

The Convener: I call Marco Biagi either to wind up or to indicate whether he will press or withdraw his amendment.

Marco Biagi: I will wind up first, given that everyone else has spoken.

I note that there were no direct attacks on the competence of my amendments and that all the comments related to implementation. However, I am a bit worried about the cabinet secretary's remark about consulting jurisdictions. Even if the consultation looked only at Europe, we would still be talking about a great number of jurisdictions. I quite deliberately cited the example of Poland, which has a constitutional ban on same-sex marriage. The fact is that we are never going to have our same-sex marriages recognised over there, so the problems that I mentioned are going to happen.

I realise, though, that the real issue is the overlapping set of laws in the UK. Nevertheless, a strong part of me says that neither Northern Ireland nor any other UK jurisdiction should have a veto over Scottish domestic legislation. I have sympathy for John Finnie's comments in support of my amendments and acknowledge that, whatever we do, we are just not going to reach an entirely clean solution. The area that I am really looking at and with regard to which I was slightly disappointed by the cabinet secretary's initial comments—although I have been reassured by his later remarks—is the desire to maximise in Scotland the availability of registration of marriage for people in foreign civil partnerships. There is a general feeling that the original comments about residents going back to their home jurisdictions might not be appropriate, and I think that the cabinet secretary has listened to what we have had to say on the matter.

On that basis, I am content to seek to withdraw amendment 10.

Amendment 10, by agreement, withdrawn.

Amendments 11 to 13 not moved.

Section 7 agreed to.

After section 7

The Convener: Amendment 14, in the name of the cabinet secretary, has already been debated with amendment 10.

Alex Neil: Before I formally move amendment 14, I want to make it clear that I have listened to and take very seriously members' comments and am therefore happy to come to the committee with a draft consultation and timescale early in the new year to reassure members about our intentions.

The Convener: Thank you.

Amendment 14 moved—[Alex Neil]—and agreed to.

Section 8—Change of qualifying civil partnership into marriage

The Convener: Group 5 is on power to provide for effect of changing civil partnership into marriage or of renewed marriage or civil partnership following change of gender. Amendment 15, in the name of the cabinet secretary, is grouped with amendments 19 and 35. If amendment 19 is agreed to, I will not be able to call amendments 18 and 20, from the previous group, because of pre-emption.

Alex Neil: The amendments follow the report by the Delegated Powers and Law Reform Committee. The DPLRC suggested that it is unnecessary for regulations to make provision on the effect of a couple in a civil partnership changing their relationship to marriage through administrative means, and we agree with that. The legal effect for the couple will be the same regardless of whether they use the administrative route to change their civil partnership registered in Scotland to a marriage or whether they go through a marriage ceremony. Amendment 15 will remove the reference to the regulations on the administrative route making provision on the effect of using that route. Amendment 19 will extend section 9, which is on the effect of changing a civil partnership to a marriage, so that it covers those who make the change through the administrative route as well as those who make the change through having a marriage ceremony.

Section 28 empowers the Scottish ministers to make regulations on renewed marriage and civil partnership ceremonies following gender recognition. Section 28(2)(h) currently allows any such regulations to make provision on the effect of

entering into a renewed marriage or civil partnership. The DPLRC suggested that the power for the regulations to make provision on the effect of entering into a renewed marriage or civil partnership is unnecessary. Again, the Government agrees with the DPLRC's recommendation. Entering into a renewed marriage or civil partnership is not intended to have any distinct legal effect. Paragraphs 9 and 10 of schedule 2 to the bill already make provision that the continuity of a marriage or a civil partnership is unaffected by the issuing of a full gender recognition certificate. Accordingly, amendment 35 will remove section 28(2)(h), on regulations making provision on the effect of entering into a renewed marriage or civil partnership.

I move amendment 15.

Amendment 15 agreed to.

Amendment 16 moved—[Alex Neil]—and agreed to.

Amendment 17 not moved.

Section 8, as amended, agreed to.

Section 9—Effect of marriage between civil partners in a qualifying civil partnership

Amendment 19 moved—[Alex Neil]—and agreed to.

Amendments 21 to 24 not moved.

Section 9, as amended, agreed to.

Section 10—Persons who may solemnise marriage

09:45

The Convener: The next group is on corrections and other minor amendments. Amendment 25, in the name of the cabinet secretary, is grouped with amendments 27, 30 and 33.

Alex Neil: These amendments relate to relatively minor matters. Amendment 25 corrects a minor drafting error. Section 8(1)(a)(ii) of the Marriage (Scotland) Act 1977 is being amended by the bill. That section refers to "marriages" rather than "marriage", and the changes that the bill makes need to reflect the terminology in the 1977 act. With amendment 25, the changes made will reflect that terminology.

Amendment 27 relates to declarators of marriage: a court judgment that a valid marriage exists or existed between two parties. Such cases are rare but take place. Since April 2009, two cases have been initiated in the Court of Session, both in 2010-11. Section 21 clarifies the jurisdiction of the sheriff court in relation to declarators of marriage. It does so by amending section 8 of the Domicile and Matrimonial Proceedings Act 1973. Amendment 27 is a minor consequential amendment. It adds declarators of marriage to a list in section 8(1) of the 1973 act.

Amendment 30 will remove paragraph 8(2)(a) of schedule 2 to the bill. The Government has now concluded that the particular minor amendment that that paragraph makes is unnecessary.

Schedule 3 to the Gender Recognition Act 2004 makes provision on registration matters in Scotland following the issue of a full gender recognition certificate, or GRC. Under the 2004 act, the registrar general for Scotland is required to make an entry in the Scottish gender recognition register in relation to the person's birth after receiving a copy of the full GRC. The bill currently extends that requirement to cases in which the applicant is in a marriage or civil partnership registered in Scotland. However, that is unnecessary. If a person receiving a full GRC was born in Scotland, the registrar general will continue to receive a copy of the certificate under the existing provisions of the 2004 act. If the applicant is in a civil partnership that is registered in Scotland but was not born here, there will be no Scottish birth entry to update.

Amendment 33 also corrects a minor drafting error. Paragraph 12(3) of schedule 2 to the bill provides that any regulations that are made

"under paragraph 20A are subject to the negative procedure."

Amendment 33 clarifies that as a reference to paragraph 20A of schedule 3 to the 2004 act.

I move amendment 25.

Amendment 25 agreed to.

The Convener: The next group is on no power to compel religious or belief bodies to carry out same-sex marriages. Amendment 38, in the name of John Mason, is the only amendment in the group.

John Mason: Section 2 of the United Kingdom Government's Marriage (Same Sex Couples) Act 2013 provides that nobody, including a religious organisation, can

"be compelled by any means … to—

(a) undertake an opt-in activity, or

(b) refrain from undertaking an opt-out activity."

Those activities are defined in a table in section 2 of that act and include similar things to those in proposed new section 8(1D) of the 1977 act that section 10 of the bill would insert, such as religious bodies giving consent or authorising their celebrants to be involved in same-sex marriages.

Proposed new subsection (1D) states that no duty is imposed by other specific subsections. The Westminster protection is broader than that, referring to no person being

"compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement)".

The aim of the amendment is not to remove the "nothing … imposes a duty" terminology but to bolster it by putting in the additional protection of not being "compelled by any means". That is to give further protection for religious liberty and the rights of conscience of those groups and individuals who do not wish to participate in same-sex marriage.

The phrase "by any means" should cover, for example, the hire of public premises being made conditional on a religious body being a prescribed body that was able to conduct same-sex marriages. That is not currently covered by the limited terminology that no duty is imposed, and it would help to prevent a scenario occurring in which a religious organisation was refused the hire of a public building because it had not registered to carry out same-sex marriages.

I move amendment 38.

Alex Neil: I do not consider that amendment 38 is necessary, and I would appreciate John Mason agreeing to withdraw it.

Let me explain why. Throughout the process, the Government has recognised that religious bodies will have concerns. In our first consultation, we sought views on the best way of protecting religious and belief bodies that do not wish to take part in same-sex marriage. Following that consultation, we indicated that an opt-in system would be established so that religious bodies would have to apply to take part.

In addition, the bill already contains provision—in section 10—that makes it clear that it does not impose a duty to opt in and that it does not impose a duty on a person to apply for temporary authorisation. The bill even makes it clear that a person who is an approved celebrant for same-sex marriages will be under no duty to solemnise same-sex marriages. We have also agreed with the UK Government an amendment to the Equality Act 2010 to protect individual celebrants from discrimination actions. Considerable steps have been taken to protect bodies and celebrants, and I believe that that approach has been supported in the evidence that the committee has received.

Our view is that it is best to tackle the issue in the way that we have done in the bill. It is the bill that establishes same-sex marriage in Scotland. We have established an opt-in system and have said that the bill creates no duty to opt in. As a result, the approach that the bill takes to protections directly mirrors the approach that is taken on the establishment of same-sex marriage. Adding more provisions on that could cause confusion. In particular, it is not clear what is meant by the use in amendment 38 of the phrase

"the enforcement of a contract or a statutory or other legal requirement".

Including those words in marriage legislation might suggest that religious and belief bodies have a statutory role in marriage ceremonies beyond the role that they have under the Marriage (Scotland) Act 1977.

I suggest that amendment 38 is unnecessary, given the comprehensive protections that are already in place to protect religious bodies and celebrants. If it were agreed to, it could cause confusion. Therefore, I invite John Mason to seek to withdraw it. I will be happy to meet him and others to discuss further the protection of religious bodies and celebrants, if that would be helpful.

John Mason: I thank the cabinet secretary for his comments, but I am afraid that I remain unconvinced by his assurances. He repeatedly emphasised the wording "the bill". In a sense, that is exactly what concerns me and others in relation not just to amendment 38 but to a number of amendments. The issue that concerns some of us is the way in which other organisations might use their position in future. The specific example that I gave related to a local authority that did not wish to hire out premises to a church because that church did not toe the line on same-sex marriage.

I am not reassured by what the cabinet secretary said. I think that the bill needs to contain extra protection, because a considerable risk is presented to bodies that do not always agree with the local authority. In many cases, there is a good relationship, but occasionally that is not the case. Therefore, I feel compelled to press amendment 38.

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 38 disagreed to.

The Convener: The question is, that section 10, as amended, be agreed to. Are we agreed?

Alex Johnstone: No.

John Mason: No.

The Convener: The dissent of Alex Johnstone and John Mason is noted. However, the only way to oppose any section in a bill, procedurally, is to lodge an amendment to leave out that section.

Section 10, as amended, agreed to.

Section 11—Registration of nominated persons as celebrants

The Convener: We move on to section 11 and to the language used in marriage declarations. Amendment 26, in the name of the cabinet secretary, is in a group on its own.

Alex Neil: Amendment 26 follows a recommendation by the committee. When a body nominates celebrants to the registrar general to solemnise opposite sex marriage, the body has to show that the marriage ceremony that it uses is of an appropriate form. At the moment, a marriage ceremony is considered to be of an appropriate form as long as it is not inconsistent with declarations set out in the Marriage (Scotland) Act 1977. Those declarations currently refer only to husband and wife. The committee recommended that gender-neutral declarations should be available as well.

We carried out a short consultation with religious and belief bodies on whether gender-neutral declarations should be available as well. In brief, the Free Church of Scotland and the Baptist Union of Scotland were wholly opposed, the Muslim Council of Scotland said that there should be no obligation to use gender-neutral declarations, the Salvation Army said that the change would not affect it, and the Humanist Society Scotland and the United Reformed Church were in favour.

Amendment 26 provides choice. If a religious or belief body wishes to use only gender-specific terms, that is fine, as is a decision by the body to use only gender-neutral terms. Similarly, a body would be free to use both types of terms if, for example, the terms used vary depending on the language that couples themselves want to use in their ceremonies.

I move amendment 26.

The Convener: No member has any points or questions to raise, so I invite the cabinet secretary to wind up.

Alex Neil: I shall forgo that right, convener.

Amendment 26 agreed to.

Section 11, as amended, agreed to.

Sections 12 to 14 agreed to.

09:59

Meeting suspended.

10:06

On resuming—

After section 14

The Convener: The next group is on effect of holding belief that marriage is between persons of different sexes. Amendment 39, in the name of John Mason, is grouped with amendments 43 and 44.

John Mason: Amendment 39 would make quite a short addition to the bill. It would insert the heading "Protecting expression of belief in marriage between persons of different sex" and the following section:

"For the avoidance of doubt, a belief in marriage as a voluntary union between one man and one woman to the exclusion of all others for life is a belief worthy of respect in a democratic society."

It is a simple statement that I do not think that anyone could object to.

The purpose of the amendment is to reflect the extremely high level of public concern about same-sex marriage. We need to make absolutely certain that, should the law be changed, those who hold to the current definition of marriage will be fully protected. That goes beyond the frequently cited issue of preventing churches or religious celebrants from being required to marry same-sex couples. It is a wider issue.

It is, perhaps, difficult for some to appreciate the strength of deep personal conviction with which a great many people hold to the view that marriage can only be between a man and a woman. Belief in the current definition of marriage has been the mainstream, prevailing view in our society for centuries and is a key part of the faith of many Christians, Muslims, Jews and others. It is the hallmark of a democratic society to show tolerance and respect for those whose views may differ from the state's position.

Paragraph 97 of the policy memorandum states:

"Many people and organisations hold the view that marriage can only ever be between a man and a woman. The Government has made clear its respect for this view".

The director of Stonewall Scotland, Colin Macfarlane, told the committee that not believing in same-sex marriage does not make an individual homophobic

"in any way, shape or form."—[*Official Report*, *Equal Opportunities Committee*, 5 September 2013; c 1397.]

Likewise, the committee's stage 1 report states:

"We recognise the validity of perspectives on all sides of this issue ... We recommend to members of the Parliament to approach the Stage 1 decision with the same dignified tenor as our evidence sessions and with due respect for a diversity of views."

The concept of respect for different views has come up a lot of times, and is something that I personally believe in strongly.

However, that view is not universally shared, and a lack of respect for those who disagree with same-sex marriage has been evident. For example, our own Deputy Presiding Officer, Elaine Smith, was verbally attacked and vilified for expressing her opposition to same-sex marriage, and I have to say that I have had some experience of that myself.

Should the redefinition of marriage be agreed by Parliament, it is vital that individuals and organisations who do not agree with the new definition feel free to express that disagreement without fear of reprisal. By agreeing to amendment 39, Parliament would be sending the strongest possible signal that intolerance of those who continue to believe in the previous definition of marriage will, itself, not be tolerated.

Amendment 39 expressly states

"a belief in marriage as a ... union between one man and one woman ... is a belief worthy of respect in a democratic society."

I understand that that is key wording that is used by the European Court of Human Rights. Among other things, it will provide reassurance for public sector employees who believe in traditional marriage and put on a statutory footing assurances that the legislation will not penalise those who believe that marriage is only between a man and a woman.

In July last year, the Deputy First Minister said:

"our overriding concern will be to respect the variety of views that exist on this issue".

I hope, therefore, that the committee and the Government will back amendment 39.

I will briefly address amendments 43 and 44, to which Richard Lyle will speak. Those amendments deal with specific issues. Amendment 43 deals with fostering and adoption, and amendment 44 deals with charitable status. They seek to clarify issues. I know that we will be assured that the amendments are unnecessary, but a lot of doubt remains because we have in the past had assurances that have, over time, not held water. If amendments 43 and 44 are not accepted, the danger is that that would send a message that it would be acceptable to discriminate against, for example, Christian parents who have traditional views, who could be prevented from fostering and adopting. Similarly, there is a risk that the Office of the Scottish Charity Regulator would start removing Christian and other religious groups from the charity register, as it has done before.

I move amendment 39.

Richard Lyle (Central Scotland) (SNP): As many members know, I have personal experience of how the system works. My wife and I adopted our daughter 31 years ago. Unlike in the TV soap operas, we did not wait two weeks; we waited six years. We had a weekly visit from a social worker, and I remember what the social worker asked us on those visits. Eventually, we got a six-week-old baby.

Should same-sex marriage become law, there is a real danger that prospective foster carers or adopters might be wrongly deemed homophobic if they reveal their opposition to same-sex marriage and therefore unsuited to the role of adoptive parent. I suggest that possible adopters are entitled to equal rights.

In paragraph 126 of the policy memorandum, the Government says that it will consider amending existing fostering guidance

"to make it clear that a would-be fosterer should not be rejected just because of his or her views on same sex marriage."

That is welcome, but it does not go far enough. It also suggests that the Government is aware of the dangers. It is my experience that that consideration needs to be enshrined in law and not just detailed in a letter to agencies.

In his reply to a written question, the cabinet secretary stated:

"It would not be appropriate for prospective and current foster carers who oppose same sex marriage to have their suitability to foster children questioned just because of opposition to same sex marriage."

He went on to say:

"opposition to same sex marriage is not by itself sufficient to make a person unsuitable to provide foster care."—[*Official Report*, *Written Answers*, 12 November 2013; S4W-018023.]

I do not know whether that answer will reassure prospective foster carers who have strong views on same-sex marriage, as I have, but if that is the Government's position, it should have nothing to fear from amendment 43, and I invite the cabinet secretary to support it. I trust that all members of the committee will agree that it would be a terrible injustice for everyone concerned if otherwise suitable foster carers or adopters were turned down because of their views on marriage. The legislation should therefore include a provision that states that views on the nature of marriage cannot

be taken into consideration during the process of approving prospective foster carers or adoptive parents.

Childless couples who wish to adopt and therefore have to go through various emotional concerns are worried about the bill, and I believe that we should alleviate their fears. I therefore ask members to support amendment 43.

10:15

The aim of amendment 44 is to ensure that an organisation's charitable status cannot be removed because that organisation believes in traditional marriage. Scottish civic society is teeming with charitable organisations, as John Mason has said, which, due to their religious ethos, could be uncomfortable with same-sex marriage. Many such organisations have publicly said so. The loss of their charitable status could lead to their closure, which would have a hugely detrimental impact on the vulnerable people who rely on the services that they provide.

Despite previous ministerial assurances regarding the future of Catholic adoption agencies, the Office of the Scottish Charity Regulator is currently in the process of removing charitable status from St Margaret's Children and Family Care Society, because St Margaret's gives preference to married couples. I know the society well, as we applied to adopt through it 30 years ago, although, unfortunately, it did not have any children at the time.

That which politicians currently say will not happen may very quickly become normal practice if there are no robust legal protections in place. Amendment 44 would simply ensure that OSCR could not consider an organisation's position on same-sex marriage when assessing its charitable status. If, as it seems, it is not the Government's intention that a body's charitable status should be at risk because of its views on marriage, it should support amendment 44, which would put the matter beyond doubt.

I invite the cabinet secretary to support amendment 44, and also amendment 43.

The Convener: If members have any questions to ask, the cabinet secretary can answer them in his winding-up speech.

John Finnie: John Mason talked about a deep personal commitment to his faith, and I do not doubt for one second that that is entirely the case for him and for a number of people who would support amendment 39. I hope that, likewise, he will recognise that there are also a number of people—including me—with a deep personal commitment to equality and social justice. That is how I see the line in relation to the proposed legislation before us.

John Mason spoke about vilification. I join him in condemning anyone, on either side of the debate, who has been responsible for that. I have received what I would describe as intemperate communications directed to me, too, and such things are not at all helpful in our democratic process. Perhaps it shows people's strength of feeling, but it should not be condoned—we should all be civil to one another.

I am grateful to the several organisations that have provided briefings, and I will quote one of them, from the Equality Network. I choose that organisation because it is an umbrella group. I will read some of the comments that it has made.

The Equality Network contends that amendment 39

"is discriminatory, would undermine general freedom of speech rights, and is ill-defined.

It is discriminatory because it singles out a belief that marriage can only be between a man and a woman as being worthy of particular respect. This discriminates against people who hold other views"—

I include myself in that, obviously—

"for example that marriage can be between people of the same sex—surely that view is equally worthy of respect in a democratic society? The introduction of same-sex marriage is intended to give same-sex couples the same status as mixed-sex couples, but this cannot be achieved if it is written into the bill that a belief in mixed-sex marriage only is worthy of respect.

The amendment would undermine general freedom of speech rights because if a particular belief is enshrined in legislation as being worthy of respect, there is a presumption that the Parliament intends that all other beliefs are less worthy of respect. The belief that marriage can only be between a man and a woman may be interpreted by the courts to be deserving of a higher level of respect than other beliefs, because the amendment singles it out for mention as worthy of respect. But surely all other beliefs that a person may hold, whether that be about nuclear weapons, income inequality, divorce, or any other subject, are equally worthy of respect in a democratic society?"

Significantly, the briefing further describes the amendment as being

"also ill-defined because it does not specify what 'worthy of respect' means. What are the practical consequences intended to be, in law? What would the enforcement mechanism be?"

I respect John Mason's right to lodge his amendment 39, but I will certainly be opposing it strongly.

The Convener: Marco Biagi wishes to comment. Any other member may comment, too. The cabinet secretary will then address those points, if applicable, and then John Mason will wind up.

Marco Biagi: Is it not the right of the cabinet secretary, under standing orders, to speak straight after the mover of the lead amendment?

The Convener: No. The cabinet secretary just has the right to speak in the debate.

Marco Biagi: Okay. I just wanted to make sure that I did not offend the cabinet secretary by speaking before him.

Alex Neil: Never.

Marco Biagi: I take a view that is very similar to that of John Finnie. I have been appalled by many of the things that have been said by people who claim to be on the same side as me in the debate. I have also been appalled by many of the comments that have been made to me by the other side. Yesterday, for example, I received an email in which I was asked:

"Would you vote to allow ritualised child sacrifice to allow the Church of Satan to be true to its faith?"

We do not get anywhere by saying that one side is better or worse than the other. Both sides in the debate have views that are worthy of respect. That is why I agree with John Finnie in saying that to single out and cover only one belief in the bill would send out a difficult message to society in general and, potentially, to the courts.

On Richard Lyle's amendment 43, on adoption and fostering, and amendment 44, although I understand where he is going—that opposition to same-sex marriage is not a homophobic perspective—I would be concerned about the amendments' unintended consequences. For example, when an adoption agency is trying to find a place for a child who has spent previous time—perhaps a long period—with a same-sex couple and is looking to move them to another family who might object to those arrangements, I would be concerned that that would become a material consideration. I appreciate what he is trying to do in protecting the generalities of the situation, but the specifics are difficult. I am sure that the cabinet secretary will address more generally how the views of prospective adoptive parents are already broadly protected in this area.

I, too, will oppose the amendments in the group.

The Convener: I ask the cabinet secretary to confirm in his response that the bill does not interfere with religious or belief organisations and that they have the option to opt in.

Alex Neil: Absolutely—as per my previous contribution. First, I absolutely agree that people should not be vilified for holding any point of view on either side of any of the arguments on the issue. Everybody is entitled to their point of view. If you look at the package of measures around not just the bill but the amendments to the Equality Act 2010, you will see that in the changes that will be announced by the Cabinet Secretary for Education and Lifelong Learning to any requirement for change to the guidelines on education and in the Lord Advocate's guidelines on prosecution, the Government has sought to take a very balanced approach and to accommodate the extension of freedom, or of rights, for same-sex couples while protecting the rights of religious organisations and celebrants. I will not support anything that disturbs that balance because it is very important.

I do not consider that amendment 39 is necessary. There is nothing in the bill that could stop persons expressing the belief that marriage is between one man and one woman. That is, of course, a belief that is worthy of respect in a democratic society. Section 14 makes it clear that existing rights to freedom of speech are unaffected by the introduction of same-sex marriage. I am concerned about an amendment of the nature of amendment 39. If we were to put provisions in the bill that purport to increase freedom of speech protections, that would raise questions about whether other areas where there are no specific legislative provisions, such as abortion and divorce, should be included.

It is not entirely clear what "belief worthy of respect" would mean in law in any case. The suggested provision could mean different things to different people. For example, the provision could be taken to mean that a belief could not be criticised in any way. I am sure that that is not the intention; nevertheless, it could be interpreted in that way.

On amendment 43, I do not consider it necessary or appropriate to amend the law on adoption or fostering following the introduction of same-sex marriage. It is already the case that views on same-sex marriage cannot in and of themselves disqualify anyone from becoming a foster carer or an adoptive parent. It is the welfare of the child that is absolutely essential.

Potential foster carers and adopters are assessed on their ability to provide safe, loving and nurturing home environments for children. That has always been and will continue to be the case. The assessment process is designed to ensure that decisions on suitability are not made on the basis of one view, characteristic or experience but must consider carers' whole ability to meet children's needs. Views on same-sex marriage are likely to be irrelevant and should not prevent prospective adoptive parents or foster carers from being successful in their applications; indeed, that is already set out in law. Again, I do not think that amendment 43 is required.

I also do not think that amendment 44 is required. Nothing in the bill would adversely affect an organisation's charitable status as a result of its

beliefs on marriage. Given that, under section 14, freedom of speech is not affected by the introduction of same-sex marriage in Scotland, religious and belief bodies are entitled to hold views and preach or express them freely, provided that that does not constitute a public disorder or incite violence, as outlined in the Lord Advocate's prosecutorial guidance on same-sex marriage.

Decisions on charitable status are for the Office of the Scottish Charity Regulator, but the bodies in question must act within the law. Charities may express views on any matter in furtherance of their charitable purposes and, in doing so, should not jeopardise their charitable status. On that basis, it is extremely unlikely that a church, say, could lose its charitable status by speaking out against same-sex marriage. OSCR has advised that where charity trustees express views on behalf of the charity—for example, in relation to same-sex marriage—that are unconnected with the charity's purpose, that would be an issue of trustee conduct rather than one of charitable status.

Finally, an amendment to the Charities and Trustee Investment (Scotland) Act 2005 in respect of views on same-sex marriage might have unintended consequences. For example, it could cast doubt on the ability of a charity to express a view on other issues and might result in our having repeatedly to amend the 2005 act to make provision for each issue.

On that basis, I urge the committee to oppose these amendments.

John Mason: I thank everyone who has contributed to the debate.

I very much share John Finnie's view about the commitment to equality. I think that that is what we are all trying to achieve here, and I welcome the comments that we should all be civil in the way in which we conduct the debate.

It has been claimed that amendment 39 is discriminatory in highlighting only one belief and not referring to other equally valid beliefs. However, that is the current position in the courts, which tend to discriminate among the protected characteristics in the Equality Act 2010 and favour certain characteristics over others. Although I agree with Marco Biagi's point that we cannot say that one side is better than the other and that all should be treated equally, I simply note that one of the faults of the 2010 act—as it happens, I sat on the committee that considered that legislation and which also discussed this very point—is that at the time the Government refused to say that all the protected characteristics were equal. For that matter, it also refused to put them into a hierarchy.

Nevertheless, the experience before and since the passing of the 2010 act has been that in practice the courts create a hierarchy. In a sense, they are forced to do so because when faced with two conflicting protected characteristics they have to choose one over the other. It might be disputed by others but some of us feel that under the Equality Act 2010 the religion and belief protected characteristic is put at the bottom of the pile and other characteristics are put higher up. In short, we are not starting from a position of equality or with a level playing field. People of a religious persuasion feel that they are being discriminated against and the point of my amendment is not to cover everything but to create a little bit more balance—

Marco Biagi: Will you take an intervention?

John Mason: Absolutely.

Marco Biagi: I appreciate that there can be a difference between feeling and reality in such situations, but are you arguing that that is the feeling or that it is the reality? If you are arguing that it is the reality, are you able to substantiate that argument with reference to cases that have gone against religious interests?

10:30

John Mason: The obvious example is the Lillian Ladele case. The issues that it raises are covered to a greater extent by some of the other amendments that deal specifically with public sector employees. In the Ladele case, an individual employee's conscience was given no room for manoeuvre against the overriding alleged responsibility of a local authority, despite the fact that the local authority had the freedom and the ability to provide a service flexibly. That is the type of case—it is not the only one—in which it seems that, when there is a conflict between different protected characteristics, the religion and belief characteristic is at the bottom of the pile.

The cabinet secretary mentioned the Lord Advocate's guidelines, but we had two Queen's counsel before the committee who, while they took quite different views on a number of issues, agreed that the Lord Advocate's guidelines carry very little weight. I agree with the cabinet secretary that balance is important, but that is exactly the point of my amendment: it tries to bring a bit more balance to what is inherently an unbalanced situation.

I press amendment 39.

The Convener: The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 39 disagreed to.

The Convener: Group 10 is on effect of holding belief that marriage is between persons of different sexes—public sector employees and services. Amendment 40, in the name of Siobhan McMahon, is grouped with amendments 41 and 42.

Siobhan McMahon: The bill does not protect civil registrars who do not wish to officiate at same-sex marriages. The Scottish Government claims that, as registrars conduct a civil function, it is not appropriate to allow them an opt-out on conscientious grounds. However, a scenario in which a long-standing member of staff is required to do something against their conscience that has never previously been part of their job is surely one in which employees should be protected. Registrars face having their job transformed around them and, since the Scottish Government is responsible for that transformation, it is incumbent on it to provide protection for those who are disproportionately affected.

There are other areas in which, in a free society, conscientious objections are respected. The right of doctors to refuse to participate in an abortion is an example, as is the right of conscientious objectors not to fight in times of war and the right of atheists not to participate in religious observance in schools. Public bodies are able to fulfil their duties while respecting the conscientious objections of all their employees. If there is no disruption to the carrying out of a civil function, why should there not be scope for conscientious objections to be respected?

It is perfectly clear that reasonable accommodation could be made to the effect that a registrar would be able to opt out of solemnising same-sex marriage as long as the service provision was not unduly disrupted. The bill should therefore contain a specific conscience clause that requires local authorities to allow civil registrars to opt out of performing same-sex marriages, as my amendment 40 proposes.

With regard to amendments 41 and 42, the important principle of reasonable accommodation should be prioritised in assessing how to fulfil the public sector equality duty that is contained in the UK Equality Act 2010. The public sector equality duty places on public authorities a duty to have regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations, which includes the need to tackle prejudice.

Many organisations such as churches and religious charities are at the forefront of tackling social problems in their area—for example, by working with the homeless or providing food banks. It must be made clear that the PSED should not be used to deny religious organisations that are known to be opposed to same-sex marriage the ability to provide public contracts or to hire public buildings, as many churches do. Public bodies should seek to make reasonable accommodation for religious groups in order to facilitate those organisations to maintain their ethos.

That principle has not been implemented to date—as is exemplified in the case of the Catholic adoption agencies—and there is concern that churches that do not marry same-sex couples may be targeted by overzealous officials and public bodies. For example, a local authority may claim that it would be in breach of the PSED if it were to give a grant towards the cost of a community project to, or to enter into a contractual relationship with, a local church if that church were unwilling to marry same-sex couples. Similarly, public sector employees may find themselves being asked to act against their consciences if they believe in traditional marriage. Nobody who works in or seeks a career in the public sector in Scotland should have their equality and diversity credentials or their suitability for employment disputed merely because they hold the existing view of marriage, whether expressed or not.

The aim of the amendments is, therefore, to ensure that public authorities continue to operate in partnership with bodies that hold to a traditional belief in marriage and accommodate their employees who may hold such views. Surely, that is reasonable and right in a free society.

I move amendment 40.

Marco Biagi: Again, I just want to give my view rather than ask a question. There are extensive protections of freedom of speech at the very highest levels of legislation, including in the European convention on human rights. We have heard extensively from a legal panel how strong those protections of freedom of expression and freedom of religion are.

It is interesting that Siobhan McMahon mentioned the example of atheists in schools. Although protection exists for children to be opted out of religious observance by their parents, there is no equivalent protection for teachers, who may

have to be present during religious observance. That is a better parallel to draw in this context, and the situation is best dealt with by management within schools. It would be a foolish headteacher who made an atheist teacher supervise religious observance if they had substantial objections and were incredibly uncomfortable there.

I understand that there is now also protection of private views on same-sex marriage arising from case law involving a case in which someone lost their job as a result of their views against same-sex marriage. I do not recall the exact case, but it was in England and the case was pursued under the Equality Act 2010.

John Mason cited earlier the case of Lillian Ladele. She was one of four people who took a group action, and one of her colleagues who had been forbidden to wear a crucifix at work, which denied her right to free expression, had her claim upheld. That protection exists. She was reinstated because the crucifix was not felt to contravene any policy and was not thought to be something that the employer could reasonably restrict. The protections exist, and the picture is more mixed than we have occasionally heard about here.

I suggest to Siobhan McMahon that nothing in the bill can override the Equality Act 2010. Although my interpretation of the Equality Act 2010 differs from hers, she should remember that equality is reserved to the UK Parliament and is not a function that we can override. Therefore, if her problem is with the Equality Act 2010, her problem lies elsewhere and her amendments will not have the effect that she seeks. Perhaps if she joined others on the committee in wishing to have those powers in Scotland, she might have greater luck with her amendments.

John Mason: I speak briefly in support of amendments 40, 41 and 42.

Surely, the public sector—frankly, any employer—should be willing to give a bit of flexibility. Marco Biagi supported that when he suggested that a headteacher has the flexibility to determine which teacher he or she would put in a particular class if somebody might be "incredibly uncomfortable". That is exactly the point. Most local authorities, for example, have such flexibility because they have a number of staff in a particular department.

That also applies in the national health service in the context of abortion. The NHS provides abortions—some of us agree with that; some of us disagree—but there is flexibility for individual employees for whom that is a matter of conscience. There is a bit of movement in that regard, which seems to work pretty well, and there seems to be no good reason why we should not provide such flexibility in the bill.

That is not to override the Equality Act 2010. As I was trying to say earlier, the act leaves quite a lot of open space, in that the protected characteristics are neither put in a hierarchy nor said to be all equal. By making comment in that area, we would seek not to override but to supplement the Equality Act.

Employees have all sorts of beliefs, and a reasonable employer will make provision for reasonable accommodation, but of course one or two employers might not be keen to do that.

John Finnie: I will be brief, because we covered the matter at stage 1 and went round all the potential anomalies that could arise. I say simply that I expect public and civil servants to do their duty. I will not support the amendments in the group.

John Mason: Do you agree that it is right that staff have flexibility in relation to abortion?

John Finnie: Are you equating legislation that brings about equality with abortion?

John Mason: The same argument would be that all public sector employees—all nurses—should take part in abortions because that would be equality.

The Convener: If there are no other comments from members, I will make a brief comment. I am concerned about the proposed approach, which I think stigmatises the group that we are trying to protect by suggesting that marriage for same-sex couples is so terrible that registrars should be able to refuse to take part in it. That undermines the bill's intention, which is to provide same-sex couples with equality.

Alex Neil: I do not support amendment 40. A civil registrar is a public servant who provides only a public function—that distinguishes them from a religious celebrant, who acts in a religious capacity. The registration of civil partnerships by civil registrars in Scotland has worked well. Over the past eight years around 4,800 civil partnerships have been registered. There is no reason to expect that the solemnisation of same-sex marriage by civil registrars would not work just as well.

Civil registrars in Scotland are employed by local authorities and it is for each local authority to decide how best to provide services for the registration of marriage. We would expect a local authority to handle with sensitivity a registrar who objected to same-sex marriage on the ground of religion or belief. It would be best for any such discussions to take place locally, rather than have the Scottish Government or Parliament try, at national level, to cut across the employer-employee relationship. Amendment 40 is therefore not only unnecessary but represents unwelcome

interference in a civil function. I invite Siobhan McMahon to withdraw amendment 40.

John Mason: Will you give way?

Alex Neil: May I finish? The Government cannot accept amendment 41, which is drawn extremely widely. The Government is concerned about the potential ramifications of the proposed approach. Subsection (1) of the proposed new section that would be inserted by amendment 41 provides:

"A public authority must take steps to ensure that, in carrying out its functions, the belief of an employee of the authority mentioned in subsection (3)"—

which is that marriage may only be between one man and one woman—

"is respected."

It is unclear what public authorities would need to do to comply with subsection (1). For example, it is not clear what an employer should do if another employee of the public authority or a person who received services from the authority indicated that he or she did not respect the view that

"marriage may only be between one man and one woman."

Another employee or person receiving public services might, in a democratic society, take a different view on marriage. That is why it is often necessary to balance competing rights and views, as the bill tries to do. Proposed new subsection (1) appears to place one set of opinions above another. We do not think that that is right.

Subsection (2) of the proposed new section raises even more problems. Again, its application looks very wide. It seems to provide that a public sector employee would be able to opt out of providing or assisting with any service on the ground that the employee held the belief that

"marriage may only be between one man and one woman."

That suggests that a public sector employee could refuse to deal with correspondence or a request on any subject from a couple in a same-sex marriage. Such an approach would seem to lead to discrimination against LGBT people. As I have said, the Government cannot accept that.

10:45

The better approach is that which we have taken in the bill. We provide protection for religious bodies and celebrants who do not wish to solemnise marriage because of clear religious concerns that relate to a religious function. The bill includes a section that makes it clear that freedom of speech is unaffected by the introduction of same-sex marriage. We are giving our public authorities the freedom to take their own commonsense decisions on how their services should be provided. That will allow them to take account of religious beliefs that their employees hold without placing them in a legislative straitjacket. A legislative straitjacket that could lead to discrimination would be inadvisable.

The purpose of amendment 42 appears to be to specify that a public authority must not withhold a service or the use of a facility from a person because of that person's belief that

"marriage may only be between one man and one woman."

We do not believe that the amendment is necessary. I am happy to place it on the record that a person or body that believes that

"marriage may only be between one man and one woman"

should not on the basis of that belief alone suffer detriment when using a public authority's service or facility.

The scenario was previously presented of a local authority refusing to let publicly owned buildings to churches that believe that marriage should be between one man and one woman. The Government considers that a local authority that acted in such a way would be at risk of a successful claim for discrimination being made against it.

The public sector equality duty in the Equality Act 2010 means that public bodies cannot discriminate when the act says that that is unlawful. If a public sector body discriminated against a person or body because their religion or belief is that marriage should be between one man and one woman, that would be unlawful discrimination. Given that, I do not consider that amendment 42 is necessary.

Another reason for opposing amendment 42 is that it would have wider implications. As I have said, there is a danger in singling out views on same-sex marriage. People and bodies might have strong views on a wide variety of issues. I remember that when I was in primary 7—that was a long time ago—a teacher refused to dance the twist because of her religious beliefs. We cannot build every eventuality into the legislation. If we mention only views on same-sex marriage in legislation, questions will be asked about whether people can suffer detriment because of other views. It is clear that we want to avoid that.

I understand the concerns that religious bodies have expressed. As well as making it clear that people who oppose same-sex marriage should not be denied public services or the use of public facilities, we have made it clear that religious bodies that oppose same-sex marriage will continue to be eligible for grants and public services. As I have said, any public services that are provided through public money must in principle be available to all. However, the views of

a body that provides a service are irrelevant as long as the service is provided to everybody without discrimination.

There is also a risk that amendment 42 could amount to regulating discrimination and could stray into the reserved area of equal opportunities.

For all the reasons that I have given, I invite Siobhan McMahon to withdraw amendment 40 and not to move amendments 41 and 42.

Siobhan McMahon: I appreciate the cabinet secretary's comments. They are helpful, but I am trying to achieve such a position in law, so I will press my amendments.

The convener said that she is concerned about people being stigmatised. I, too, am concerned about that, which is why I lodged the amendments. If we are talking about equality, we should think about both sides when we discuss the issues.

I appreciate John Mason's comments. The intention is to supplement provisions rather than take anything away.

I agree that it might well be foolish for teachers to do what Marco Biagi described but, given that that happens, we must have more protection in the bill. I will press my amendments.

The Convener: The question is, that amendment 40 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 40 disagreed to.

Amendment 41 moved—[Siobhan McMahon].

The Convener: The question is, that amendment 41 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 41 disagreed to.

Amendment 42 moved—[Siobhan McMahon].

The Convener: The question is, that amendment 42 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 42 disagreed to.

Amendment 43 moved—[Richard Lyle].

The Convener: The question is, that amendment 43 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 43 disagreed to.

Amendment 44 moved—[Richard Lyle].

The Convener: The question is, that amendment 44 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 44 disagreed to.

The Convener: The next group is on holding belief that marriage is between persons of different sexes not to constitute commission of certain offences. Amendment 45, in the name of Richard Lyle, is grouped with amendment 46.

Richard Lyle: Although section 14 of the bill is intended to provide reassurance regarding freedom of expression, I believe that it falls short of fulfilling the pledge that was made in a Government press release dated 25 July 2012, that the

"legislation will be accompanied by important protections for freedom of speech".

Section 14 simply refers to "nothing in this Part" affecting the exercise of free speech. In other words, it applies only to the bill. The concerns about free speech do not necessarily arise with the bill directly, because they relate to the impact of the redefinition of marriage on how existing public order law will be applied. The Lord Advocate's new guidelines on hate crimes may be insufficient because, although opposition to same-sex marriage would not be a sole ground for prosecution, it could be a factor. Protection for something as fundamental to a democratic society as free speech should not be reduced to being in guidance; it should be in legislation.

It must be recognised that, in a completely new situation in which marriage has been redefined, the effectiveness of existing rights could be reduced. What is needed to protect free speech is clear protection within public order legislation. There are clear precedents for free speech clauses in legislation at both Westminster and Holyrood. The incitement to religious hatred offence that Westminster created in legislation in 2006 includes a robust free speech clause; likewise, the Scottish Government included a free speech clause in section 7 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 to protect religious debate in the light of the threatening communications offence. I suggest that the same principle should apply to the redefinition of marriage. In order to protect free speech and debate, free speech clauses should be included in public order legislation.

The committee should also note that the issue was considered sufficiently important to merit inclusion in the recent Westminster legislation on same-sex marriage. The UK Government's Marriage (Same Sex Couples) Act 2013 adds a specific subsection to the English offence of incitement to hatred on grounds of sexual orientation, making it clear that disagreeing with same-sex marriage does not breach that law. My amendment 45 is designed to ensure that similar Scottish offences contain proper regard for freedom of speech. I ask the committee to support my amendments.

I move amendment 45.

The Convener: Do members have any questions?

John Finnie: I would like to comment on Mr Lyle's amendments. To single out a particular area is not helpful for criminal law or indeed the criminal justice system. Context is everything, and before a prosecution took place, criminal intent would need to be shown. I therefore think that what Mr Lyle proposes is completely redundant; you would have a list as long as your arm if you were to single out areas in that way. Criminal intent has to be shown, so Mr Lyle's amendments are redundant and I will oppose them.

The Convener: I now invite the cabinet secretary to speak.

Alex Neil: The Government does not support amendments 45 and 46 because we think that they are unnecessary. Criticism of same-sex marriage is not, in itself, an offence and the bill will not change that situation. People can freely express that they are opposed to same-sex marriage provided that they do not incite hatred or intend to cause public disorder. That was made clear in the Lord Advocate's prosecutorial guidance. To be frank, I find it unbelievable that people say that that will have minimal impact when, in effect, it contains instructions to prosecutors in Scotland.

Where there is a prosecution under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 or section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, it would be for the behaviour that the person adopted rather than for their expressing their views on same-sex marriage. It would not be appropriate to make a person immune from prosecution if the motive for any actions that would otherwise be criminal happens to be opposition to same-sex marriage.

Amendment 45 provides that

"any discussion or criticism of marriage which concerns the sex of the parties"—

whether they are for or against same-sex marriage—

"must not be taken of itself to be an offence under"

section 38 of the 2010 act. The amendment is therefore unnecessary. The offence in the 2010 act requires "Threatening or abusive behaviour" that is intended or

"likely to cause ... fear or alarm".

Therefore, simply expressing a view on same-sex marriage would not by itself amount to an offence.

Similarly, amendment 46 seeks to ensure that

"any discussion or criticism of marriage"

at a regulated football match

"which concerns the sex of the parties to marriage"—

whether the speaker is for or against same-sex marriage—

"must not be taken of itself to be an offence under"

section 1(1) of the 2012 act. Again, the amendment is unnecessary. The offence in the 2012 act requires engagement in offensive behaviour that

"is likely ... or ... would be likely to incite public disorder."

Simply expressing a view on same-sex marriage would not by itself amount to such an offence. On those grounds, the Government opposes amendments 45 and 46.

11:00

The Convener: I invite Richard Lyle to wind up and press or withdraw amendment 45.

Richard Lyle: I intend to press amendment 45. I am exercising my free speech in regard to the points that have been raised in committee today. With the greatest respect to the cabinet secretary, I believe that the Government has not fulfilled its pledge to ensure that the legislation is accompanied by important protections for freedom of speech. I therefore press amendment 45.

The Convener: The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

Abstentions

McMahon, Siobhan (Central Scotland) (Lab)

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

Amendment 45 disagreed to.

Amendment 46 moved—[Richard Lyle].

The Convener: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 46 disagreed to.

The Convener: The next group is on indemnification of losses arising from certain legal actions. Amendment 47, in the name of Alex Johnstone, is the only amendment in the group.

As members know, the Presiding Officer has determined that the potential costs associated with amendment 47 are such that they would cause the bill to require a financial resolution under rule 9.12 of standing orders. No such resolution is currently in place. I intend to allow the debate to proceed and I will ask Alex Johnstone to wind up the debate. However, I will not ask him whether he is pressing or withdrawing the amendment today. That will be held over to our second day of stage 2 consideration of the bill. Whether I am able to put the question on the amendment at that final point, if Alex Johnstone presses it, will depend on whether a financial resolution is in place at that time.

Alex Johnstone: I begin by expressing my gratitude to the members of the legislation clerking team who assisted me in drafting amendment 47, which facilitates—today, at least—the opportunity to debate the principles that lie behind it.

It is not like me to ask the Government to spend money. In this case, I console myself by telling myself that amendment 47 is an amendment of last resort—that is a more comfortable position for me to find myself in.

The amendment seeks to create a duty on the Scottish Government to use public funds to indemnify those who suffer financial loss from any discrimination claims against them that result from the bill. The Government has gone out of its way to reassure people who have concerns about the bill and who oppose same-sex marriage that they have nothing to fear and that nobody, other than

perhaps several registrars, will be forced to act against their conscience. If that is so, the minister should have nothing to fear from deploying his hefty financial resources as insurance for those who are worried about finding themselves in court. If the Government is confident that its assurances are correct, surely the financial resources that are at its disposal will never be required.

Amendment 47 would provide invaluable peace of mind for the clergy and for others who are witnessing the long-standing definition of marriage being redefined around them. Looking at some of the material that has been made available to us, I suggest that the ending of what the Government sees as one form of discrimination might in effect create a whole new class of discrimination and that, regardless of what happens to my amendment, it is reasonable to expect some form of challenge to materialise in the courts. Christian and other religious groups as well as individuals with strongly held views fear that the legal system will be used to trample them underfoot.

The letter that I received from the Presiding Officer makes it clear that my amendment cannot be agreed to by the committee without a financial resolution being in place. Whatever happens, there might well be challenges and, where they materialise, there is always a risk that the Government might not be able to make its views stand up in court. As a consequence, I believe that the bill carries a financial risk and it would be responsible for the Government to put a financial resolution in place. In conclusion, I ask the cabinet secretary whether the Government will at this stage consider the need for a financial resolution on the bill.

I move amendment 47.

Alex Neil: We are certainly making history this morning. Alex Johnstone has just asked me to spend public money.

The Government asks the committee to reject amendment 47. We assume that its major purpose is to protect religious bodies that do not wish to solemnise same-sex marriage and to protect others who hold beliefs that are against such marriage. The Government has recognised the concerns of religious bodies and celebrants with regard to same-sex marriage by establishing an opt-in system for those who wish to take part. The bill also contains provisions that make it clear that it does not create any obligations to take part, and we have agreed with the UK Government that amendments should be made to the Equality Act 2010, for example, to protect individual celebrants. More generally, we have put in the bill a provision to put beyond doubt our view that freedom of speech is unaffected by the introduction of same-sex marriage.

Given that context, I will explain why the Government opposes amendment 47. First, we have put in place robust protections. As has been shown in evidence to the committee, it is clear that religious bodies and celebrants are not going to be forced to marry same-sex couples. It is also clear that freedom of speech will continue to exist, which means that there is no need for the amendment.

Secondly, it appears that the amendment is very wide. It could open a Pandora's box by extending to the Scottish ministers a requirement to indemnify commercial service providers who face a discrimination claim after refusing to provide a service to a same-sex married couple on the basis of a belief that a marriage is between a man and a woman. At the moment, if a letting agency refuses to let a flat to a same-sex couple, that could be discrimination. In the future, that couple could be married. It would appear that, under the proposals in the amendment, if the letting agency did not let the flat to the couple because it believed in traditional marriage, the agency would have to be indemnified by the Scottish ministers against any discrimination claim. Refusing to provide such a service to a same-sex couple would be discrimination.

Thirdly, the amendment could lead to inequality of arms, which is a technical phrase used by lawyers in court cases. A defender in an equality case could hire a top Queen's counsel, knowing that the Government would have to pay, whereas the person who raised the action would not be in the same position. As a result, the legal support that was available to the two sides in the case might be different, which is a position that I do not find fair or just. Also, the Government is being asked to sign a blank cheque with the possibility of some of the money being used to support outright discrimination.

In summary, the Government opposes amendment 47 on the grounds that there is no need for it given the robustness of the existing protections, and that it could support people who have been carrying out blatant acts of discrimination. It could also lead to inequality of arms in court cases and would require us to sign a blank cheque.

Finally, I am happy to answer the question whether the Government will lodge a financial resolution in respect of the amendment. I will discuss the matter with colleagues in Government. However, given that the protections are robust, we do not see a need for the amendment, and we have concerns about its potential discriminatory nature. I therefore think that it may well be unlikely that we would wish to lodge a financial resolution, and I ask the committee to reject the amendment.

The Convener: I ask Alex Johnstone to wind up but not to press or seek to withdraw his amendment.

Alex Johnstone: I acknowledge the views that the minister has expressed and accept that the nature of the amendment is such that it is drawn extremely widely. Its purpose was to facilitate the discussion that we have had. In my view, it is conceivable that a more specifically drawn amendment might be lodged at a later stage. I believe that the key issue at this stage has become that of a financial resolution, and the minister has given a commitment that that will be properly considered in due course.

I conclude by saying that, as I said previously, I believe that the bill, once it has completed its course, will inevitably lead to a small number of cases that are similar to the cases that have been used as examples when we discussed other amendments this morning. Consequently, I am confident that legal costs will be incurred as a result of the legislation and that, should a case be brought in which the Government is challenged and defeated, the costs will fall to the Government. Consequently, I believe that it would be appropriate to have a financial resolution on the bill.

The Convener: That ends today's stage 2 consideration of the bill.

11:11

Meeting continued in private until 11:25.

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