



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Equalities and Human Rights Committee

**Thursday 27 February 2020**

**Session 5**



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**Thursday 27 February 2020**

**CONTENTS**

	<b>Col.</b>
<b>INTERESTS</b> .....	1
<b>CIVIL PARTNERSHIP (SCOTLAND) BILL: STAGE 1</b> .....	2

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**EQUALITIES AND HUMAN RIGHTS COMMITTEE**

**4<sup>th</sup> Meeting 2020, Session 5**

**CONVENER**

\*Ruth Maguire (Cunninghame South) (SNP)

**DEPUTY CONVENER**

\*Alex Cole-Hamilton (Edinburgh Western) (LD)

**COMMITTEE MEMBERS**

\*Angela Constance (Almond Valley) (SNP)

\*Mary Fee (West Scotland) (Lab)

\*Maurice Golden (West Scotland) (Con)

\*Alison Harris (Central Scotland) (Con)

\*Fulton MacGregor (Coatbridge and Chryston) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Fiona Blair (Association of Registrars of Scotland)

Ephraim Borowski (Scottish Council of Jewish Communities)

Rod Burns (National Records of Scotland)

Tim Hopkins (Equality Network)

Elena Soper (YWCA Scotland – The Young Women’s Movement)

Kenny Stewart (Equality and Human Rights Commission Scotland)

Fraser Sutherland (Humanist Society Scotland)

**CLERK TO THE COMMITTEE**

Claire Menzies

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



## Scottish Parliament

### Equalities and Human Rights Committee

Thursday 27 February 2020

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

### Interests

**The Convener (Ruth Maguire):** Good morning, and welcome to the fourth meeting in 2020 of the Equalities and Human Rights Committee. I ask everyone to make sure that their mobile devices are switched off or on silent and put away.

Agenda item 1 is declarations of interests. I welcome to the committee Alison Harris and Maurice Golden, who are replacing Oliver Mundell and Annie Wells. I put on record the committee's thanks to Oliver and Annie for all their hard work and contributions during their time on our committee. I invite Alison Harris and Maurice Golden to declare any relevant interests that they might have.

**Alison Harris (Central Scotland) (Con):** I do not believe that I have any relevant interests that require declaring.

**Maurice Golden (West Scotland) (Con):** Likewise.

**The Convener:** Thank you.

## Civil Partnership (Scotland) Bill: Stage 1

09:00

**The Convener:** Agenda item 2 is the Civil Partnership (Scotland) Bill, on which we will take oral evidence from two panels. I welcome our first panel: Fiona Blair, president of the Association of Registrars of Scotland; Rod Burns, deputy registrar general at the National Records of Scotland; Fraser Sutherland, chief executive of the Humanist Society Scotland; and Ephraim Borowski, director of the Scottish Council of Jewish Communities. You are all very welcome this morning, and I thank you for being with us.

I will start off by asking you to tell us briefly about your organisation and whether you support the general principles of the bill.

**Fiona Blair (Association of Registrars of Scotland):** I am the president of the Association of Registrars of Scotland, which is also known as AROS. We have been representing Scottish local authority registrars since 1865. AROS provides a valuable networking group for registrars and assistant registrars and, as an association, we are very proactive in contributing towards a workable and customer-friendly registration system. We work closely with National Records of Scotland, provide professional advice on registration procedures and take part in working groups such as this. We are in favour of opening up civil partnerships to mixed-sex couples.

**Fraser Sutherland (Humanist Society Scotland):** The Humanist Society Scotland is the national body for humanists in Scotland. We have 15,000 members across the country, and many people know us for providing ceremonies at weddings, funerals and naming ceremonies. We are very supportive of opening up civil partnerships to mixed-sex couples.

**Ephraim Borowski (Scottish Council of Jewish Communities):** I am the director of the Scottish Council of Jewish Communities, or SCoJeC. We are an umbrella body for all the organised Jewish communities in Scotland, which are the ones in the cities. We also work very closely with the scattered Jewish population in more remote areas. We have just finished a piece of research that looks not at this kind of issue but at the issues that concern Jewish people in Scotland in general.

**The Convener:** Do you support the general principles of the bill?

**Ephraim Borowski:** I should put on record that there are political issues—with a small “p”—on which it is not possible to speak with a single view

on behalf of an ethnically and religiously diverse community such as the Jewish community. Therefore, I will probably be speaking for a kind of consensus, which is that we are unlikely to be very much engaged with this but do not have any objections to it. However, individuals and groups in the community have diverse views.

**Rod Burns (National Records of Scotland):** National Records of Scotland is a non-ministerial department of the Scottish Government. We oversee the registration system and provide support and training in relation to the information technology process and that kind of thing, in order to implement Scottish Government policy around registration. We support the bill.

**The Convener:** What implications, if any, might the bill have for your organisations?

**Fiona Blair:** We do not think that there will be many implications apart from the initial set-up. Our social work departments would need to incorporate forced civil partnership along with forced marriage. That would mean a change to their interagency guidance and, possibly, training, which would mean releasing registrars to come down to Edinburgh to do centralised training, with the associated travel costs. However, apart from that, we cannot think of anything that would impact on our service.

**Fraser Sutherland:** The implications for us would be much the same as those that Fiona Blair has described. We would update the training and information that we provide. Many of our celebrants are already trained to provide civil partnerships for same-sex couples, and the procedures would be the same; we would just update our celebrants on what was available.

**Ephraim Borowski:** There may well be two points where the bill will affect us. First, we have a semi-official role through a concordat with NRS. If a couple in which one partner is from Scotland and the other is from anywhere else in the world want to be married by a rabbi from “back home”, wherever that is, NRS is required to check the bona fides of that individual. However, it does not—quite rightly—want to get involved in the internal divisions between groups in the Jewish community, so it has a single, one-stop shop: SCoJeC. NRS asks us to go to the relevant branch of Judaism and check out the individual. That will apply for civil partnerships just as it does, at the moment, for marriage.

The second, more important, point concerns the inclusion of section 9 of the bill, which is about religious divorce. I very much welcome that section. At the moment, the only listed faith is Judaism, but the same provision might be available for other faiths if they wanted it, which is why the provision is written in general terms. That

is important, because it mirrors the clause in the Divorce (Scotland) Act 1976, which has been extremely useful and has, as far as we are aware, put an end to the abuse that there used to be.

**Rod Burns:** For NRS, adding mixed-sex civil partnerships will simply add a complementary new function. As Fiona Blair said, there will resource implications in the initial set-up. We will make changes to the forward electronic register, which is the national electronic database for registration; system changes will have to be made; there will be training of registrars; the process will have to be amended; and our handbook will need to be updated. We will have to devote resources to setting up the system, but, once it is up and running, it will become part of business as usual. It will be complementary to same-sex civil partnerships, which Fiona Blair would agree have become a regular part of registration business and are completely unproblematic.

**Alison Harris:** Good morning. What are the legal and social differences between marriage and civil partnership? Can you explain those?

**Fiona Blair:** It is confusing for the public, who often ask us what the differences are. I understand that adultery cannot be cited as a reason for the dissolution of a civil partnership, whereas it can be cited in a divorce case. There is very little difference between civil partnership and marriage regarding legal rights, which have been protected and changed over time. It is confusing for the public, and it would be good to have clear guidance.

**Fraser Sutherland:** I will not speak much about the legal side; you have people who are far more expert than me here to do that.

You have received quite a lot of written evidence from couples and individuals who see the historical context of marriage as something they do not want to enter into. Civil partnership is more attractive to them because of how marriage has historically been framed.

It is interesting that, since the introduction of same-sex marriage, a lot of same-sex couples have chosen to get married rather than to opt for civil partnerships when they have that choice. There has been historical discrimination against lesbian, gay, bisexual and transgender people, who have been unable to have a wedding. That is no longer an issue, which may have changed some of the social aspect of marriage.

The social aspect changed dramatically during the 20th century. Marriage used to be a religious thing; then registration services, on behalf of the Government, became the most popular choice. From the turn of the century, since 2005, humanist marriages have become a thing. There is a growing popular demand for humanist marriage,

which, in the words of the Marriage and Civil Partnership (Scotland) Act 2014, is a “belief marriage” as opposed to a religious or Government-based service. The social landscape of marriage changed considerably over the 20th century and has also changed since the 2005 decision to allow for a belief body and following the 2014 change in the law to recognise belief marriages.

**Ephraim Borowski:** The difference for the Jewish community would be minimal. The reason why we need section 9 is that, in the case of marriage, a single ceremony creates two marriages: civil marriage and religious marriage. If a marriage is going to come to an end, both marriages will need to be terminated, and the processes are different.

The reason why I said that the bill would not have much practical impact is that the reasons that people give for wanting civil partnerships rather than marriage would make it almost contradictory for them also to want to have a religious marriage ceremony. It may be that this does not come about, but, in effect, Judaism recognises marriage by custom and repute—for want of a better phrase—in that publicly living together still requires a religious divorce. From that point of view, if someone were to go down the new path envisaged by the bill, it would make very little difference at all.

**Rod Burns:** We work quite closely with the Scottish Government and provide input when it is developing new policy on something like this. However, we set ourselves squarely in the role of implementing whatever the law ends up being. In general, NRS refrains from taking a view on the social impact of something, even though people who work in NRS are quite interested in marriage and civil partnership. We are at the receiving end of settled policy, and we work carefully with registrars, the Scottish Government and other stakeholders to ensure that we are implementing things fairly and transparently.

Civil marriage was introduced in 1940 and, since then, we have had civil partnerships and the introduction of the category of belief marriages—those are all staging posts along the way of new settled policy, which we are working to implement. We do not take a view on the social benefits, although there clearly are social benefits; we just crack on with doing a good job of implementation.

**Maurice Golden:** Fiona Blair mentioned that one of the differences between marriage and civil partnership is in the grounds for divorce or dissolution, specifically in relation to adultery. Do the panel members have any views on that specific subject?

**Fiona Blair:** I have no views on that; I would never get involved in the divorce or dissolution aspect of a marriage—that would be dealt with legally.

**Fraser Sutherland:** There is a wider question about reviewing the whole of the divorce legislation and how it sits at the moment. Many voices are saying that the separation requirements in divorce legislation are not modern and up-to-date in relation to how people’s lives work. There have been some high-profile cases down south. It is time for a wholesale review of that legislation, rather than just of that issue.

**Ephraim Borowski:** I agree with that. In Judaism, marriage is entered into voluntarily and the contract is ended equally voluntarily by the parties. Therefore, in a sense, the only ground for religious divorce is irretrievable breakdown—the parties say, “This marriage has come to an end.” Anything that goes towards that level playing field would be consistent with where we are coming from.

**Rod Burns:** We do not have a view on that issue.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** I want to ask about the benefits of introducing different-sex civil partnerships. What might the impact be on different equality groups? We have had submissions from Engender, Children in Scotland and others, letting us know what they think the benefits might be. Do you have any views on that?

09:15

**Fiona Blair:** I think that the introduction of the ability to recognise mixed-sex civil partnerships will be good from an equality point of view and will give us parity with other areas of the United Kingdom. It is already possible to enter into such partnerships in England. Since that law has been implemented in England, as registrars, we have had 47 inquiries in 11 local authority areas from people who want to enter into a mixed-sex civil partnership in Scotland. That is just a small sample that I took before coming to the meeting.

The reasons that people give for wanting to do that vary. For some, it is their personal preference; they see marriage as a one-time thing and they want something different. Some people do not want to have a ceremony—with marriage it is necessary to have some form of ceremony, whereas with a civil partnership it is just a case of registration. Some people whose marriage ended with a death do not want to get married again because they think that, if they did so, that would be seen as not honouring their first husband or wife. Many different reasons are given for wanting to enter into a mixed-sex civil partnership. From an

equality point of view, I think that the introduction of the ability to do that is a good thing.

**Fraser Sutherland:** From our point of view, it is important to give couples the opportunity to decide for themselves. At the moment, we have a mixed system in which some couples can choose between the two options and some couples cannot. We do not favour that, and the bill seeks to repair the situation.

Fiona Blair has highlighted some of the reasons why people might choose a civil partnership over a wedding. At the heart of the matter, it is a question of giving couples the choice and allowing them to decide what is right for them. A couple might have a myriad of reasons for making their choice, but it is important that we recognise that choice when they form their relationship in a legal context.

**Ephraim Borowski:** I can speak for only one equality group. Beyond that, all I would say is that, if other groups feel that the ability to enter into a mixed-sex civil partnership would benefit them, our default position is to be in favour of equality.

**Rod Burns:** It is clear that having a wider range of legal unions available to people brings a range of benefits, but there are some key groups who will benefit quite strongly, such as people who are undergoing the gender recognition process. Under the current rules, the process has always seemed quite harsh. At NRS, we take the end results of the UK gender recognition panel and implement them by making an entry in the gender recognition register. We are involved in the practical, business end of changing people's birth certificates and facilitating the official legal recognition of their new status.

It has always seemed quite harsh and rather against the general drift on equalities that someone who was in an existing civil partnership had to dissolve it. For me, a key benefit of the bill is that it will address that. Although only a small number of people will benefit in that way, we are talking about a key equalities group.

I agree with the comments of the other panel members.

**Fulton MacGregor:** What do you think are the specific benefits of civil partnership compared with cohabitation?

**Fiona Blair:** Civil partnership provides couples with better financial and legal status. Entering a civil partnership gives a couple a recognised certificate that enables them to prove that they are a couple, whereas cohabiting couples must prove that they have been together for a certain period of time.

**Fraser Sutherland:** As humanists, we would favour a system in which it did not matter what the legal status of a couple's relationship was. People

should be treated as equal in the eyes of the law. Lawyers would probably roll their eyes at that and say, "That would be a nightmare—how would you police that?"

As a belief body, for want of a better expression, we would say that the important thing in a relationship is the commitment between the partners. It does not really matter whether a couple has a piece of paper that says that they are in a civil partnership or a marriage or are cohabiting. What matters is the relationship at the heart of that and the commitment of the partners to each other, rather than the fact that they have a bit of paper.

**Fulton MacGregor:** I hear what you are saying about the idealist point of view, but do you think that the current system provides more financial security?

**Fraser Sutherland:** There are people who have excluded themselves from the marriage landscape because they do not feel that they fit into it. The civil partnership gives them the option to access the legal advantages that they would not get because they do not want to enter into marriage. That can only be a good thing.

Over the years, a number of people who have wanted to enter into civil partnerships have not had that option. Some of those people might change their mind and decide they want to have a marriage instead, but some might decide they do not want any legal ceremony, so they just continue to cohabit. The civil partnership will be another option for them. Fiona Blair has highlighted how registrars have already received a number of inquiries, and, since the legal changes down south, we have had people getting in touch and asking how long it will be before they can have civil partnership as an option.

**Ephraim Borowski:** I understand that there is very little practical legal difference between the two. The reason that somebody might opt for a civil partnership is that, on the one hand, they want recognition, but, on the other hand, they reject—and this is quite clear from the English court cases on the topic—some of the baggage that comes with the term "marriage". If that was a reason for not formalising the relationship at all, having this option, which allows them to get that recognition, and formalising it in a way that will affect children, property and so on is obviously a good thing.

**Rod Burns:** I echo that stress on recognition. With many apologies to Fraser Sutherland, I do not want to disagree publicly, but NRS is in the business of producing and standing behind bits of paper, so we think that they are quite important. They are no reflection of the strength of a relationship, but they are the means by which



people can rely on the formal legal recognition of their union. As I said, we think that expanding the number of options that people have to acquire that legal recognition is a good thing.

I do not have any specific comment on the underlying issue.

**Angela Constance (Almond Valley) (SNP):**

The bill replicates the provisions for religious and belief bodies to opt in if they wish to register different-sex civil partnerships. What are the witnesses' views on those provisions? I would like to start with Mr Borowski.

**Ephraim Borowski:** I thought that you might.

Obviously, that is at the interface between the NRS and the community. It will not be an issue for a couple both of whom are Scots. If they are members of the Jewish community, whatever clergy their community has will automatically be recognised by the NRS as able to solemnise marriages and, if it wishes to, solemnise civil partnerships.

The problem that arises is purely practical. If the celebrant has to be somehow certified to the NRS for it to recognise the religious ceremony as creating a civil marriage or a civil partnership, the new wrinkle will be that, if one member of a couple comes from elsewhere, such as England, or from one of the different umbrella communities—the orthodox, reform or liberal community in Scotland—or potentially another branch of Judaism that does not exist in Scotland, they might want to bring a celebrant from their own community. The issue might be to do with the branch of Judaism not recognising, or not wishing to participate in, civil partnership ceremonies of any kind.

We have suggested a couple of tweaks to the wording in order to handle a case in which an individual rabbi or member of the clergy is prepared to carry out the ceremonies, but belongs to a branch that has turned its face against them. We take the view that two checks—not just one—would need to happen. If somebody performs a religious ceremony, they do so on behalf of their faith community, and therefore they cannot dissent from that community's view while supposedly representing it. That is the thinking behind our suggested tweaks to the wording.

**Angela Constance:** Will you summarise what you think the solution is, given that—correct me if I am making wrong assumptions—pluralism will continue to exist within the Jewish community? You have made suggestions about the wording. For the record, will you explain what would help?

**Ephraim Borowski:** Let us start with marriage. Currently, if somebody wants to bring their rabbi from Patagonia, the NRS will ask us about the

bona fides of the individual. We will then check with whichever UK or Scotland branch the individual purports to be affiliated with whether it accepts that they are affiliated, and we will pass on the answer to the NRS.

The same thing that currently happens in the case of marriage would happen in the case of a civil partnership. However, we suggest that two checks need to happen rather than just one. It should be checked that the individual is willing to conduct the ceremony—I presume that they have already been asked, otherwise the couple would not have suggested it—and that the branch that the individual claims to be affiliated with does not have a policy that would prevent one of its local members from carrying out that ceremony. That extra check would be carried out by us rather than by the NRS. We would then report to it.

**Angela Constance:** Okay. Thank you for that.

Mr Sutherland, would you like to add anything in reply to my root question?

**Fraser Sutherland:** There is nothing specific to add. Obviously, the bill will replicate our organisation's prescribed status under the existing legislation, which allows us to nominate celebrants in order to carry out humanist ceremonies. Nothing major would change in that process with regard to civil partnerships—things would be the same. We do not have quite the same issue that Ephraim Borowski has pointed out.

Quite a lot of couples come to Scotland in order to specifically access humanist marriage, because not many countries around the world offer it. It is, notably, not available in England and Wales. The majority of the couples who want a legal humanist marriage in our sister organisation, which is based down south, choose to come to Scotland to enter into that, because they cannot have that in and England or Wales. Other European states and some US states recognise humanist marriages, but we still get quite a lot of people for them. Scotland is seen as a wedding destination—Fiona Blair could give members the statistics for that. A lot of couples choose to come to Scotland to get married for a variety of reasons, and we do only a small part of the belief marriages. However, that is important.

The option for more couples might or might not drive extra people coming to Scotland. It certainly will not do so from England and Wales, but it might from further afield, where civil partnerships for mixed-sex couples are not available.

**Angela Constance:** Do other members of the panel want to add anything? I know that neither Ms Blair nor Mr Burns is representing religious or belief bodies, but they might wish to add something, given what they have heard.

09:30

**Rod Burns:** Yes. I simply want to add that the opt-in principle is important. We have done a bit of research, as Fiona Blair has done, on how many bodies have opted in to do the existing civil partnership ceremonies. According to our records, only 13 religious and belief bodies have opted in to the list to do them, whereas there are quite a lot more that do opposite-sex marriages, for instance.

It would be dangerous to presume that all bodies that put forward celebrants for authorisation will automatically want to do the new civil partnership ceremonies. As Ephraim Borowski said, it is not just about the body; it is also about individual celebrants. There should be no compulsion on a body to provide celebrants to do the new civil partnership ceremonies or on individual celebrants to do them. The principle of voluntary engagement has worked very well so far with the existing civil partnerships, and our general principle would be that, if that is working well for same-sex civil partnerships, we should probably replicate the process for mixed-sex civil partnerships, given that it is tried and tested.

**Fiona Blair:** Until 2014, civil partnerships were carried out by a registrar or an assistant registrar. Under the Marriage and Civil Partnership (Scotland) Act 2014, it was opened up for religious and belief groups to carry them out. From looking at the statistics, I note that only nine civil partnership ceremonies have been conducted by a religious or belief body. The majority have been carried out by a registrar or an assistant registrar. I do not know whether people associate the word “civil” with registration services. However, it is good to give people choice across the board. That is my view.

**Alex Cole-Hamilton (Edinburgh Western) (LD):** Good morning, and thank you for your remarks so far, which have been very interesting. It has been clear to the committee since the bill was introduced that one of the drivers behind extending civil partnerships to mixed-sex couples is the not inconsiderable baggage that some people attach to the term “marriage” or the institution of marriage. For many reasons, people find it off-putting, and they do not want to go down that route. Fiona Blair articulated very well a reason that I had not heard of before, which is that, in the case of widowhood, somebody might want to honour the marriage that has gone before but solemnise the relationship that they are in now. I think that that is exactly right.

Section 3 of the bill, which is entitled

“Interim recognition of different sex relationships formed outwith Scotland”,

refers to jurisdictions that already have mixed-sex civil partnerships, such as England. Section

3(2)(a) suggests that a couple who have such a civil partnership and come to Scotland are, until the bill is adopted and implemented,

“to be treated as being in a marriage”.

Last week, it came out quite strongly that that would be a real concern to people because, as I have said, that is not what they went into and they do not want to be thought of as being in a marriage. What are your views on that? Do you see any way round it? Could we regard such people differently on implementation of the bill?

**Fiona Blair:** I cannot say that I have thought about that. At present, registrars would not recognise a mixed-sex civil partnership in Scotland, but I do not really have any strong views on the subject. In the interim, recognising such civil partnerships as marriage would be difficult for people who entered into a civil partnership because that was their choice. They had the choice of marriage or a civil partnership, and they went down the civil partnership route. They did not want a marriage. I can see that people would not be happy about that but, as a registrar, I do not really have a view on that, I am afraid.

**Fraser Sutherland:** I suppose that it comes down to the legalities and how we can recognise something that does not exist. I imagine that that is why the bill is drafted in that way.

In general, I agree with the principle that you mentioned. If people have deliberately chosen not to have a marriage, why would we classify them in that way? I suppose that the drafters would say that it is because they want to provide the protection that comes with that, as the people are in a legally recognised relationship. It is, no doubt, a tricky one to square.

**Ephraim Borowski:** I do not have very much to say about that, but I will say it nonetheless—I cannot help it. Given that there is almost no difference between the two states, I make the logic-chopping point that there is a difference between being married and being treated as being married. The interim status would merely treat two people as if they were married because there is no alternative to that at the moment. You can call it what you like, but it would merely be a recognition of something that happened somewhere else.

If I remember correctly, at your meeting last week, somebody discussed with you the analogy of polygamous marriages. You cannot have them here, but if you are misguided enough to have them somewhere else, you are treated here as being married to all the people to whom you are married. There would be something similar to that: people would be treated as if they were married, which is not the same as actually having that status.

**Alex Cole-Hamilton:** That is a very helpful insight. Reading section 3(2)(a) in that context puts a slightly different spin on it.

By extension, given that we have in Scotland the institution of civil partnership, albeit that it is currently only for same-sex couples, what impediment would you see to our changing section 3(2)(a) so that it says that people would be “treated as being in a civil partnership”? I know that the institution of civil partnership for mixed-sex couples does not exist, but we can treat people as if they were in a civil partnership, because the institution does exist.

**Ephraim Borowski:** I think that you are asking me again.

**Alex Cole-Hamilton:** You offered the insight, so I would be interested to hear your view on that point.

**Ephraim Borowski:** I would give you the same answer. This is turning into a bit of a philosophy tutorial.

I would have given you exactly the same answer if it had been the other way round: treating two people as if they were in a civil partnership would not actually create a civil partnership. From that point of view, I am not sure whether I can see any difference. If people would be happier with that tweak, it would not affect us. I am not now speaking as a representative of the Jewish community; I am just engaging in an interesting discussion. I cannot see a problem with that.

**Rod Burns:** There would be a few practical implications if people did not have any form of recognition while the bill came into force. For instance, let us consider a couple in a mixed-sex civil partnership in England, Wales or Northern Ireland—wherever it is—who come to Scotland, set up home, get on with their jobs and engage with life. Let us consider what would happen if one partner got pregnant and gave birth. If they did not have any civil status, the father would not have the parental rights that flow from being treated as being married. That is a key distinction.

I take the point that people take the civil status of their civil partnerships very seriously—it touches on their personal identity. People are quite keen to keep us on the front foot and are almost punctilious in keeping us right on the terminology and language that we use as registrars, and they want the people who oversee legislation to treat them properly and respectfully. I absolutely take the point that people might not like being classified and treated as being married when they are not married and do not like all of that baggage. It is a real thing, not a cavil. To be treated as being married would impinge on people’s identities. However, if there was no protection in that interim period, fairly extraordinary measures would have

to be taken to ensure that, for example, somebody could be treated as the father of a child, with all the legal responsibilities that flow from that. Treating somebody as married, albeit that that would be offensive to their identity, would mean that they would have a much less problematic route to receiving parental rights and responsibilities and all the social and legal benefits that would flow from that.

In practical terms, there are different forms of civil status. When people die, people have to serve as informants. There is a whole host of information and background data that we collect. Some of that goes on to register pages, and that is defined by one’s civil status.

The approach is probably not ideal in terms of people’s identities but, practically speaking, having some form of recognition is better than having no form of recognition. We deal with complicated cases every day—as do the registrars—that take a lot of delving into and untangling.

From an administrative viewpoint, if no other, putting in place some recognition that forestalls those sorts of complexities can be only a good thing, and it would be temporary. Most reasonable people would probably say, “Well, I don’t like it, but I can see the benefits both to me and to the state more widely.”

**Alex Cole-Hamilton:** I accept all of that. It is important that we have some recognition in the interim but, from an NRS perspective, can you see a legal impediment to changing that provision so that, in place of the word “marriage”, the words “civil partnership” are inserted? It is being treated as a civil partnership—an institution that exists already in this country—with all the trappings that you describe, albeit not for mixed-sex couples. From a legal perspective, can you see any problem in amending that?

**Rod Burns:** I am not qualified to comment from a legal perspective. I feel a bit like one of Ephraim Borowski’s philosophy students. The only way that I can see that happening is if the bill had already been passed and we already recognised mixed-sex civil partnerships. My brain is falling apart trying to understand that.

**Alex Cole-Hamilton:** We do not need to already recognise mixed-sex civil partnerships for that to work, because there is an institution called “civil partnership” that already confers all the parenting rights, pension stuff and everything else. The issue is incredibly important to people who do not wish to be seen as being in the institution of marriage or to be treated as if they were in a marriage. The nomenclature around that is incredibly important—as you say, it touches on people’s personal identities. We have been asked to change that; I just wonder whether we can.

**Rod Burns:** I honestly do not know. Civil partnership is defined exclusively as for same-sex partners. That is the philosophical hurdle that I am trying to get over.

**Fiona Blair:** Yes.

**Rod Burns:** I hope that, in your session with the minister and legal representatives next week, they can come up with some wizardry that will answer your question, because I cannot. I am sorry.

**The Convener:** You took the words right out of my mouth. We will explore those questions further with the Government. Is Alex Cole-Hamilton content for now?

**Alex Cole-Hamilton:** I am.

**Mary Fee (West Scotland) (Lab):** Mr Burns, you briefly touched on the issue of gender in one of your answers. In our evidence session last week, Professor Norrie suggested that the provisions regarding gender recognition are overly complex. Do members of the panel share that view? If not, why not; and if so, why?

**Rod Burns:** I have not read Professor Norrie's testimony in full. Could you give me a quick capsule of why he said they were overly complex?

**Mary Fee:** Professor Norrie said in his written submission—I will cover that first—that he questioned whether

“the full implications have been worked out when one party to an existing civil partnership or marriage changes gender”.

One of his reasons for saying that it overly complicates things was that, in his view, the issue of gender recognition should be dealt with by amending the Gender Recognition Act 2004 and should not be brought into this bill. Currently, someone in a same-sex civil partnership who seeks to obtain a gender recognition certificate would need to end the civil partnership. If different-sex civil partnerships are introduced, a couple in a civil partnership in which one person seeks to change gender could continue that civil partnership if the other person agrees. Professor Norrie's view was that things are being made more complicated than they need to be and that we need to consider amending the Gender Recognition Act 2004 at some point in the future, because that would be the appropriate legislation under which to do something about gender in relation to civil partnerships.

**Rod Burns:** Obviously, the Scottish Government is consulting on gender recognition reform and I know from my engagement with officials in the Scottish Government and other stakeholders that it is a ferociously complex area and far from uncontroversial. In NRS, we try to stay away from controversy if at all possible.

That returns me to our key purpose, which I mentioned at the beginning. We work closely with Scottish Government policy colleagues to serve as a springboard for some of the practical implications of a proposed policy avenue might be, so we think through what our processes are and how the policy could be fully worked out in relation to the information that we require and the data that goes on to forms. That spirals quite quickly into complex discussions.

As far as I am concerned, one of the key benefits of what is proposed—although I am not going to argue with Professor Norrie—is that it seems to be a limited proposal with fairly huge implications and benefits for an individual who wants to undergo gender recognition. That stood out to me personally.

09:45

As I said, we deal with relatively small numbers of people—maybe 25 or 30 people a year in Scotland—who have gone through the gender recognition process and been awarded a full certificate. We receive a package with all the information from the UK panel and, in essence, set about putting their life on a new footing.

It is quite moving talking to people who have gone through that process. Not many people do it, but the impact on them is absolutely profound, and it touches very deeply on identity. So, my view—which is, of course, just my personal view—is that the benefit that could be gained from a relatively limited engagement on that aspect of the gender recognition issue would be quite profound. Obviously, the complexities of dealing with gender recognition in the round are enormous, not least in terms of NRS and the registrars. It has quite significant implications for additional workload and resources that we would need to put in place if we were to go down the route of having a self-certification process and pulling out of a tribunal context.

My view is that those things are so complicated that we probably do not have time to get into them now; that will happen in the future. However, I reiterate that it seems to me that, as things stand in Scotland, it is a relatively limited proposal, but it would have quite significant benefits personally for individuals.

**Mary Fee:** It is only fair to point out at this stage that a number of organisations welcome the approach that has been taken in relation to gender in the proposed legislation. Professor Norrie's view was different to those of a number of organisations. Do any other panel members have a view on this issue?

**Fiona Blair:** I echo what Rod Burns has said. Also, gender recognition would be dealt with at the NRS level and not at the registration level.

**Fraser Sutherland:** For us, it is about ensuring that the system allows a couple to remain in a relationship if they consent to that and want to do that. My understanding is that, if that is not in the legislation, those people would have to legally separate and then re-form their relationship in a legal sense. If both parties are accepting of their civil partnership continuing, I do not see why it is beneficial to stop that happening.

**Ephraim Borowski:** I do not think I would want to say anything on behalf of the Jewish community about this issue, because there will be diverse views about both gender recognition and civil partnership. The interface and interlocking of the two is going to produce so many different possible answers, that I could not possibly speak on that without doing an awful lot of homework.

However, I think that there is a clear link between the points that Mary Fee and Alex Cole-Hamilton made. The status already exists, and therefore a sideways move is easier than dropping out and then coming back in—or going around two sides of the triangle rather than going straight across the base.

**The Convener:** We have had quite a bit of reflection on the status of marriage versus civil partnership, and the baggage—or whatever it is—that comes with it. To continue that a little further, what are the panel's reflections on whether we should allow married couples to convert to civil partnerships? Do you have views on that?

**Fiona Blair:** If a civil partnership can be converted to a marriage, I think that that will be a question that the registrars are asked. I do not have a specific view on it. I note that the Scottish Government does not intend to provide for that as part of this bill but that it might consider the issue at a later date. I think it is something that we will be asked for.

**Fraser Sutherland:** Some couples who have come to us have decided that they wanted to proceed with a marriage because a civil partnership was not available to them. I do not know how they would feel about converting to a civil partnership many years down the line.

It seems odd that, if we change the law so that civil partnership is available to them but there is no conversion option, the only way for them to get that is to get divorced and then form a civil partnership. I do not think that that is a good idea, so I would support the transfer provisions. Couples have come to us and said that they wanted a civil partnership because of all the baggage. Some of them decided that they would not have any legal relationship, but some decided to enter into

marriage because they wanted to have the legal protections. If the conversion option was not there, those people would miss out just because they got married five years ago.

**Ephraim Borowski:** I do not think that we have a view on the pros and cons, or that the provision would make much practical difference. I have done no consultation, so what I am about to say is doubly hypothetical, but if it were to be introduced, I do not think that any branch of the Jewish faith would ask people to divorce first before entering into a civil partnership. If they simply wanted to change their civil status, that would be up to them and would have no repercussions further down the line. The whole point of section 9 of the bill is to replicate what is already provided for divorce after a marriage, so it would make no difference from our point of view.

**Rod Burns:** My view is straightforward and pragmatic. If Parliament were to decide that marriages could be changed to civil partnerships, we would work with the Scottish Government to figure out ways to implement that. It is that simple. We do not have a principled policy view on it.

**Mary Fee:** Has the panel any views on how popular different-sex civil partnerships may be? The Government's preparatory work estimated that there could be between 100 and 150 and it has based its costs analysis on 109. The Equality Network has estimated that there could be 500 a year. If we base the figure on UK Government estimates, it could be higher, at between 2,000 and 8,000 a year.

**Fiona Blair:** When same-sex marriage was introduced, civil partnerships dropped away to roughly 70 a year and marriages increased. Most people—not all—who had entered into same-sex civil partnerships wanted a marriage, with a formal ceremony akin to a marriage.

We would probably find that there would be a redress; people who had been cohabiting would enter into a civil partnership just for legal protection, so there would be a bit more civil partnership. As I said before, we have had 47 inquiries in 11 local authorities, so more people could choose that route. Whether the mixed-sex civil partnership would be a ceremonial route with a religious element, a simple register office process or a ceremony with a registrar, I cannot say what the difference would be in numbers, but I definitely think that people will choose that option.

**Rod Burns:** Fiona Blair is right; on the introduction of same-sex marriage, the figure went from 600 civil partnerships a year down to about 60 or 70, so there was a 90 per cent drop off. Most of those people took up same-sex marriage, but by that token, 50 or 60 on-going new civil partnerships could continue to be created every

year. I suspect that there is a smaller but real demand for mixed-sex civil partnerships.

A range from 100 to 8,000 is quite wide. The truth is probably somewhere in the middle. A figure of 8,000 is unlikely but, even if we did see figures at the highest end, additional resources may be drawn down by registrars and by the NRS with regard to its oversight of the registration service. We would adopt the process into our normal business as usual. If we were looking at tens of thousands of cases, that would probably displace some of the resources that registrars have available to do marriages. Last year, there were 26,000 or 27,000 marriages, so the system already has knocking on for 30,000 civil unions. We have capacity to deal with quite a lot, but possibly not an additional 8,000. I had not heard that figure, and it seems quite large, certainly when compared with 100 to 150.

**Mary Fee:** It would be a massive increase. If the legislation is introduced, do you think that there will be a spike in the number of people who want that type of formal relationship, which might then drop off and stabilise?

**Fiona Blair:** Yes.

**Rod Burns:** That seems to be a fairly settled view, and certainly the experience of other countries suggests that there is pent-up demand, so there is a bump at the beginning and then it will taper off, on that model, to maybe a few hundred each year. From a registration system perspective, 200, 300 or 400 a year is eminently absorbable into our normal business.

**Mary Fee:** Do other panel members have a view?

**Fraser Sutherland:** I do not necessarily agree with Rod Burns's last point, although I appreciate that it is based on what has happened elsewhere. If I draw a comparison with humanist marriage, in 2005, fewer than 100 people decided that that was the option that they wanted to take, and now the number is in the region of 5,000. The reason for the growth is that people have gone to humanist ceremonies and want to replicate them. There is a social growth element in that people see such a ceremony and then recognise it as an option for themselves. I do not know whether that is going to happen with civil partnerships; I am a humanist, so I do not believe in crystal balls telling me the future. I cannot tell you what is going to happen, but it happened with us for humanist marriage and it could happen with civil partnerships. As people start going to see civil partnership ceremonies, they might feel that they are much more reflective of the relationship that they want to form. That question is probably best asked of younger generations who are going to be entering into such relationships 10 or 20 years down the line. We can

second guess what people today would do, but we do not know what the future might hold.

**Ephraim Borowski:** I can link the point with something that Fraser Sutherland said earlier about marriage tourism. I do not see there being a huge uptake in the Jewish community in Scotland, but that leads me to correct something that I said at the beginning of the meeting. I was talking about couples in which one person comes from outside Scotland, but we should actually be thinking about couples in which both people come from outside Scotland. The main difference between Scottish marriage or civil partnership and English marriage or civil partnership is that we license individuals, which is why we have the relationship that we have with the NRS, whereas in England they license premises. Therefore, if a couple, for whatever reason, decide that they want to get married or have a civil partnership ceremony at the top of Ben Nevis, they can. Given that they probably cannot have a civil partnership back home, if they have emotional or philosophical reasons for wanting a civil partnership rather than a marriage, Scotland is a very nice place to do it, although not necessarily at his time of year.

**Mary Fee:** Not at the top of Ben Nevis, no.

**Ephraim Borowski:** It may well be that small faith communities will actually see the marriage tourism that Fraser Sutherland talked about earlier.

**Mary Fee:** That is an interesting point, thank you.

**The Convener:** Thank you for your interesting evidence, which has been very helpful. We will now suspend briefly.

09:58

*Meeting suspended.*

10:02

*On resuming—*

**The Convener:** Welcome to our second panel of the day. I welcome Tim Hopkins, director of the Equality Network; Kenny Stewart, head of policy at the Equality and Human Rights Commission Scotland; and Elena Soper, programmes co-ordinator at YWCA Scotland—The Young Women's Movement.

Can you tell us about your organisations, whether you support the general principles of the bill and what implications—if any—it will have for your organisations?

**Elena Soper (YWCA Scotland – The Young Women's Movement):** We support the bill. We are a feminist organisation and we run

empowerment programmes for women of all ages through our national work, which is based in Edinburgh, and through community outreach work in Glasgow. We do not foresee any issues if the bill is enacted.

**Kenny Stewart (Equality and Human Rights Commission Scotland):** The Equality and Human Rights Commission is Great Britain's equality body and one of the UK's three national human rights organisations. Our job is to help to make Scotland, England and Wales fairer, which we do by safeguarding and enforcing the laws that protect people's rights to fairness, dignity and respect. We support the aims of the bill on the basis that it advances equality of opportunity for mixed-sex couples.

**Tim Hopkins (Equality Network):** The Equality Network is a national lesbian, gay, bisexual, trans and intersex equality organisation in Scotland. All our policy work is based on consulting LGBTI people across Scotland. We first did that about partnership recognition in 2000 and 2001 and, even back then, people were saying to us the same things as they are saying now. A lot of LGBT people said that the only thing that is true equality is equal marriage and they wanted to be able to marry, but a significant minority said that marriage is not for them, but that they would like to be able to do something else to register a partnership—civil partnership did not exist in this country in those days. Our policy since 2001 has been that civil partnerships should be introduced and should be available to all couples regardless of gender—and that marriage should be equalised.

It has taken quite a while to get to this point. Marriage was equalised five or six years ago. We consider the bill to be unfinished business from the equalisation of marriage. We very much welcome it. The bill is well drafted. We have one suggestion to add something to the bill, but I will say more about that later.

**Alison Harris:** What are your views about the legal and social differences between marriages and civil partnerships?

**Tim Hopkins:** As the committee has heard from other witnesses, the legal differences between marriage and civil partnership are very small. It was mentioned earlier that adultery is one of the ways to prove the irretrievable breakdown of a marriage, but not a civil partnership. I can say some more about that later. There are some other very small differences. A marriage is voidable—meaning it can be annulled—on the ground of the permanent and incurable impotency of one person. That does not apply to civil partnership. The Scottish Government describes that rule as “antiquated” in the policy memorandum to the bill. The legal differences are tiny.

The important thing is not legal difference but cultural difference and social meanings and personal meaning to the couple and their family. The whole reason why we supported equal marriage was that, although people could already get the legal rights through civil partnership, that is not the same as marriage: marriage has meanings for people that civil partnership does not. For many people, marriage is seen as the gold standard. That is why it was so important that marriage should be available to same-sex couples.

However, not everyone sees it that way. For some people, as the committee has already heard, marriage is not what they want, for all sorts of reasons. However, they want the opportunity to enter something like a civil partnership, because the social meanings are different and because it means something different to them and their family. The differences are not about the law—they are wider than that. That is why the bill is so welcome.

**Elena Soper:** From a feminist woman's perspective, for some people—women in particular—marriage can be seen as being rooted in patriarchal and outdated ideals and closely bound to religious processes. Despite the evolution of marriage towards something more equal and the fact that it is not the same as it was historically—it was only 30 years ago that rape was made illegal in marriage; that is still within living memory—the anachronisms are still evident. For example, if we think about a traditional wedding ceremony, the bride is still given away by her father to the groom. Civil partnerships provide an alternative that can be seen as a more equal commitment and less encumbered by traditional and societal expectations of women in their role as a wife.

**Kenny Stewart:** I do not have a lot to add to those answers. Civil partnership is another route to the very similar legal protections that are provided by marriage. We absolutely understand why some couples may prefer that route, for the reasons that other witnesses have outlined.

**Maurice Golden:** This question is for Tim Hopkins and anyone else who wants to chip in. Can you elaborate on your earlier point on the difference between the break-up of a marriage and the dissolution of a civil partnership? What are your thoughts on that?

**Tim Hopkins:** The basic ground on which to get a divorce or dissolve a civil partnership is irretrievable breakdown of the relationship. The law says that that can be demonstrated or proved in several different ways. The principal way to prove it is by ending cohabitation: non-cohabitation for two years is a ground for divorce, even if one partner does not want the divorce, and

non-cohabitation for one year is enough for divorce if both partners agree to the divorce. The other ground is what is often called unreasonable behaviour, where one partner behaves in such a way that the other partner cannot reasonably be expected to continue to cohabit with them. An obvious example of that would be domestic abuse.

For marriage, but not for civil partnership, the other way to prove irretrievable breakdown is through adultery. However, adultery has a very narrow definition. Adultery means sexual intercourse between a man and a woman where one of them is in the marriage and the other is not. Other forms of sexual infidelity are not adultery. If the husband in a mixed-sex marriage engages in other sexual activity with another woman—oral sex for example—that is not adultery. His wife could still get a divorce on the unreasonable behaviour ground, but not on the adultery ground. Many lawyers would say that the adultery ground is not really needed, because unreasonable behaviour covers it all.

When civil partnership was introduced 15 years or so ago, we were happy that adultery was omitted from the grounds for dissolution, although we wanted civil partnership to replicate marriage law as much as possible, because infidelity can be dealt with under unreasonable behaviour. Adultery is still in Scottish marriage law because it is important to religious bodies such as churches: adultery is mentioned in the Bible. It has been retained in divorce law for marriage, but we see no reason to have it in civil partnership dissolution law.

**Maurice Golden:** That is helpful, thank you.

**Fulton MacGregor:** What are the benefits of introducing mixed-sex civil partnerships? Elena Soper began to touch on that. Can you speak about the benefits or other impacts that the legislation could have for the groups that you represent, or more widely?

**Elena Soper:** I have spoken about why marriage is not an option for some women. When mixed-sex couples decide that they do not want to get married, they have access only to the degree of legal protection and social recognition that is offered by cohabitation under the Family Law (Scotland) Act 2006. They have fewer rights and responsibilities than they would otherwise be afforded through a marriage or civil partnership.

We know that women have less access to resources, assets and income due to systemic issues such as unpaid caring roles, the gender pay gap, violence against women, domestic abuse and unequal representation. The lesser protections that are provided by cohabitation are more likely to negatively impact women's rights and security. We know that the Scottish Law

Commission is currently investigating whether the law on cohabitation requires reform and whether it is comprehensive enough to offer sufficient protection and clarity to couples. Couples who want to have those enhanced legal rights without entering into the institution of marriage ought to have the option of a civil partnership. We believe that would also benefit dependent children.

As an intersectional feminist organisation, we do not represent only straight women. We see the bill as having a positive impact on our siblings in the trans and non-binary community. I am sure that Tim Hopkins will pick up on that. Those people currently rely on the sex marker on their birth certificate, which may not be true of their lived sex, to determine which options of commitment are available to them. We believe that the extension of rights would mean that trans people who have entered into a civil partnership prior to obtaining a gender recognition certificate would not have to choose between their civil partnership and the GRC.

**Kenny Stewart:** We believe that the lack of legal rights for unmarried cohabiting partners is deeply gendered. Extending the provision to mixed-sex couples will therefore benefit women in couples who have chosen, for whatever reason, not to marry.

As Elena Soper also noted, we think that there is a benefit for trans people, who will no longer have to end their civil partnerships in order to change their legal gender.

We think that there is also a positive impact on civil partners from outside Scotland. If the bill goes through, their relationships can be recognised here.

**Tim Hopkins:** The bill benefits trans people. Anybody who is trans in a civil partnership and who wants to obtain gender recognition currently has to end the civil partnership first, either by dissolving it or by changing it into a marriage. Obviously, they have chosen not to change it into a marriage already: they do not want to do that. That is a benefit for trans people.

10:15

Elena Soper mentioned non-binary people. It is worth mentioning something that already applies to gender-neutral equal marriage. NRS operates a system in which non-binary people can marry without specifying on their marriage notice whether they are male or female. If people are being married by a civil registrar, for example, the civil registrar will provide a full service for same-sex couples and mixed-sex couples—it does not matter whether a person is male or female or whether the partner is male or female. People are allowed to submit their marriage notices without



specifying a gender as long as they are married by a civil registrar, who would marry couples of any gender mix. That is a benefit to non-binary people, because they do not have to state on their marriage notice whether they are male or female—which they are not. The same would apply to civil partnerships once they have become gender neutral or equal.

I want to talk briefly about young people. Obviously, the lower age limit for marriage and civil partnerships in Scotland is 16. Unlike in England and Wales, young people in Scotland do not need their parents' permission. Very small numbers of young people marry or enter civil partnerships, but some do. LGBT Youth Scotland found in its consultation with young LGBT people that young people are worried that, if they enter a civil partnership, just stating that they are in such a partnership would out them as being lesbian, gay or bisexual. That would show that they are in a same-sex relationship, because civil partnerships are all currently same-sex partnerships. Those young people therefore welcome the extension to equal civil partnership, because people stating that they are in a civil partnership will no longer out them as being in a same-sex relationship.

**Fulton MacGregor:** I have a follow-up question on an issue that you have all touched on in your previous answers. Are there any other specific benefits of civil partnerships compared with cohabitation? If you think that you have already covered that, I am okay with that.

**Tim Hopkins:** As Elena Soper said, it is certainly true that cohabitation law currently gives weaker protections—particularly weaker financial protections—than those that are given by marriage or civil partnerships if the couple split up or if one of the couple dies. The protections are weaker and less certain, because people have to persuade the court that they were cohabiting. If a person is married or is in a civil partnership, they will have a certificate, which will give them the status there and then.

As Elena Soper mentioned, the Scottish Law Commission is reviewing the law on cohabitation—I think that it published its discussion paper on that yesterday—so we might see improvements to that. However, people might feel that, because a person makes a positive choice to opt into marriage or a civil partnership, the protections for them should be stronger, especially for finances, than they are for a person who has made a choice not to sign up to those things. However, that will come out in the discussion about how the law on cohabitation should improve.

**Elena Soper:** I do not have anything to add to that.

**Angela Constance:** As you know, the bill replicates the existing provisions with regard to how religious and belief bodies might want to opt in to register different-sex civil partnerships. What are your views on those provisions? Given Mr Stewart's role as a human rights guarantor, I would like him to start.

**Kenny Stewart:** As you have said, the bill replicates the provisions in the Civil Partnership Act 2004. We think that the existing exemptions in the Equality Act 2010, which allow religious and belief bodies to refuse to undertake same-sex marriages, would ensure that a religious or belief body that decides not to undertake civil partnership ceremonies in general would not be discriminating on the ground of sex or sexual orientation, as it would not be providing that service to anyone.

**Tim Hopkins:** We certainly welcome the fact that religious and belief bodies will be able to opt in to conduct mixed-sex civil partnership ceremonies if they wish to do so. Obviously, the Humanist Society Scotland has already said that it will do that, and I believe that the Unitarians, who currently conduct same-sex civil partnership ceremonies, have said something similar. We welcome that.

To come back to a point that Kenny Stewart made, it is true that equality law at the moment has exemptions, which mean that religious and belief bodies are not under any obligation to conduct either same-sex marriages or same-sex civil partnerships. We agree with those exemptions.

I think that something needs to be added to the Equality Act 2010 and I believe that the Scottish Government is going to ask the UK Government to do that in the section 104 order that will make reserved legislation amendments that are consequential to this bill. A religious body might be willing to register same-sex civil partnerships but not mixed-sex civil partnerships because it may well take the view that, if you are a mixed-sex couple, you should get married, but it may disagree with same-sex marriage and nevertheless be prepared to register same-sex civil partnerships.

The 2010 act may therefore need to be tweaked to protect religious and belief bodies from claims of discrimination if they do it that way round—if they say that they will register same-sex civil partnerships but not mixed-sex civil partnerships. There would need to be a small addition to the 2010 act.

**Angela Constance:** Okay. Thank you. We might follow that up with the minister next week.

**Alex Cole-Hamilton:** The witnesses belong to organisations that, more than most, have

particular views about the institution of marriage and the baggage that that can attach to the people you represent through your organisations. Elena Soper articulated very well the gendered hang-ups that marriage still has attached to it. That is a welcome reminder that there are aspects of the institution of marriage and the ceremonies—even the civil services—that many might find arcane.

I will ask the same question that I put to the previous witnesses. Before mixed-sex civil partnerships are introduced in Scotland, the bill provides that, as an interim measure, those who have entered into mixed-sex civil partnerships overseas, or in the parts of the UK where mixed-sex civil partnerships are already legal

“are to be treated as being in a marriage”.

Does that attach an unnecessary level of baggage by almost pretending that those people are in an institution that they have demonstrably rejected?

**Elena Soper:** Yes. England and Wales introduced mixed-sex civil partnerships last year. That feels quite odd, because it seems as though it has been a long time since a progressive policy was introduced in England and Wales before it was introduced in Scotland. Furthermore, France has had the *pacte civil de solidarité*—the civil solidarity pact—since 1999.

Commitment is an inherently personal choice—even a hard-core feminist might still want to get married. It should not be up to the law to determine what kind of commitment is right for someone; there should be an open choice for everyone. If someone has decided, for whatever reason—whether it be religious, moral, ethical or even financial—to go into a civil partnership, they have already rejected that ideal of marriage. For them to then come to Scotland and be told, “Actually, you are married here” feels ethically wrong.

**Kenny Stewart:** We would acknowledge that some couples in that circumstance might be pleased to have a level of legal protection afforded to the relationship. Equally, however, many couples will have chosen to enter into a different partnership for exactly the reason that has been outlined: marriage is not appropriate for them. Therefore, they may feel that an interim recognition of their relationship as a marriage is inappropriate for them.

I cannot speak for the Scottish Government, but I assume that it has judged that offering a level of protection for couples is a pragmatic interim solution. I do not have a different or better solution to offer just now, but I absolutely recognise that that might be uncomfortable for some couples.

**Tim Hopkins:** As Martin Loat said to the committee last week, for people who are in mixed-

sex civil partnerships, it feels very unsatisfactory that their civil partnerships will be treated as marriages in Scotland, even though it is just for a while. It is a tricky area because it is a question of pragmatism and trying to get the best solution.

Let me set out what I think are the issues. First, the Government’s idea is that section 3 of the bill should be commenced as soon as possible after the bill is passed by Parliament, as we hope that it will be. That might be in the summer. That would introduce interim recognition of overseas civil partnerships as marriages. If that happens, we would want the rest of the bill to be commenced as quickly as possible afterwards, so that the interim stage is as short as possible.

The Scottish Parliament information centre suggests in its briefing on the bill that the rest of the bill might be commenced by spring next year. We think that it could be done quicker than that. If the bill is passed by Parliament by the summer, we see no reason why it should not be fully commenced by the end of the year, to try to keep the interim-recognition period as short as possible, recognising that it is unsatisfactory for civil partnerships to be treated as marriages.

The second issue is about the question that you put to the previous witnesses. You asked whether section 3 could be amended so that the interim recognition of relationships is as civil partnerships, instead of as marriages. The problem is that civil partnership law is not complete at the moment, because it misses out some of the things that are needed for mixed-sex couples and that are in marriage law—because they always have been in marriage law. I am talking about things that are added by schedule 2 of the bill, such as the granting of parental status and parental responsibilities and rights to the male partner in a mixed-sex civil partnership—as is the situation for the husband in a marriage. Rod Burns mentioned that.

Such provisions are not currently in civil partnership law, so if you simply change section 3 to say that someone’s civil partnership—from England, say—will be recognised as a civil partnership in Scotland, the law will be incomplete. Yes, the person will be recognised in Scotland as a civil partner, but during the interim period they will not have those really important automatic parental responsibilities and rights and parental status, which Rod Burns mentioned, through being the male civil partner of a woman who gives birth.

Therefore, what needs to happen is not just the amendment of section 3 to replace the word “marriage” with “civil partnership”, but the commencement of some provisions of schedule 2, so that the real rights, responsibilities and protections that need to be in place for mixed-sex civil partnership to work in the same way as

mixed-sex marriage does are brought into effect at the same time as interim-recognition provisions.

As soon as possible after the bill gets royal assent, there should be the commencement of section 1, on mixed-sex civil partnership, and of some provisions of schedule 2, to give the practical protections that the law needs to provide. That would give interim recognition; and commencement of the rest of the bill would allow registrations to take place in Scotland later.

It is the start-up of interim recognition that is more complicated. I would welcome the committee asking the Scottish Government whether what I have proposed is feasible.

**Alex Cole-Hamilton:** Wow!

**The Convener:** So much of our discussion inevitably ends up being a bit philosophical. It is important that we focus on what being treated as being in a marriage will mean and what protection that will provide. The issue is not the names of institutions, but whether people will lose rights and responsibilities that ultimately protect them; we do not want that to happen. It is a fascinating area.

**Alex Cole-Hamilton:** I thank Tim Hopkins for his characteristically helpful input. I might need to go back to the *Official Report* and work my way through everything that you said, because you have given us a lot.

Your comments spark two follow-up questions. As you said, the civil partnership that exists in Scotland for same-sex couples is incomplete, because it does not confer parental rights. Should we use the bill to remedy that? I imagine that dealing with existing civil partnerships would be in the scope of the bill.

**Tim Hopkins:** That is an interesting question. However, the changes to which I was referring are specific to mixed-sex couples, because we are talking about a case in which a woman gives birth and the question is what the parenthood status of her male partner should be.

An area of the law that deals with an analogous situation for same-sex couples is the Human Fertilisation and Embryology Act 2008, but that is reserved to Westminster. That legislation will need to be updated, too. Indeed, I think that that might already have been done in the legislation on mixed-sex couples down south—the Civil Partnership (Opposite-sex Couples) Regulations 2019.

The 2008 act covers a situation in which a woman gives birth and her female partner will be treated as another mother of the child; I think that that situation has already been extended to cover civil partnership. In the case of a mixed-sex civil partnership, the woman—obviously—gives birth and her male partner needs to be treated as the

father of the child, even if the sperm donor is different, which is the kind of thing that the legislation covers. I think that that extension to civil partnerships has already been made by the legislation down south.

10:30

**Alex Cole-Hamilton:** My other question is about commencement. There is a disparity between your view and that of SPICe about how quickly we could implement the legislation. I admit that I have not yet properly read that section of the SPICe briefing, but I am keen to know what the metrics are, what things will cause the delays and how we can mitigate those.

**Tim Hopkins:** I would hope that Parliament can pass the bill before the summer recess. There would then be a four-week or one-month delay before it can get royal assent, which would take it to sometime in July.

Before the act is fully commenced, various bits of secondary legislation need to be put in place, covering things like the alteration of the forms that NRS and registrars use. Also needed is training for NRS staff and registrars, as well as the alteration of NRS's IT systems. For example, NRS keeps statistics on a number of same-sex and mixed-sex marriages. It wants to keep statistics on a number of same-sex and mixed-sex civil partnerships, which requires a tweak to the IT system.

With regard to the Scottish statutory instruments that need to be put in place, it takes a certain time for affirmative instruments to go through Parliament: laying those before Parliament in September would leave plenty of time to get those through before the end of the year. As long as NRS can make its IT tweaks by then, it should be possible to commence the legislation at that time.

**Alex Cole-Hamilton:** That is helpful.

**The Convener:** I suppose that the term "IT tweaks" will send shudders around the room. [*Laughter.*] What are those tweaks, and on what do you base your assertion?

**Tim Hopkins:** As I understand it, the NRS system does not count statistics separately for mixed-sex and same-sex civil partnerships at the moment, which the NRS wants to do, so I know that the software will require an adjustment. That might be a small change: all the systems for entering data are already there and the forms for entering data about civil partnerships already exist; the only difference will be that the two names will refer to people of different sexes.

**The Convener:** You do not know the detail of it, so we would probably have to look into that.

**Tim Hopkins:** I do not know the detail; that would be a question for NRS.

**Mary Fee:** I want to cover the issue of gender recognition in more detail. Do the witnesses share Professor Norrie's view, as set out in last week's evidence session, that the provisions regarding gender recognition are "overly complex"?

In Professor Norrie's written submission, he said:

"I wonder if the full implications have been worked out when one party to an existing civil partnership or marriage changes gender?"

In his oral evidence, he said that the bill replicates an

"overly complex"

provision in order to deal with the fact that civil partnerships were open only to same-sex couples, and if one party obtained a gender recognition certificate

"that relationship had to come to an end".—[*Official Report, Equalities and Human Rights Committee*, 20 February 2020; c 15.]

He suggested that that issue would need to be considered in the draft gender recognition reform (Scotland) bill, which is out for consultation at the moment.

**Tim Hopkins:** Thank you for that important question. Prior to equal marriage being introduced, if one obtained gender recognition while one was in a marriage—all marriages were mixed sex—one had to dissolve the marriage before one could get full gender recognition, otherwise a same-sex marriage would have been created, which was not allowed.

When the equal marriage legislation went through, six years ago, the Gender Recognition Act 2004 was amended to allow a process whereby one could get gender recognition while staying in one's marriage. That would change the marriage to a same-sex marriage, which is now fine. The legislation is a bit complex in that area. One has to allow—

**Mary Fee:** Can I interrupt and ask you the same question that I put to Professor Norrie? Are the provisions complex because they need to be complex, or are they complex because we are making it more complex than it needs to be?

**Tim Hopkins:** The provisions could be simpler. The Civil Partnership (Scotland) Bill would replicate for such partnerships the somewhat complex process that exists for marriages. The changes that it would make for civil partnerships would have exactly the same implications for gender recognition as the changes have that were made in relation to marriage—that is, people will be able to stay in their civil partnerships. The

approach in this bill is correct. Its basic principle is to replicate exactly the way in which things work for marriage. However, I think that it might be overcomplex.

The Equality Network strongly supports the Scottish Government's proposals for gender recognition reform. In our view, a number of things are wrong with the law in that area, which those proposals address. However, they do not touch very much on the issue of interim gender recognition certificates, which Kenneth Norrie mentioned in last week's evidence session. We have had a quick look at that aspect. In our view, if interim gender recognition certificates were to be done away with—which, arguably, could be done—the effect would be to remove eight sections from the Gender Recognition Act 2004, as amended by the draft gender recognition reform (Scotland) bill, which would simplify the legislation considerably. However, the right way to do that is properly a question for debate on the draft gender recognition reform (Scotland) bill and not one for the Civil Partnership (Scotland) Bill.

On the question of timing, those two bills will not overlap if the Civil Partnership (Scotland) Bill is passed before the Parliament's summer recess.

The approach in the Civil Partnership (Scotland) Bill to replicate, for civil partnered couples, the admittedly rather complex existing arrangements for gender recognition for married couples is correct. We might look again at whether that aspect could be further simplified in the context of gender recognition reform more generally.

**Mary Fee:** Before I bring in other panel members on that, I want to follow up on Tim Hopkins's point about changes to gender recognition legislation and the potential removal of eight sections. Would such simplification make the bill clearer and perhaps more understandable, or would we lose something by doing that?

**Tim Hopkins:** Just to clarify, I was referring not to the Civil Partnership (Scotland) Bill but to the proposed gender recognition reform (Scotland) bill and the Gender Recognition Act 2004.

**Mary Fee:** That is helpful.

**Tim Hopkins:** Yes—removing those sections would clarify the situation substantially.

Several sections of the Gender Recognition Act 2004 that are replicated in the draft gender recognition reform (Scotland) bill deal with interim gender recognition certificates and how they are converted to full gender recognition certificates. Such conversion can happen in a number of ways—for example, if someone's spouse or civil partner dies; if the partners end the marriage or civil partnership; or if those involved agree that they do not want it to end. All those cases are

covered by sections in the legislation. If we no longer had interim gender recognition certificates, as is the case in most other countries, the effect would be to remove around eight sections from the 2004 act. However, that aspect of the legislation needs further consideration.

Questions remain about how we ensure that we have the correct balance between the rights of a trans person who is in a marriage or civil partnership and who is applying for gender recognition, and the feelings of their spouse or partner. In his evidence to the committee last week, Kenneth Norrie suggested that there might be ways of ending a marriage or civil partnership without the need to obtain an interim gender recognition certificate in the way that people do at the moment.

Those are matters for divorce law reform. As witnesses in the earlier panel mentioned, if we were to move to a no-fault divorce system similar to those in other countries—or, as Ephraim Borowski mentioned, a system similar to that for Jewish religious marriages—in which people can divorce simply because they attest that their relationship has broken down irretrievably, we would not need interim gender recognition certificates. The non-trans spouse could simply say that the fact that the other spouse had transitioned meant that, for them, the relationship had broken down irretrievably and they would like a divorce.

**Mary Fee:** That would be enough to end it. That is helpful.

Do other panel members have views on that?

**Kenny Stewart:** There is not much that I can usefully add to what Tim Hopkins has said. It is a complex area of law. We agree that, in principle and for practical reasons, it is right that the Civil Partnership (Scotland) Bill should replicate those admittedly complex existing provisions. We hope that the legislative timetable will—just about—work out so that all the relevant aspects can be considered in the context of the proposed gender recognition reform (Scotland) bill.

**The Convener:** I am interested in panel members' reflections on allowing mixed-sex couples to convert their marriages to civil partnerships. Elena Soper spoke earlier about the serious connotations that exist for some women. What are your views on allowing such conversion to happen?

**Elena Soper:** For so long, the only option in terms of commitment for mixed-sex couples was marriage. As we said previously, the co-habitation laws perhaps do not go far enough in ensuring protection for both parties in the couple. Some couples see civil partnership as an alternative modern institution and think that, if it were on the

table, everyone should have the option to transfer to it if they believe that it is best for them. People might have married simply because one partner was in ill health or they had children and wanted to ensure that they received the full legal protections given by the institution of marriage, without necessarily buying into the traditions and ideals of marriage that we so often see. We support providing the ability for a couple in a marriage to convert to a civil partnership if that better aligns with their commitment choice.

**Kenny Stewart:** We do not have a strong view on the issue, but if the option was on the table we would not have any objections in principle.

**The Convener:** Is there an issue of equality? We acknowledge that the case was different when people were able to convert civil partnerships to marriage because, arguably, a much greater injustice was being corrected.

**Kenny Stewart:** Yes, that is right; the context was different. That was absolutely about correcting the original inequality. There was a particularly strong case for that. However, as I say, we do not object at all to people converting marriages to civil partnerships.

**Tim Hopkins:** I mentioned earlier that we would like one change to the bill, and this is it. Our views on the matter have strengthened since we submitted our written evidence. There are certainly couples who have married because they needed the legal protections and would have chosen a civil partnership if that had been available. The same was true when equal marriage came in—there were couples in civil partnerships who would have chosen marriage and they were allowed to convert. People can, rightly, still convert from a civil partnership to a marriage.

In the documents that accompany the bill, the Scottish Government says that the argument for people being able to change a marriage to a civil partnership is weaker. The Government says that the big injustice was that, until five years ago, same-sex couples had to enter a civil partnership and could not enter a marriage. That implies that that was somehow a bigger injustice than the other way round, when people are forced to enter a marriage, even if they do not want to, in order to get the legal protections.

The problem with that argument is that, if you are one of the majority of people who think that marriage is the gold standard, it seems obvious that the big injustice is not being able to marry. However, if you are one of the minority who do not want to marry for all the reasons mentioned by Elena Soper and by lots of others in their written evidence to the committee, the injustice is the other way around. I strongly believe that, on the

ground of equality, people should be able to change a marriage into a civil partnership.

We mentioned in our written evidence that the provision could perhaps be time limited, on the basis that the biggest injustice will be for people who married before the legislation comes into effect and want to be able to convert. However, last week, Martin Loat made a good case for it not to be time limited. I will repeat a couple of the things that he said, because they are important.

First, take the situation for a mixed-sex couple from Scotland who go to work in Sweden, say, for a few years, which we hope will still be possible despite Brexit. Sweden does not have civil partnership any more; it has only marriage, so if that mixed-sex couple needs legal protections, perhaps because they have a child, they will have to marry. However, if they move back to Scotland 10 years from now and they would really have liked a civil partnership, the ability to change from marriage to civil partnership would still need to be available then. That is one reason for not time limiting the provision.

The other reason that Martin Loat gave, with which I agree, was that the cultural meanings of such things change over time. It may well be that in 10, 15 or 20 years, civil partnership will be much more popular and there will be people who want to change. Perhaps the view of their family or the social circle that they move in will change and at that point they might want to make the switch.

10:45

We believe strongly that conversion from marriage to civil partnership should be allowed, and that, contrary to what we said in our written evidence, it would be better if that was not time limited. The Scottish Government has raised a couple of technical issues with that. The main one is to do with the date on which the civil partnership is deemed to have begun. When a civil partnership is converted to a marriage, as is already possible, the civil partnership cannot possibly have started before 5 December 2005, because that is when civil partnership began in Scotland. The marriage that results from the conversion is treated as having begun on the date that the civil partnership had begun, and that cannot be before 5 December 2005.

However, when a marriage that began in, say, 1990, is converted to a civil partnership, what date should be treated as the start of that resulting civil partnership? If conversion worked in the same way as it does from civil partnership to marriage, one would say that the start date should be 1990. The problem with that is that civil partnership law did not exist before 2005.

That is not an insurmountable problem. The UK Government proposes a solution of allowing conversion from a marriage to a civil partnership, at least for a time, and has suggested three options for dealing with the problem that I have just described. The option that makes most sense is to treat the couple as having been in a civil partnership since 5 December 2005, and as having been in a marriage prior to that—from 1990, if that was the beginning of their marriage—until 5 December 2005. Some little bits of law are needed to ensure the continuity of those relationships, so that, for example, if they later dissolve their civil partnership, the civil partnership property—the equivalent of matrimonial property—would also include the property that they had accrued between 1990 and 2005.

The issues are not insurmountable. The UK Government is proposing to do it, so we would like the Scottish Government to have a go at that as well.

**The Convener:** That is helpful.

**Mary Fee:** I want to cover briefly the numbers that may wish to enter into a different-sex civil partnership. There has been a wide range of suggestions. The Scottish Government has based its cost analysis on a figure of between 100 and 150. UK Government figures put it much higher. The Equality Network has based it at around 500, so I start by asking Tim Hopkins why that figure has been decided on.

**Tim Hopkins:** The reason for the big differences in the estimates is that comparisons are being made with different countries, where experiences are different.

The Scottish Government's estimate is based primarily on the experience in New Zealand, where civil unions, as they are called, involve the same rights, responsibilities and protections as marriage. However, the number of people who enter civil unions in New Zealand is quite small.

The UK Government has based its estimates partly on experience in the Netherlands, which has registered partnerships, with the same rights, responsibilities and protections as marriage. A significantly bigger proportion of people in the Netherlands choose registered partnership rather than marriage than the proportion in New Zealand who choose civil union rather than marriage. That would give a figure for Scotland of about 2,000.

The UK Government has come up with even bigger figures, based on a survey that it carried out, in which people said that they would be interested in a mixed-sex civil partnership. The Equality Network did a similar survey a few years ago, and a surprisingly large percentage of people said that they might be interested in a mixed-sex

civil partnership, although such surveys have to be taken with a pinch of salt.

We came up with the figure of 500 for two reasons. First, we think that the Scottish experience might be somewhere between those of New Zealand and the Netherlands, which would give a figure of 500 to 1,500. We also looked at the proportion of same-sex couples who choose civil partnership. As was mentioned earlier, 60 to 70 couples a year choose that, compared to roughly 900 same-sex couples who choose marriage. That means that about 7 per cent of same-sex couples choose civil partnership rather than marriage. If we apply the same figure to mixed-sex couples and say that 7 per cent of those who currently choose marriage will choose a civil partnership, we get a figure just shy of 2,000. We might, however, largely be talking about people who would not get married and who are cohabiting at the moment, although I am not saying that they would not choose marriage.

Experience in other countries suggests that the proportion of mixed-sex couples who go for civil partnership rather than marriage is smaller than is the case for same-sex couples. We therefore reduced the figure of 2,000 a bit, which is how we got to the figure of 500 to 1,500. As I said in the written evidence, at this point, it is a finger-in-the-air exercise.

Down south, since 31 December 2019, several hundred couples have already registered a mixed-sex civil partnership or submitted notice to register one. That gives me confidence that the figure might be closer to the 500 that we have suggested than to the 100 to 150 that the Scottish Government has suggested.

**Mary Fee:** When the measure is first introduced, there may be an increase in the number of couples who want to enter into that kind of partnership, and that might then drop off and normalise.

**Tim Hopkins:** That is likely. As Fraser Sutherland suggested, as civil partnership becomes better understood, it might become more popular. There might be a spike at the beginning and then a slow increase in the following years.

**Mary Fee:** Do other panel members have a view?

**Kenny Stewart:** We have made no effort to estimate the numbers, partly because there are figures out there and partly because doing so would necessarily be looking at contexts that are different from ours. Any kind of research would be based purely on hypotheticals, which would not give a firm indication of future action.

Although we do not know exactly what demand could look like, we know that there would be some

demand. Even if there are low numbers, the main thing for us is the achievement of equality or parity.

**Mary Fee:** Yes. It is that people have the opportunity to do it.

**Kenny Stewart:** We know that there is some demand, so the level is perhaps less relevant.

**Elena Soper:** The numbers that we have come from the Equality Network, so I am glad that Tim Hopkins is here to explain how it arrived at them. I agree that, even if demand is small, it is still important to meet it, if feasible. Extending equality for a minority does not mean a rollback of equality for the majority.

**The Convener:** As members have no more questions, I thank the witnesses for their evidence, which was interesting and helpful.

The committee's next meeting will be on 5 March, when we will have our final evidence session on the Civil Partnership (Scotland) Bill, with the Cabinet Secretary for Social Security and Older People. An agenda will be on the committee's website on 28 February.

I now move the meeting into private session.

10:52

*Meeting continued in private until 11:01.*





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