

JUSTICE 1 COMMITTEE

Wednesday 28 January 2004
(Morning)

Session 2

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JUSTICE 1 COMMITTEE

† 4th Meeting 2004, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)

*Marlyn Glen (North East Scotland) (Lab)

*Michael Matheson (Central Scotland) (SNP)

*Margaret Mitchell (Central Scotland) (Con)

*Margaret Smith (Edinburgh West) (LD)

*attended

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)

Helen Eadie (Dunfermline East) (Lab)

Miss Annabel Goldie (West of Scotland) (Con)

Mike Pringle (Edinburgh South) (LD)

THE FOLLOWING ALSO ATTENDED:

Paul Burns (Adviser)

THE FOLLOWING GAVE EVIDENCE:

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 3

† 3rd Meeting 2004, Session 2—held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 28 January 2004

(Morning)

[THE CONVENER opened the meeting at 10:42]

Gender Recognition Bill (UK Legislation)

The Convener (Pauline McNeill): Good morning and welcome to the fourth meeting of the Justice 1 Committee in 2004. We have a photographer here to take photographs for the Parliament's annual report. I am sure that, as usual, we will make the meeting look lively and interesting.

The first agenda item is the Gender Recognition Bill, which is United Kingdom legislation. We will hear from the Deputy Minister for Justice, Hugh Henry, who will give a short statement. I welcome the minister to the meeting. Before we go to questions, I warn the minister that since we last met the committee's members have been trained by the Faculty of Advocates—make of that what you will. I thought that it was only fair to mention that.

The Deputy Minister for Justice (Hugh Henry): Perhaps I should just leave now.

The Convener: You obviously think that the training did us some good.

We now go over to the minister for his opening statement.

Hugh Henry: The Executive is committed to ensuring equality for all Scotland's people. The transsexual community is one of the smallest and most vulnerable groups in Scotland and the Gender Recognition Bill represents significant progress in addressing the practical difficulties that transsexual people face in their daily lives. The committee may be aware that, following rulings in the European Court of Human Rights in 2002, all parts of the United Kingdom must make provision for gender recognition.

The Gender Recognition Bill will ensure that, irrespective of where transsexual people live in the United Kingdom, they will be able to apply for legal recognition. The bill will create a credible, robust and sustainable system for deciding on applications from transsexual people. At present, transsexual people are not recognised in their acquired gender under the law of any part of the

United Kingdom. Although they can obtain some official documents with their new name and acquired gender, they cannot obtain birth certificates and they do not enjoy the rights that are conferred and conferred by law to people of the gender to which transsexual people feel they belong. For example, transsexual people cannot marry in their acquired gender.

The bill aims to provide transsexual people with legal recognition in their acquired gender. It will provide for the establishment of a gender recognition panel, which will have the authority to issue gender recognition certificates to transsexual people who satisfy certain requirements that are specified in the bill. A certificate will confer legal recognition on a transsexual person in their acquired gender.

The Executive has supported a UK bill from the outset, because that method offers early compliance with the European convention on human rights. It will integrate the devolved and reserved policies that are affected by legal recognition and it will avoid cross-border anomalies. The bill aims to give transsexual people the right to live legally in their acquired gender, but it does not aim to make special allowances for transsexual people, which do not apply to other groups in society. Transsexual people will be able to make an informed choice about whether to seek full legal recognition, with all the consequences that go with it.

There are compelling reasons for the use of a Sewel motion for the Gender Recognition Bill. First, the bill covers many important elements of legislation that fall within reserved areas, not the least of which are benefits and pensions. Secondly, there is no immediate slot in our parliamentary timetable to introduce a Scottish gender recognition bill. Thirdly, it would undermine the principles of the bill if transsexual people were afforded full recognition in some areas of the United Kingdom but not in others. We must remove the possibility that cross-border complexities will arise.

I hope that committee members share my view that including Scottish provisions in the Gender Recognition Bill and passing a Sewel motion offers the swiftest and most efficient means of remedying non-compliance with the ECHR and delivering comprehensive legal recognition of the acquired gender of transsexual people that embraces devolved and reserved policy consequences.

10:45

Margaret Mitchell (Central Scotland) (Con): I think that the minister has covered my question in full—I was going to ask why the Executive has decided to use a Sewel motion to cover the

devolved issues. Do you have anything to add on that issue?

Hugh Henry: No. The reasons are clear: the alternatives are not available and we see no option other than to pursue a Sewel motion.

Margaret Mitchell: So you are confident that, for the reasons you have stated, a Sewel motion rather than separate legislation is the best way in which to proceed.

Hugh Henry: Yes. The difficulty is that we do not have a parliamentary time slot. There is a breach of the ECHR, which could have legal consequences and lead to a challenge under infraction proceedings. The matter must be addressed sooner rather than later and the Gender Recognition Bill affords us the opportunity to meet our legal obligations at the earliest possible opportunity.

Mr Stewart Maxwell (West of Scotland) (SNP): Why will there not be a separate gender recognition panel for Scotland?

Hugh Henry: The panel is not considered to be something that people will necessarily have to appear in front of. It will bring together the requisite medical and scientific knowledge and skills. Given that a small number of people are involved, there are likely to be a fairly small number of requests to the panel in any one year. The costs and difficulties of bringing together a Scottish panel with the relevant requisite skills might be disproportionate to the benefits. A Scottish panel could substantially increase costs and difficulties in trying to make progress.

We think that bringing together skills and knowledge on a United Kingdom basis is the best way in which to proceed. As I said, people will not have to appear in front of the panel. Our view is that it is necessary to get the right skills and knowledge rather than worry about where the panel would sit at particular times. A Scottish panel could mean disproportionate cost and difficulties. The main issue is to get the right people who can make the right decisions.

Mr Maxwell: I accept that relatively few people would apply to the panel but, bearing it in mind that it is suggested that the panel will meet in London and that there has been some discussion about an appeals process, during which further appearances before the panel would be necessary, how will the travel costs and so on of the individuals who apply be dealt with?

Hugh Henry: Appeals will be dealt with by the Court of Session, not the panel. That means that it will be possible to deal with appeals within the Scottish legal framework.

The issue of where the panel will sit has still to be determined. I suppose that some people have

made a presumption that it will sit in London, but that is by no means certain. At the moment, I do not know where it will sit.

Mr Maxwell: There has been some debate about the overall costs for applicants. Evidence that we have seen suggests that the cost could be as much as £1,600 or £1,700. What will be the cost for applicants?

Hugh Henry: We do not have a clear idea as yet as to exactly how much it will cost, but we are sensitive to the issue. Costs will have to be recovered and the UK Department for Constitutional Affairs is examining the matter closely. I am not sure that the cost will be as high as some of the figures that have been mentioned. However, the Government is aware of the concerns that have been expressed and will do everything that it can to keep the costs to the minimum.

Mr Maxwell: Will the system be self-financing or will a flat-rate fee be set, similar to the fee for passports and driving licences, to ensure that applicants do not have to pay for the overall system?

Hugh Henry: The system will not necessarily be self-financing but that does not rule out the possibility of there being a fee as a contribution to costs. We are not saying that it will be a no-cost process, but neither are we suggesting that people will have to bear the full cost of all the provisions. There is a need to try to keep costs as low as possible. We expect that there will be a contribution from applicants but we are equally aware of difficulties that can be caused by extortionate fees: we realise that a balance will have to be struck.

Mr Maxwell: The Equality Network expressed concern about the possibility that there might be no people with qualifications in Scots law on the gender recognition panel. It gave the example of universities in England refusing to accept evidence of gender change because they require a deed poll for a change of name even though deed polls are not used in Scotland. How will that be tackled?

Hugh Henry: That is not my understanding. I understand that provision has been made for Scots legal advice and opinion to be included on the panel. I will take on board what you have said, but our understanding is that the situation will be different from what you describe.

Marlyn Glen (North East Scotland) (Lab): There is some concern about a lack of clarity about clause 19, arising perhaps because the law in England and Wales has gender-neutral offences, which Scots law does not. Why have you not extended clause 19 to ensure that gender-specific sexual offences apply fully to transsexual people?

Hugh Henry: It is my understanding that that would be outwith the scope of the bill. There are also differences between Scots law and English law in relation to sexual offences, and that has been clearly recognised.

Marlyn Glen: There seems to be confusion because the matter has not been considered. For instance, it is not clear that the law in Scotland covers offences involving surgically constructed genitalia, whereas that is covered in English law.

Hugh Henry: The law in Scotland is different, and we believe that we have given that sufficient recognition, but Marlyn Glen raises an important point. We have considered that point, but we will go back and examine it further to see whether there are either implications or complications that might arise from it that need to be addressed. It is certainly not our intention either to omit inadvertently something that could have serious consequences or to include something that would have unforeseen implications or consequences. We will look further at that point and, if required, we will address it.

Marlyn Glen: That would be helpful. It has been suggested that there is a need for a commitment to examine gender-specific crime in general.

Margaret Smith (Edinburgh West) (LD): One of the other contentious points of the bill concerns the fact that some transsexuals are married and, in some cases, they may be forced to dissolve their marriages because of the bill. Could you outline what the procedures will be by which the very small number of such couples who wish to remain together will be able to do so?

Hugh Henry: Such couples can choose to remain together, but certain legal changes need to be made to reflect their new circumstances. It is not the intention in any part of the UK to create same-sex marriages. If the proposed steps were not taken, two people of the same sex could, in effect, remain married. That is a different argument for a different place at a different time but, as things stand, the net effect is that if two people choose to remain together and one of them has changed sex according to the proper process, there is an issue about their remaining married. Legally, it would mean two people of the same sex having a valid marriage. As things are at the moment, that is not what is contemplated.

There will be another debate further down the line—which I should not anticipate—in relation to civil partnerships. There will be another discussion to be had on what recognition will then be given to civil partnerships, which would apply not just to transsexual people but to other people who wish to have a civil partnership recognised. It would be wrong of me to try to anticipate what the decision of the United Kingdom Parliament, or indeed the

Scottish Parliament, would be in relation to civil partnerships. At the moment, we are dealing with a specific proposal and with the law as it stands. As the law stands just now, there is no intention of recognising same-sex marriages, which would be the consequence of someone legally changing their sex but remaining married.

Margaret Smith: Let me clarify that. What the bill does is introduce a new ground for divorce for people who do not wish to divorce. Those people would have to petition for divorce. At the moment, with no civil partnerships in place, they would simply then be divorced as a result of the bill.

Hugh Henry: That is correct.

Margaret Smith: If we can hypothesise on the basis that there are going to be civil partnerships, which certainly looks likely, once civil partnerships are in place couples in the situation that I described could undertake to move into a civil partnership. What assurances can you give us that the transition from a marriage to a civil partnership would be as seamless, quick and easy for people as possible?

Hugh Henry: That is a difficult question to answer because I am being asked to anticipate decisions from two different Parliaments. It would be wrong of me to pre-empt the Scottish Parliament's decision, never mind the UK Parliament's decision. If the Scottish Parliament decides to endorse the principle of civil partnerships—we do not know the details or in what form they might be endorsed—I would want any such transition to be as smooth and easy as possible. However, it would be wrong of me to give you any assurances or guarantees on something that has not yet been decided by Parliament.

11:00

The Convener: I want to pursue a wee bit further the technicalities that are involved. As we understand it, a person who has an interim certificate and wants to go for a full certificate to change their gender must be divorced before doing that.

Hugh Henry: Yes, that is correct.

The Convener: What I am struggling with is how, by dint of a person becoming another gender, they can be married anyway. I do not quite understand the process under the bill whereby the parties are jointly expected to go to court and get a dissolution of the marriage.

Hugh Henry: A person would not get legal recognition of their acquired gender until they were divorced or their previous legal status was altered.

The Convener: Right. I am just trying to examine how they would get divorced. Would both parties go to court?

Hugh Henry: Yes. They would have to petition the court in the same way that anyone else would.

The Convener: Right. Would they have to go together or would it be sufficient for just one party to go?

Hugh Henry: One party could go. What will be established will be a new ground for divorce. However, one party could pursue that. It is certainly not the case at the moment that both parties—

The Convener: So it would have to be the other party, then.

Hugh Henry: No. Either of the parties—

The Convener: Can either sue for divorce on the same ground?

Hugh Henry: Yes. The fact that a marriage is no longer the marriage that has previously been recognised means that there is a ground for the marriage to be dissolved.

The Convener: Does that mean that the court then has to divide the property as it normally would under divorce proceedings?

Hugh Henry: There is no intention to change any other aspects of divorce law or rights. We anticipate that some of the cases that have been described would be non-adversarial. That is not to say that there will not be cases in which there is clearly an adversarial element. However, current divorce law and arrangements would stand.

The Convener: I just wanted to draw to your attention the process, which I am not sure is the right way to do it, because it is a bit confusing. If the other party to a marriage, who is not changing their gender, is happy to remain in the relationship, then the couple must go together to the court because the marriage must be dissolved in order for one party to change their gender. However, there might be another scenario, in which a person wants to be divorced because their partner seeks to change gender. That person would go to court and sue for divorce on the ground that there can no longer be a marriage. Therefore, there is more than one possible scenario.

The other way of doing it, which might give a cleaner break, would be if the law were simply to conclude that once a person acquired a certificate their marriage would automatically be annulled because the legal definition of marriage involves a man and a woman. If there is no longer a man and a woman in a marriage, then the parties cannot be considered to be married in any case.

Hugh Henry: That would mean that the gender recognition panel was acting as a divorce court and a new avenue for divorce to be formally recognised would be introduced, which could have profound legal consequences.

The gender recognition panel will be charged with a specific function, which will not include dealing with divorce. There could be other consequences of divorce that would need to be considered; such consideration will properly rest with the court rather than with the gender recognition panel. For example, in some relationships there might be arguments about access to children and parental responsibility.

The Convener: So, under the bill, the parties would be asked to seek a dissolution of their marriage before the person received a full certificate for change of sex. The bill wants all those issues to be sorted out first.

Hugh Henry: That is correct. If that issue was not resolved before full recognition was given, there would, in effect, be a marriage of two people of the same sex. There is no intention to legislate for same-sex marriages, so the marriage issue would have to be resolved before full recognition was given.

The Convener: So even if the couple wanted to stay together, they could not remain married. They would have to divorce and the property would have to be divided up in the normal way, although they could remain in the same household and carry on as before.

Hugh Henry: Clearly, individual circumstances will determine how any property is divided up. If the two people were in agreement, I am sure that the courts would reflect the wishes of the parties about the transfer and division of property. The issue comes back to the point that I made to Margaret Smith earlier. Even if the two people wanted to stay together, they could not remain legally married if one of them decided to change gender.

Michael Matheson (Central Scotland) (SNP): There is probably a straightforward answer to this question. If so, perhaps the minister can explain it to me. If a male who had acquired a female identity subsequently chose to join a female-only religious order, how would that order check the person's identity, given that the order might not approve of a change of gender identity?

Hugh Henry: That question would not be for us or the law to decide. The question would be one for the religious order to determine—I presume in the same way that they determine such matters now. I do not know what checks religious orders make before they allow people to enter. Clearly, someone who has a vocation to enter a religious order does so on the basis of honesty and trust.

Whether that trust might then be abused by someone who sought to dissemble or deceive is a matter for religious orders. It is not a matter for the law to decide how religious orders choose to allow people to enter.

Michael Matheson: How could the religious order legally check a person? My understanding is that normally the person's birth certificate would be checked. If the person had been issued with a new birth certificate, how would the religious order check whether the person had changed gender identity?

Hugh Henry: To all intents and purposes, the person would have a new gender. If we are talking about an order of monks, to all intents and purposes the person would legally be a man. If we are talking about an order of nuns, to all intents and purposes the person would legally be a woman. In the eyes of the law, the person would have a new gender. Whether religious orders would want to go further and ask questions about whether the person had changed their gender is a question for religious orders. Legally, the person would have the right to lead a full life in their new gender.

Michael Matheson: If, subsequent to the individual having joined the religious order, it was found out that they had changed their gender identity at an earlier stage, would the religious order be breaking the law if it chose to expel the individual as a result of that? Would that be illegal discrimination on the basis of a change of gender identity?

Hugh Henry: We are moving into speculation. The matter would be for the religious order to determine. I do not know how clearly the rules of religious orders are drawn. I do not know whether religious orders have rules that specify certain gender requisites.

Michael Matheson: There are such rules for convents and for priests.

Hugh Henry: I assume that the rules comply with sex discrimination legislation, in which case, if an individual was no longer of a requisite sex under the order's rules, they would no longer be able to stay in the order.

Michael Matheson: You can understand my concern. The individual might have legally acquired a new gender, but the religious order might have a problem with that. If the order said, "We have found out that you have changed your gender identity; you must leave," what penalties would it be subject to?

Hugh Henry: You are now talking about different aspects of sex discrimination legislation that are not the remit of the Gender Recognition Bill. That would be a matter for the order, and it

would be wrong for me to speculate about what any order might do. I am sure that an order would consider their rules and take advice. I really do not think that the circumstances that you describe are likely to occur frequently. Any organisation that faces that dilemma as a consequence of the bill will have to consider its rules and responsibilities. The effect of the bill will be to give someone in law the new gender identity that they have chosen.

The Convener: Does that mean that there will be nothing in the register indicating the individual's previous sex?

Hugh Henry: That is correct. There will be nothing that can be checked publicly that would indicate the individual's previous sex. They will have their new gender recognised.

Margaret Smith: I want to pick up on the wider issue of privacy. Particular concerns have been expressed about the way in which transgender people are treated in the national health service and in the courts system. Clause 21(4)(e) allows disclosure of transsexual identity for the purpose of any court or tribunal proceedings. Will you consider whether the rest of clause 21 is sufficient to cover criminal prosecutions and whether clause 21(4)(e) goes too far? I am concerned to ensure that people are not outed inappropriately during court proceedings.

Hugh Henry: There is an obligation to protect privacy. The clause to which you refer states clearly:

"the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal".

Although we seek to secure legal rights for transsexual people, there is clearly a need for a balance between those rights and the rights and freedoms of others. Such a balance is central to all human rights legislation. We have to consider the circumstances in which the disclosure of information would be permitted for the purpose of preventing or investigating a crime. We will consider the matter, but I think that the right balance has been struck.

Margaret Smith: It was put to the Equal Opportunities Committee that clauses 21(4)(d) and 21(4)(f) are sufficient to cover the needs of the courts system and that anything over and above that would be a threat to people's privacy. I would appreciate it if you would reconsider clause 21.

Hugh Henry: The privacy issue had to be considered carefully but, as I have said, I believe that the right balance has been struck. We are aware of the sensitivities and believe that the introduction of the legislation indicates the UK Government's commitment to making progress. The bill is not about disadvantaging people. I will consider the issue, but, I say again, I believe that the balance that has been struck is fair.

Marlyn Glen: How will the Scottish Executive meet the requirement of respect for privacy, particularly in the NHS and in the justice system? Is the Executive thinking about ensuring that there are suitable training, guidance and standards in the NHS?

Hugh Henry: Yes. Guidance and training will be provided. There will be a requirement for them.

Marlyn Glen: Do you mean in the NHS and in other areas?

11:15

Hugh Henry: Yes. Guidance and training will certainly be provided to all agencies with which we have a relationship. Training would have to be addressed regardless of whether the bill was enacted. We are aware of such issues.

The Convener: I have a brief question about the age at which a person should be able to apply for a gender recognition certificate. People who have provided evidence to the Equal Opportunities Committee have stated that the age criterion in Scotland should be set at 16 rather than 18. Are you content with the bill as it stands in that respect?

Hugh Henry: There are dangers. Given that a two-year period is required for recognition, if we legislated for the age to be set at 16, the two-year process would have to start when a person was 14. I am not sure that we want people to have to go through the process at such an age, without their having full legal rights. That would have implications for the individual and their family. We are talking about permanent, life-changing circumstances. People must make huge choices, and I am not sure that it would be right for 14-year-olds to make such choices when they do not necessarily have access to other legal rights. I think that involving people as young as 14 would be a step too far.

Mr Maxwell: I want to clarify something. Michael Matheson asked about original records and organisations checking people. What will be the process regarding the official records that are kept if a person changes their gender and gets a new birth certificate?

Hugh Henry: When the gender recognition panel issues a gender recognition certificate, the registrar general will create a new record for the transsexual person in the gender recognition record, if there is a record of the person's birth. A new birth certificate with the new name and gender that are recorded on the gender recognition certificate may be issued from that new record.

Mr Maxwell: Does that mean that the birth certificate and the record will state that the person was born in their new sex?

Hugh Henry: The new birth certificate will certainly indicate that, but the original birth certificate—which will be retained—will not be altered.

Mr Maxwell: I was coming to that issue. Is it true that the original birth certificate will not be erased, replaced or amended in any way and that the record will stand in Register House?

Hugh Henry: That is correct. The original birth record of the person who has received the certificate will remain and an extract from the original record will be available on request and on payment of the prescribed fee to a person who can supply the requisite details. For the purposes of official records, it is important accurately and faithfully to record individuals' histories. However, legally, for the purposes of their life as it stands, they will have a birth certificate in their acquired gender.

Mr Maxwell: How will people be able to identify the link between the new birth certificate and the original birth certificate, for the purposes of genealogy for example? Is a process in place for that, or is there not, because of issues of privacy?

Hugh Henry: That link would be confidential. If someone was simply interested in knowing a wee bit more about a particular family or individual, they would not have access to such a link. There are issues over when such information could be disclosed. Some people have argued that information should be disclosed after 75 years, but someone who acquired a new gender in their late teens and who went on to live a long life could still be alive. Such people have a right to some protection. The gender recognition register and the index to it, as well as the link between the original birth certificate or adoption record and the new record, would not be open to public inspection or search, except for specified official purposes, for which a trace could be justified under the law.

Mr Maxwell: What are the specified purposes for which a trace could be carried out?

Hugh Henry: Disclosure Scotland's work comes to mind.

Mr Maxwell: Exactly when will the link between the original record and the new record be available for public inspection—or will it be at all? Have you identified a point in time for that?

Hugh Henry: No.

Mr Maxwell: So it would never be available.

Hugh Henry: There is no similar process for adoption; that would not be changed either.

Mr Maxwell: Sorry—I am just trying to clarify this point, and I am not—

Hugh Henry: We are not clear what the public benefit would be in that link being made available. As far as we are concerned, someone will have acquired a new identity and the record of that will not be available for public inspection. There will only be certain official circumstances in which it will be available.

Mr Maxwell: Would it not be available even after death?

Hugh Henry: No, not even after death.

Margaret Smith: How do you see the rest of the process going? Some of us have concerns about what has so far been a truncated Sewel process. One of my concerns is that we will now hand the matter over to Westminster, which might amend the bill quite heavily. What are your intentions should the bill be amended heavily? Will the bill be brought back to the committee and to the Parliament for us to consider?

Hugh Henry: Yes, that is certainly our intention. If there are no significant changes to the bill, it could go forward, if a Sewel motion is agreed to. If there are changes that have significance for Scotland, and if it is warranted, we would bring the matter back to Parliament. In the past, we have simply raised some of the relevant matters in the Parliament, but I think that there is value in the committees considering such matters. You have my assurance that, if any changes of significance for this Parliament are made to the bill, they will be brought back.

The Convener: I return to a point that Marlyn Glen raised. Clause 9(1) says:

“Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender”.

Clause 19 is on Scottish gender-specific offences and I wonder how the relevant relationships would be affected. Clause 9(1) might be all that is required, if it is “for all purposes”.

Hugh Henry: We did give consideration to that. We took evidence from a number of people, which suggested that certain potential anomalies could result. The transgender community was keen to consider some of the problems surrounding sexual offences. Potentially, there could be loopholes or anomalies, which we thought it important to address, so that there is absolutely no question of someone avoiding prosecution for a serious offence that is more associated with their previous gender simply because they have changed their gender legally. Indeed, the same applies to a victim of an offence that is more associated with their previous gender. Clause 9(1) might well have been sufficient, but we felt it important to give added recognition to such situations to remove any dubiety whatever.

The Convener: Now that members have heard from you, it is up to them to decide what they will report. I do not think that you will be surprised if the committee decides to report that it has been difficult to examine quite a technical area of law in such a short time. I realise the constraints that we have all been under. You gave assurances in response to Margaret Smith’s question about issues that could emerge at Westminster. If we agree to the Sewel motion, what is the mechanism for letting us have another look at something if further implications for Scots law emerge?

Hugh Henry: Irrespective of the mechanism, we would certainly keep you informed. We would report back to the committee and the committee would then report back to the Parliament.

The Convener: So we would get to consider the bill again.

Okay. I am afraid that there can be no more questions, as we have other things to do. I thank the minister and his team for coming before us this morning and giving us a worthwhile explanation of the Gender Recognition Bill.

I must ask committee members whether they want to make a report. If so, they should please give me a brief indication of what they would like to go in it. I have the general gist of members’ concerns from the lines of questioning that I have heard. I take it for granted that the committee is not happy with the timescale and that we need to comment on that.

Margaret Smith: I hope that we do not do the same with legislation on civil partnerships.

The Convener: The next stage in the process will take place on Thursday 5 February, when a motion will be put to Parliament to agree that the matter be handled at Westminster. There will be no debate, simply a Sewel motion. Does the committee wish to make a report following this morning’s proceedings?

Margaret Smith: Before we answer that, I would like to know who decides that there will be no debate on the issue.

The Convener: That is a matter for the Parliamentary Bureau.

Margaret Smith: The issue has been before the committee for only a short time. I do not have a problem with there being no debate if members feel that they have had a chance to discuss everything fully. However, at yesterday’s meeting of the Equal Opportunities Committee, members were unhappy that they had not had the time to finalise a report on the evidence that the committee took. Today, we have had only a short period in which to discuss the issue.

Given the sexual offences issue that Marlyn Glen raised with the minister and the marriage issue, there would be some value in putting on the record in the chamber the fact that people have concerns. The bill is a quite contentious but interesting piece of legislation, and I do not feel that either of the committees has examined it for the proper length of time. I am surprised to hear that there will not be even a half-hour debate in the chamber.

The Convener: It is open to the committee to make recommendations to the bureau if members feel strongly about the matter; however, ultimately, the decision is a matter for the bureau. Does the committee wish to make a report?

Michael Matheson: On the back of what Margaret Smith has said, I should add that some of us have been going on about the use of Sewel motions for some five years, so I am glad that so many members have converted to the belief that we need to address the procedure. There is a clear issue about how the Parliament deals with Sewel motions and how we go back and check matters. Over the past five years, many Sewel motions have been agreed to with little more than a 30-minute debate, never mind any evidence taking. In my experience, we have probably had more detail on the current Sewel motion than on any previous Sewel motion. I have never known of a Sewel motion that has been dealt with in such a way. One committee has already taken specific evidence and produced a report on it; we, too, have taken evidence on it and are considering whether we should produce a report.

Having only a half-hour debate is not the only issue; there is also an issue about the procedure. Are we establishing a precedent? Are we going to deal with all future Sewel motions in the same way? The minister said that he was prepared to come back if significant changes were made to the bill. When there have been Sewel motions relating to justice issues in the past, such questions have been flagged up. The Parliament needs to address the matter. The wider question of the whole procedure for Sewel motions has not been dealt with as yet.

11:30

The Convener: I have a similar view, in that I believe that there needs to be an examination of the process, especially if committees are going to deal with Sewel motions. The fact that we have been able to scrutinise the motion on the Gender Recognition Bill is a good development. It had been intended that we would deal with the issue next week but, in order for us to influence the process, we had to do it today. It seems to me that there is a lot to draw to the Parliament's attention, so we should produce a report. It is clear which

areas we should draw to the Parliament's attention.

I am still not clear about the process for divorce and dissolution—I am trying to work it out in my head. Something tells me that there is something not quite right about the process. Given the issues to do with sexual offences that Marlyn Glen and Margaret Smith raised, it is necessary to consider that area again. It is open to the committee to ask the Parliamentary Bureau to reconsider whether there should be some debate. Even if the bureau were to agree that there should be a debate, I imagine that that debate would be for 30 minutes. I do not know whether members think that there would be any value in that.

Margaret Mitchell: The only area in which there was a bit of confusion related to what the minister said about the possibility of there being some acrimony when someone had the interim certificate and wanted to go forward from there. This is the first time that I have considered the issue, but my understanding of what the officials and everyone else said was that someone would go for divorce and full recognition only if everything had been resolved and the parties were in full agreement. I thought that, if that had not happened, the new legislative route would not be open—things would have to be resolved in the usual manner. That is the only issue that I had any problem with.

On Stewart Maxwell's point about the panel, overall, I took the view that that was a UK matter. If one panel deals with gender recognition, every case will be dealt with under the same legislation, no one will be treated differently and no problems will arise from that. On the whole, I was quite happy with what I heard today—it seemed to be enough for me.

Mr Maxwell: I note the view that one panel would result in a consistent approach to cases, but that argument is false—I do not accept it at all. It is not possible to have just one panel, as the panel members will change. The fact that there will be one panel does not mean that there will be consistency. The panel members will change; there will be various medical and legal representatives. I do not think that that argument holds water.

As the evidence that is in front of us today indicates, there is an issue about Scots legal representation on the panel. It would be better if there were a separate panel but, if there is to be a single panel, there must be Scots lawyers on it to deal with Scottish cases. Several pieces of evidence cited the example of universities, which do not accept a name change without a deed poll. The minister did not really address that issue. Someone who changes their name because they are changing their gender will do so in the usual

way that names are changed in Scotland. We do not change names by deed poll in Scotland. We got no response to our question of what we can do about such a situation and the fact that a name change might not be accepted in universities and other English institutions.

We must address a whole series of issues about the legal aspects of the matter, the differences between the two systems and the fact that there will be only one panel. I heard the minister say that we should not prejudge where the panel will sit, but it is clear that, for obvious reasons, it will sit in the south of England. If that is the case and people have to appear before the panel, we have to consider another series of issues about travel and the additional costs that people will incur the further they live away from the panel. I do not think that those questions have been answered.

The Convener: We need to run through some of the issues to find out whether there is any consensus about what should go in the report. Does any member dissent from the view that there should be easy access to the panel? Members can go into further detail and say where they want the panel to be, but it seems that we agree that the issue of accessibility must be examined. The question of the fee must also be addressed, because it will be a problem if it is too costly.

Margaret Smith: We also need to examine the general issue of cost.

The Convener: Do members agree that we could say in our report that the panel should not necessarily be self-financing?

Mr Maxwell: I agree with that.

The Convener: As for Stewart Maxwell's points about representation on the panel, could we suggest that it should have Scottish representation or include someone with knowledge of the Scottish legal system?

Mr Maxwell: There has to be such representation if there is to be only one panel.

The Convener: If we state that in our report, it should cover most of the issues that you have raised.

Marlyn Glen mentioned sexual offences. Marlyn, do you have any suggestions for the report or would you like us to bring the issue back to the committee to be discussed in detail?

Marlyn Glen: The whole issue needs to be clarified. In any case, Hugh Henry said that he was going to examine the matter.

The Convener: Can we say in the report that we welcome the minister's commitment to look at issues that emerge from clause 9(1) of the bill?

Margaret Smith: We do not want to leave anyone without protection at any point in the process. After all, this process has three stages—the gender that the person in question has lived in; the gender that they live in until they acquire their new gender; and the acquired gender—and the bill has to cover all three in relation to perpetrators and victims. There is a lack of clarity on the matter, which will result in the courts making judgments.

The Convener: So we seek clarity on that issue. We shall say in the report that we welcome the minister's comments that he will re-examine the matter, but that we might want to have another say on the issue if that is needed.

Are members clear about the impact on Scots law of the additional grounds for divorce that the bill introduces?

Members indicated agreement.

Margaret Smith: My concern is that people who do not really want to divorce might be forced to do so. Irretrievable breakdown cannot be cited as a factor, because the relationship has not broken down. A small number of couples have somehow or other managed to keep a relationship going in the face of everything.

I am a bit concerned by that issue. After all, people are being asked to dissolve a relationship. I would feel happy about that only if they were able to enter into another legal relationship that would give them similar rights and responsibilities. However, that possibility does not exist at the moment. The minister did not want to give me any guarantees and reassurances when I asked him about a hypothetical situation, but we are being asked to legislate on the same hypothetical situation.

The Convener: I do not think that all the scenarios have been covered in that respect. For example, let us say that two parties to a marriage have to go jointly to court and a dissolution is necessary for a person to apply for a gender swap. If the other person does not want to be involved, where will that leave the person who wants the gender swap? We also have to think about the person who does not want anything to do with the situation and will not go jointly to the court.

Margaret Smith: What about the situation that Paul Burns mentioned, in which people would have to wait for five years?

Paul Burns (Adviser): There is no mechanism under divorce law that I know of—unfortunately, Christopher Gane has left the room—whereby anybody of whatever gender can jointly apply for divorce.

The Convener: That is right. One party sues the other.

Paul Burns: That was the one thing from a techie point of view that I could not get my head round. Even if a conventional couple—if one is allowed to use that phrase—both agree and want to divorce, they cannot, as it were, hold hands and go in front of the judge. One has to divorce the other.

Mr Maxwell: I accept that it would be fairly rare for the situation to occur. If two people do not wish to divorce and there is no breakdown in their relationship, even though one of them is changing gender, I find it difficult to understand why we are saying that they should be forced to go through a divorce. They will carry on in the same relationship. The divorce court will have to split the property, goods, children and everything else, and decide legally who gets what in a divorce case that neither party wants. What would the status of such a case be? I presume that it would be the normal status, effectively. Would somebody get the house and somebody else get the children?

Margaret Smith: I presume that that would not have to happen.

The Convener: Can we round the discussion up? There needs to be clarity about the purpose and mechanisms of the bill.

Margaret Mitchell: May I bring up a policy point? Does the bill introduce a new provision whereby there can be agreement on divorce, or will one of the two parties, even if there is agreement, have to bring divorce proceedings? Is it the case that there has to be agreement and it is just a technicality that someone has to say, "I will be the one to say that I want the divorce"?

The Convener: My understanding is that, where both parties agree to go jointly to court, the court would dissolve the marriage. That is a departure in Scots law, because in every other instance one person sues the other. There is another scenario, in which one party does not want to go jointly, but it is not clear how things will proceed in that case. It seems that current divorce law might kick in, because one person might say that they have reason to divorce the other on the ground that what that person is doing is unreasonable.

Margaret Mitchell: I understood that the procedure would not kick in unless there was agreement, so that in some circumstances people might not be entitled to their full certificate.

The Convener: It is open to any party to sue another person for what they think is unreasonable behaviour and it is for the court to make its decision. The court will probably regard that situation as irretrievable breakdown. It does not really matter whether the case is brought on the ground of desertion or whatever.

Margaret Mitchell: So we are talking about timescales.

The Convener: I suggest that we ask for clarification on the purpose of doing things this way and on the mechanism, to address Margaret Mitchell's question of whether the proposal is the only way of dealing with the situation.

On the question of age, I am content with the minister's answer. I do not want to comment further. On the question of privacy and the issues that Stewart Maxwell raised about birth certificates, are there any comments?

Marlyn Glen: When we took evidence at the Equal Opportunities Committee, it emerged that we are ahead in Scotland, because in England there will be a marked-up register. It was accepted that what we are doing is better.

The Convener: Does that mean that, in Scotland, if you go searching for someone's birth certificate you will get only the new birth certificate, and you will not be able to tell what sex they were born?

Margaret Mitchell: Yes, unless there is a good reason for you to know. For example, if the guy who was the janitor in the Soham case had had a sex change, there would be good reason to look right back in his history. If a person was involved in a serious crime, there would be a good reason for going back.

Mr Maxwell: I did not think that it was the case that only the new birth certificate would be available. The minister said that the original certificate would be in New Register House. Surely that means that someone could get the original certificate from there.

Margaret Smith: The certificates would be available to certain Government departments for certain purposes, but to which departments and for what purposes?

The point that I made about privacy was raised in the Equal Opportunities Committee, when witnesses said that the bill would allow information to be disclosed for the purposes of court proceedings and crime prevention, but that it would leave a gap in the middle that would mean that people's details might be disclosed in, for example, divorce cases or if they were serving on children's panels. The witnesses said that the provision was drawn too widely.

11:45

The Convener: Do members think that the situation is clear? I do not and I would like there to be more clarity—[*Interruption.*] Can we just have the one meeting? This is difficult enough.

Do members want to make any other points?

Marlyn Glen: It might be worth mentioning that the minister said something about training and guidance for NHS and justice personnel.

The Convener: Yes. We could—

Margaret Smith: The minister mentioned the privacy issue. The only other point that I wanted to mention concerned pensions. I know that that issue is not really part of our remit, but I think that Stewart Maxwell asked the minister about it.

Mr Maxwell: My question was about people who already receive a pension. If someone who had been receiving a state pension since they were 60 underwent a female-to-male change before they turned 65, their pension would be withdrawn. Under the new system, a small group of people would be caught in that situation.

The Convener: The only matter for this committee in relation to pensions is the fair division of pensions in the event of a divorce. We do not need to comment on pensions. I suggest that we take up Marlyn Glen's point that other issues should be considered, such as the privacy of people who receive treatment in the NHS. That is mentioned in the Equal Opportunities Committee's report anyway.

I presume that this committee would like to welcome the general tone of the legislation in so far as it offers people protection in law.

Margaret Smith: There are other matters that we did not consider. For example, there is a fast-track procedure for people who have lived in an acquired gender for a long time.

The Convener: I think that the committee has gone as far as it can on the issues that it can draw out.

Marlyn Glen: The Equal Opportunities Committee did not produce a report—that is one of the problems. We have only a summary of the evidence that the committee heard. Our report will be the only one.

The Convener: So we should take that snapshot in the evidence about privacy issues that might arise when people receive treatment in the NHS and say that those issues need to be addressed. The minister is on the record as saying so.

Margaret Smith: The clerks could consider some of the points that the Equal Opportunities Committee made in its synopsis. I think that we got caught because we thought that we would have a chance to finalise our report before passing it on to whichever committee was considering the matter.

The Convener: Members realise that our report will be limited to what we have been able to discuss today, but we have raised a few points

that are worth drawing to the Parliament's attention.

Margaret Smith: Do other members think that there should be a debate on the matter? I take Michael Matheson's point that we do not have a clear picture about how Sewel motions should be dealt with. When I convened the Health and Community Care Committee, I took the view that we would take evidence on Sewel motions that generated enough interest among people. If people lobbied us to say, "There are issues here that have to be looked at", we always took evidence and tried to discuss the matter. I know that there is no clear picture of what happens across the board. The Gender Recognition Bill raises a number of issues—

The Convener: We do not have time for another debate on the matter. I imagine that members want to record their unhappiness at the timescale for what is a very difficult task. I am happy for our comments to be strongly worded; procedures such as this should not be allowed to happen in this way. We have done our best. Probably we have not done a bad job, given the time that has been available. We have drawn out all the points that we wanted to raise. To do that, we have cut into our time to deal with other matters.

Margaret Smith asked whether we wanted a debate. Members could say that they would prefer a debate or decide that they want to make representations to the Parliamentary Bureau. What is it to be?

Bill Butler (Glasgow Anniesland) (Lab): As it is true, we could say that some members want the bureau to consider a debate and by implication that other members do not want that. It is fair to say that some members see the need for a debate, which could be relayed to the bureau.

Margaret Smith: If I am the only person who wants a debate, I am happy to withdraw the point.

Bill Butler: I am not saying that. I was just making a factual statement.

Michael Matheson: If we are to produce a report, a half-hour debate will not make a further contribution. Having been involved in several half-hour debates, I know that they serve little purpose. If we are to flag up concern and use strong terms about the procedure's operation and the limited timescale, should we not also highlight those matters to the Procedures Committee, which is responsible for examining the Parliament's procedures?

The Convener: Does anyone have a problem with that?

Members: No.

The Convener: In our report, we will highlight our criticism of the timing of the process for the

future and we will suggest that the Procedures Committee should consider the matter. If committees are to continue to deal with Sewel motions—I hope that they will—we need to consider how they can be dealt with in the available timescales.

Criminal Procedure (Amendment) (Scotland) Bill: Stage 1

11:51

The Convener: We agreed that we would discuss the second half of our stage 1 report in private. Before we do that, I make it clear that we will not be able to meet again to finalise the report, so we will have to operate as we have done before. That means that the clerk will circulate by e-mail a draft report on which members will have to comment by Monday morning at the latest, so that the report can go to Parliament by Wednesday. I apologise, but there is no way round that. I know that members would want to see the report in some form, although I hope that we will get the report right based on what members have said.

11:52

Meeting suspended until 11:58 and thereafter continued in private until 14:06.

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