OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 4 March 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 4 March 2020

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EDUCATION AND SKILLS COMMITTEE
5th Meeting 2020, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Daniel Johnson (Edinburgh Southern) (Lab)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*Iain Gray (East Lothian) (Lab)
*Jamie Greene (West Scotland) (Con)
*Ross Greer (West Scotland) (Green)
*Jamie Halcro Johnston (Highlands and Islands) (Con)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
Alex Neil (Airdrie and Shotts) (SNP)
*Gail Ross (Caithness, Sutherland and Ross) (SNP)
*Beatrice Wishart (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Maree Todd (Minister for Children and Young People)

CLERK TO THE COMMITTEE

Roz Thomson

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education and Skills Committee

Wednesday 4 March 2020

[The Convener opened the meeting at 09:30]

Interests

The Convener (Clare Adamson): Good morning, and welcome to the Education and Skills Committee's fifth meeting in 2020. I remind everyone to please turn their mobile phones and other devices to silent mode for the duration of the meeting.

Our first agenda item is declarations of interests by our new committee members. I pay tribute to Liz Smith and Alison Harris for their contributions to the committee's work. I understand that Liz was the longest-serving member of the Parliament's education committees. That continuity and expertise has been very beneficial, so I offer a vote of thanks to Liz, in particular, for her contribution to the committees' work over the years.

Liz Smith has been replaced by Jamie Greene, and Alison Harris has been replaced by Jamie Halcro Johnston, both of whom we welcome to the committee. I invite Jamie Greene to declare any relevant interests.

Jamie Greene (West Scotland) (Con): Thank you for your warm welcome, convener. I will add to your comments about Liz Smith and say that she has left big boots to fill, but I will try my best. I have no formal declaration to make, but I voluntarily declare that I taught English for two years.

The Convener: Thank you. I invite Jamie Halcro Johnston to declare any relevant interests.

Jamie Halcro Johnston (Highlands and Islands) (Con): Thank you for your welcome, convener. I have no relevant interests to declare.

Decision on Taking Business in Private

09:31

The Convener: Our second agenda item is a decision on whether to take consideration of our work programme in private today. Are members content to do so?

Members *indicated agreement.*

Disclosure (Scotland) Bill: Stage 2

09:31

The Convener: Our next agenda item is stage 2 of the Disclosure (Scotland) Bill. I welcome to the committee Maree Todd, who is the Minister for Children and Young People, and her officials.

Everyone should have a copy of the bill, the marshalled list of amendments, which sets out the amendments in the order in which they will be debated, and the groupings of amendments.

It might be helpful to explain the procedure briefly. There will be one debate on each group of amendments. I will call the member who lodged the lead amendment in the group to speak to and move that amendment, and to speak to other amendments in the group. I will then call other members who have lodged amendments in that group. Members who have not lodged amendments in the group but who wish to speak to amendments should indicate that by catching my or the clerk's attention. The debate on the group will be concluded by me inviting the member who moved the lead amendment in the group to wind up.

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

If a member does not want to move their amendment when it is called, they should say, "Not moved." Please note that any other member present may then move the amendment. If no one moves the amendment, I will immediately move on to the next amendment in the marshalled list.

Only committee members are allowed to vote. Voting is by a show of hands, so I urge everyone to keep their hands clearly raised until the clerks have recorded the vote. The committee is required to indicate formally that it has considered and agreed to each section of the bill, so I will put the question on each section at the appropriate point.

Our aim is to complete part 1 of the bill today. I refer members to the marshalled list.

Section 1—Level 1 disclosure

The Convener: Group 1 is entitled "Level 1 and Level 2 disclosures: childhood convictions: alignment of state and self-disclosure provisions". Amendment 1, in the name of the minister, is grouped with amendments 2, 5 to 17, 20, 21, 52, 53, 58, 62, 90, 92, 98 and 201.

The Minister for Children and Young People (Maree Todd): Good morning, convener. I am pleased to be moving the Government's amendments to the Disclosure (Scotland) Bill this morning. They reflect the level of engagement that has continued since the bill was introduced, and the committee's constructive scrutiny of the bill.

The first group of amendments is concerned with the rules on self-disclosure of unspent convictions under the Rehabilitation of Offenders Act 1974 and how those rules relate to the provisions in the bill on state disclosure of childhood convictions.

When we introduced the bill, we were aware that further changes would be needed in order to align the disclosure rules in the bill with the self-disclosure regime under the 1974 act, in relation to childhood convictions. If an unspent childhood conviction is not disclosable by the state, the individual should have the right to treat a question from prospective employers and others about previous convictions as excluding that relevant childhood conviction. We were therefore conscious that there would have to be symmetry in the provisions of the state and the self-disclosure regimes in order to give full effect to the policy intent of the bill.

As was explained to the committee at the outset, our intention was always to address that through stage 2 amendments, once changes to the 1974 act that were made by the Management of Offenders (Scotland) Act 2019 had been enacted. The main challenge arises in relation to unspent childhood convictions, particularly in sectors that do not routinely use the disclosure system to verify the existence of unspent convictions. If individuals had to disclose only what had been included in a disclosure product they would, in effect, be exempt from self-disclosing any childhood convictions, provided that they never had to apply for a disclosure.

The policy intention of the amendments addresses that potential safeguarding gap while providing a truly transformative opportunity for people who have offended in their childhood, which is consistent with the policy thrust of the bill. Through our amendments, the majority of childhood convictions will immediately become spent under the 1974 act. They would therefore not be capable of being disclosed as unspent convictions in either level 1 or level 2 disclosures, and the individual would not have to self-disclose the convictions if an employer were to ask about any past offending behaviour. That change is similar to changes that were made to the self-

disclosure rules relating to children's hearings disposals by the Management of Offenders (Scotland) Act 2019.

However, that general provision will be subject to important exceptions. Public protection will be served by provisions that draw a line around the most serious forms of criminality during childhood. That most serious behaviour will remain eligible for state disclosure, and there will be a corresponding duty on the individual, for as long as the conviction remains unspent, to self-disclose such criminality when asked by an employer. The conviction will appear automatically on a level 1 or level 2 disclosure as an unspent childhood conviction. That exception would be for individuals who have a conviction that resulted in a custodial sentence exceeding 48 months—known as an "excluded sentence" under the 1974 act—and, in the case of a sexual offence, a conviction that resulted in a custodial sentence exceeding 12 months.

That approach means that many of the provisions in the bill that relate to childhood convictions for level 1 disclosures can be removed entirely. There will no longer be a decision-making process by ministers in relation to childhood convictions for the purposes of a level 1 disclosure, because the small category of childhood convictions that will remain unspent will be disclosable automatically, without any exercise of discretion, for as long as they are unspent.

The effect of the proposal will be to remove all negative consequences for individuals that were caused by the 1974 act with regard to childhood convictions, save for convictions for the most serious types of offending. Such individuals are a very small minority of all those who are convicted in childhood. The vast majority of childhood convictions will become immediately spent and will not be disclosable, either by the individual or by the state, in any circumstances.

Taken together, the amendments in the group will successfully align the rules on self-disclosure and state disclosure of unspent childhood convictions, and they will deliver the benefit of allowing individuals to move on from their childhood offending behaviour while ensuring a suitable level of public protection for vulnerable groups.

I urge committee members to support the amendments. If members want me to discuss them in more detail, I will be happy to do so.

I move amendment 1.

Daniel Johnson (Edinburgh Southern) (Lab): I thank the minister for that explanation. Broadly, the amendments make an awful lot of sense in aligning the bill with other recent legislation, but I want to check my understanding, because I am not a lawyer.

We are talking about how childhood convictions will be treated. The vast majority of childhood convictions, although not the most serious ones, will be immediately spent. I just want clarification on that and to ask whether the minister could explain further. I understand that that will not need ministerial discretion and that a conviction's not being spent will be by dint of the level of seriousness of the offence.

Is removal of that discretion entirely, along with some of the routes for appeal to the independent reviewer, clear cut? Are we saying that there are no grey areas because of how the law will now work for childhood convictions? My query is whether it is safe to make removal of childhood convictions purely automatic with no ministerial discretion, and safe to remove routes for review and appeal?

Maree Todd: First, the convictions will become spent, and secondly, there will be no grey area. That is reasonable.

We gave a great deal of thought to where the line should be drawn. There is a fine balance to be struck between the policy of helping people to move on from offending and the need to ensure that the disclosure system gives sufficient protection.

As I have said, the changes to the 1974 act are primarily concerned with level 1 disclosures, because there are separate rules for level 2 to ensure protection of vulnerable groups. We need to make provision for a limited set of rules on self-disclosure in order to cover people who have been convicted of the most serious offences. In doing that, we must remember that the same rules have to apply to state disclosure. The more rules we add, the further we would move from ending automatic level 1 disclosure of childhood convictions.

There is no straightforward answer about where to draw the line; I accept that there might be different views about where the balance has been struck. Committee members will agree that the excepted sentences that I propose in the amendments cover very serious offending behaviour. I have carefully balanced that against the principles of article 40.1 of the United Nations Convention on the Rights of the Child, which states the requirement to promote

"the child's reintegration and the child's assuming a constructive role in society."

I am listening to members' views and will work with them to ensure that we have provisions that allow people to move on from their childhood offences.

Amendment 1 agreed to.

Amendment 2 moved—[Maree Todd]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Provision of Level 1 disclosures

The Convener: Amendment 3, in the name of the minister, is grouped with amendments 4, 22, 50, 51, 68 to 89, 97, 102, 121, 125, 126, 200, 205 and 206.

Maree Todd: The amendments are grouped as minor and drafting amendments and are primarily intended to assist clarity in reading and understanding the legislation or are a consequence of other amendments.

Amendments 102 and 68 to 88 are minor technical changes that will replace the words "individual" and "scheme member" with "applicant" in the relevant sections. The amendments will support consistency for those following a notional application through processes that are provided for in the legislation.

Amendments 4 and 50 clarify that an individual can apply for a disclosure only in relation to themselves. That will remove potential ambiguity in interpretation of the legislation.

Amendment 3 will insert language that will clarify that ministers can refuse to issue a level 1 disclosure product under the bill when it is more appropriate that the information that would be contained in the disclosure could be obtained in the form of a disclosure product from another competence authority, such as a basic disclosure that is obtained from the Disclosure and Barring Service. The current wording of the bill might have implied that an actual level 1 disclosure product could be obtained from a person other than the Scottish ministers: that is not the case.

09:45

Amendments 51 and 89, similarly to amendment 3, will insert language to clarify that the purpose of a level 2 disclosure must be one in relation to which the protections against self-disclosure under the Rehabilitation of Offenders Act 1974 have been excluded by an order that has been made by the Scottish ministers. That means that, when any of the protections were excluded for other purposes by an order that has been made in another part of the United Kingdom, any disclosure application for those purposes should be directed to the appropriate UK disclosure service.

Amendment 22 will introduce wording to make it clear that the definition of "non-disclosable conviction" includes a conviction for a list B offence. Previously, the definition referred only to a list B offence, but it is the existence of a conviction for such an offence that brings a matter within the definition.

Section 29(4)(a), as drafted, is inconsistent in referring to the "purposes" of the disclosure in the plural. All the other provisions refer to a singular "purpose", and that is what is used in the defined term in section 70. Amendment 97 will bring that reference into line.

Amendment 121 will remove paragraph (c) from section 69 of the bill, which defines what is involved in consideration of suitability. The wording in paragraph (c) was intended to underpin section 57(4) and the provision of advice from an umbrella body to a personal employer. However, in terms of section 57, it is still the personal employer making the suitability assessment and thus they are covered by paragraph (a) of section 69, which renders paragraph (c) unnecessary.

Amendment 125 will substitute for the definition of "spent conviction", a new definition of "spent" and "unspent" that will apply to all convictions, including childhood convictions and cautions. That will avoid the need to add a separate definition of "spent childhood conviction". The introduction of a definition of "unspent" in relation to convictions will enable some simplification of the amendments relating to disclosure of childhood convictions in section 1 and the definition of "criminal disposal" in section 13(3).

Amendment 126 provides a definition of "type of regulated role", which is a phrase that is used in a few places in part 1 of the bill. There is no new definition in broad terms under amendment 126, which simply makes it clear that the definition of the term in the Protection of Vulnerable Groups (Scotland) Act 2007 applies for the purpose of the references in part 1 of the bill.

Amendment 200 will amend the PVG act to ensure that the Scottish ministers must issue guidance, and that the chief constable must have regard to that guidance in the exercise of their functions under part 1 and part 2 of the PVG act. The bill currently provides that only in relation to the chief constable's functions under part 1 of the bill. Amendment 200 will improve consistency in the approach by which information is provided by the chief constable.

Amendments 205 and 206 will fix an error in the drafting of schedule 5, on minor and consequential amendments. The amendments are intended to ensure that the power to make regulations prescribing fees covers applications to renew membership of the scheme and that, if a fee that is prescribed for an application is not paid in the manner that is provided for in the regulations, the application need not be considered. The bill currently makes that amendment in the wrong place in section 70(4) of the PVG act; the

amendments will make sure that the amendment is made in the correct place in section 70(4).

I move amendment 3.

Amendment 3 agreed to.

Amendment 4 moved—[Maree Todd]—and agreed to.

Section 2, as amended, agreed to.

Sections 3 and 4 agreed to.

Section 5—Level 1 disclosures: childhood conviction information

Amendment 5 moved—[Maree Todd]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Level 1 disclosure: application for review

Amendment 6 moved—[Maree Todd]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Review of accuracy of information by the Scottish Ministers

Amendment 7 moved—[Maree Todd]—and agreed to.

Amendment 8 moved—[Maree Todd]—and agreed to.

Section 7, as amended, agreed to.

Section 8—Review of childhood conviction information by the independent reviewer

Amendment 9 moved—[Maree Todd]—and agreed to.

Section 8, as amended, agreed to.

Section 9—Independent reviewer: information and representations

Amendment 10 moved—[Maree Todd]—and agreed to.

Section 9, as amended, agreed to.

Section 10—Notification of independent reviewer's decision

Amendment 11 moved—[Maree Todd]—and agreed to.

Section 10, as amended, agreed to.

Section 11—Appeal against independent reviewer's decision

Amendment 12 moved—[Maree Todd]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Provision of new Level 1 disclosure on conclusion of review proceedings

Amendments 13 to 16 moved—[Maree Todd]—and agreed to.

Section 12, as amended, agreed to.

Section 13—Level 2 disclosure

Amendment 17 moved—[Maree Todd]—and agreed to.

The Convener: Amendment 18, in the name of Maree Todd, is grouped with amendments 23, 49, 54 to 57, 59 to 61, 63 to 65, 91, 93 to 96, 99 to 101, 105, 113, and 122 to 124.

Maree Todd: The amendments have been lodged in response to evidence that was given to the committee by a number of groups that have commented on the disclosure of children's hearings disposals. The bill as introduced treats offending behaviour that has been addressed in the children's hearings system as a childhood conviction for the purposes of state disclosure. A number of groups have said that that is not in keeping with the ethos of a welfare-based system.

The proposed amendments mean that children's hearings disposals would not be categorised as convictions for the purposes of the bill but should otherwise be treated in the same way as spent childhood convictions in terms of the rules on when they should be included on a level 2 disclosure. They are treated as spent childhood convictions because the changes that were introduced by the Management of Offenders (Scotland) Act 2019 mean that all children's hearings outcomes become spent immediately.

Amendment 122 inserts a definition of "children's hearing outcome". It draws on section 3 of the Rehabilitation of Offenders Act 1974 and therefore ensures a consistent approach to the definition of "conviction" in the bill, which also points to the 1974 act. That approach reflects the link between the system of state disclosure in the bill and the system of self-disclosure in the 1974 act.

Amendment 123 carves "children's hearing outcome" out of the definition of "conviction".

Amendment 49 replicates section 14 of the bill, such that we still have provision for children's hearings outcomes that should be non-disclosable. We do not need to replicate section 14(1)(a) as all children's hearings outcomes will be immediately spent because of the Management of Offenders (Scotland) Act 2019. Amendment 124 is

consequential. Amendment 23 deletes section 14(3) as a consequence.

Amendments 18 and 54 add a provision into sections 13 and 17 respectively, which, when read with the consequential amendments 55 to 57, 59 to 61 and 63 to 65, effectively treat children's hearings outcomes in the same way as spent childhood convictions for disclosure purposes, albeit that they will be clearly badged separately from childhood convictions in any disclosure certificate.

Amendments 91, 93 to 96, 99 to 101, 105 and 113 are consequential and ensure that children's hearings outcomes are treated in the same way as spent childhood convictions for the purposes of the review and appeals processes, and for the purpose of the power in section 40 to modify other disclosure enactments.

I move amendment 18.

Amendment 18 agreed to.

The Convener: Group 4 is on level 2 disclosure: other relevant information. Amendment 19, in the name of the minister, is grouped with amendments 66, 67 and 203.

Maree Todd: The amendments relate to the disclosure of other relevant information—ORI—on a level 2 disclosure and as vetting information for the purpose of the protecting vulnerable groups scheme.

Amendment 19 provides that ORI from an overseas police force is a category of information that may be disclosed on a level 2 disclosure. The amendment ensures that overseas ORI can continue to be disclosed as is currently the case under the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007.

Section 18 of the bill already permits ORI that is provided by the chief constable of Police Scotland to be included in a level 2 disclosure. The Scottish Government will use a section 104 order under the Scotland Act 1998 to replicate the bill provisions for ORI provided from other UK police forces, so that the same applies to the chief officers of police forces across the rest of the UK. However, that order will not be able to deal with the disclosure of ORI from overseas police forces. Amendment 19, together with amendment 67, will address that issue.

Subsection (1) of amendment 67 places a duty on the Scottish ministers, before providing a level 2 disclosure to an applicant, to request the chief officer of every relevant overseas police force to provide ORI that meets the two-part test. The Scottish ministers cannot compel the chief officer of an overseas police force to engage in a statutory review process. It would not be within the competence of the Scottish Parliament to legislate for Scottish ministers to do so.

Together, subsections (2) and (4) of the amendment provide that overseas ORI may be included in a level 2 disclosure only following a direct review to the independent reviewer, including, if taken, an appeal to a sheriff against the independent reviewer's decision.

Subsection (5) of amendment 67 provides the Scottish ministers with the power to make regulations about the procedural aspects of the direct review. That includes the opportunity for the applicant to make representation to the independent reviewer and an appeal to a sheriff against the independent reviewer's decision. Under the existing disclosure legislation, ORI from overseas police forces is very rare. Given how infrequently we anticipate that the review process will be utilised in practice, the procedural aspects of the review process are considered to be too detailed to be in the bill.

Subsection (6) provides a power to prescribe "relevant overseas police forces", in keeping with the approach under the existing law.

Amendment 66 inserts new subsections into section 18. The amendment clarifies that information relating to a time when the applicant was under 12 years of age can be provided by the police as ORI only after a determination has been made by the independent reviewer under the Age of Criminal Responsibility (Scotland) Act 2019. That reflects similar provisions that the ACR act inserted into the disclosure provisions of the Police Act 1997 and the PVG act, which will now be superseded and repealed by the disclosure provisions in the bill.

Amendment 203 is a consequential amendment to the PVG act. Section 97(5) of the PVG act defines "relevant police forces" with reference to the Police Act 1997. As the bill repeals that act, it is necessary to substitute the reference to it with reference to section 50(7) of the bill. The range of relevant police forces remains the same, which ensures that the arrangements under the PVG act for obtaining ORI as vetting information remain the same.

I move amendment 19.

The Convener: Do any members wish to come in?

Daniel Johnson: I have a bit of a speculative question. Initially, I was concerned that the amendments cast a very wide net by talking about overseas police forces, so I read and reread the section.

Then I realised that those overseas police forces will be defined as the ones in the Channel Islands, the Isle of Man and so on. However, that

gave rise to a question. I accept that a line has had to be drawn on what can be done practically, but given that Police Scotland has access to intelligence systems such as that of Interpol, what consideration did the Government give to intelligence and information that Police Scotland might hold or be able to access but which have been gained from police forces beyond the overseas police forces as they will be defined in the bill?

10:00

Maree Todd: For clarity, are you talking about information that is accessible to Police Scotland, in relation to which disclosure would be for Police Scotland in the circumstances that we are talking about?

Daniel Johnson: It struck me that an individual might well have committed offences or have come into contact with police forces outside the jurisdictions of the forces that are set out in amendment 67. Such information might be of concern and relevant, given the considerations, but it will not be caught by the provisions of the bill. Given that the Government has expanded the number of police forces and jurisdictions from which Police Scotland can draw disclosable information—albeit that it has done so only to include the Channel Islands and so on—was consideration given to looking at conviction information from other jurisdictions, as part of the work that went into this group of amendments?

Maree Todd: Yes, it was. Overseas information goes through a single police force in the UK—Hampshire Constabulary—and is then used in the system, as is described in the legislation.

Daniel Johnson: That was a helpful clarification.

Iain Gray (East Lothian) (Lab): Also on a point of clarification, if someone was applying for disclosure and other relevant information had been provided, and if they had the opportunity to have the appropriateness of the information reviewed, would they know the source of the information?

Maree Todd: Yes, they would.

Jamie Greene: Those were interesting comments. If information is not captured through the relevant authority—I think that you said that that is the Hampshire force, minister—and, after disclosure, further information comes to light, perhaps from a police force that is not linked to the system, what powers of revocation will be available?

Maree Todd: Such a situation will be covered by the on-going monitoring requirements of PVG scheme membership.

Amendment 19 agreed to.

Amendments 20 and 21 moved—[Maree Todd]—and agreed to.

Section 13, as amended, agreed to.

Section 14—Non-disclosable convictions

Amendments 22 and 23 moved—[Maree Todd]—and agreed to.

Section 14, as amended, agreed to.

Schedule 1—List A offences

The Convener: We move to the next group, "List A and List B offences: miscellaneous amendments". Amendment 24, in the name of the minister, is grouped with amendments 25 to 35 and 37 to 48.

Maree Todd: The amendments in the group relate to the offence lists in schedules 1 and 2 of the bill. They are also known as lists A and B.

Convictions for offences in schedules 1 and 2 will continue to be disclosed in level 2 disclosures until a successful review or, in the case of a conviction for an offence that is listed in schedule 2, an offence becomes non-disclosable under section 14.

The amendments update the offence lists in the schedules with recently amended or newly created statutory offences. The amendments to schedules 1 and 2 also respond to requests from the Crown Office and Procurator Fiscal Service and on behalf of the Judicial Appointments Board for Scotland that offences relating to dishonesty, the administration of justice and integrity be moved to schedule 1. The changes cover dishonesty offences against an individual, breach of trust or responsibility, and misconduct in a position of authority. Moving those offences from list B to list A will mean that they are disclosable for longer, even after they are spent, which is intended to promote the integrity of the justice system in Scotland.

Separately, a number of recently amended or newly created statutory offences have recently received royal assent and warrant inclusion on the offence lists. They have been situated in the lists alongside similar offences that are currently in schedule 1 or 2, taking into account the factors that are described in paragraph 119 of the policy memorandum.

I move amendment 24.

Amendment 24 agreed to.

Amendments 25 to 35 moved—[Maree Todd]—and agreed to.

The Convener: Group 6 is on "PVG Act: carrying out a regulated role without being a scheme member". Amendment 36, in the name of the minister, is grouped with amendments 146 to 149.

Maree Todd: The amendments in the group relate to offences to be inserted into the 2007 act by the bill, in connection with the mandatory PVG scheme.

Amendment 36 is consequential, so, although it leads the group, I will discuss it last.

Amendment 146 removes the words "seek or" from the offence in new section 45C(1) that is to be inserted into the 2007 act by section 74 of the bill. That is necessary to make it clear that the act of applying for a job before being a scheme member will not be regarded as a criminal offence. The amendment does not adversely impact on the requirement for those carrying out a regulated role to be in the mandatory PVG scheme. It will also be an offence for an individual to agree to carry out a regulated role without being a PVG scheme member.

Amendment 147 inserts a new provision into new section 45C of the 2007 act. In relation to the offence under 45C(1) of agreeing to carry out a regulated role without being a scheme member, the amendment makes it clear that an individual is not deemed to have agreed to carry out a regulated role if that agreement is subject to the individual joining the PVG scheme for that role. There is a similar provision in new section 45D(2) for employers, and it is only right that the same treatment is extended to individuals, so that they may apply for a role without being a scheme member, although they may agree to take up employment and start in the role only once they have successfully joined the scheme.

Amendment 148 provides the Scottish ministers with a regulation-making power to prohibit organisations from permitting an individual to carry out a regulated role and to require organisations to remove an individual from a regulated role, when the individual is not a scheme member. That is to address organisations continuing to employ someone to carry out a regulated role when that person is not or is no longer a scheme member. Regulations may impose prohibitions or requirements in relation to particular types of organisations or in relation to particular kinds of regulated roles. Section 45DA(3) makes it an offence for an organisation to fail to

"comply with regulations made under subsection (1)",

although it will be a defence for an organisation to prove that it did not know, and could not reasonably be expected to have known, that the individual was not a scheme member.

Amendment 148 ensures that there will be an onus on organisations to check whether their employees remain scheme members. It ensures that there is a consequence for any organisation that does nothing following receipt of a notification under the new section 45B, which states that a scheme member's membership has lapsed.

Under the bill, as introduced, when a scheme member's membership has lapsed and they continue to carry out a regulated role, only the individual would be committing an offence. Amendment 148 means that there would be an equivalent offence for organisations that fail to comply with any prohibition or requirement imposed by regulations.

Amendment 149 applies the same penalties to the new offence created by amendment 148, and they are set out in the new section 45F of the 2007 act. That is appropriate, as all the offences that are introduced by section 74 of the bill deal with the same conduct, namely evading the mandatory PVG scheme.

The offences in the new sections 45C, 45D and 45E, which are inserted by the bill into the 2007 act, are all included in the list of offences in schedule 1—the list A offences, which can continue to be disclosed on level 2 disclosures, even after they are spent.

For consistency, amendment 36 adds the new offence that is proposed by amendment 148 to schedule 1.

I move amendment 36.

Iain Gray: I might be at fault for not reading properly, and I accept that you alluded to the matter, but I want more clarity on the sanctions that would be available when those powers are used against an organisation that has continued to use individuals in regulated roles without membership of the scheme.

Maree Todd: As I said, amendment 149 applies the same penalties to the new offence that is created by amendment 148. The sanctions that we are introducing today align with the sanctions to which I previously alluded.

New section 45F sets out the penalties for offences relating to regulated roles performed by individuals who are not in the scheme. It says:

"A person who commits an offence under section 45C, 45D or 45E is liable ... on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)"

or

"on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both)".

Iain Gray: Presumably, in the case of the organisation or employer, rather than the

individual, that would apply to the legal entity of the organisation, depending on what its structure was.

Maree Todd: There is a provision in the 2007 act concerning corporate offences, which is where that would apply.

Jamie Greene: Please accept my apologies if this matter was covered at stage 1, but how much of a shift in the status quo does the introduction of those new penalties represent? Does it give ministers additional powers to hold organisations to account more than individuals, or does it give them greater powers to create offences that concern individuals rather than the umbrella organisations within which they sit?

What parliamentary scrutiny would be afforded to the committee or the Parliament when ministers create the regulations under new section 45DA?

Finally, what guidance would be given to organisations that are perhaps currently made up of a mix of PVG and non-PVG personnel? Will there be any changes in their perception of how the regulations will affect them? Could you specifically address concerns about changes in the law?

Maree Todd: The balance between the individual and the organisation is pretty similar. The requirements are introduced by the fact of the scheme becoming mandatory. A great deal of guidance will be issued to ensure that everybody is aware of the change that is coming and what duties are required.

Reminders will also be built into the system. Our intention is not to criminalise a large number of people, but to have a secure scheme that is easily operable and understood by the general public. We will endeavour to deliver that.

Did you also ask about scrutiny of guidance?

Jamie Greene: Yes. If, for example, ministers change the details of the types of organisation or roles that the offences cover, what scrutiny will be afforded to those decisions?

Maree Todd: They will be regulations made under the negative procedure.

Jamie Greene: Thank you.

Amendment 36 agreed to.

Schedule 1, as amended, agreed to.

Schedule 2—List B offences

10:15

Amendments 37 to 48 moved—[Maree Todd]—and agreed to.

Schedule 2, as amended, agreed to.

After section 14

Amendment 49 moved—[Maree Todd]—and agreed to.

Section 15—Provision of Level 2 disclosures

Amendment 50 moved—[Maree Todd]—and agreed to.

Section 15, as amended, agreed to.

Section 16—Level 2 disclosure applications: countersigning and purposes

Amendment 51 moved—[Maree Todd]—and agreed to.

Section 16, as amended, agreed to.

Section 17—Level 2 disclosures: childhood conviction information

Amendments 52 to 65 moved—[Maree Todd]—and agreed to.

Section 17, as amended, agreed to.

Section 18—Provision of relevant police information

Amendment 66 moved—[Maree Todd]—and agreed to.

Section 18, as amended, agreed to.

After section 18

Amendment 67 moved—[Maree Todd]—and agreed to.

Section 19—Further information for certain purposes: non-PVG scheme members

Amendments 68 to 80 moved—[Maree Todd]—and agreed to.

Section 19, as amended, agreed to.

Section 20—Further information for certain purposes: PVG scheme members

Amendments 81 to 88 moved—[Maree Todd]—and agreed to.

Section 20, as amended, agreed to.

Section 21 agreed to.

Section 22—Level 2 disclosures: Crown employment

Amendment 89 moved—[Maree Todd]—and agreed to.

Section 22, as amended, agreed to.

Section 23—Level 2 disclosure: application for review

Amendments 90 and 91 moved—[Maree Todd]—and agreed to.

Section 23, as amended, agreed to.

Section 24 agreed to.

Section 25—Review of childhood conviction information by the independent reviewer

Amendments 92 to 96 moved—[Maree Todd]—and agreed to.

Section 25, as amended, agreed to.

Sections 26 to 28 agreed to.

Section 29—Review of removable convictions by the independent reviewer

Amendment 97 moved—[Maree Todd]—and agreed to.

Section 29, as amended, agreed to.

Section 30 agreed to.

Section 31—Independent reviewer: information and representations

Amendments 98 to 102 moved——[Maree Todd]—and agreed to.

Section 31, as amended, agreed to.

Section 32 agreed to.

Section 33—Appeal against independent reviewer's decision

The Convener: The next group is on "Level 2 disclosure: process after independent review". Amendment 103, in the name of the minister, is grouped with amendment 104 and amendments 106 to 110.

Maree Todd: The amendments seek to introduce a right to subsequent review for disclosure applicants when there was a previous decision to include information. That ability—which was recommended by the committee at stage 1—will be provided through amendment 106.

The purpose of section 33(5), as originally drafted, was to ensure that, following a successful review, the same information would be excluded from a subsequent level 2 disclosure. However, its effect would have meant that there was no recourse to subsequent review of the inclusion. Amendment 106 will allow such a subsequent review in appropriate circumstances.

Amendments 103, 104, 107 and 108 relate to the chief constable's right of appeal against a decision by the independent reviewer and how that would affect the timescale for the reviewing process coming to an end. When the chief constable has a right to appeal to the sheriff against the decision of the independent reviewer to remove ORI from a level 2 disclosure, the chief constable can inform ministers that they will not be pursuing such an appeal and therefore allow the earlier conclusion of review proceedings. That mirrors the existing ability in the bill for the applicant to notify ministers that they do not intend to pursue an appeal.

Amendment 109 is consequential to amendment 110. Together, the amendments relate to how information that is removed after a review is treated for the purposes of the PVG scheme. Amendment 110 will introduce language clarifying that ministers must remove the information from the applicant's scheme record and that the excluded information will no longer amount to vetting information within the meaning of section 49(1) of the Protection of Vulnerable Groups (Scotland) Act 2007. The significance of that is that vetting information can trigger a consideration for listing under section 12 of the 2007 act. Amendment 110 will ensure that the information that has been removed from a level 2 disclosure following the review process cannot be used to commence a consideration for listing.

I move amendment 103.

Amendment 103 agreed to.

Amendments 104 and 105 moved—[Maree Todd]—and agreed to.

Section 33, as amended, agreed to.

Section 34—Provision of new Level 2 disclosure on conclusion of review proceedings

Amendments 106 to 110 moved—[Maree Todd]—and agreed to.

Section 34, as amended, agreed to.

After section 34

The Convener: The next group is on "Level 2 disclosure: spent childhood convictions and children's hearing outcomes: disapplication of section 4 of the Rehabilitation of Offenders Act 1974". Amendment 111, in the name of the minister, is the only amendment in the group.

Maree Todd: Amendment 111 seeks to insert a new section into the bill. It is modelled on section 8 of the Age of Criminal Responsibility (Scotland) Act 2019. The amendment provides that, for any referral to the independent reviewer made under section 25 of the bill in respect of spent childhood convictions or children's hearings outcomes, the protections against self-disclosure under section 4 of the Rehabilitation of Offenders Act 1974 would be disapplied for the purpose of that referral, including any appeal to a sheriff under section 33.

In broad terms, that means that a person who has asked for a review has to answer questions and provide information about their spent childhood convictions or their children's hearing outcomes for the purposes of the review process.

I move amendment 111.

Amendment 111 agreed to.

The Convener: The next group is on "Disclosures: principles for decision making". Amendment 112, in the name of the minister, is grouped with amendments 208, 221 and 202.

Maree Todd: These amendments have been lodged in response to feedback from stakeholders and the committee's recommendation in its stage 1 report on including a set of guiding principles or criteria in the bill for the application of the two-part test for inclusion of certain information in disclosure certificates. In particular, I thank Daniel Johnson for his close scrutiny of the matter. The fact that we have both lodged amendments that seek to achieve similar policy outcomes demonstrates that the Scottish Government has listened and responded to his calls for more detail on the two-part test to be in the bill.

Amendment 112 provides two lists of matters that may be taken into account when the two-part test is applied by the Scottish ministers, the independent reviewer or the chief constable for the various purposes to which it applies in the bill. The matters listed are based on and seek to reflect the factors that have been highlighted in significant case law. As there are two parts to the test—whether something is "relevant" and whether something "ought to be included"—there is considerable overlap between subsections (2) and (3) of the new section that is added by this amendment. That aspect is already acknowledged in the case law on which the factors are based.

There is broad discretion for decision makers about how to take account of those matters in practice. Subsections (2) and (3) are both framed as matters that may be taken into account. There is no duty to take account of all the matters that are listed. That is particularly important, as not every factor will necessarily be pertinent to every decision that is made under the two-part test and we do not want to create a duty for decision makers to have to consider or rule out every factor. Such an outcome could prolong the disclosure application process, which is a situation that the Scottish Government is keen to avoid.

Subsections (2) and (3) also provide that the matters that are listed in each subsection are non-exhaustive. That ensures that other relevant matters can be taken into account, so that the discretion of the decision maker is not fettered. That is vital in the context of the guidance that will be developed in collaboration with stakeholders. I am certain that stakeholders will have views on other factors that should form part of the decision-making process and will want them to be part of the guidance. It is crucial that the provisions do not shackle that engagement and the guidance or prevent decision makers from taking a targeted approach to each case that is before them.

Subsection (4) explains that references to "other information" mean ORI.

Subsection (5) enables both sets of matters to be amended by secondary legislation. That regulation-making power will come under section 87(4) of the bill and will therefore be subject to the negative procedure. The Scottish Government considers that to be appropriate, as it will allow ministers to respond quickly and flexibly to any significant developments in case law.

Amendment 202 extends the application of new decision-making factors in amendment 112 when the chief constable is considering the same two-part test in relation to the provision of ORI for inclusion in a person's scheme record under the Protection of Vulnerable Groups (Scotland) Act 2007.

In addition, the independent reviewer applies the same two-part test under the Age of Criminal Responsibility (Scotland) Act 2019 in relation to a decision about the inclusion of pre-12 behaviour as ORI in the disclosure certificate.

Amendment 204, in my name, which we will come to in a later group, will ensure that the decision-making principles are applied consistently across all three pieces of legislation.

I urge members to accept the amendments in my name in this group.

As I said, Daniel Johnson's amendments would achieve similar policy outcomes to my amendments. There are two main areas of difference. First, amendment 208 would impose a duty on decision makers to

"have regard to the matters in subsections (4) and (5)"

whereas amendment 112 gives them discretion about which matters to take into account. The Scottish Government considers that allowing that flexibility is more appropriate, as not all the matters will necessarily be relevant to every decision.

The second issue on which we take a different view is the manner in which the decision-making principles can be amended through secondary legislation. Daniel Johnson proposes in amendment 221 that the matters will be amendable by affirmative procedure, whereas my amendment proposes that they be amendable by negative procedure.

Essentially, the regulation-making power is an administrative function of ministers. To ensure that the principles keep pace with any development in jurisprudence, we consider it appropriate to have that power subject to the negative procedure. The default rule in section 87(4) of the bill would therefore apply.

I ask Daniel Johnson not to move amendment 208. I hope that he can see that I have taken into account his close scrutiny of the issue, and that the amendments in my name address his concerns about the two-part test. Moreover, my amendments are all connected and ensure that the decision-making principles are applied equally across the bill, the Age of Criminal Responsibility (Scotland) Act 2019 and the Protection of Vulnerable Groups (Scotland) Act 2007.

I urge members to support amendment 112 and all my other amendments in this group. Should members be required to vote, I ask them to reject Daniel Johnson's amendments in the group.

I move amendment 112.

10:30

Daniel Johnson: I thank the minister for acknowledging the issues that I have raised and for meeting me to discuss those matters.

I will be relatively brief. As the minister has pointed out, her amendments and mine largely do the same work and have the same effect, so I will not move amendments 208 and 221.

It is important to put the principles in the bill in order to provide clarity and certainty, and the amendments in the minister's name achieve important flexibility. It is important to recognise that these matters cannot be rigid and that they will evolve. Therefore, it is important that whatever we do in that regard reflects that, which the minister's amendments do.

I will make two small points. First, as an Opposition back bencher, I will always advocate the use of the affirmative procedure over the use of the negative procedure. There is an important and substantive point in that regard. Given how the decisions will be made, I think it important to ensure that there is adequate parliamentary scrutiny of the principles should ministers propose to alter them. However, that is essentially a matter of detail, which I will certainly not die in a ditch over today.

Secondly—this point is more one of reflection—I was interested to note similarities between the minister's amendments and mine. One slight difference is that my amendments expand on the materiality decisions. Subsection (4)(a) of amendment 208 elaborates on the material considerations in relation to the nature of the conviction, and I recognise that subsection (2)(a) of the minister's amendment 112 provides largely the same thing.

However, I wonder whether my elaboration is helpful in relation to the nature of the crimes that are considered. The test whether something is "relevant" is, I think, essentially about whether the materiality—the nature—of the crime is relevant to the considerations at hand, whereas whether something "ought to be included" is about whether it is pertinent to disclose the circumstances.

I am not of a fixed view that the elaboration necessarily makes my proposed amendments significantly better, but I wanted to highlight it as a point of difference, and it may be something to consider at stage 3. Otherwise, I am happy with the Government's amendments, and I will not move mine.

Maree Todd: We can certainly expand on the points that Daniel Johnson has raised in the guidance that we produce. I am more than happy to work with him between now and stage 3 to make sure that we arrive at something that we are all happy with.

Amendment 112 agreed to.

Sections 35 to 39 agreed to.

Section 40—Childhood information: power to modify other enactments

Amendment 113 moved—[Maree Todd]—and agreed to.

Section 40, as amended, agreed to.

Sections 41 to 50 agreed to.

Section 51—Removal of registration on other grounds

The Convener: The next group deals with accredited bodies. Amendment 114, in the name of Maree Todd, is grouped with amendments 115 to 120.

Maree Todd: The amendments relate to the role of accredited bodies. Amendments 114 and 115 introduce a sanction: the removal from the register of an accredited body that does not comply with the duty to have a lead signatory. A duty without such a sanction would render the provisions in section 51 less effective.

Amendment 118 gives an applicant for registration in the register of accredited bodies the power to nominate one or more countersignatories instead of requiring it to nominate countersignatories.

Amendments 116 and 117 are consequential drafting amendments. They ensure that the existing duty under the bill to nominate a lead

signatory remains in place, while accommodating the conversion of the duty to nominate countersignatories into a power to do so.

Amendment 119 is a consequential amendment. It removes sections 52(8) and 52(9). Section 52(8) imposed a requirement to have at least one countersignatory, but given that the only duty will now be to have a lead signatory at all times, with a power to nominate countersignatories, that subsection is not appropriate. Section 52(9) is redundant, as the definition of lead signatory under section 52(1) makes it clear that the lead signatory has authority to act as a countersignatory.

Amendment 120 reframes the duty on an accredited body acting as an umbrella body when it is deciding what information may be shared with an organisational employer. Instead of requiring the accredited body to be satisfied that the individual is suitable to have access to the information, the accredited body will need to be satisfied that disclosure to that person would comply with the code of practice that will be published under section 56. That will make it clearer to accredited bodies what is expected of them.

I move amendment 114.

Amendment 114 agreed to.

Amendment 115 moved—[Maree Todd]—and agreed to.

Section 51, as amended, agreed to.

Section 52—Lead signatories and countersignatories

Amendments 116 to 119 moved—[Maree Todd]—and agreed to.

Section 52, as amended, agreed to.

Sections 53 to 56 agreed to.

Section 57—Sharing of Level 2 disclosure information by accredited bodies

Amendment 120 moved—[Maree Todd]—and agreed to.

Section 57, as amended, agreed to.

Sections 58 to 63 agreed to.

After section 63

Amendment 208 not moved.

Sections 64 to 68 agreed to.

Section 69—Definition of consideration of suitability

Amendment 121 moved—[Maree Todd]—and agreed to.

Section 69, as amended, agreed to.

Section 70—Interpretation of Part 1

Amendments 122 to 126 moved—[Maree Todd]—and agreed to.

Section 70, as amended, agreed to.

The Convener: That ends day 1 of consideration of the bill at stage 2. Our next meeting will be on Wednesday 11 March, and our target is to complete this stage of the bill on that day. Any further amendments to the remaining provisions of the bill must be lodged with the clerks in the legislation team by 12 noon on Thursday 5 March.

10:41

Meeting continued in private until 11:07.

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