EDUCATION COMMITTEE

Wednesday 1 November 2006

Session 2

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EDUCATION COMMITTEE
22nd Meeting 2006, Session 2

CONVENER

*Iain Smith (North East Fife) (LD)

DEPUTY CONVENER

*Lord James Douglas-Hamilton (Lothians) (Con)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)
*Ms Rosemary Byrne (South of Scotland) (Sol)
*Fiona Hyslop (Lothians) (SNP)
*Mr Adam Ingram (South of Scotland) (SNP)
*Mr Kenneth Macintosh (Eastwood) (Lab)
*Mr Frank McAveety (Glasgow Shettleston) (Lab)
*Dr Elaine Murray (Dumfries) (Lab)

COMMITTEE SUBSTITUTES

Richard Baker (North East Scotland) (Lab)
Mr Jamie McGrigor (Highlands and Islands) (Con)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)
Mr Andrew Welsh (Angus) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Robert Brown (Deputy Minister for Education and Young People)
Paul Martin (Glasgow Springburn) (Lab)
Michael McMahon (Hamilton North and Bellshill) (Lab)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Mark Roberts

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 6

Scottish Parliament

Education Committee

Wednesday 1 November 2006

[THE CONVENER *opened the meeting at 09:52*]

Adoption and Children (Scotland) Bill: Stage 2

The Convener (Iain Smith): I welcome everyone to the 22nd meeting in 2006 of the Education Committee. We have one item on our agenda today: day 2 of consideration of the Adoption and Children (Scotland) Bill at stage 2. Although we have only one item, it is a fairly length one.

I welcome again the Deputy Minister for Education and Young People and his officials. I remind the officials that, during stage 2 proceedings, they can advise the minister but are not allowed to speak. I also welcome Paul Martin MSP and Michael McMahon MSP, who are with us to speak to amendments in group 4. Obviously, if they wish to contribute to any other part of the proceedings, they are welcome to do so.

Section 9—Considerations applying to the exercise of powers

The Convener: Amendment 163, in the name of Rosemary Byrne, is grouped with amendments 35, 206, 179, 164, 207, 208, 165, 180, 181 and 210. If amendment 163 is agreed to, I cannot call amendment 35 because of pre-emption.

Ms Rosemary Byrne (South of Scotland) (Sol): I lodged amendment 163 because the words

"so far as is practicable"

are a bit of a get-out in terms of the dialogue with the child. In any adoption of a child, consideration must be given at all times to their wishes and feelings, religious persuasion, racial origin, cultural and linguistic background and the long-term effects of adoption on the child; no bar must be set. If the words

"so far as is practicable"

are left in the bill, it will be all too easy for people not to bother to take all those factors into consideration.

I move amendment 163.

The Deputy Minister for Education and Young People (Robert Brown): I hear Rosemary Byrne's observations on the issue. She has raised an interesting interpretational point. All the amendments in the group are connected to how a court or adoption agency is to consider the role of the birth family and the child when considering whether adoption is right for a child. The amendments in the group are quite different from one another. I will need to spend a little time in addressing each of them.

Amendments 163 to 165, in the name of Rosemary Byrne, would ensure that an adoption agency or court did all that it could to involve members of the birth family when a decision was taken about a child's future. Amendment 163 concerns what an adoption agency or court must consider when making a decision on the adoption of a child. As Rosemary Byrne said, the amendment would remove an element of the discretion that section 9 gives a court or adoption agency when considering such matters.

Rosemary Byrne's view is too prescriptive. Courts and other bodies that make such decisions are given discretion on many issues. As often as not, they are questions of balancing a series of matters. I make it clear that the presence of the clause

"so far as is practicable"

does not eliminate the requirement to consider issues, which is stated in the bill. However, the phrase puts the decision in the context of a range of other issues. The primary matter is the child's welfare, which stands at the top of the hierarchy.

Section 9(2) talks about a primary duty to

"have regard to all the circumstances of the case",

so a series of matters must be dealt with. In practice, it may not be possible to have regard to all the information as fully as may be desirable. For the sake of argument, some information may not be ascertainable, one or both parents might have died or might be unable to be found or the child might be unable or unwilling to express a view. If Rosemary Byrne's amendment 163 were agreed to, in such cases, adoption agencies would still have a duty to have regard to the factors, but the discretion to assess only the information that they could find would be removed. That is important, because it could create unnecessary delays while information was sought.

I stress that the phrase

"so far as is practicable"

does not mean that a court or adoption agency can disregard those factors, which we all regard as being important and central. Current practice supports that view.

Amendment 35, in the name of the Minister for Education and Young People, will place on courts and adoption agencies a clear duty to have regard to the factors so far as is reasonably practicable,

so it will widen discretion. It will achieve a balance between requiring an adoption agency or court to have regard to such matters and leaving discretion so that a case can move forward if information is unavailable. I stress that amendment 35 will not relieve adoption agencies or courts of having to have regard to the matters.

With that reassurance, I hope that Rosemary Byrne will accept that her amendment 163 would not take us forward from current practice and from what is proposed in the Executive's slight amendment to the bill. I hope that she will be prepared to withdraw amendment 163.

Amendments 164 and 165 would ensure that members of the birth family are consulted when adoption agencies and courts decide whether a child should be adopted. The bill already caters for that. Amendment 210 will remove section 10—some reordering is to take place—and amendment 208 will insert into section 9 part of what is in section 10. The result is that the amended section 9 will provide that an adoption agency must, before making any arrangements for a child's adoption or when placing a child for adoption, consider whether a better practical alternative exists for the child, for example with a relative of the child.

Under the court rules, a report by a local authority or adoption agency on a prospective adoptee at the preliminary stage of the adoption process must include the position of other relatives or people who are likely to be involved. In addition, the reporting officer's duties include investigating whether any people have a relevant interest in the case and assessing their views. Amendment 208 will expand that so that the views of parents, guardians and other relatives are all taken into account. I hope that that is sufficient to reassure Rosemary Byrne. Nobody disputes that the wider family is important, but it is part of the situation and is not the only factor. A balance must be achieved.

Amendments 179 and 181 would remove the reference to a child's age so that when an adoption agency or court has regard to a child's views, only the child's maturity, rather than their age and maturity, would be considered. That is an attempt to ensure that all children are given a fair chance to have their views heard, which is right, because such decisions affect them fundamentally. However, the two amendments would create the risk that a child who was aged 12 or over would be unable to express his or her views if he or she was not considered to be mature enough. That goes back to the arrangements on such matters in the Children (Scotland) Act 1995.

Under the bill, a child of that age will automatically be able to express his or her view. While I understand the reasoning behind the amendments, it would inadvertently take us backwards rather than forwards on the matter. I hope that Ken Macintosh will accept that argument and be prepared to withdraw—it says in my speaking notes "these offences", but I think it should say "these amendments".

10:00

Amendment 180, which was also lodged by Ken Macintosh, seeks to add clarity to section 9 to ensure that children aged 12 or over will be presumed to be capable of expressing a view. There is an element of ambiguity in the current phraseology, which is not our intention. Therefore, I see merit in accepting amendment 180.

Amendment 206, which is an Executive amendment, will make a relatively minor change, replacing the phrase "wishes and feelings" with "views". While that does not alter the effect of the section, it is a more modern use of language and is consistent with the Children (Scotland) Act 1995.

Amendment 207, which is another Executive amendment, will replace a reference to the adoption agency or court having a duty to consider the effect on the child of being an adopted child with a duty to consider the effect of making an adoption order. That provision was originally intended to catch the potential psychological effect of the child ceasing to be a member of his or her original family and becoming an adopted child. We have now changed that to reflect both the original intention and the broader, legal effects of the making of an adoption order. In short, the phraseology is more satisfactory.

I invite the committee to support amendments 180, 206 and 207.

Mr Kenneth Macintosh (Eastwood) (Lab): Amendments 179, 180 and 181 were first suggested to me by Children in Scotland, although I note that they have been supported by a number of other organisations, including Barnado's Scotland, ChildLine, Aberlour Child Care Trust, YouthLink Scotland and Children 1st. As the minister correctly identified, the idea behind all three amendments is to separate the two different issues of age and maturity. Currently, section 9(7) creates a backstop at the age of 12 years, at which point children have the right to have their views heard. That is the minimal position. The words

"taking account of the child's age and maturity"

are repeated in section 9(4)(a), and there is a danger that, rather than helping matters, that will be interpreted as emphasising the importance of

the age of 12 as the key determinant, rather than the maturity of the child.

By separating the issues, my amendments propose to put the emphasis on seeking the views of the child, depending on maturity, with the age of 12 merely becoming the absolute minimum at which that must apply.

The danger in reading sections 9(4)(a) and 9(7) together is that, at worst, seeking the views of the child could be reduced to a tick-box exercise, with such views being sought only at the age of 12. I would welcome further comment from the minister on why he feels that my amendments would mean that there might be a danger that the views of someone over 12 would not be sought. At the moment, all I am taking out is the word "age" from section 9(4)(a); 12 years old would still be the absolute minimum. There would still be an absolute right for a child to be consulted from the age of 12 onwards.

This a series of helpful amendments, which are designed to put the emphasis not just on seeking the views of the child at the age of 12 and over but seeking the views of the child and taking their maturity into account. That is the reason for the amendments and I believe that they are well considered.

Fiona Hyslop (Lothians) (SNP): I speak in support of Ken Macintosh's amendments. He has laid out the case well. The point here is to ensure that we expand, rather than restrict, the opportunity for children's views to be heard. Section 9(7) maintains the right of children who are aged at least 12 to have a view but, by removing references to "age", the amendments would ensure that, in many cases, children under 12 would be considered to have the maturity to have their views heard. The issue was highlighted in the committee's stage 1 report.

Robert Brown: I hear what has been said. In many ways, the different subsections of section 9 have quite a tortuous involvement with provisions in the Children (Scotland) Act 1995—which is the lead statue to which we will need to return often in our discussions—which lays down particular phraseology on the need to take account of the views of the children involved. The 1995 act was particularly concerned with that, among other things. As with many bills that we have discussed, the language in the bill needs to conform with the phraseology of that act. That is why section 9 is phrased as it is in the bill. Unintended consequences could creep in if we move away from the well-considered and well-thought-through wording that is contained in that piece of legislation.

Sections 9(4) and 9(7) need to be read together. I accept that it would not be the end of the world if amendments 179 and 181 were agreed to, but the central point—of which we should not lose sight—is that the Executive's intention in the bill is that, at all ages, the views of the child or young person should be taken into account. With older children, the issue is much more clear cut because the bill provides the cut-off age of 12 that has been touched on. With younger children, the operation is more complex and will depend to a much greater extent on the child's ability to understand and to discuss the issues and to articulate views on how matters should be taken forward. It is important that the child's age, as well as maturity, remains part of the consideration required in section 9(4), which refers to

"the child's ascertainable wishes and feelings"—

"wishes and feelings" will become "views" if amendment 206 is agreed to—

"regarding the decision (taking account of the child's age and maturity)".

I do not see any difficulty with how the requirements of that provision will operate in practice.

It was suggested that, if we do not agree to amendments 179 and 181, people will just go through a tick-box exercise and will take no notice of the strong requirement—under both section 9 of the bill and section 6 of the Children (Scotland) Act 1995—to take the child's views into account. It was suggested that those requirements will somehow just be ignored, but there is no question of that. There is a strong, statutory imperative to ensure that the views of children at all ages are sought, ascertained and taken into account in the reckoning by both the court and the adoption agency. I ask the committee to accept that that is the intention and effect of the bill as it stands and to support the Executive's view on the matter.

I appreciate that we could have a long argument about the interrelation between the two pieces of legislation, but the phraseology in the bill is consistent with what has been done before. I hope that the committee will accept that.

Ms Byrne: I do not understand the minister's point that amendment 163 could remove room for discretion. I believe that amendments 163 and 181 would put the child very much at the centre of considerations. Given that, under our procedures and practices in education, children are supposed to participate in their learning plan and looked-after children are involved in their care plan, amendments 163 and 181 would provide consistency by requiring people to get into a dialogue with children about their future and their life. That is an important point. By deleting the words

"so far as is practicable",

amendment 163 would ensure that children are consulted as part of a dialogue and that their views are listened to.

Having listened to what the minister has said, I will not press amendments 164 and 165, but I will press amendment 163.

The Convener: The question is, that amendment 163 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Byrne, Ms Rosemary (South of Scotland) (Sol)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Macintosh, Mr Kenneth (Eastwood) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Smith, Iain (North East Fife) (LD)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 163 disagreed to.

Amendments 35 and 206 moved—[Robert Brown]—and agreed to.

The Convener: Amendment 179, in the name of Ken Macintosh, has already been debated with amendment 163.

Mr Macintosh: I thank the minister for his comments. It is clear that there is no difference between his position and either mine or the committee's. We want children's views to be taken into account at all stages, and the only question is one of interpretation.

My feeling is that my amendments would make the situation clearer, and my only worry is about the consistency with other legislation. It is a question of weighing up whether the other legislation is a box-ticking exercise that the amendments would get away from, or whether the amendments would create problems. Given that the minister is clearly of the same mind as the committee, I am minded not to move amendment 179 and to discuss further whether to address the point at stage 3.

Robert Brown: I am happy to have discussions with Ken Macintosh if that is helpful.

Amendments 179 and 173 not moved.

The Convener: Amendment 184, in the name of Adam Ingram, is grouped with amendment 185.

Mr Adam Ingram (South of Scotland) (SNP): Committee members will recall receiving a round-robin letter from leading children's organisations in Scotland about stating explicitly in the bill the right of a child to be heard in the adoption process.

As it stands, the bill provides only for those over the age of 12 to be heard on and give consent to an adoption. By contrast, the United Nations Convention on the Rights of the Child provides that all children have a right to be heard on matters that affect their lives. There can hardly be a more important matter for a child than their adoption, so the bill should state their right to be heard regardless of their age. It could also be argued that without the meaningful participation of a child through the adoption process, the chances of a successful placement are much reduced.

Children in Scotland, which inspired the amendments, believes that independent advocacy provides the most effective means for children's voices to be heard in the adoption process. Independent advocates would put forward the views of children and young people directly to courts or adoption agencies, without reference to third-party judgments by professionals or other adults on the child's best interests.

It should also be remembered that children who are involved in the adoption process are vulnerable and may have behavioural and learning difficulties, all of which can inhibit their participation in the process. Independent advocacy would be their means to effective communication. Furthermore, the Executive recognises the important role that independent advocates play in, for example, the children's hearings system, and it is concerned to improve the services in that context.

In our previous discussions on independent advocacy at our meeting on 4 October, the minister suggested that access to the service would not be as central as under acts such as the Education (Additional Support for Learning) (Scotland) Act 2004 and the Mental Health (Care and Treatment) (Scotland) Act 2003. By way of explanation, the minister mentioned the diverse nature of adoption cases and the absence of clear categories of people who consistently require advocacy. I beg to differ. Surely the child at the centre of the adoption process must be so regarded.

I would also take issue with the minister's response:

"An explicit statement that the child's views can be expressed via an independent advocate is not necessary in primary legislation, because there is no bar on that happening."—[*Official Report*, *Education Committee*, 4 October 2006; c 3510.]

That surely misses the point made by Children in Scotland and others that it is important to include the principle in the bill so that, first, children and young people are informed of the right and offered

advocacy rather than having to request it and, secondly, local authority service planning can incorporate the need for independent advocacy in its resource allocations. Amendments 184 and 85 would achieve that purpose, and I commend both to the committee.

I move amendment 184.

10:15

Lord James Douglas-Hamilton (Lothians) (Con): I am pleased to support Adam Ingram's amendments, which introduce to the bill the right for a child to access independent advocacy services. I spoke to both the Scottish Independent Advocacy Alliance and Children in Scotland about the issue and they are keen that the right to independent advocacy be included in the bill in the same way as it is included in comparable legislation that is already in force, including the Education (Additional Support for Learning) (Scotland) Act 2004 and the Mental Health (Care and Treatment) (Scotland) Act 2003.

The principle of independent advocacy is to enable the child to receive support and representation from someone independent of the adoption agencies. Given that the bill quite rightly makes provision for the views of the child to be heard, it is important that those views are sought and put forward as clearly and incisively as possible. The children involved are likely to be vulnerable and might have behavioural or learning difficulties, and so might require support in airing their views. Bearing that in mind, I believe that allowing the appointment of a competent and professional independent advocate to provide support is a necessary safeguard to ensure that the best interests of the child are upheld.

I point out for the avoidance of doubt that I am a non-practising Queen's counsel.

Mr Macintosh: Amendments 184 and 185 have been suggested, or inspired, by Children in Scotland and other children's rights organisations. I am sure that the committee will have a lot of sympathy with the view that children's views should be heard—that principle is accepted in the bill. The question is whether we want to write into the bill the right to independent advocacy. I would not like anyone to think that I in some way oppose independent advocacy services—far from it—but I am slightly concerned that we did not explore the issue in much detail at stage 1 and I have some doubts about whether we should provide for the right in the bill. It strikes me that it is another step—and another cost—that we did not discuss fully at stage 1. However, I would like to hear the minister's comments on how we can address the principle of the amendments, which is to ensure that children's views can be heard and independently expressed.

Fiona Hyslop: I will be interested to hear what the minister says about the amendments. As Adam Ingram pointed out, the minister said before that there would be no bar to independent advocacy, but that is completely different from saying that it should be made available. The question is whether that should happen by means of enshrining the right in legislation or through policy and good will. How do we ensure that the voices of children are heard? If the committees of the Parliament are to take the UN Convention on the Rights of the Child seriously, we must ensure that we respect it in our legislation. One of the fundamental ways of doing that would be to ensure that children have a right to independent advocacy, to ensure that their voices are heard. There is a world of difference between saying that there is no bar to something, which might happen through good will, and ensuring that it happens.

Ms Byrne: I support Adam Ingram's amendments. Providing independent advocacy is one way of ensuring that any child or young person is given advice and support free of any form of manipulation or anything else that can go on in whatever setting they find themselves in. It is extremely important that their voices are heard. Given the route that we have been trying to take with children and young people in other acts, the amendments are important, because they show that we think that it is important that children are supported in having their voices heard.

Robert Brown: This is an important issue and it is fundamental that children are at the centre of the process. We have already dealt with the sections that state that specifically; the issue is how it is best provided for, and Rosemary Byrne put her finger on that—independent advocacy is one way, but not the only way, of dealing with the matter. We are talking about a by-blow. Amendment 184 tries to clarify the way in which children's views are expressed. Amendment 185 is a much more substantial amendment that seeks to provide a right to independent advocacy services. As Kenneth Macintosh correctly said, that has resource implications.

In adoption procedures, children can already express their views in a number of ways. There are curators ad litem, who act in the best interests of the child, and there are safeguarders. The act of sederunt that governs the current legislation states:

"Where a child has indicated his wish to express his views the sheriff … may order such procedural steps to be taken as he considers appropriate to ascertain the views … and … shall not make an order under this Part unless an opportunity has been given for the views of that child to be obtained or heard."

That is from the court rules on the matter.

It is not true to say, as some members implied, that there is a right to independent advocacy in all the other acts that were mentioned. I cannot speak for the mental health legislation, but I am fairly certain that the Education (Additional Support for Learning) (Scotland) Act 2004 allows people to use advocacy but does not give them a right to have the resource made available, which is a different and much more substantial thing.

In an earlier discussion on the matter, an important point was made about whether advocacy is the central way of dealing with the matter. I stand by what I said on that occasion. Different approaches and opportunities are available to children to express their views. That is at the heart of the reporting system, which brings reports to the court, so the question of children being involved and having their views taken into account is central to the process. Therefore, there is less need for advocacy in general than there is in some other instances. However, I do not mean that advocacy is not useful in some instances. It is useful, and it is perfectly possible under the current arrangements.

On amendment 184, it is not necessary to state in the bill the ways in which children can express their views. That is a matter for the detail in the court rules. There is nothing to prevent anyone from expressing their views in any way to the agency or the court. There is a series of obligations on the court to ensure that children's voices are heard, so amendment 184 is simply not necessary.

I hope that the committee will accept, on mature reflection, that amendment 185 goes too far. It seeks to give children a right to obtain independent advocacy services before a decision is made, which will not be needed in the vast majority of cases because other resources exist. I hope that Adam Ingram will accept my arguments and seek to withdraw his amendment.

Mr Ingram: I accept the minister's argument on amendment 184, but it is important to enshrine in the legislation the principle that is contained in amendment 185.

The minister made much of the fact that independent advocacy is one way, but not the only way, of ensuring that the child's voice is heard in the process. However, we need to establish consistency across the board so that every child has access to the system, and the only way of doing that is to enshrine in the legislation the principle that every child has access to independent advocacy. That might indeed have resource implications, but I recall that there was a great deal of debate on the principle of advocacy during the passage of the Mental Health (Care and Treatment) (Scotland) Act 2003 and, in the end, its importance was such that ministers accepted the need to include it in the legislation. I argue that we are discussing an equally important case.

Children and young people must be informed of their rights and offered advocacy rather than their having to request it; otherwise, we could end up with a postcode lottery that depends on the approach that different adoption agencies and local authorities take. On that basis, I am keen to press amendment 185.

Amendment 184, by agreement, withdrawn.

The Convener: Amendment 158, in the name of Ken Macintosh, was debated with amendment 146 on day 1 of stage 2 proceedings. I invite the member to indicate whether he wishes to move the amendment.

Mr Macintosh: I missed day 1 because of transport problems. I will not move amendment 158, on the basis that I will have an opportunity to move a similar amendment at stage 3 if the issue remains.

The Convener: Day 1 was some time ago, and I accept that there were transport difficulties.

Amendments 158 and 164 not moved.

Amendments 207 and 208 moved—[Robert Brown]—and agreed to.

Amendment 165 not moved.

Amendment 180 moved—[Mr Kenneth Macintosh]—and agreed to.

The Convener: Amendment 209, in the name of the minister, is grouped with amendments 253, 254, 256, 257, 262 and 281 to 286.

Robert Brown: Amendments 209, 254, 257, 262 and 281 to 286 are technical in nature. They do not change the effect of the provisions, but they have been lodged for the sake of clarity and to provide consistency of expression throughout the bill.

Amendment 253 relates to section 37. Section 37(1) currently provides that the making of an adoption order will not affect the parental responsibilities and rights that were vested in the parent of the adopted child immediately before the making of the order, as mentioned in section 32(3)(d). Section 37(3) should not extinguish the duties that are set out in paragraphs (a) and (b) of section 32(3) to provide aliment or to make any other payment where they are owed by a natural parent in the context of a step-parent adoption. The amendment achieves that effect by distinguishing the duties owed by natural parents who had parental responsibilities and rights prior to the adoption order from those owed by adoptive parents. The amendment is a little less technical

than the others in the group and is not unimportant.

I move amendment 209.

Amendment 209 agreed to.

Amendment 181 not moved.

Section 9, as amended, agreed to.

After section 9

Amendment 185 moved—[Mr Adam Ingram].

The Convener: The question is, that amendment 185 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Byrne, Ms Rosemary (South of Scotland) (Sol)
Douglas-Hamilton, Lord James (Lothians) (Con)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Smith, Iain (North East Fife) (LD)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 185 disagreed to.

The Convener: Amendment 287, in the name of Michael McMahon, is grouped with amendments 308 and 1 to 3.

Michael McMahon (Hamilton North and Bellshill) (Lab): Quite rightly, under schedule 5 to the Scotland Act 1998 Parliament has the duty to ensure equality in a range of areas. However, we all know from legislating on previous occasions that it is sometimes difficult to strike a balance between the rights of one person and those of another.

People will be given rights under this bill that other people in religious organisations advise me may impinge on their rights. Amendment 287 seeks to resolve one of the fears of the faith communities that provide adoption services. As things stand, faith-based adoption agencies can—on the basis of an understanding—refer those who do not meet their criteria to other adoption agencies. In doing so, they take away no one's rights. However, if we move away from the status quo, we may affect that situation in ways that were never intended. I argue that that would discriminate against the faith-based adoption agencies.

10:30

As we give homosexual and unmarried couples the right to adopt, we could inadvertently put religious adoption agencies in danger of being legally challenged for acting in accordance with their religious beliefs and ethos and for following the current practice of referring on. It may be that the Scottish Executive expects faith-based adoption agencies to do what they currently do. I would welcome clarification and assurance on that point from the minister. I hope that the minister will accept that the rights of religious adoption agencies could be afforded the same protection in law as is being given to other groups.

If we protect those agencies, we will do absolutely nothing to take away the rights of homosexual and unmarried couples, and we will also do what the Scotland Act 1998 requires us to do—prevent discrimination against personal attributes, which include beliefs or opinions such as religious beliefs.

I hope that the minister will be positive about amendment 287. I know that concerns have been raised with him. I am interested to hear his views.

I move amendment 287.

Paul Martin (Glasgow Springburn) (Lab): In speaking to amendment 308 in my name, I do not wish to elaborate on the moral arguments that arose during stage 1 when various witnesses gave evidence. My arguments are based on facts and evidence about the benefits to children of their adoptive parents being married. I refer in particular to the millennium cohort study of more than 15,000 children born between 2000 and January 2002. The risk of family breakdown for married couples was about 6 per cent, whereas for unmarried couples it was 32 per cent. It is therefore important that, in adoption, consideration be given to married couples.

It is important to acknowledge that there are various family circumstances throughout Scotland, but we have to acknowledge the risk of family breakdown that children might face. The facts and the recent powerful evidence suggest that the risk of breakdown is extremely high for unmarried couples. Amendment 308 states clearly that the court must not make an adoption order unless

"it is satisfied that consideration has been given to placing the child with a married couple".

I am not seeking to compel the outcome to be that the child is placed with a married couple, but I want the legislation to take into consideration the evidence from the recent survey, which was the most wide-ranging compilation of evidence ever made on this issue. The evidence is that the risk of family breakdown is 6 per cent for married couples and 32 per cent for unmarried couples.

The minister has rightly said that the welfare of the child is of maximum importance, with which I think we all agree. It is therefore crucial that a long-term relationship results from the adoption process, and we should ensure that the child benefits from that process by taking into consideration some of the powerful research that has recently been carried out on the issue.

The Convener: I invite Lord James Douglas-Hamilton to speak to amendments 1 to 3 and to the other amendments in the group.

Lord James Douglas-Hamilton: I begin by referring to amendment 287, in the name of Michael McMahon. During the stage 1 debate, I asked for and was given reassurance from the minister on the point Michael McMahon makes. The minister argued that it was not necessary for the bill to state explicitly that faith-based adoption agencies would not be compelled to help same-sex couples to adopt. I believe that, although we must not allow discrimination against gay people in terms of eligibility to adopt, we must also be careful not to put people in positions where they would be expected to act against their religious principles. Therefore, although I welcome the minister's reassurance, it is desirable that that should be included in the bill. I therefore support the principle of amendment 287, as it would send a clear signal to faith-based agencies that their valued work can continue unhindered.

In lodging amendments 1 to 3, I was mindful of the policy laid down by the minister when we debated the bill in the chamber and he said:

"Above all, it will provide safe and secure homes for those children."—[*Official Report*, 13 September 2006; c 27408.]

Later in his speech, he referred to "stable family environments". The test, clearly, is how best to ensure that stability. The law as it stands allows a single person to adopt, irrespective of their sexuality. The bill proposes to extend eligibility to all couples in a safe and secure home with an enduring family relationship. That test is met where the couple have chosen to marry or to become civil partners, if the persons concerned are altogether well qualified.

The evidence that now exists introduces a substantial element of uncertainty in other cases, and I shall say something about the nature of that evidence. A study on population trends by the Office for National Statistics, entitled "Childbearing Outside Marriage in Western Europe", published in the winter of 1999, found that only 8 per cent of married couples split up within five years of the birth of their child, but 52 per cent of couples who were unmarried but cohabiting broke up within the same period. That suggests that there is a great deal more instability and lack of certainty in relationships that have not been formalised.

Of course, I accept that there is a chance that the cohabiting couple will not split up and a chance that the married couple or civil partners might. Nonetheless, the figures overall indicate that where there is a formal relationship there is a much greater chance of stable and committed parenting. That is particularly important for children who are being adopted, as such children are often particularly vulnerable and may have experienced much insecurity or other problems previously.

It has been brought to my attention that the majority of consultees who responded to the consultation did not wish to endorse widening the eligibility criteria. The Parliament, by an overwhelming majority, has decided that it would be wrong to discriminate against a group of people on grounds of sexual orientation, which is why I would not wish to go as far as to support amendment 308. Nonetheless, we would be wise to act with caution so as to minimise the possibility of any unsatisfactory outcomes. My amendments infer that we should act with caution and restraint, remembering that the interests of the child must be paramount.

With that in mind, I believe that the wording in sections 31(3)(c) and 31(3)(d) is not necessarily sufficient to ensure that there is a secure, stable and enduring family environment in the majority of cases. The words "as if" are vague and do not mean one thing or the other. If we are not careful, we could give a signal to the adoption agencies that they should take it on trust that couples will provide stability and will remain committed to each other without ever having formalised their relationship. I wish to put down a marker that the deliberate vagueness of the wording is not necessarily consistent with the interests of the child being paramount, which would require maximising the necessary stability. Accordingly, I suggest that the wording be deleted.

Dr Elaine Murray (Dumfries) (Lab): This is probably the most contentious part of the entire bill. I will refer to the three different approaches that have been outlined. I have a great deal of sympathy for what Michael McMahon says. It is an issue that I have raised in discussion both in the committee and at stage 1. We must accept that faith-based agencies have a set of values from their faith and that it is not acceptable to them to place children with unmarried couples. They would find it morally difficult to do so. We should not force those agencies to act against their own principles and faith. However, we have had assurances from the minister, which I hope will be repeated.

It is important that the adoption agencies and faith groups from which we took evidence are not compromised. There would not be much point in

an unmarried couple seeking to adopt from a faith-based organisation that believed that placements should be with married people, as the organisation would not believe that that would be in the best interests of the child. It would be foolish to force that organisation into such placements rather than say that it should signpost the couple to another agency that can offer the service that they want. I have a lot of sympathy for what Michael McMahon has said, and I wait to hear the assurances from the minister again.

On Paul Martin's point, as a married person with children I, too, believe that marriage is the best forum in which to bring up children. That is my personal belief. Nevertheless, although stability is extremely important for vulnerable children, we must bear it in mind that this is about the adoption of individual children by individual people or couples, and that the skills that an individual or couple have could be extremely important to the experience of the child. They may have experience of disability issues and want to adopt a disabled child, or they may be a gay couple who have experience of discrimination and who could offer greater understanding to a child who has been badly bullied. There could also be faith issues or cultural and racial issues that would make a particular individual or unmarried couple more suitable for an individual child than a married couple. We would not want to state in legislation that a married couple must take precedence over an individual person or couple with that experience. I therefore have reservations about Paul Martin's proposal.

I also have reservations about Lord James Douglas-Hamilton's amendments. He referred to research that shows that 52 per cent of unmarried couples split up within five years of the birth of a child, but that means that 48 per cent of them did not. In considering the adoption of an individual child by an individual couple, the stability of that individual relationship is what should be assessed for the best interests of the child, not the statistics about the likelihood of that type of relationship failing. I would not, therefore, say that just because I personally took the decision that it was appropriate to be married in order to bring up children, every other couple that does not take that decision is incorrect or intrinsically less stable in their relationship.

Fiona Hyslop: I will address the amendments in the order in which they were presented. The content of Michael McMahon's amendment 287 has deeply exercised the committee. Our stage 1 report shows that we had a great deal of sympathy with ensuring that adoption agencies that have particular views or values based on religious beliefs should be able to continue their good work. We were impressed by the two agencies that gave evidence to us about their role in adoption in Scottish society. Everybody agreed with their arguments, so the issue is whether we need to put something about that in the bill. The minister has given some reassurance, and I would like to hear it again. There was concern about whether we should put something in the bill because of what might be happening at Westminster on equality and discrimination legislation. We perhaps need some legal clarification on that.

10:45

I have no difficulty with the content of amendment 287; my question is whether we need it. However, I have some difficulty with Michael McMahon's argument for it. In arguing the case, he started to talk about rights for people to adopt, but the committee is adamant that the bill should not and must not be about anybody's right to adopt; it should be about the right of children to be placed and adopted in secure and loving family relationships. If the debate degenerates into an argument about who has the right to adopt and who does not, it will do a disservice to the rights of children.

On Paul Martin's case for amendment 308, many members of the committee have chosen to be married to bring up their families, but the issue is whether the state should determine a pecking order of what is appropriate for others. My view is that it should not. There are also practical difficulties with amendment 308. At stage 1, we heard about the difficulties that smaller local authorities and smaller adoption agencies have in finding appropriate people to adopt. Amendment 308 may suggest that they would have to look the length and breadth of Scotland and then of the United Kingdom to find, exploit and exhaust the supply of married couples before they could even consider looking elsewhere.

Some of the judgments that are expressed in amendment 308 and in Lord James Douglas-Hamilton's amendment 1 raise the question of what is most appropriate for the child: is it a policy that is based on statistical probability or one that is based on the quality of the individual relationship? I want to base adoption policy on the quality of individual relationships rather than on statistical probability, because it is far more appropriate to place children for adoption with couples who will have enduring relationships. Bearing in mind the fact that many married couples, as well as unmarried couples, split up, the real test of the bill is to ensure that children are placed with families that have gone through a vetting process that tests the enduring quality of their relationships.

I appreciate Lord James Douglas-Hamilton's arguments and his logic, but I have some questions for him. Currently, gay people can adopt, but only as individuals, and the adopted

child can then be brought up in a gay relationship. Similarly, a child can be adopted by a heterosexual individual and subsequently brought up by an unmarried heterosexual couple. Are we going to be honest about the current situation or pretend that it does not happen, although we know that, in reality, the law allows for children to be adopted by individuals and brought up subsequently by couples? Would Lord James Douglas-Hamilton's amendments 1 to 3 roll back the situation that allows individuals of any persuasion to adopt? I would like to hear clarification on that.

Lord James Douglas-Hamilton: I am not allowed to speak again, so I say an emphatic no to your question. I am in favour of individuals having the right to adopt. My doubt is about casual relationships that can readily and easily split up. We need to be cautious in our approach.

Fiona Hyslop: The convener will keep us right on procedure.

My concern is that, although Lord James Douglas-Hamilton says that he is in favour of individuals' right to adopt, the legal effect of his amendments 1 to 3 might be different. We do not want a lottery for our children; we want certainty. Lord James Douglas-Hamilton talks about caution and restraint but, if we exercise caution and restraint, it will result in more children remaining under the parental responsibility of the state. We have all acknowledged that the state has an extremely poor record as a parent. Our job is to ensure that the right of children to be placed in loving family relationships is paramount.

On that basis, I reject amendments 308 and 1 to 3. I am interested to hear the minister's comments on amendment 287. The issue is whether that amendment should appear in law.

The Convener: The procedural position is that only the member in charge of the bill and the mover of the lead amendment in the group are entitled to speak again, but there is nothing to prevent members from taking interventions in the way that they can in a meeting of the Parliament.

Ms Wendy Alexander (Paisley North) (Lab): In light of the previous exchange, I observe that there is nothing casual about the adoption process for anybody who is involved in it. One of our hopes for the bill must be that it will make the adoption process simpler and more straightforward, particularly as concerns the welfare of children.

We seek further reassurance from the minister on the issue. The implication of leaving any ambiguity in the bill is that it could lead to a possible diminution in the number of adoption agencies in Scotland. One of our problems is that fewer adoption agencies—faith-based or otherwise—are active in Scotland than is the case in many other parts of the UK. Although that may be an administrative convenience to Government, it is not in the interests of the welfare of the children.

In Scotland at the moment, many couples and individuals have no alternative but to use local authority adoption. We know about the staff shortages in local authorities, including in social work—some levels are as high as 45 per cent. Parents who wish to enter into adoption by the route of home assessment, for example, have no other recourse. They simply have to sit out the delay, which can run to months or years.

Other parts of the UK have a plurality of adoption agencies, some of which are faith-based. If the minister offers reassurance, I hope that he will indicate that, as a matter of policy, we will not do anything to diminish the number of adoption agencies. Indeed, I hope to hear him say that we want to see an increase in the number of agencies that are active in the field. That would allow there to be the speed and urgency that does not always characterise the process at the moment. It would also mean that those entering into the process would not have to rely on one agency, especially one that may be struggling as the result of a lack of staff resource.

Mr Macintosh: I do not have anything particularly new to add to the debate. The comments that Elaine Murray, Wendy Alexander and Fiona Hyslop made reflect accurately not only my view but the agreed view of the committee. We discussed the matter in detail at stage 1. However, the importance of the issue means that it is worth while restating that for the record.

I thank Michael McMahon for lodging amendment 287, which addresses an important and sensitive point to which we have paid a lot of attention. I welcome the assurances that the minister gave at stage 1 and look forward to hearing his response today, particularly in the context of the points that Wendy Alexander has just made.

On Paul Martin's amendment 308, I echo Elaine Murray's comments. My personal choice is for marriage; it is the choice that I wish on others. However, when we look at the issues involved in adoption, we tend to confuse the rights of adults and those of children.

I was very taken with the statistics that Lord James gave on the pressure that the arrival of a child can bring to bear on a relationship. Although I was not surprised to hear the figures, my interpretation of them is entirely different. The fact that so many unmarried couples split up when they have a child serves only to show the importance of marriage. By taking the marriage vows, two people make a commitment to each

other before they have a child, for the sake of the child. It is interesting to note that only 8 per cent of married couples split up after having had a child. The commitment that married couples make to each other makes the difference; they are less likely to split up.

It is almost impossible to think that anyone would approach adoption with less seriousness or thoroughness than they would if they were having a child. That thoroughness is similar to that which a couple bring to their decision to get married and make a commitment to each other. However, if we are looking at the best interests of the child, we can trust families to make an assessment of their own suitability and adoption agencies to make their own assessment. For that reason, we should not place any particular value on the significance of marriage itself. As we know, marriages can split up.

Finally, Lord James Douglas-Hamilton talked about the expression "as if" in section 31 of the bill. I did not take the same meaning as he does from the term. He implied that it was somehow a weak term, but I read it to be a comparative term. It is not a measure of weakness; it is merely a way of comparing one relationship with another. However, I would welcome it if the minister could clarify that point.

The Convener: If no other members wish to contribute, I would like to say a few words as a committee member rather than as convener. This is an important group of amendments and I want to say why I will not support any of the amendments if they are pressed.

First, on amendment 287, in the name of Michael McMahon, the important balance for the bill to strike is what is in the best interests of the child. I am concerned that if any of the amendments in the group is accepted, the bill will become more about the best interests of the agency, the religious group, the couples or whatever than about the best interests of the child. That is not to say that I think that the issue in relation to faith-based adoption agencies is not important. However, I am satisfied with the assurances that the minister has given at stage 1 and which I am sure he will give again at stage 2 that nothing in the bill changes what faith-based adoption agencies can and cannot do. The bill does not require them to place children with couples who do not meet their religious beliefs. Therefore, I see no need to put such a statement in the bill.

I also have to say that the wording of the amendment might go slightly further than is necessary and may be open to all sorts of interpretations, but that is a matter of detail. It is not necessary for the provisions that are in amendment 287 to be added to the bill, so I do not support the amendment.

There is a danger that amendment 308, in the name of Paul Martin, could have some perverse effects. If, for example, a foster parent who wishes to adopt a child is not part of a married couple, the court would be obliged to consider a married couple first rather than whether it is in the best interests of the child to be adopted by the foster parent. I do not think that that is what Paul Martin intends to be the result of the amendment, but it could be one of its perverse effects. Therefore, I could not support the amendment, although in any case I do not think that it is necessary.

Paul Martin: I made the point that consideration should be given to a married couple, but you make the powerful point that a foster parent may be involved. If that foster parent is such a powerful player in the future of the child's life, although the married couple will be considered, they will not have a strong case anyway. Clearly, the assessment that is carried out will indicate, "Sorry, but the interests of this child are met by being with the foster carer." I would prefer not to put it in these terms but, crudely, in respect of the competition that is taking place, when an assessment takes place in the circumstances that you describe it is clear that the foster carer will be way ahead of the married couple.

The Convener: I am suggesting that, in those circumstances, when the court determines that it is clearly in the best interests of the child to be adopted by a foster parent, single person or person in some other relationship, the court should not have to consider whether consideration has been given to placing the child with a married couple. The best interests of the child should be paramount rather than the relationship that the child is going into.

I do not think that amendments 1, 2 and 3, in the name of Lord James Douglas-Hamilton, are necessary, because their basis is that the categories of couple outlined in sections 31(3)(c) and 31(3)(d) are not as stable as the other categories. To be honest, a couple must be fairly committed to each other to go through the adoption process together. It is not an easy process for prospective adoptive parents, let alone the adopted child, to go through. I do not think that any couple, whether they are married, in a civil partnership, or living together as if they were married or in a civil partnership, are likely to go through the process lightly. In any event, even if the amendments were passed, if a single person who happens to be living with someone else wished to adopt as a single person, they would still be entitled to do so. As a result, I do not think that amendments 1, 2 and 3 are necessary. The court has to determine what is in the child's best

interests, not make a judgment based simply on some piece of paper that comes out of another part of the legal process.

I do not support any of the amendments in the group.

11:00

Robert Brown: I thank colleagues for a high-quality debate on some very difficult, delicate and sensitive issues. A number of powerful comments have been made from a number of different perspectives and it is right that all those perspectives should be covered.

However, we need to focus on certain central issues. As the convener rightly pointed out, our approach centres on the child's best interests. Indeed, as Fiona Hyslop and others have said, there is a difference between the rights of children—who, after all, are the only people who have any rights on this matter—and the rights and interests of other parties. We are well aware of the tragic family circumstances of some of these children, and our central objective is to secure the stable family environment—I prefer the phrase secure loving family environment—that Fiona Hyslop referred to.

As members have made clear, the point about statistics is important. However, these matters must be assessed individually for individual children and individual potential adopters—of whom there are, unfortunately, not enough. Indeed, that is one of the background issues that we need to deal with.

As introduced, the bill seeks to maintain the status quo by allowing married couples and single people to adopt. However, it also allows civil partners, unmarried couples and same-sex couples who are not civil partners to adopt as long as they go through the rigorous assessment process successfully. It is important that the assessment process is rigorous, because it is central to this matter. These people are not simply plucked out of the general population; they have shown an interest in being adopters, have gone through the assessment process and have had to establish to the court's satisfaction that they are in an enduring family relationship. In that respect, I totally repudiate Lord James Douglas-Hamilton's concerns that the relationships under discussion are casual. The need to establish the existence of an enduring family relationship is very much built into the bill.

Amendment 287, in the name of Michael McMahon, is designed to secure an assurance that faith-based adoption agencies will be able to continue to offer their services. As Peter Peacock and I have made clear to the committee and to Parliament, Scottish ministers have no intention of ending or curtailing the role of such agencies—indeed, quite the opposite. We very much want faith-based adoption agencies to continue their work, because they offer a valuable service in addition to the services offered by local authorities and others. In that respect, Wendy Alexander made a very important point about the need for choice and a range of services. Faith-based adoption agencies also add to that range of services and assist in securing successful adoptions from the widest range of people.

Before the bill was introduced, I sought a meeting with the two faith-based agencies to say, among other things, that we wanted them to have a stronger role in future; to find more potential adopters; to provide services to a range of adults and children; to appeal to their own faith-based communities in order to secure more adoptive parents who can meet all the stringent requirements of adoption; and to be part of the overall system to provide the choice that Wendy Alexander has rightly talked about. As a result, I am anxious to reassure Michael McMahon that we want to continue and indeed to expand the role of such agencies.

That said, amendment 287, which seeks to give an adoption agency the broad power when placing a child

"to uphold its values and ethos derived from a religious or philosophical perspective",

raises a number of points that I should rehearse for the committee's benefit. First, its terms are somewhat problematic. In this context, the phrase "adoption agency" could refer to any agency that offers adoption services, including local authorities. It is not clear that local authorities derive their

"values and ethos … from a religious or philosophical perspective".

However, given that such a claim could be made at some point, the wording in the amendment introduces an unhelpful ambiguity into the matter.

Legislation must be precise and clear but, under the terms of amendment 287, it might be difficult to identify with any clarity the precise "values and ethos" of a particular body. For example, one could argue that an important aspect of the ethos of faith-based adoption agencies is that they provide services to people of all faiths and none. Obviously, we want them to continue to do so. Even if a body's values and ethos can be identified precisely, they can change quite quickly. That means that it would be difficult, if not impossible, to interpret whether an agency had acted in accordance with them. Although one could argue that there are some eternal verities, the point still stands.

Ministers have consistently made it clear that there is nothing in the bill that prevents adoption agencies from having regard to their values and ethos, provided that they fall within the general law of the land, or from setting criteria for the adopters that they will consider. In practice, if an adoption agency considers itself unable to assist someone, whether a child or a prospective adopter, it should refer that person to another adoption agency that would be able to provide the service and support necessary for the welfare of the child. That is the current practice of adoption agencies and I do not think that there is any desire on the part of the committee or of the Scottish Government to interfere with that.

Peter Peacock and I both want to do whatever we can that is consistent with our policy objectives for the bill to give appropriate reassurance on the future role of the faith-based adoption agencies. We are more than happy to remain in dialogue with Michael McMahon and with committee members if they have concerns on the issue.

Fiona Hyslop and Wendy Alexander mentioned the Westminster legislation. The regulations to be made by Westminster deal with equal opportunities issues, which are reserved, so by definition they are not matters that provisions in the Adoption and Children (Scotland) Bill can affect. Although we have been in close communication with Westminster about these matters, the relevant determinations will be made at the proper stage in the Westminster procedures, not by us. In other words, amendments to the bill would not be effective in this regard.

I hope that, in the light of those assurances and my fairly lengthy exposition of the ministers' position on the matter, Michael McMahon might be prepared to withdraw amendment 287.

Amendment 308, in the name of Paul Martin, relates to the marital status of prospective adopters. As well as seeking specific changes, Paul Martin seeks to highlight the continuing importance of marriage and to obtain reassurance from the Executive that it considers marriage to be important, which it does. Amendment 308 would insert the proviso that the appropriate court must not make an adoption order unless consideration has been given to placing the child with a married couple.

It is important to examine a number of the lesser and more technical aspects, as well as the central welfare issue. Paul Martin quoted what I accept are powerful statistics about the break-up of married and unmarried couples, as did Lord James Douglas-Hamilton. However, they were not comparing like with like, because we are not talking about the same cohort of people. Adopters are over 21 and I am sure that Paul Martin would accept that in a large number of relationship break-ups, there is a linkage with immaturity and the young age of the people concerned. There is also the intergenerational aspect of people coming out of care. A high proportion of the break-ups will be concentrated among people in the under-21 category, who will not go on to adopt.

In addition, the vast bulk of people whose relationships break up would not be in a position to seek to adopt. A number of powerful arguments have been made about that, which I think Paul Martin would accept the force of. A highly significant assessment process takes place. People have to decide that they want to adopt; it is not something that they do on a whim. It is arguable that parents who decide to adopt give more consideration to their decision than parents who have children in the more usual way, if I can put it like that. Adoption is something that parents give a great deal of consideration to and on which they make a deliberate and well-thought-through decision.

Their decision is double-checked by the state authorities through the assessment procedure that takes place. As I have said, there is a double-barrelled check—a couple must prove that they are in an enduring relationship and there is rigorous consideration of what is best for the child. Although the statistics provide interesting context, we must recognise that people who are considering adoption are not the same cohort of people as the general population.

Paul Martin: I appreciate the point that the minister makes about not comparing like with like, but does he accept that even in the group that is assessed, the statistics show that the possibility of relationship breakdown will be higher among unmarried couples than among married couples?

Robert Brown: I am suggesting that adoption is done on much more of an individual basis, which comes back to the point that a number of members have made. There is no doubt that we can get some guidance from statistics to a degree. However, I would suggest that the figures that you have quoted do not take us anywhere like as far as the proposition that you made when introducing amendment 308. Whatever the precise figures are for married and unmarried couples in the more narrow cohort that we are talking about, they will be much closer together, given the checks and balances that apply in relation to this matter. There is a danger that we might end up getting into an argument that will not help us to move forward in relation to what is in the best interests of individual children. I wanted to spend a bit of time on that issue as I think that it is quite important.

As a number of people have said, there are many issues beyond the statistics. In practice, amendment 308 would create a hierarchy of

adopters, with married couples being placed at the top of the hierarchy on the presumption that their married status makes them better suited to adopting. That idea undoubtedly emerges from the amendment. That presupposes what might be in the best interests of a particular child. It might well be that adoption by a married couple will be in the best interests of some or, indeed, many children. However, an assessment of an applicant's parenting abilities and the strength of any relationship must be objective and made in the best interests of the particular child. Agencies must always place the needs of the child first. Section 9(3) states specifically that the welfare of the child is "the paramount consideration". There might be instances in which, for example, the interests of a child with special needs are best served by their being placed with a person or couple with the most suitable skills to provide for the child, such as a specialist nurse. Such a person might not be found by taking an approach that involves insisting on the marital status that people must have.

Further, it might also be in the best interests of a child to be adopted by a close relative or friend of the natural parents who has an existing and strong bond with the child, if that person is not married but meets every other stringent test. In that circumstance, and the ones that Iain Smith touched on, it would not be right for such an adoption not to take place just because there was the potential for the child to be adopted by a married couple.

Underlying this argument is the paucity of people who want to adopt, which is what inhibits public policy in this area. Indeed, there is an implication in the amendment that, as long as any married couple is available to adopt, no other couple or person could be considered to be suitable. In that regard, Fiona Hyslop made the point about exhausting the supply of people who meet the criteria.

Another issue is to do with the wording of amendment 308. If the amendment were accepted, it would be possible to bypass its intention simply by considering, even if not seriously, a married couple. We have to be careful to be precise when we are dealing with legislation.

The most important factors are the needs of the child and the ability and suitability of the prospective adopters to meet those needs. Section 31 already says that couples who are not married or are not civil partners should be in an enduring family relationship. That is a sufficient safeguard to ensure that a child is adopted into a stable and appropriate relationship and is better than relying on a judgment that is made on the basis of marital status.

The bill provides for particular factors to be taken into account in considering the suitability of any particular adoption, such as the child's racial origin and their cultural, religious and linguistic background. The bill allows consideration of a range of factors to determine, in the individual case, when a particular adoption arrangement might or might not be in the best interests of the child.

We must consider the balance of reality in Scotland. Some 40 per cent of children are born to unmarried parents who jointly register the birth. That is the reality in Scotland, regardless of whether it is the choice that we would make. Therefore, there are many parents who are not married to each other but who are bringing their children up in loving and nurturing homes. The bill reflects that reality. It would be unacceptable to say or imply that such parents—those who have successfully nurtured and raised their own children in successful relationships—are somehow less able to offer adoption as an option to some of our more needy children, which is the central point.

Paul Martin's underlying point relates to the importance of marriage. Scottish ministers have made clear in Parliament that they would love more married couples to come forward to adopt and foster and would welcome initiatives that would assist that outcome. There is no policy intention by ministers to undermine the important institution of marriage or to show any prejudice towards marriage in relation to adoptions. Married parents remain a hugely important part of our community, into which children can, should and will be adopted. Recognising that and supporting and encouraging married couples to adopt has to be a key part of our strategy.

In that spirit and, consistent with our policy objectives, I hope that Paul Martin will withdraw amendment 308. I am more than happy to discuss particular aspects with him if he wants to come back to them.

11:15

We have made the point that provisions in the bill arise from the need to broaden the position from the existing reality of single people being able to adopt in some situations. I make it clear that the bill is not about giving rights to adults, because no one has a right to adopt, but about children benefiting from the relationships.

It is worth making the point that the phrase "enduring family relationship" has a forward-looking context. The word "enduring" means not that we will test the length of a relationship up to a point but that we expect both partners to consider the relationship permanent. The relationship's length can be important, but it must be ensured

that both partners are committed to each other and to the relationship. We deliberately chose a different phrase from that which is used in other legislation because we have a different purpose, which is to consider a relationship's future rather than what it has been.

Amendment 1, in the name of Lord James Douglas-Hamilton, raises a different context and has been dealt with in very effective contributions. I say with considerable respect to him that it is difficult to see the logic of the amendment. In effect, it would leave the current law—except that on civil partnerships—unchanged. The bill's main driver was the independent review that Sheriff Principal Cox QC chaired and the amendment would significantly undermine a key recommendation of that review and our capacity to improve the lot of some of our most vulnerable children.

Amendment 1 cannot be motivated by any concern that same-sex couples should be able to adopt, as it would leave that provision intact. If the amendment was intended to allow adoption only by couples who have chosen to show commitment to each other through marriage or a civil partnership, it would not achieve that aim, because it would take us into the unfortunate territory of casting doubt on unmarried couples' parenting abilities.

If the amendment were agreed to, a person in a relationship with someone else of whatever sex would still be able to adopt as a single person and, as now, their partner would be able to seek some rights with regard to the child, provided that they met the stringent adoption requirements. Couples would still adopt, but as individuals rather than as couples. That would be an unsatisfactory outcome. All that the amendment would do is deprive children of such adoptions of the new rights that the bill would otherwise establish for them. As I said, if Lord James is concerned about casual commitments, the reading of the bill that I described should put his mind at rest.

What would agreeing to the amendment say about all the unmarried parents who successfully nurture and bring up their children? I have mentioned that 40 per cent of children in Scotland were born to unmarried parents who registered the birth jointly. Allowing them to adopt jointly will undoubtedly widen the potential number of people who can adopt or foster. By preventing them from adopting jointly, all that we would do is disadvantage children because of the choices that adults had made. I hope that Lord James Douglas-Hamilton, who is a reasonable person, will be reassured by those comments, will reconsider the context of the bill and will accept that his amendment would take us backwards and would cast doubt over the appropriateness of the parenting arrangements that almost half the children in Scotland experience. I hope that he will not move amendment 1.

I am sorry to have gone on at length, but the debate is important and I had to put on record several aspects of the Scottish ministers' thinking.

Michael McMahon: On Fiona Hyslop's point, I accept that the language that was used was possibly not as clear as it should have been. I looked at my notes and saw that I started by saying that the discussion was about adoption agencies' rights under schedule 5 to the Scotland Act 1998, rather than rights in relation to adoption. Perhaps I did not make that as clear as I should have. I take Fiona Hyslop's point that the emphasis in the bill is right as it is on the rights of the child; the bill does not give individuals or groups the right to adopt.

In seeking assurance, faith-based adoption agencies have discussed the concern that other members raised. Assurances were given, but if those assurances had been strong enough, I would not be here this morning with amendment 287. Those same adoption agencies assisted me in drafting the amendment. If the minister's comments and the discussions that have taken place had reassured them, we would not be debating the amendment.

However, I heard what the minister said. I understand the concerns about the language of amendment 287; it can be improved on and I am more than happy for that to happen in future. I believe that ministers are sincere in their assurances that they will try to reassure the adoption agencies that they will be able to continue operating as they have so far and I welcome the minister's offer to continue the dialogue with them. On that basis, I seek to withdraw amendment 287.

Amendment 287, by agreement, withdrawn.

Section 10—General considerations when placing child for adoption

Amendment 174 not moved.

Amendment 210 moved—[Robert Brown]—and agreed to.

The Convener: I inform members that I am thinking about having a comfort break at around quarter to 12. We will press on just now to get through a few more groups of amendments.

Section 11—Restriction on arranging adoptions and placing children

The Convener: Amendment 211, in the name of the minister, is grouped with amendments 212 to 214.

Robert Brown: Section 11 is intended as a restatement of section 11 of the Adoption (Scotland) Act 1978. It makes it an offence for anyone who is not an excepted person to arrange or to place a child for adoption. The 1978 act provision prevents anyone other than an adoption agency from placing a child or making arrangements for the adoption of a child unless the proposed adopter is a relative of the child. The provision in the bill prohibits a person other than an adoption agency or relative from placing the child or making arrangements for adoption. That would allow the child's relative to place the child with anyone with a view to adoption, which was not the policy intention.

Acting in conjunction, amendments 211 to 214 secure the restatement of section 11 of the 1978 act and widen the category of person with whom a child might be placed without commission of an offence so as to include parents, a partner of a parent and relatives. All those categories should be exempt from prosecution in such circumstances.

I move amendment 211.

Amendment 211 agreed to.

Amendments 212 to 214 moved—[Robert Brown]—and agreed to.

The Convener: Amendment 36, in the name of Lord James Douglas-Hamilton, is grouped with amendment 37.

Lord James Douglas-Hamilton: Amendment 36 would increase the possible period of imprisonment for someone who commits an offence under section 11. My reasons for lodging amendments 36 and 37 are identical: the Law Society of Scotland is of the view that the period of imprisonment specified in sections 11 and 13 is too light.

There is a strong conviction that offences covered by section 11, including taking part in

"the management or control of a body of persons"

that makes arrangements for the adoption of children but which is not an adoption agency, should be deterred by substantial penalties. I accept that the seriousness of a crime depends on the surrounding facts and circumstances. I hope that the minister will consider the principle behind amendment 36 and, if appropriate, come back with an amendment at stage 3.

I move amendment 36.

Robert Brown: As Lord James said, his amendments are intended to increase the maximum length of the prison sentence that can be imposed on a person who has unlawfully arranged an adoption or unlawfully placed a child for adoption. It is important to mention that, as drafted, sections 11 and 13 allow for a maximum fine of £5,000 or imprisonment for a maximum of three months—the same levels as in the equivalent provisions in the Adoption (Scotland) Act 1978.

Amendments 36 and 37 would increase the maximum length of imprisonment to 18 months. Although we all want to discourage the activities that sections 11 and 13 provide against, I am not minded to accept the amendments. There is a general presumption against increasing maximum sentence levels unless there is a specific reason for doing so.

I do not think that the matter has been under discussion until now. Offences under the equivalent provisions in the 1978 act have been rare in recent years, which indicates that the existing provisions are probably a sufficient deterrent. If Lord James has anything further to say, I am happy to discuss the matter with him, but we are not persuaded that there is a case for increasing the sentences. I therefore ask Lord James to withdraw amendment 36.

Lord James Douglas-Hamilton: Cathy Jamieson and the minister's other colleagues in the Government have repeatedly said that they are opposed to short sentences and that too many people in prison are serving short sentences. The bill points in the direction of short sentences, even if a serious offence has been committed, which is not satisfactory. Either the sentence should be longer or there should be no sentence at all. The minister should be prepared to take the matter away and come back at stage 3.

Robert Brown: Lord James raises a broader issue. If there are to be changes to the way in which short sentences are dealt with, that is a matter for the Justice Department—people need to accept that such changes cannot be a by-blow of the bill. We are operating under the current arrangements for such matters, and the question is whether there is a case for increasing the maximum sentence. I thought that I was being helpful by saying to Lord James that I am happy to talk to him about that if he has particular concerns or cases that he wants to discuss, and I repeat that offer. However, my present advice is that there is no case for increasing the sentences that have been used without apparent problem since the 1978 act, and perhaps before then.

Lord James Douglas-Hamilton: In view of the fact that the minister is not prepared to consider the matter and come back with a new proposal at stage 3, he is forcing me to push the matter to a vote.

The Convener: The question is, that amendment 36 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Douglas-Hamilton, Lord James (Lothians) (Con)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Smith, Iain (North East Fife) (LD)

ABSTENTIONS

Byrne, Ms Rosemary (South of Scotland) (Sol)

The Convener: The result of the division is: For 3, Against 5, Abstentions 1.

Amendment 36 disagreed to.

The Convener: Amendment 215, in the name of the minister, is grouped with amendments 217, 220, 221 and 280.

Robert Brown: These amendments are all intended to improve the logical structure of the bill without altering the effect of the sections. Sections 11 and 12 are about enforcement and the creation of criminal offences and would be more appropriately placed later in the bill. Sections 13 and 14 are linked. They concern financial issues and create offences, and their relocation to later chapters in the bill would improve the structure of the remainder of chapter 2.

I move amendment 215.

Mr Ingram: The British Association for Adoption and Fostering Scotland is rather unhappy with the Executive's proposal in amendment 215 to move section 11 to after section 79. The provisions in section 11 are a very important part of the adoption structure, as they place restrictions on the arrangements for the placing of children. BAAF Scotland therefore thinks that section 11 should stay where it is at the beginning of chapter 2, which is about the adoption process. I put it to the minister that the equivalent provision in the existing legislation is located in such a position.

Robert Brown: This is not a major issue, per se. As I have already indicated, the effect of section 11 will be the same, whether it is at the beginning, middle or end of the bill. One section has the same force as any other. This is a drafting matter, and it is logical to move the sections in the way that has been suggested. Amendment 215 does not in any sense suggest a downgrading of section 11, which is what Mr Ingram seems to be implying. I therefore ask the committee to accept these drafting suggestions.

Amendment 215 agreed to.

Section 11, as amended, agreed to.

Section 12—Adoption societies which are not registered adoption services

11:30

The Convener: Amendment 216, in the name of the minister, is in a group on its own.

Robert Brown: Amendment 216 is purely technical; it removes a redundancy in the bill.

Section 12(1)(a)(i) of the bill refers to a registered adoption society within the meaning of section 2(2) of the Adoption and Children Act 2002. Section 12(3) of the bill, which amendment 216 seeks to delete, states that that reference covers only the voluntary organisations that are registered under part 2 of the Care Standards Act 2000. However, section 2(2) of the Adoption and Children Act 2002 explicitly states that, for its purposes, a registered adoption society must be registered under that part of the 2000 act. Section 12(3) of the bill is therefore redundant.

I move amendment 216.

Amendment 216 agreed to.

Amendment 217 moved—[Robert Brown]—and agreed to.

Section 12, as amended, agreed to.

Section 13—Prohibition of certain payments

The Convener: Amendment 288, in the name of Adam Ingram, is grouped with amendments 219, 159, 279 and 302.

Mr Ingram: The amendments in this group concern payments in relation to adoption. Amendment 288 is redundant as a consequence of certain proposed Executive amendments, so I do not propose to press it.

Amendment 302 is designed to replace in its entirety section 77, which deals with adoption allowances. BAAF Scotland, which drafted amendment 302, argues that section 77 simply duplicates the current messy and inconsistent system in which adopters are subject to a postcode lottery. The Executive is moving towards the introduction of regulations for a national fostering allowances system, which will include a recommended minimum rate of payment, so logic dictates that the same should be done for adoption allowances.

The proposed new section that would be inserted by amendment 302 is couched in terms similar to those in section 103, which deals with fostering allowances. It should be noted that the introduction of a national system for adoption allowances would be in line with the recommendations of the adoption policy review group. I do not understand why those

recommendations were not accepted by the Executive.

Ken Macintosh's amendment 159 appears to try to achieve the same aim as amendment 302. If the committee were minded to accept his amendment instead of mine, that would also improve the bill.

I move amendment 288.

Robert Brown: As Adam Ingram says, amendments 159 and 302 deal with the same issue and seek to create a national system of specified rates for adoption allowances. I acknowledge the spirit of the amendments but I am not in a position to support them this morning. It is not the view of Scottish ministers that having a national rate of adoption allowances under which each child is paid a set amount based on factors such as age is the best way forward. The purpose of an adoption allowance is different from that of a fostering allowance. The purpose of an adoption allowance is not to reimburse parents for out-of-pocket expenses, as is the case for fostering allowances, but to help with particular needs that an adopted child might have. Needs vary greatly from child to child, and the needs of any child will also vary as he or she grows older. I therefore believe that decisions on adoption allowances should continue to be made on a child-by-child basis, and not on a predetermined scale.

At present, adoption allowances are decided by regulations made under powers in the Adoption (Scotland) Act 1978. I acknowledge Adam Ingram's point that the decision-making process in relation to the amount of an allowance can vary from one local authority to another. Although I feel that it is right that different allowances should be paid to meet different needs, I very much understand and accept the frustration and anxiety that can be caused by apparent disparities.

As drafted, the bill contains the power for Scottish ministers to make regulations on adoption allowances. We intend to use that power to ensure that local authorities make clear and systematic decisions about adoption allowances that are transparent and accountable. That will be the best way to improve the system.

I want to ensure that adopted children and their families are treated fairly and equally, no matter where they live, when decisions are taken on adoption allowances. We accept that central point. However, the best way in which to achieve that is to ensure that adoption allowances are based on the specific circumstances and needs of individual children and not on a scale that may have no real relevance to particular children throughout their childhood. We do not need a one-size-fits-all approach; we need a system that meets the complex and often specific and different needs of individual children. That will be best achieved through the bill as drafted and not through amendments 159 or 302. Given that, I hope that Ken Macintosh and Adam Ingram will not move their amendments.

Adam Ingram said that he will not press amendment 288, so I do not need to deal with it. Amendment 279 will remove section 77(5). Amendment 219 is a minor technical amendment that will insert an "or" into a list of factors, to clarify that each of the factors may apply, rather than all of them having to apply. That is subsidiary to the main point.

Mr Macintosh: I lodged amendment 159, which again was suggested by Children in Scotland and BAAF Scotland, primarily because, although we discussed allowances at stage 1, we did not do so in sufficient detail—the matter certainly was not covered in our stage 1 report. When I reread our report, it was hard to find out whether we consciously made a decision about a national allowances scheme. We heard evidence about the difficulties with the current situation. At that point, my judgment was to make a distinction between fostering and adoption allowances. We heard a lot of evidence that fostering is increasingly becoming more akin to professional support or care—that is a bit unfair, but the evidence was along those lines. We also heard that, because adoption creates a new family, many financial obligations come with that. I made the distinction in my head, but that is probably a rather old-fashioned way of thinking about adoption and fostering. All the evidence that we have heard on the bill is that the nature of adoption is changing. The amendments that I was not able to move at the previous committee meeting were about increasing adoption support. It is only fair that we consider adoption allowances, which are a key part of adoption support.

The rather artificial distinction that I made between adoption allowances and fostering allowances is contradicted by the fact that, no matter what we think, we have a system of adoption allowances, which means that we acknowledge the need for the state to provide financial support for families who adopt. The evidence that we heard was that the current system does not work well, because of variations and other difficulties, such as the fact that adoption allowances are means tested and therefore, even if they are awarded, can have little financial impact. Given that evidence and our acknowledgement of a need for allowances, is it really fair to have an uneven playing field in Scotland, so that whether families receive an adoption allowance depends on where they live? Surely the system should be equitable and fair for all. We should not introduce a degree of strife for families or question marks about whether they will be entitled to an allowance or what the level will

be. All the arguments that apply to a national scheme of fostering allowances apply in the case of adoption allowances, although not to the same extent. We should explore the issue in more detail.

I want to raise one issue about adoption allowances that was raised at stage 1 but which we did not pursue much, although I am not sure whether it requires an amendment. Actually, convener, I will not pursue that now, because it does not relate to amendment 159. I will reserve that issue for stage 3.

Fiona Hyslop: I, too, agree that, on reflection, we should have explored the issue of allowances more at stage 1. I will pick up the minister's points and discuss Adam Ingram's and Ken Macintosh's points a bit further.

The minister talked about adoption allowances being based on individual need, and I am struck by the fact that adoption allowances are tied in with adoption support services. We are frequently approached by constituents who need support to help children through traumatic experiences. Bearing in mind that the bill will cover older children rather than babies and that many will have gone through traumatic experiences and suffered abuse, attachment issues and social-emotional behaviour will have to be dealt with.

If we had a wonderful system of adoption support services, that would perhaps mitigate the need for adoption allowances. Although the minister seems to be saying that we want to move to such a system, we are still in a situation in which many adoptive parents want to provide specialist and buy-in support for children who have particular difficulties, and that is where adoption allowances would be required. I wrote to the minister recently—in fact, I received a reply just this week—on the support that is available for children who have suffered abuse. As a country, we have a system that seems to be concentrated on crisis intervention. I know that many children's organisations are concerned about the available level of support after abuse.

Bearing in mind that many adoptive parents are providing support, I would like to explore the idea of setting out the parameters of what allowances would be for. Whether that is done in guidelines or is something that we return to at stage 3 to put into the bill, we should explore the idea.

My other point is about foster carers. Many foster carers become adoptive parents, but there is obviously a financial penalty in doing so. That has been raised with the committee, and there is a question about the potential of transitional allowances.

There is more to do, and I will be interested in the minister's response.

Robert Brown: I appreciate the opportunity to come back in, and I thank members for their contributions. As was mentioned, the issue was not fully explored in earlier debates, but some good and interesting points have been made today. I am conscious that members want to insert into the bill a power rather than a duty, and as such I would like to have a fresh look at the idea.

I do not want my comments to be taken as an undertaking to introduce a national system of allowances—that is a step further down the line—but I want to continue to engage with the committee on these difficult issues and how to make progress.

Fiona Hyslop made valid points about the link to adoption support services and about support after abuse. Ken Macintosh's point about the modernisation of the concept of adoption was also relevant. In a sense, we go from placements to temporary fostering to fostering to permanence orders to adoption. The context is not the old Roman law scene in which someone is looking for an heir and successor to their name and family. The context has changed, and there are issues about transitions.

Several good points have been made. I am not entirely satisfied with the wording of the suggested additional power, but I undertake to come back to the committee before stage 3 with a view to seeing what we can usefully do. If we have the tools in the bill, the question of what we do with them, particularly considering the wider powers that members are looking for, will be a matter for subsequent debate. At least we will not need fresh legislation to consider the matter again or to empower us. If the committee is satisfied with that response, I hope that Mr Ingram will be happy to withdraw amendment 288, thus enabling ministers to consider the issue further.

Mr Ingram: On the basis of the minister's undertaking, I am happy to withdraw amendment 288, although I reserve the right to return at stage 3 after we have explored the issue further.

I would like to make a point about adoption allowances being seen as part of the continuum of post-adoption support. In the past, we have had the notion that once adoption has happened, that is the end of the problem. We have to get away from that mindset. I am also conscious of Fiona Hyslop's point about the transition from fostering to adoption, and it seems to me that a financial penalty probably is involved in that. I would certainly welcome the minister's thoughts about how that might be addressed.

On the basis of the minister's undertaking, I intend to withdraw amendment 288 and not move amendment 302.

Amendment 288, by agreement, withdrawn.

11:45

Meeting suspended.

11:55

On resuming—

The Convener: The next group of amendments is on possession of children. Amendment 218, in the name of the minister, is grouped with amendments 230 to 232, 236 to 243, 245, 246, 272 to 275 and 145.

Robert Brown: I thank Lord James for picking up the point of the amendments in the group in an earlier debate. There are lots of amendments in the group, but the issue is straightforward. At stage 1, a number of people commented that it is not appropriate for the bill to refer to the "possession" of a child. I am happy to agree with that, and the amendments in the group were lodged accordingly. The point is also made in Lord James's amendment 145 to the bill's long title.

I move amendment 218.

Lord James Douglas-Hamilton: I thank the minister. It is a great step forward for children to be regarded never as possessions but as individuals and persons in their own right. The Children (Scotland) Act 1995—as the minister who took that legislation through, I had a good deal to do with it—changed the law relating to children by implementing in Scotland the UN Convention on the Rights of the Child. The key aspect of the convention is that we should respect children as people rather than as objects of ownership or possession. The bill should reflect that philosophy, so the amendments are necessary.

I oppose not just children but any human beings being regarded as possessions. I am glad that the minister agrees that that is morally wrong and frankly quite offensive and out of place in today's world, and I am grateful to him for lodging his amendments.

Amendment 218 agreed to.

Amendment 219 moved—[Robert Brown]—and agreed to.

Amendment 37 not moved.

Amendment 220 moved—[Robert Brown]—and agreed to.

Section 13, as amended, agreed to.

Section 14—Excepted payments

Amendment 221 moved—[Robert Brown]—and agreed to.

Section 14, as amended, agreed to.

Section 15—Child to live with adopters before adoption order made

The Convener: Amendment 222, in the name of the minister, is grouped with amendments 223, 224, 289, 225, 226 and 290.

Robert Brown: Amendments 222 and 223 are technical amendments.

Amendments 289 and 290, which were lodged by Adam Ingram, are also technical. They seek to alter the text of two of the conditions in section 15 so that they refer to "the applicants or one of them" rather than to "the applicants". The intention is probably to capture joint applicants who live apart—for example, a man who is serving abroad and his wife who remains in Scotland. We believe that the amendments are unnecessary, despite the worries about the 1978 act, because in such a case the soldier's home would still be in Scotland rather than being a temporary place of residence elsewhere. However, there may be more to it than that.

Amendment 225 seeks to remove section 15(4)(a). The condition that the child must be at least 12 months old is redundant because section 15(4)(b) specifies that the child must have lived with the applicant or applicants for at least 12 months, thus ensuring that the child is at least 12 months old—the imperishable logic of these briefings is quite substantial.

Amendments 224 and 226 concern the period for which a child must have lived with the applicant or applicants before an adoption order is made. They alter the wording so that it relates to the time period that immediately precedes the date of the adoption order rather than to the period that precedes the date of the application. It is sufficient merely that the relevant period should elapse prior to an adoption order being made, as under the 1978 act. The current position is preferable to linking the residence requirement to the date of the application. Failure to meet the period of residence criteria, as currently drafted, could not be corrected but would require a new application, which would cause unnecessary delays. If the requisite period under the 1978 act is not met, the court need merely continue the action for a period of time. I hope that the committee will support the amendments.

I move amendment 222.

12:00

Mr Ingram: My amendments 289 and 290 were inspired by BAAF Scotland, which felt that the Executive might have overlooked the fact that section 13 of the 1978 act makes it clear that the child's residence can be with both adopters or one of them. Was that an oversight or does the

Executive have an issue of substance with the existing provisions?

Robert Brown: That is an interesting point. I think that the issue is entirely to do with technical drafting matters; there is no difference in the intention. I do not have a particularly strong view one way or the other, I have to confess. My advice, however, is that the current wording deals with situations that might emerge.

Amendment 222 agreed to.

Amendments 223 and 224 moved—[Robert Brown]—and agreed to.

Amendment 289 not moved.

Amendments 225 and 226 moved—[Robert Brown]—and agreed to.

Amendment 290 not moved.

Section 15, as amended, agreed to.

Section 16—Home visits

The Convener: Amendment 190, in the name of Lord James Douglas-Hamilton, is grouped with amendment 191.

Lord James Douglas-Hamilton: Amendment 190 would ensure that applicants who do not have a home in Scotland would be able to adopt a child. The bill currently provides that only applicants who have a home in Scotland can fulfil the conditions for home visits, which is potentially discriminatory and a barrier that should be removed. It is surely an unnecessary impediment to adoption in some cases in which adoption would be in the best interests of the child.

Amendment 191 is a consequential amendment.

I move amendment 190.

Robert Brown: This kind of adoption application does not happen often in practice but it can cause problems for local authorities when it does, as they have a duty to visit the child in the home of the applicants. A court might not make an adoption order unless it is satisfied that a local authority has had sufficient opportunity to see a child in the home of the applicants. In the past, that has meant that local authorities have had to send a social worker overseas to carry out that duty or use an independent social worker at significant cost. The adoption policy review group therefore recommended that courts should have discretion to dispense with the duty. At first, the Executive supported that recommendation, but in light of consultation responses from local authorities that were concerned at the implications of removing the duty, we changed our position.

This is fundamentally a child protection issue. Although I am sympathetic to the difficulties that local authorities can sometimes face, I believe that the child's welfare must be our prime concern. We have therefore retained the duty by restating in the bill the duty that was in section 13(3) of the Adoption (Scotland) Act 1978.

Amendment 190 seeks to allow a local authority proposed by the applicant and agreed by the court, or an equivalent body, in the country where the applicants live to carry out the Scottish local authority's duties in relation to home visits. It is current practice, when a local authority employee has not been sent to see the child in the home of the applicants, that a court will accept a local authority engaging a local agent, such as a local social worker, consular official, solicitor or military welfare officer to undertake the visit and report back to the local authority, thus enabling it to fulfil the duty. Because local authorities are able to discharge the obligation on them under existing practice, I do not believe that the amendment is necessary.

Sections 16 and 18 must be read in conjunction with section 19. A person who applies to adopt is, under section 18, required to give notice to the local authority in whose area they have their home. Section 19 requires the local authority to investigate the application and report to the court. That investigation will include the home visits that are referred to in section 16.

As for amendment 191, giving notice to a local body that is equivalent to a Scottish local authority would not serve any purpose. That body would not be under any obligation to do anything following receipt of that notice and it would not be within the legislative competence of this Parliament to impose such an obligation. The amendment does, however, raise the important point that it is important to address the need to provide for a Scottish local authority to receive notice of such an application and to carry out the function of investigation and reporting to the court, including carrying out home visits, whether directly or through a local agent.

Sections 16, 18 and 19 restate provisions in the 1978 act. At the moment, there is nothing in legislation to provide which local authority should receive notice, investigate the application, carry out the home visit and report to the court when the applicant does not live in Scotland. That should be addressed by the bill, and there are questions to be considered about which local authority the duty should fall on. Officials are currently exploring that, with a view to lodging an amendment at stage 3.

I hope that Lord James Douglas-Hamilton will be reassured by what I have said and that he will be prepared to withdraw his amendments.

Lord James Douglas-Hamilton: If I understood you correctly, you said that the amendment is not

necessary but that, if it is appropriate to do so, you might return to the issue at a later stage—

Robert Brown: I said that we will return with an amendment on the matter of the local authority receiving notice.

Lord James Douglas-Hamilton: Yes. I would just like to point out that there could be problems with jurisdiction. I would like you to give an assurance that if a person who does not have a home in Scotland is able to adopt a child and it is considered highly desirable that they do, that person will not be discriminated against by the drafting.

Robert Brown: I am subject to legal correction on this matter but, to qualify to adopt in Scotland, the adopters would need to have a permanent domicile in Scotland, which is usually connected with a permanent residence. I appreciate that, sometimes, a person does not have a current home but remains domiciled in Scotland. There could be an issue in that regard. Because of the technical nature of this issue, perhaps I could write to the committee on the detailed implication of the point. The situation in this regard is not quite the same as that which relates to visits, as the assumption in that regard is that everything is in order up to that point. We are trying to set in place the appropriate arrangements. I think that we can scoop this up at stage 3 if any particular difficulty arises.

Lord James Douglas-Hamilton: I would be grateful if the minister could look into this issue. International private law is sometimes fiendishly complex. It might be necessary to return to this matter at stage 3. It would be inappropriate to say that any applicant who lived outside Scotland should not be able to be considered. There might be special circumstances that indicate that that person should be considered. There are any number of cases in which that could be argued.

Robert Brown: The issue is complicated; it is a difficult area. The substance of the matter in hand is the practice of home visits. The notice issue should be able to scoop up the remaining issues to which Lord James Douglas-Hamilton referred. In case I am getting all that wrong, given the technical nature of these matters, I will come back to the committee before stage 3.

Lord James Douglas-Hamilton: In view of the minister's comments, I will not press amendment 190.

Amendment 190, by agreement, withdrawn.

Section 16 agreed to.

Section 17—Reports where child placed by agency

The Convener: Amendment 39, in the name of Lord James Douglas-Hamilton, is grouped with amendments 40, 227 and 228. If amendment 40 is agreed to, I cannot call amendment 227, because of the pre-emption rule.

Lord James Douglas-Hamilton: Amendment 39 clarifies section 17, which is badly worded. Section 18 appears also to be badly worded and places an unnecessary constraint on applications, which is not found in the existing law. Amendment 40 clarifies the whole of section 18. It removes the requirement that notice must be given to the local authority three months before the application and reinstates the requirement for three months' notice to be given prior to an order being granted, which has worked satisfactorily in practice for many years.

I move amendment 39.

Robert Brown: I thank Lord James Douglas-Hamilton for his points on the drafting of the bill. The fundamental point is that the Executive draftsman has followed a particular style of drafting that keeps the bill inherently and internally consistent. I must say that since becoming an MSP I have noticed the fingerprints of different draftspeople on different sorts of legislation.

The point being raised is important, but stylistic. Although the provisions could be drafted differently, they follow a particular style. I ask Lord James Douglas-Hamilton to withdraw amendment 39 on the ground that it does not add or change anything in the bill in policy terms.

Amendment 40 raises more than a style issue and I agree with the policy point that Lord James Douglas-Hamilton makes, but Executive amendment 227 achieves the same effect while maintaining a consistent style. Amendment 227 alters section 18(2) so that an adoption order may not be made unless the applicants have, at least three months before the date of the order, rather than the date of the application, given notice to the local authority of their intention to apply for the order. At the moment, the bill states that they have to give that notice three months before the date of the application. Amendment 227 restores the position under the 1978 act. It is preferable, in that failure to give three months' notice before the date of the application could not be cured and would require a new application, which would cause unnecessary delays. If the three month period before the date of the order is not met, the court merely needs to continue the action for an appropriate period.

Amendment 228 is really to do with the point that Lord James Douglas-Hamilton made earlier. I consider that the term "reside" in section 18(2) should be replaced with "have their home". That would follow section 22(1) of the 1978 act and be consistent with the expression used in section 16.

It would mean that a person who resides abroad but retains a Scottish domicile and has their home in Scotland would not be prevented from adopting. Although the provision is unlikely to be used often, it would enable a solider from the Royal Regiment of Scotland stationed with the family in Germany to adopt under Scottish law. If an adopter has two places of residence in Scotland, notice would be given where their home is.

I ask members to reject amendments 39 and 40 and to accept amendments 227 and 228.

Lord James Douglas-Hamilton: In view of the minister's reassurance, I will not press amendment 39.

Amendment 39, by agreement, withdrawn.

Section 17 agreed to.

Section 18—Notification to local authority of adoption application

Amendment 40 not moved.

Amendments 227 and 228 moved—[Robert Brown]—and agreed to.

Amendment 191 not moved.

Section 18, as amended, agreed to.

Section 19—Notice under section 18: local authority's duties

Amendment 42 moved—[Robert Brown]—and agreed to.

12:15

The Convener: Amendment 229, in the name of the minister, is grouped with amendments 234, 43, 235, 44, 45, 244, 306 and 307. If amendment 235 is agreed to, I will not be able to call amendment 44.

Robert Brown: The purpose of the amendments is to replace references to children who are "in care" with references to children "who are looked after", which reflects the language that was ushered in by the Children (Scotland) Act 1995, with which Lord James Douglas-Hamilton is very familiar. There are a number of references throughout the bill to children "in care". That was not an oversight—several sections are restatements of the Adoption (Scotland) Act 1978, which used that phrase.

The bill as introduced provided an interpretation section that stated that references to children who are "in care" should be read as children "who are looked after". I now accept that it is preferable that the bill does not contain the phrase. Accordingly, we have lodged amendments 229, 234, 235, 244, 306 and 307 to remove it, replacing it with "who are looked after". We have also lodged an amendment to remove the interpretation section, section 111. The Executive's amendments will have the same effect as Lord James's amendments, but cover every occurrence of the phrase where it should be replaced, other than that covered by amendment 43, which we will support.

Amendment 44 seeks to replace the phrase "in the care of", but does not go quite far enough. Executive amendment 235 makes the full amendment that we consider appropriate from a technical perspective. I invite Lord James not to move his amendments, apart from amendment 43.

I move amendment 229.

Lord James Douglas-Hamilton: I am most grateful to the minister. He is confirming that the world did not start in 1999 and that the draftsmen who helped to draft the Children (Scotland) Act 1995 did a good job. Their hard work should be respected.

Amendment 229 agreed to.

Section 19, as amended, agreed to.

Section 20—Restrictions on removal: child placed for adoption with consent

Amendment 230 moved—[Robert Brown]—and agreed to.

Section 20, as amended, agreed to.

Section 21—Restrictions on removal: notice of intention to adopt given

Amendment 231 moved—[Robert Brown]—and agreed to.

Section 21, as amended, agreed to.

Section 22—Restrictions on removal: application for adoption order pending

Amendment 232 moved—[Robert Brown]—and agreed to.

Section 22, as amended, agreed to.

Section 23—Scottish Ministers' power to amend period of time in sections 21 and 22

The Convener: Amendment 233, in the name of the minister, is grouped with amendment 303.

Robert Brown: Section 23 gives the Scottish ministers the power to amend the period of time in sections 21 and 22, which concern restrictions on removal. It is a restatement of section 28(10) of the 1978 act. The power has never been used to amend the five-year period that is set out in the act. In light of that, we consider that the retention of the power is not justified. As a consequence, a further amendment will delete section 109(5)(a),

which refers to an order under section 23. The amendments are technical, but I hope that the committee will support them.

I move amendment 233.

Amendment 233 agreed to.

Section 24—Duty to give notice where child in care of other local authority

Amendment 234 moved—[Robert Brown]—and agreed to.

Section 24, as amended, agreed to.

Section 25—Restrictions on removal of child in care of local authority

The Convener: Amendment 43, in the name of Lord James Douglas-Hamilton, has already been debated.

Lord James Douglas-Hamilton: I will not move the amendment.

The Convener: The minister indicated that he will accept amendment 43.

Lord James Douglas-Hamilton: I am sorry. I thought that the minister's drafting would be superior to mine, but I am grateful to him for accepting the amendment.

Amendment 43 moved—[Lord James Douglas-Hamilton]—and agreed to.

Amendments 235 and 236 moved—[Robert Brown]—and agreed to.

The Convener: We now come to amendment 45, in the name of Lord James Douglas-Hamilton.

Lord James Douglas-Hamilton: Can the minister explain his position in relation to the amendment. Does he accept it?

Robert Brown: That is a trick question. I cannot quite remember.

The Convener: I think that amendment 43 was the only one he indicated support for.

Robert Brown: We do not accept amendment 45. It is covered elsewhere.

Amendment 45 not moved.

Section 25, as amended, agreed to.

Section 26—Return of child removed in breach of certain provisions

Amendments 237 to 239 moved—[Robert Brown]—and agreed to.

Section 26, as amended, agreed to.

Section 27—Return of child placed for adoption by adoption agency

Amendments 240 to 242 moved—[Robert Brown]—and agreed to.

Section 27, as amended, agreed to.

Section 28—Return of child in care of local authority and not placed for adoption

Amendments 243 to 246 moved—[Robert Brown]—and agreed to.

The Convener: Amendment 247, in the name of the minister, is grouped with amendments 248 to 252.

Robert Brown: These amendments to section 28 are all technical, reflecting preferred language. The main point is that the word "return" implies that a child who will now be under the care of the local authority was previously under such care, which may not always be the case.

I move amendment 247.

Amendment 247 agreed to.

Amendments 248 to 252 moved—[Robert Brown]—and agreed to.

Section 28, as amended, agreed to.

Section 29 agreed to.

Section 30—Adoption orders

Amendment 308 not moved.

The Convener: Amendment 291, in the name of Adam Ingram, is in a group on its own.

Mr Ingram: Amendment 291 is inspired by BAAF Scotland. It seeks to ensure that courts will not make any contact conditions unless they really are in a child's interests. Under current law, contact conditions are made only in exceptional circumstances. That approach should be maintained, not least because contact is a matter that arises much more commonly now than it did in the past, given the changing nature of most adoptions in this country.

The first subsection in the amendment is similar to the adoption legislation south of the border and it is suggested that consistency would be helpful for cross-border cases. The second subsection emphasises to the court and all parties that considering does not mean making a condition unless it is really necessary.

I move amendment 291.

Robert Brown: I am not unsympathetic to what Adam Ingram is trying to do in amendment 291, but I am not sure that the amendment is necessary.

It is interesting that the amendment seeks to add further provision after section 30(3), which currently provides:

"An adoption order may contain such terms and conditions as the court thinks fit."

I am not entirely sure whether amendment 291 would become a new subsection (4) or a further paragraph of subsection (3), but in either event the context relates to adoption orders having terms and conditions.

As Adam Ingram rightly pointed out, the slant of the existing law is against adding conditions to adoption orders, although such conditions can be made. That will continue to be the case under the bill, which provides that conditions can be made if they are needed. We gave great consideration to removing that provision because it had not been used much other than in the previous contact situation, for which it is no longer necessary because of the extension of orders made under section 11 of the Children (Scotland) Act 1995. Therefore, amendment 291 is not necessary as such.

The principle that conditions should be attached to adoption orders only in exceptional circumstances is indeed sound, as Adam Ingram accepts. It is worth stating that contact is now a more common issue in adoption cases because of the changing nature of adoption, to which Adam Ingram referred. Failure to include conditions in an order will not necessarily mean that contact will not be possible or will remain unprotected, given that informal contact arrangements can continue after the adoption order has been made. When such arrangements run into difficulties, the bill offers a remedy by removing the current bar on birth parents applying for contact under section 11 of the Children (Scotland) Act 1995. It would be better for people to follow that route rather than—I am not sure whether this is what Adam Ingram was suggesting, but his amendment certainly reads this way to some extent—to seek conditions being placed on the adoption order.

As I am sure Adam Ingram accepts, it can be necessary to change the conditions but such changes can be difficult when the conditions are attached to the adoption order. Courts can still consider contact and, in practice, they do so as a matter of routine. They can also make a section 11 order at the same time as the adoption order if they feel that contact needs to be enshrined in a court order. Such orders have the added advantage of being easier to alter if, as often happens, the situation changes.

In short, I am not adamantly opposed to Adam Ingram's suggestion but I do not think that it is necessary. Amendment 291 could add an element of confusion into the existing, relatively clear, arrangements in the bill. Given those reassurances, I hope that Adam Ingram will withdraw amendment 291.

Mr Ingram: I wanted some reassurance that the current situation, whereby contact conditions are made only in exceptional circumstances, will continue. The minister's remarks suggest that it will. On the basis of that assurance, I will not press amendment 291 at this stage. Perhaps I can discuss the matter with the minister with a view to ensuring that we are both, as it were, singing from the same song sheet.

Robert Brown: I will be happy to do that.

Amendment 291, by agreement, withdrawn.

Amendment 253 moved—[Robert Brown]—and agreed to.

The Convener: Amendment 292, in the name of Adam Ingram, is grouped with amendments 293, 294, 298, 299, 301 and 305.

Mr Ingram: All the amendments in this group are on the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, and have been suggested by BAAF Scotland. I have provided alternatives: one set of amendments is amendments 292 to 294, 298 and 299; the other set is amendments 301 and 305.

Under current adoption legislation, convention adoption orders, which are made in a different way from all other Scottish orders, are clearly defined. As the bill stands, the only provision for convention adoption orders is a definition in section 111, but the definition appears ambiguous, as it is unclear which sections of the bill will apply to convention adoption orders and which will not. BAAF also believes that what such orders are and what the basis for court applications is should be stated on the face of the bill.

One suitable approach is to amend sections 30 to 34, which is what the first set of amendments in the group does. The other set, amendments 301 and 305, create a new section on convention adoption orders after section 64, with an amended definition in section 111. I hope that the minister will be able to accept one set of amendments, thereby satisfying BAAF's call for clarity in this area.

I move amendment 292.

12:30

The Convener: No other member wishes to speak on this group of amendments, so I ask the minister to respond.

Robert Brown: I am not surprised that no other member wishes to speak on the amendments; this is a somewhat technical aspect. I hear what Adam

Ingram has to say, but there is a fallacy in his argument. The approach that he suggests was not that which was used under the Adoption and Children Act 2002. It is necessary for the additional definitions to be included. Convention adoption orders are given effect by regulations made under section 1 of the Adoption (Intercountry Aspects) Act 1999. The current regulations are the Intercountry Adoption (Hague Convention) (Scotland) Regulations 2003 (SSI 2003/19).

Section 111 of the bill as introduced states:

"'Convention adoption order' means an adoption order which, by virtue of regulations under section 1 of the Adoption (Intercountry Aspects) Act 1999 (c.18), is made as a Convention adoption order".

We believe that that is sufficient for convention adoption orders to be recognised in the primary legislation. Separate provisions are unnecessary, and they could create confusion, given the powers contained in section 1 of the 1999 act. At each stage of the Hague convention adoption process between two states, strict articles must be complied with by virtue of the 2003 regulations, under which a Scottish court must be satisfied that the terms of the Hague convention have been met before making a convention adoption order. That includes receipt of information confirming that the child has been freed for adoption and evidence that consents have been obtained. As such, and in line with the approach that was taken in the 2002 act, we feel that the governing regulations provide all the detail required in relation to the Hague convention adoption process and the guidance that the practitioners and others involved should have, and that no further provision is required in the bill.

We share an understanding of the need for clarity, but we are saying that the clarity already exists elsewhere. It would cause confusion to replicate those provisions in the bill beyond the necessary reference that we have made in the interpretation section.

Mr Ingram: I am not entirely sure whether I am convinced by the minister's arguments. I will not press my amendments at this stage, but we might need to examine the matter again. I might write to the minister about the issues involved.

Robert Brown: I am happy to discuss the matter with Adam Ingram—almost certainly in the presence of officials, for my reassurance.

Amendment 292, by agreement, withdrawn.

Section 30, as amended, agreed to.

Section 31—Adoption by certain couples

Amendment 254 moved—[Robert Brown]—and agreed to.

Amendment 1 moved—[Lord James Douglas-Hamilton].

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Douglas-Hamilton, Lord James (Lothians) (Con)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Byrne, Ms Rosemary (South of Scotland) (Sol)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Smith, Iain (North East Fife) (LD)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 1 disagreed to.

The Convener: Amendment 255, in the name of the minister, is grouped with amendments 258, 259 and 297.

Robert Brown: The amendments in the group define the word "parent" in specific circumstances. A general definition of the word "parent" is not included in the bill; the absence of such a definition means that the expression has its ordinary dictionary meaning.

The word "parent" should cover not only natural parents, but adoptive parents, persons who are a mother or father by virtue of sections 27 and 28 of the Human Fertilisation and Embryology Act 1990 and persons in whom parental rights and duties are vested by virtue of a parental order under section 31 of that act—that is, those who are treated in law as parents. Those parents may or may not have parental responsibilities or rights—that is often immaterial to the section of the bill in question—but the word "parent" in sections 31 and 32 should mean only a parent with any parental responsibility or right, and the amendments provide for that definition. The same definition should be applied to amendment 260, which relates to section 33(2), which we will debate in due course.

I move amendment 255.

Ms Byrne: I am concerned that amendment 255 will leave out unmarried fathers who did not have parental responsibilities and rights prior to the Family Law (Scotland) Act 2006. They may be involved with the child but not have retrospective rights.

Mr Ingram: BAAF Scotland objects to amendment 255 for reasons that are slightly

different from those that Rosemary Byrne has given. BAAF Scotland objects because the definition of the word "parent" is not sufficiently wide. The proposed definition of a parent is someone

"who has any parental responsibilities or parental rights in relation to the child."

However, people who acquire full parental responsibilities and rights in relation to a child are sometimes not parents. A child may have a step-parent who has obtained a residence order under section 11 of the Children (Scotland) Act 1995, or a grandparent, another relative or a friend may have such an order because the child's birth parent has died, is incapable of caring for the child or is unable to do so. Such people should not be excluded from consenting or not consenting to a subsequent adoption.

Fiona Hyslop: Rosemary Byrne made a substantive point about fathers without parental responsibilities and rights prior to the Family Law (Scotland) Act 2006. However, the minister might want to reconsider the drafting of section 31 on the ground that although the definition of "parent" in amendment 255 may be appropriate for section 31(1)(b) in strict legal terms, it would not, for the reasons that Adam Ingram has given, be appropriate when it comes to consent. A blanket definition of the word "parent" will apply in different circumstances, and I am particularly concerned about consent. I am thinking of, for example, the step-parent of a child whose birth parent has died. There may need to be a broader definition of the word "parent" than someone who can get an adoption order under section 31(1). Perhaps the minister could reconsider the drafting of the section so that it is a bit more explicit and focuses on specific needs, rather than having a blanket definition that could have consequences that he may not have foreseen.

Mr Macintosh: I echo BAAF Scotland's concerns, which Adam Ingram mentioned. I will not repeat them, but it questioned whether the definition of "parent" in amendment 255 is wide enough.

Robert Brown: Members have made a number of points, for which I am grateful. The area is complex; we have had difficulty with it in considering other legislation. I will review the points that members have made in the debate afterwards to ensure that we have not missed anything or got anything wrong.

Rosemary Byrne mentioned unmarried fathers without parental rights. The implication is that consent by them is not required, but they would receive notification and could seek to make a case if they wanted to do so. In other words, they can come in on the matter in certain situations, but there would be no absolute requirement for them to consent. They could not hold things up, which is probably right.

Mention was made of grandparents, who are not parents in the sense that we are discussing. In consent situations, it is probably not appropriate that grandparents should be required to give consent; that would be going too far. I think that I am right in saying that grandparents have a right to express their views on such matters, when that is appropriate.

Given the complex nature of the family situations that now exist, there is the potential for quite a number of people to be involved in the adoption process. We must strike a balance. As well as giving to people who have a legitimate and genuine interest in an adoption rights that they can exercise, we must not allow the adoption process to become overly complicated or to involve so many people that it becomes difficult to get adoptions through. I am concerned about that.

I am aware of the point that BAAF made. We have taken the view that to require the consent to be obtained of anyone who had a parental responsibility or right would be too onerous. I have mentioned grandparents who have a right of contact. That right will not necessarily be affected by the adoption of the child. It will be possible for section 11 orders to continue. We are talking about a whole new ball game. Under the previous legislation, adoption usually cut off contact with members of the natural family, but under the bill, grandparents' rights will not be adversely affected in such situations.

Fiona Hyslop: I have a question about consent that relates to section 33. Let us take the scenario in which a child's parents have been killed in a car crash and the grandparents have taken on parental responsibilities and rights. If it is subsequently decided that the child should be put up for adoption, would the grandparents have no right to be asked for consent? Is that what your proposals would mean?

Robert Brown: The answer to that would depend on the situation. If the grandparents had applied for a guardianship order, they would have consent rights. If that was not the position, they would not have consent rights, but they would have the opportunity to put their case. I am perfectly sure that in such a situation, the court would take seriously the grandparents' views.

However, it seems fairly unlikely that grandparents who had a residence order would find themselves facing an adoption order. I cannot see how that would come about, unless the children had been taken away from the grandparents and were no longer resident with them. We might be talking about a theoretical

situation rather than one that might arise in practice.

I will take account of what has been said. We must work to ensure that we have got things right and that our proposals are compatible with all the other sections of the bill. We think that our approach is the right one, but I want to take on board the comments that have been made and to respond to them. If individual members feel that our proposals are wrong and want to discuss matters in detail, I would be happy to do so. We are considering a delicate and difficult issue. We must strike a balance between recognising people's rights and not clogging up the adoption process by involving people who are on the edge of it. It is important that we get our proposals right, so I would be more than happy to discuss matters further with members, if that is what they wish.

The Convener: The question is, that amendment 255 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Alexander, Ms Wendy (Paisley North) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Macintosh, Mr Kenneth (Eastwood) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Smith, Iain (North East Fife) (LD)

AGAINST

Byrne, Ms Rosemary (South of Scotland) (Sol)
Ingram, Mr Adam (South of Scotland) (SNP)

ABSTENTIONS

Hyslop, Fiona (Lothians) (SNP)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 255 agreed to.

Amendment 293 not moved.

Section 31, as amended, agreed to.

12:45

The Convener: I inform members that I intend to finish the meeting at around 1 o'clock, by which time I hope that we will have reached section 36—that is my target. We still have several groups to debate and quite a few votes to get through, so we will see what progress we make.

Section 32—Adoption by one person

Amendment 256 moved—[Robert Brown]—and agreed to.

Amendment 2 not moved.

Amendments 257 and 258 moved—[Robert Brown]—and agreed to.

Amendment 3 not moved.

Amendment 259 moved—[Robert Brown]—and agreed to.

Amendment 294 not moved.

Section 32, as amended, agreed to.

Section 33—Parental etc consent

The Convener: Amendment 260, in the name of the minister, is grouped with amendments 295 and 296.

Robert Brown: This group of amendments relates to the grounds on which a court can determine whether the consent of a parent or guardian to the making of an adoption order can be dispensed with. Ordinarily, a parent or guardian must consent to the making of an adoption order. However, in some cases, it is clear that such consent will not be given, and the court must then decide whether it can dispense with the need for such consent. Indeed, that is an acknowledged technique under the current adoption legislation.

As introduced, the bill allows the court to dispense with the need to secure consent if

"the parent or guardian cannot be found or is incapable of giving consent, or … the welfare of the child requires the consent to be dispensed with."

Amendment 260 seeks to permit dispensing with the consent of the parent or guardian if they have died. Although such a person might well be "incapable of giving consent", that relies on the provision being interpreted generally as opposed to being interpreted in relation only to a living person's capacity to give consent. In the past, the courts have not interpreted similar provisions in that way and, in any case, adding that further category removes any doubt in that respect.

Amendment 295 seeks to insert references to subsections setting out two new grounds for dispensing with consent under amendment 296. The first relates to a parent or guardian who has parental responsibilities and rights but is neither discharging those responsibilities nor exercising those rights and, in the court's opinion, is likely to be unable to do so satisfactorily. In practice, that provision will cover cases in which a parent technically has parental responsibilities and rights but has not discharged or exercised them satisfactorily in the past. Such responsibilities and rights will usually have been suspended by a supervision requirement and the question then for the court is whether there is a probability that the suspension will be lifted following a review of the supervision requirement.

The second ground relates to a parent or guardian who, because of the making of another order, does not have parental responsibilities and

rights and is unlikely to regain them. If either ground exists and the welfare of the child requires the consent to be dispensed with, the court may dispense with the need for the consent of the parent or guardian. The court will not be free to dispense with consent simply if it considers that the child's welfare requires that to happen. I believe that that issue was raised at stage 1. Of course, consent should always be sought in the first place, but the provision allows the court to dispense with it if it is being withheld to the child's detriment.

I move amendment 260.

Mr Ingram: BAAF Scotland objects to amendment 296, particularly proposed new subsection (2B), because it refers only to current or future situations not to past parental circumstances. That might open up some cases to litigation, which, of course, is the direct opposite of what the bill seeks to do. For example, what of a reformed drug user who might be able to assume care of their child, but the child has become established in the care of others as a result of the birth parent's failings and has no bond or contact with them?

Ms Byrne: My point is similar to my previous one about the unmarried father who does not have retrospective rights under the new Family Law (Scotland) Act 2006 and so would not have parental rights and responsibilities. I ask the minister to explain what the situation might be when there has been, for example, drug and alcohol misuse. For whatever reasons, the father might never have been allowed to participate in the child's life and grandparents might also not have had that opportunity.

Mr Macintosh: I would like to hear the minister's response to Adam Ingram's comments on amendment 296. BAAF Scotland suggests that the wording is forward looking and would lead to further legal challenge. In other words, if there is an assessment of whether someone is likely to be able to exercise parental duties, the decision is likely to be challenged. It would be better if the assessment were retrospective—BAAF has suggested wording for an amendment that could be lodged at stage 3—and looked back on whether they had exercised their responsibilities correctly. The decision would be made based on their past behaviour rather than on an estimate of their future behaviour.

We are not arguing against the general argument that people who have not behaved like a parent should not be allowed to hold up the adoption process, but we are trying to make the grounds for the decision less challengeable and clearer.

Robert Brown: I understand the point that members are making. There is a fairly narrow point of distinction between us, but it is nevertheless important.

The central point is that the justification for adoption is that it is in the child's best future interests. Therefore, the way in which amendment 296 is phrased is entirely logical. Of course, what has happened in the past is not irrelevant; it is relevant and is of interest as a way of judging what might happen in the future. Clearly, if there have been all sorts of failures in the past and that is the on-going position, it is highly unlikely that adoption will be refused. However, in the case of a reformed drug addict, which has been raised, there can be a gradation of different situations.

A reformed drug addict might have had no dealings with the child in the past and there might be no likelihood of any contact in the future. If it is reasonably clear that the responsibilities are not being exercised and will not be exercised in future, there will be no likelihood of a court not approving the adoption. However, we can envisage an in-between position in which the reformed drug addict has re-established some element of contact with the child. I do not want to prejudge the situation, but such a situation might raise different considerations about what might happen in the future. In that context, the barrier to be overcome might be fairly high but it might not be impossible in certain conceivable circumstances. Of course, what has happened in the past will be significant in judging what is likely to happen in the future but, in itself, past failure, if it is not indicative of future failure, need not necessarily justify adoption. There could also be European convention on human rights issues in respect of deprivation of family life and so on.

When birth parents want to contest an adoption, they will be able to dispute what has happened in the past as much as what might happen in the future. Amendment 296 does not entirely prevent that from happening. In many cases, the ball game will be a fairly tedious recitation of events that have taken place and explanations of why this or that was the position. I would be nervous about the implications if we drifted into a situation in which a parent who could be satisfactory lost out because there was a failure to proceed appropriately swiftly to adoption and, instead, a succession of care placements had been allowed to erode the parental bond. As always, a series of different ball games can emerge and there is a gradation.

Amendment 296 deals with the issue correctly and will enable the court to have sufficient flexibility in the relatively unusual but nevertheless possible situation in which, although the background is awful, the parent still has contact

with the child and there is potential for the future. We must also bear in mind the fact that other arrangements, such as permanence orders, fostering arrangements and supervision orders, provide a safeguard.

A couple of other points were raised about the position of unmarried fathers and grandparents. Both those categories of people might have an interest in applying to the courts for contact—or, indeed, for residence—if the circumstances are appropriate. They have had that opportunity in the past and will continue to have it in future, subject to the provisions in the bill.

If an adoption is going ahead without such people having made their interests known, it is highly unlikely that their interests will be active. However, it would be for the court to interpret each situation in the light of the provisions laid out in amendment 296.

I hope that my fairly detailed explanation will reassure people who have concerns about various issues.

Amendment 260 agreed to.

Amendment 295 moved—[Robert Brown]—and agreed to.

Amendment 296 moved—[Robert Brown].

The Convener: The question is, that amendment 296 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Alexander, Ms Wendy (Paisley North) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Macintosh, Mr Kenneth (Eastwood) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Smith, Iain (North East Fife) (LD)

AGAINST

Byrne, Ms Rosemary (South of Scotland) (Sol)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 3, Abstentions 0.

Amendment 296 agreed to.

Amendment 175 not moved.

Amendment 297 moved—[Robert Brown]—and agreed to.

Amendment 298 not moved.

Section 33, as amended, agreed to.

Section 34—Consent of child aged 12 or over

The Convener: Amendment 261, in the name of the minister, is grouped with amendments 263 and 264.

Robert Brown: Amendments 261 and 263 are technical amendments to give clarity and consistency. I ask the committee to support them.

Rosemary Byrne's amendment 264 covers similar ground but approaches it from a slightly different angle. In the bill, we follow the general line that a child of 12 or over is generally held to be of sufficient maturity to give his or her consent to the various orders, unless the court is satisfied otherwise. Therefore, consent is normally required from a child aged 12 or over, but not from a child under that age, although such a child's views will be taken into account in accordance with section 9.

Amendment 264 comes to the same conclusion about maturity, but from the opposite direction. It would require the consent of any child that the court considered to be capable of consenting. That would be a significant change from the position that is set out in the Adoption (Scotland) Act 1978, and such a change was not proposed by the review group. Therefore, the committee should reject amendment 264. The amendment would also raise many other practical difficulties.

I move amendment 261.

Ms Byrne: I have listened to the minister and will not move amendment 264, but I will consider the issue again for stage 3.

Amendment 261 agreed to.

Amendments 262 and 263 moved—[Robert Brown]—and agreed to.

The Convener: Amendment 176 is in the name of Lord James Douglas-Hamilton.

Lord James Douglas-Hamilton: The principles behind the amendment have been voted on, so I will not move it.

Amendments 176, 264 and 299 not moved.

Section 34, as amended, agreed to.

Section 35—Restrictions on making orders

The Convener: Amendment 300, in the name of Adam Ingram, is in a group on its own.

Mr Ingram: Amendment 300 would make a minor change to section 35. It seeks to include the old Scottish act and the old English and Welsh act—the Adoption (Scotland) Act 1978 and the Adoption Act 1976—in the list in section 35(3). The Executive has indicated that it will make the change in the transitional provisions for the bill. However, BAAF Scotland believes that it should be included in the bill for future reference.

Transitional provisions are intended for short-term use, whereas section 35 will be used for the

whole life of the bill. It is theoretically possible that the refusal of an adoption order under the 1978 act or the 1976 act could be relevant to proceedings more than 10 years after the bill comes into force, when courts and others may have lost sight of transitional provisions.

I move amendment 300.

Robert Brown: The issue is a narrow one and there is not a difference of principle. Amendment 300 relates to a transitional matter: the effect of older legislation that is being replaced. I accept that, during a child's childhood, it may be possible for such an issue to arise and that the possibility to which Adam Ingram refers may exist for a certain tranche of time. However, it is highly unlikely that there will be a big gap of the length that Adam Ingram describes—the situation is highly likely to have moved on in the meantime. Therefore, the issue is properly described as transitional and can be dealt with in that fashion. There is not a difference of principle between us. I ask the committee to resist Adam Ingram's amendment 300.

Mr Ingram: I will not press amendment 300, given the minister's remarks.

Amendment 300, by agreement, withdrawn.

Section 35 agreed to.

Section 36 agreed to.

The Convener: At that point, I will conclude day 2 of stage 2 proceedings on the bill, if members are content with that. At next week's meeting, we will resume consideration of the remaining sections of the bill at section 37. I remind members that the deadline for lodging amendments is 12 o'clock on Friday. I thank the minister and his team, members and particularly the clerks, for getting us through this morning's complex business.

Meeting closed at 13:02.

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