EDUCATION COMMITTEE

Tuesday 13 February 2007

Session 2

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EDUCATION COMMITTEE
4th Meeting 2007, Session 2

CONVENER

*Iain Smith (North East Fife) (LD)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Ms Rosemary Byrne (South of Scotland) (Sol)
*Fiona Hyslop (Lothians) (SNP)
*Mr Adam Ingram (South of Scotland) (SNP)
*Marilyn Livingstone (Kirkcaldy) (Lab)
*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)
Tommy Sheridan (Glasgow) (Sol)
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)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Mark Roberts

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 6

Scottish Parliament

Education Committee

Tuesday 13 February 2007

[THE CONVENER *opened the meeting at 13:33*]

Protection of Vulnerable Groups (Scotland) Bill: Stage 2

The Convener (Iain Smith): Good afternoon, colleagues, and welcome to the fourth meeting of the Education Committee in 2007, in our new Tuesday afternoon slot. As there is only one item on the agenda today, it should be a short meeting.

I welcome the Deputy Minister for Education and Young People and his usual team of colleagues for consideration of the Protection of Vulnerable Groups (Scotland) Bill at stage 2. This is the first day of consideration of amendments. I remind the minister and his team that, in stage 2 proceedings, although the minister may take advice from his officials, only the minister will be able to participate in the debate. Members should have copies of the marshalled list, the groupings and the bill. I will do my best to take us through this fairly complex set of amendments logically and coherently.

Section 1—Duty of Scottish Ministers to keep lists

The Convener: The first group of amendments is on the combination of children's and adults' lists. Amendment 149, in the name of Lord James Douglas-Hamilton, is grouped with amendments 150, 23, 151, 153 to 161, 164 to 172, 174, 176, 177, 179, 181, 183, 185, 186, 190 to 197, 199 to 212, 220 to 223 and 256 to 259. I will not read out that list again. The paper on the groupings contains information about pre-emptions in the group.

Lord James Douglas-Hamilton (Lothians) (Con): First, I thank the convener for arranging the groupings so quickly and the clerks for working overtime to ensure that that was possible. On a general procedural point, the committee must consider 200 amendments in two days, which is a very constricted timescale and puts everyone under considerable pressure. Perhaps in due course the Procedures Committee should consider the matter, in relation to bills in general.

Amendment 149 was lodged on behalf of the Law Society of Scotland and questions why there should be two separate lists: a list of people who are barred from working with children; and a list of people who are barred from working with protected adults. The Law Society noted that no reason appears to have been given for an approach in which an individual could be barred from working with children but not barred from working with protected adults, or vice versa. It thought that it would be easier to administer one list and that a one-list system would certainly be more understandable to the people who required access to the list.

I hope that the minister will consider amendment 149 but, if it is not agreed to, I will not move the other amendments in my name in the group.

I move amendment 149.

The Deputy Minister for Education and Young People (Robert Brown): I am sorry to start off on a negative note after Lord James's gracious introduction. However, the issue that is raised is not new and there has been much discussion about whether the bill should provide for one list or two. It is fair to say that there is a divergence of views among the stakeholders who have given evidence.

The objective of the bill is to keep unsuitable individuals out of regulated work and to minimise bureaucracy for employers and scheme members, without depriving individuals of their right to earn a living—that is important. The approach has been one of minimal intervention.

The arguments for a single list are centred round two points: ease of use for employers and other users; and the view of some stakeholders that no individual can be unsuitable for one workforce but not the other. In response to the first point, I say that the two-list system will not in practice impose a significant additional burden on employers or users. Individuals who are unsuitable for work with children will be included in the children's list and, similarly, individuals who are unsuitable for work with adults will be included in the adults' list. It is likely that many individuals will be on both lists, particularly in cases of physical or sexual abuse or significant neglect in a care setting. All that the employer must worry about is whether the individual is on the relevant list for the regulated work that they would do. Therefore there would be no bureaucracy or difficulty for users.

On the second point, experience of the two-list system—the protection of vulnerable adults list and the children's list—which operates in England and Wales shows that a significant number of individuals should not be included in both lists. That means that there would need to be a higher threshold for listing in a single-list system than there would in a two-list system, in which thresholds can be tailored to each list, so protection would be reduced if there was a single list. A two-list approach is more sensitive and flexible. Ministers decided to have a two-list system for those reasons and for reasons of

compatibility with the rest of the United Kingdom. I hope that Lord James will accept that the arguments for a two-list system are persuasive and withdraw amendment 149.

Amendment 23, which is the only Executive amendment in the large group that we are considering, is a technical amendment that the Convention of Scottish Local Authorities suggested and will make clear in section 1 that an individual can be included in one or both lists.

I hope that Lord James accepts the rationale behind our approach. The situation is not black and white, but on balance and given the consultation that has taken place, we think that a two-list system has the advantage of being less intrusive and less likely to knock people out of their employment unnecessarily.

The Convener: I do not support the proposal to have one list. It is important that listing should apply only to those who pose a serious, immediate or continuing risk to a vulnerable group. There may be some people who pose such a risk to children but not to vulnerable adults. For example, a former drug addict may be acting as a counsellor to drug users but may previously have been involved in the supply of drugs to young people. One might deem that such a person is a risk to children but not to those vulnerable adults who are receiving their counselling support.

Likewise, there may be people who have previously abused a position of trust for personal financial gain when working with vulnerable adults. It is unlikely that they would be in a position to do that working with children. Ultimately, we need to ensure that the legislation does not detract from the responsibility of employers to determine the suitability of a person for a specific post. There is a danger that combining the lists might result in lowering the bar, which would, in my view, work against encouraging and ensuring good employment practices. I will not be supporting amendment 149.

Lord James Douglas-Hamilton: I thank the minister for explaining that there are no major administrative problems with having two lists and that there are significant numbers who should not be on both lists. Consequently, I will not press amendment 149. However, amendment 23 is absolutely acceptable—it would make sense for it to be incorporated in the bill.

Amendment 149, by agreement, withdrawn.

Amendment 150 not moved.

Amendment 23 moved—[Robert Brown]—and agreed to.

Amendment 151 not moved.

Section 1, as amended, agreed to.

Section 2—Referral ground

Amendments 153 to 159 not moved.

Section 2 agreed to.

Sections 3 to 6 agreed to.

Section 7—Reference by court

The Convener: Group 2 is on court referrals and automatic listing. Amendment 100, in the name of the minister, is grouped with amendments 24 to 26, 101 to 106, 43 to 47, 118 and 96. There is a pre-emption in relation to this group.

Robert Brown: The amendments in the group make practical improvements to the way in which the scheme works. They simplify the referral power for courts at section 7 by removing the requirement on the court to work out whether the victim was a child or protected adult. The amendments also adjust the effect of being convicted of a schedule 1 offence. In the bill as introduced, conviction of a schedule 1 offence led to automatic listing. The amendments mean that conviction of a schedule 1 offence places the courts under a duty to refer and leads to automatic consideration for listing, rather than automatic listing. That means that an individual will always have the opportunity to make representations prior to a listing decision being made about them.

I move amendment 100.

Fiona Hyslop (Lothians) (SNP): From a technical point of view, what is likely to happen with the relevant information that is to be provided under amendment 100? Does it go to Disclosure Scotland for assessment? What is kept on record? Whereas conviction had been an automatic trigger for listing, I now have concerns about swathes of information going about. I understand the minister's reasoning, but will the information that was previously held by the courts now be duplicated in Disclosure Scotland? Is that an efficient way of dealing with the administration?

13:45

Robert Brown: I do not think that that is how the process will work. In effect, information on convictions for the same offences as before will go in the same direction as before, from the court to the central barring unit. The central barring unit will then make decisions on barring, as it does in a whole series of situations. It will do so on the basis of many things, including any representations that may come from the people themselves.

Even offences that sound the same can, in different circumstances, contain quite different situations. At the higher level, there will be pretty much a rubber-stamp operation. However, at the lower level, other considerations that will make a

difference might come into it. It is not the case—as it would have been otherwise—that a particular sort of offence will get someone listed, full stop, end of story. An element of discretion will be allowed. This will not change the bureaucracy of the process other than by requiring the central barring unit to make decisions about the matter.

The Convener: I am taking that as an intervention.

Fiona Hyslop: Yes. Can I carry on? I have a further question on a technicality of the amendments. I understand the logic of referring to the relevance of an offence as opposed to whom the offence was against. The Executive's amendments seem to be moving away from referring to offences against children and protected adults and refer instead to relevant offences. Does that not mean that the courts, rather than ministers, will have to interpret what a relevant offence is, although ministers will then have to take a discretionary view on whether something is automatically a barring issue?

Robert Brown: It does not. In the general scheme, the central barring unit will receive information about all offences, but schedule 1 offences, in particular, will form a sub-category. There will not be a requirement on the court to get involved in the bureaucracy of decision making in that regard. The courts will deal with the conviction and all of that at the beginning, but the central barring unit will have to make the decision about relevance.

Amendment 100 agreed to.

Amendments 24 and 25 moved—[Robert Brown]—and agreed to.

Amendment 160 not moved.

Amendment 26 moved—[Robert Brown]—and agreed to.

Amendment 161 not moved.

Section 7, as amended, agreed to.

Section 8—Reference by certain other persons

The Convener: Group 3 is on minor, technical and miscellaneous amendments. Amendment 27, in the name of the minister, is grouped with amendments 28, 29, 34 to 36, 51, 56, 119, 120, 72, 74, 86 and 94.

Robert Brown: All 15 amendments in the group are technical in nature and I do not propose to go into the detail of them. If members want clarification on any point, I will be happy to explore that with them; otherwise, I simply leave it at that.

I move amendment 27.

Amendment 27 agreed to.

Amendments 28 and 29 moved—[Robert Brown]—and agreed to.

The Convener: Group 4 is on regulatory bodies: referrals and information et cetera. Amendment 30, in the name of the minister, is grouped with amendments 31, 37, 38, 92 and 97.

Robert Brown: For the scheme to work effectively, regulators of the health professions should have the power to make referrals and be under a duty to provide ministers with relevant information when they are considering whether to list an individual. The bill, as introduced, referred to Scottish regulatory bodies such as the General Teaching Council for Scotland. These amendments extend the relevant provisions to UK-wide health regulatory bodies such as the General Medical Council. They will ensure that the regulatory bodies for doctors and opticians in Scotland will have the same rights and responsibilities as the regulatory body for teachers.

I move amendment 30.

The Convener: Those regulatory bodies did not have the opportunity at stage 1 to comment on the implications of their being included in the bill. I would be grateful if the minister would advise the committee what consultation there has been with the bodies. I also ask him to assure us that there are no conflicts between the requirements of amendment 30 and the regulatory bodies' responsibilities and duties. Are the bodies already covered for the same purposes in the equivalent UK legislation?

Robert Brown: That is the major point that I wanted to make. The bodies are UK bodies and were involved in the discussion of the Safeguarding Vulnerable Groups Act 2006, in which the issues were explored. We have probably not consulted the bodies concerned specifically on including them in the bill but, on the other hand, they are well aware of the position and would have been involved in discussions with UK officials and ministers on the equivalent English legislation. To that extent, their inclusion does not raise anything new for them in principle or in the practical details.

Amendment 30 agreed to.

Amendment 31 moved—[Robert Brown]—and agreed to.

Section 8, as amended, agreed to.

After section 8

The Convener: Amendment 162, in the name of Fiona Hyslop, is in a group on its own.

Fiona Hyslop: Amendment 162 reflects general concern that the bill is focused on people in

regulated work although we know that the greatest risk to children comes from people whom they know. We have just passed amendment 30, which gives certain organisations the ability to refer to ministers information about people who they think are unsuitable to work with children. However, there is nothing in the bill that specifically says that councils, which will have information about people who have abused children in a domestic situation, have powers to refer such information directly to ministers.

At its last evidence-taking session, the committee raised that issue with representatives of COSLA and the Association of Directors of Social Work. We asked about the incidence of reoffending and what likelihood there is that, if somebody has abused a child who is in their care, they will go on to abuse a child subsequently. There was some reflection on the current route of referral for information, which tends to be through the police or Disclosure Scotland. It seems slightly anomalous that it is okay for the registrar of chiropractors to refer directly to ministers in connection with barring, listing and reference for employment but it is not okay for councils to refer to ministers even though they have information on the far wider and more pervasive concerns about people who have abused or are suspected of abusing children in domestic settings, which is the vast majority of cases.

I have lodged amendment 162 to address the reality of the risk. In a sense, it is a probing amendment to find out the minister's response. It is necessary to determine a referral route for councils to ensure that people whom they know to have abused children are not in a position to escape referral. It might be that the bill is more about regulated work situations, statutory bodies and the professional organisations that have been added by amendment 30, but we need to find some way to recognise and bar the more pervasive abusers of children as and when necessary.

The route to barring is the issue. I suspect that there are many difficulties, such as civil liberties arguments about the right to appeal and the exchange of information that does not relate to a conviction. However, we need to explore the matter to ensure that our response in legislation is proportionate.

I move amendment 162.

Robert Brown: I entirely understand where Fiona Hyslop is coming from and she is right to raise the issue, but there are a number of difficulties with amendment 162. I will explain the system in a minute.

Amendment 162 would give councils a wide power to refer anyone to ministers. The central issue of the bill is regulated work, but a person would not need to do regulated work for the council or for anyone else to be referred under amendment 162. Its wide power contrasts with the balance that we have been trying to strike and takes a disproportionate approach to the problem.

The amendment is not necessary anyway, because the bill makes provision for councils to provide information when appropriate. If the council is the employer, it is under a duty to make a referral under section 3. It is reasonably obvious that that section applies if we are talking about people in a council's workforce. In other cases, councils will be under a duty to give information in the same way as any other public bodies, under section 19, because, in any other case in which the council has concerns about an individual, they can inform the police, who are able to provide vetting information that they consider to be relevant. The council will not be in a situation that is any different from the sort of situation that anyone else is in. If it has relevant information about criminal activities, it is at liberty to inform the police.

Many of the things that Fiona Hyslop touched on, which were to do with people who are known to have abused children in their care, would be known about by social workers or whoever and would have been the subject of children's hearing references and so on in any case, so it is conceivable that such information would have ended up before the courts in that way. The point is that there are mechanisms for dealing with the issues that have been raised without having to include this significantly widening amendment in the bill. That might lead to an element of gold plating and the need to send into the system an awful lot of information that in many instances will not add to the sum of human knowledge but will clog the system up with things that are not immediately relevant.

The Convener: Fiona, would you wind up the debate?

Fiona Hyslop: I am still concerned about this area. Concerns about the behaviour of people in regulated work would be referred into the system for access in some of the soft disclosures whereas information about people who are under suspicion of abuse which, again, is soft information, would not be accessed as part of the vetting and barring scheme, via Disclosure Scotland; only convictions would be. Obviously, if someone has committed abuse against a child and that has resulted in a conviction, we would expect that to be referred to the vetting and barring system automatically. However, the issue is to do with the soft information. Police are being used as a clearing mechanism in those circumstances. I would like to reflect on this further and discuss the matter again

with the minister so, in this instance, I will not press the amendment.

Robert Brown: I am more than happy to have further discussions with Fiona Hyslop and other members of the committee on this matter, which is a complex one. I want to ensure that there is mutual understanding about what is intended and what will result from the bill. In passing, I should say that the police do not only have conviction information; they also have non-conviction information, which would end up on the register as well. However, subject to the scrutiny that we are talking about, there has to be more than just a suspicion. We will be dealing with reasonably solid information in that context.

Amendment 162, by agreement, withdrawn.

Section 9—Failure to refer: offence

The Convener: Group 6 is on failure to refer: time limit. Amendment 32, in the name of the minister, is in a group on its own.

Robert Brown: Because an individual might be dismissed from one organisation but still be working for another, it is important that those individuals who harm children or protected adults at work are identified to the central barring unit quickly. By setting a time limit of three months for making a referral, we have struck a balance that ensures that we give organisations enough time to get a referral together without leaving it for an unduly long period of time. As you will recognise, there is a dilemma between, on the one hand, having a time limit that is meaningful and, on the other hand, having a time limit in place that people pass, which might be an incentive for people not to report things.

Under the Protection of Children (Scotland) Act 2003 and in this bill as it stands, there is no time limit for making a referral. I am grateful to the Faculty of Advocates for raising this issue in its evidence to the committee at stage 1. In my letter of 12 December to the committee, I undertook to consider this issue. That consideration resulted in the lodging of this amendment.

I move amendment 32.

Amendment 32 agreed to.

Section 9, as amended, agreed to.

Section 10—Consideration whether to list: organisational referrals etc

The Convener: Group 7 is on the opportunity for individuals to comment on information before consideration whether to list. Amendment 163, in the name of Lord James Douglas-Hamilton, is grouped with amendment 173.

14:00

Lord James Douglas-Hamilton: The effect of amendment 163 would be to provide for the individual to be allowed to make representations with regard to prescribed information. The reason for the amendment is that the Law Society is concerned that an individual can be referred and consequently considered for listing without having any recourse at that stage. The Law Society notes that although, under section 10(1), the central barring unit would have to satisfy itself that the information given in the referral has not been given for vexatious or frivolous purposes, the whole process might well be triggered by a referral that, although not vexatious or frivolous, is based on incorrect information.

The Law Society takes the view that the individual should have an opportunity to comment on such information prior to being considered for listing. Even a consideration for listing on the basis of incorrect information might prevent an individual from obtaining regulated work, so care must be taken with regard to the possibility of unfairly prejudicing an applicant's employment. I would be most grateful if the minister could look at that issue. Amendments 164 and 165 are merely consequential.

I move amendment 163.

Fiona Hyslop: Could Lord James clarify what information he is seeking to give the individual the opportunity to comment on? Section 17(1)(a) says that an individual must be given the opportunity to make representations. What difference will the amendment make to the powers that are already in the bill in relation to all the information on which ministers intend to rely? In order to comment on the information, they must have access to it.

Lord James Douglas-Hamilton: It might be for the minister to reply before I do.

The Convener: Indeed.

Robert Brown: I understand the motivation behind the amendments. The balance between the protection of children on the one hand and the protection of an individual's rights and security in their employment on the other is a sensitive and difficult issue that lies at the heart of these arrangements.

As Fiona Hyslop pointed out, provision is made at section 17 for exactly that purpose. It specifically provides that the individual must be given the opportunity to make representations about all the information that is to be used in deciding whether to list them or not. Details of how that will work will be spelled out in the procedural regulations under section 39(1), just as they are set out in regulations under the Protection of Children (Scotland) Act 2003.

The amendments would not be particularly helpful. In effect, they would introduce a double determination with two opportunities for individuals to engage. Lord James's point is perhaps that before people are even considered for listing, they should have an opportunity to make representation; a case could be made for that. However, it would delay consideration for listing, which would mean that organisations would not be notified during the first exchange with the individual and it would make the listing process very bureaucratic, without offering the individual any particular advantage.

The bill does not affect in any way employment law generally and the way in which employers are authorised to respond to information that comes into their possession, whether through the new bill or in some other way, that might affect an individual's employment. The bill does not change any of that in any way, and I do not want to make any observations on the possible effects of the provisions; that is a matter for determination against a well-established employment law background.

The principle of giving people the opportunity to comment before information goes out to the organisation that employs them is not the proper one to employ in this case. Section 17 gives them the opportunity to make representations about listing. The consideration for listing position in between times is a precautionary one, which might have implications for employment that would have to be dealt with in that context.

I hope that Lord James will accept that the amendments would amount to a double bar and could prevent information about potentially dangerous individuals from going out to the organisations that should know about them at an early stage.

Lord James Douglas-Hamilton: I will not press amendment 163. When an individual is wrongly accused by somebody who may have an obsession and who acts in what can only be described as a vexatious manner, that is a sensitive issue. If dealing with that is always left until after listing has occurred, an innocent person could be unjustly accused and it could be believed publicly that there is no smoke without fire. The minister should reconsider that before stage 3, in case any further protection of the innocent needs to be put in place.

Robert Brown: I will make one small comment, but I do not want to hold up proceedings unduly. In response to what Lord James said, it is worth saying that—all being well—the individual should not be in that position, because the relevance of information that came in the first instance from a police source would have had a fairly rigorous police check, which should eliminate the information that Lord James describes. If information came from another source, a hearing by a regulatory body or a disciplinary hearing would probably have been held, so that would exclude the vast majority of the situations that Lord James describes. I am happy to talk to him if he wants to exchange a bit more detail with me on the matter.

Amendment 163, by agreement, withdrawn.

Amendments 164 and 165 not moved.

Section 10 agreed to.

Section 11—Consideration whether to list: court referrals

Amendments 101 and 102 moved—[Robert Brown]—and agreed to.

Amendments 166 to 168 not moved.

Section 11, as amended, agreed to.

Section 12—Consideration whether to list: vetting information etc

Amendments 169 to 174 not moved.

The Convener: Amendment 175, in my name, is in a group on its own. The group is on the relevance of listing information.

Amendment 175's purpose is to ensure that, when considering the relevance of conviction information other than that which would lead to automatic listing, the central barring unit would not operate a simple tariff system but would consider each conviction on its merits. The amendment was lodged because the pre-consultation document says that the processes for determining listing decisions could be rules based—for example, a rule could relate to schedule 1 offences—guidance based, whereby a scoring system would be used for offences and other variables; and judgment based.

My concern is that using a scoring or tariff base may result in some people being barred inappropriately while others who should be barred are not barred. For example, in identical circumstances for the same offence, different police forces or officers might choose different approaches. They could simply caution someone, warn them about their behaviour, charge them with breach of the peace or charge them with a more serious offence, such as a public decency offence. If someone urinates up a close—it is not unknown for people to do that occasionally—they can be charged with anything from breach of the peace to a public decency offence. A public decency offence would attract a higher tariff in a scoring system than would either of the first two options that I described, but the person concerned would pose no more or less of a risk to vulnerable

adults whether they were charged with breach of the peace or a public decency offence.

Some offences have a fairly broad range from relatively minor to very serious. Some people might have convictions for offences that no longer exist, such as that of consensual sex between men who were under 21 or 18 before the relevant law was changed. Some people might have committed fairly serious offences but pled guilty to and been convicted of lesser charges. My amendment would ensure that, when considering non-schedule 1 convictions, the central barring unit acting on behalf of ministers took all those factors into account to ensure that only people who should be and need to be listed are listed.

I move amendment 175.

Fiona Hyslop: I have sympathy for amendment 175, which relates a wee bit to amendments that I lodged on the criteria for listing and barring. The basis on which judgments will be made is a fundamental question. I support the general approach and spirit of amendment 175, because it is common sense that regard should be had to relevant circumstances. The committee said that it would have liked to see the subordinate legislation that will contain the detail on that key area, but our problem is the haste with which we must consider the bill. As the convener said, we have seen only policy guidance, which is perhaps unsatisfactory, so we discuss the issue with some discomfort at this stage.

Lord James Douglas-Hamilton: I hope that the minister will consider amendment 175 sympathetically. The amendment is necessary to protect the innocent and will guard against the destruction of a person's career through tittle-tattle or malicious allegations.

Robert Brown: I can be reasonably reassuring on the points that members made. Amendment 175 is unnecessary, because ministers and—more important in this context—the people who act on behalf of ministers must always have regard to the details, circumstances and relevance of vetting information. The decision to list an individual will always be made by a panel and the decision to consider an individual for listing will be confirmed by agency staff, even if some data gathering and assessment is automated. Vetting information will never lead to consideration of a person for listing, let alone listing itself, without such an approach being sanctioned by an appropriate member of agency staff.

In my letter of 12 December 2006 to the committee, I said that vetting information from the police is not any old tittle-tattle but has been through the 5x5x5 assessment process and is considered accurate. Vetting information from other sources, which will mainly be local authorities and regulatory bodies, will be prescribed under section 46(1)(d) and will be based on objective and verifiable facts.

I understand where the convener is coming from in lodging amendment 175. The issue relates to what we said about automatic referral for consideration only when a schedule 1 offence has been committed. In that context, we are trying to take an approach that is more discretionary than one in which barring happens automatically because a particular crime is listed.

The issue must be consulted on as part of the follow-up to the bill's implementation. Various options have been suggested about how the central barring unit might operate when it is called on to make decisions about barring. The issue will be closely discussed with the committee and stakeholders before a final decision is made. The options that are open are laid out in the Executive's pre-consultation discussion paper on secondary legislation, which was considered at last week's committee meeting. The Executive has not committed itself to one option and is keen to engage on the pros, cons, practicalities and implications for civil liberties and other matters of the options before a final decision is made.

Members should bear it in mind that, under section 12, ministers will have an overarching duty to be satisfied that the information

"indicates that it may be appropriate for the individual to be included in the children's list",

or the adults' list. Therefore, there will be a framework beyond which it will not be possible to go. I have indicated some of the ways in which the system might operate in practice, but the approach will be worked out in the consultation that will take place after the bill has been passed. As I said, in any event ministers will have to consider the details, circumstances and relevance of information. That does not have to be stated in the bill; it is the policy intent and will be the reality, given how the bill is drafted. I am happy to continue to discuss the matter with you, convener, and I hope that you will not press amendment 175 at this stage.

14:15

The Convener: Thank you for your comments. I remain concerned that there is potential for a point-scoring or tariff-based system to emerge from the consultation, which might disadvantage some people and allow others who present a real danger to avoid inclusion on a list. I welcome the opportunity to continue to discuss with the minister how the bill might contain, if necessary, an assurance that proper account will be taken of the circumstances, to protect the rights of individuals as well as the rights of children and vulnerable

adults. On that basis, I seek leave to withdraw amendment 175.

Amendment 175, by agreement, withdrawn.

Section 12 agreed to.

Section 13 agreed to.

Section 14—Automatic listing

Amendment 176 not moved.

Amendments 103 and 104 moved—[Robert Brown]—and agreed to.

Amendment 177 not moved.

The Convener: Group 9 is on the duration of a listing. Amendment 178, in my name, is grouped with amendment 198.

Amendments 178 and 198 are intended to address what I think is an anomaly in the bill. Section 25(3)(a) states that an application for removal from a list is competent only if

"the applicant has been listed for such period as may be prescribed".

However, as far as I can see, there is no reference to ministers being able to prescribe such a period in the sections of the bill that deal with listing. Amendment 178 attempts to correct that anomaly by requiring ministers to prescribe such a period, although I recognise that the period may be indefinite.

Amendment 178 may not be correctly worded or perhaps it would not amend the correct part of the bill—it would amend section 14, "Automatic listing". If that is the case, I would be happy to consider the matter further and perhaps lodge an alternative amendment at stage 3 to ensure that all persons who are listed would be covered.

There may be a case for saying that, in some cases, a person would automatically be removed from a list after the prescribed period, subject to the understanding that they would have to make a fresh application to become a scheme member, and that that application would be considered in the same way in which any other application would be, by the central barring unit. The person could then be relisted if it were deemed that they were still a risk. In other cases, the person could be listed for an indefinite period but allowed to apply for removal from the list after a specified period. That may be the preferred approach—I refer to the new subsection proposed by my amendment 178, which refers to

"the minimum time that must elapse before an application for removal from the list can be made".

The point is that, if the removal of a person from a list can be considered only after a prescribed period, that period and how it is defined must be indicated somewhere in the bill.

I would be grateful if the ministers considered my amendments and lodged appropriate amendments at stage 3; alternatively, they could discuss with me a more elegantly thought-out amendment that I could lodge at stage 3 to achieve my aims.

I move amendment 178.

Fiona Hyslop: I have some sympathy with what the convener has proposed. I am concerned about the duration of listings, but a deeper issue is involved. If somebody has committed offences against children or there is suspicion about their behaviour with children, is that behaviour automatically removed over time? That comes down to policy issues. Once a person has committed a crime against a child, the likelihood is that they will do so again. I am concerned about listings having a duration at all.

Perhaps that reflects on the logic of the system. It seems to make sense that a person can apply to be removed from listing and that that decision will be made by the barring unit, which will reflect on all the information that it has. Obviously, if somebody wanted to start a job or to be in a position in which they would have access to children, they would have to reapply to the scheme anyway, so perhaps we need a system that would allow for an application to be made and for a person to be removed from a list at the same time. That would trigger reassessment of the case, although that would be difficult for ministers. The amendment wants to include in the bill a requirement on ministers to consider the duration of a listing. Perhaps the duration of a listing should be removed and we should rely on a new application being made—which could be made at the same time as an application for removal from listing—to trigger reassessment.

Robert Brown: The convener has raised an interesting issue. I would like to take a little time to consider the relationship between the sections. As he rightly said, his amendment 178 refers to section 14, although section 25, "Application for removal from list", refers to a

"period as may be prescribed".

The central policy intention behind the scheme is to keep unsuitable individuals out of regulated work for as long as they remain unsuitable. As Fiona Hyslop mentioned, that will be for life for many individuals. However, the scheme is about risk management rather than criminal justice sanctions, so it will not involve exactly the same considerations as the courts carry out—it is a slightly different ball game. It is therefore not appropriate to set what we might call a sentence for listing at the time of the initial listing.

However, I would like to consider the issue again, as I am not entirely satisfied that section 25

is phrased correctly. We will consider how the section fits together. Listed individuals must be able to apply for removal from the list if they consider that their circumstances have changed. One problem with amendment 178 is that it suggests that an individual's circumstances will change within a certain time, which is not really what is intended. It is important that listing does not end until an individual is no longer unsuitable to carry out regulated work—it should not end because of a predetermined arbitrary time period. We have got the balance right on that, although an issue has been raised on which I am not entirely sure that we have the balance right. I would therefore like to consider the matter again, in consultation with officials and the convener.

The Convener: I thank the minister for his reassuring words and I am happy to discuss the matter further with him.

To respond to Fiona Hyslop, the sort of situation that I envisage is, for example, one in which a person who, when relatively young, is convicted of supplying alcohol to children—to use an example from the policy documents—and deemed to be unsuitable to work with children, but who would not be barred if they applied 10 or 15 years later and had no further blemish on their record, because of the time lapse and the fact that they had no further convictions or no further concerns had been raised about them. My concern is that a period of time may not be set within which a listing is to be reconsidered, but that, for some people, there may be no change of circumstance other than that a period of time has elapsed. We should ensure that people are not barred for life as a result of actions that they would not have been barred for had they applied to the scheme at a later stage in their life. That is the policy intention behind amendment 178.

I am happy to discuss further with the minister how we can reach some logic in the process, so that it makes sense for everyone involved. I therefore seek leave to withdraw my amendment.

Amendment 178, by agreement, withdrawn.

Amendment 179 not moved.

Amendment 105 moved—[Robert Brown]—and agreed to.

The Convener: We come to group 10. Amendment 180, in the name of Fiona Hyslop, is grouped with amendments 182 and 184.

Fiona Hyslop: Amendments 180, 182 and 184 seek to develop a defined process for the consultation on the criteria for listing. From the debates on the earlier amendments, it is clear that the criteria for listing are absolutely key. The relevant offences or information could range from the sort of offences to which the convener referred—those that an individual commits when they are young—right through to harsh offences against children. Those who will use the lists need reassurance that the criteria that will be developed will be consulted on and that the order to specify the criteria will be in place before either the children's or adults' list is operational.

The issue is again about the process of developing and implementing the bill. It is about commencement and ensuring that a wide consultation takes place on the criteria for listing. I suspect that the minister would consult with the many and varied individuals who should have an input into the factors that are likely to be a predictor. Much of the system will refer to what has happened, but the key issue for employers and others is to assess what is likely to happen, which in many ways will put them in an invidious situation. Listing could have life-changing implications for many individuals, so it is essential that the criteria are correct. The criteria also need to be correct for the sake of the children who might be exposed to those individuals.

I hope that the minister will find acceptable what I have suggested in amendment 180, which proposes the inclusion in the bill of provisions that stipulate that the process by which the criteria will be specified must involve consultation and that the criteria must be available before the lists are implemented. It is necessary to have that written into the bill because the subordinate legislation is not ready and the other information is not available to us. Amendment 180 is procedural.

If the minister could provide a timetable for commencement of the bill, that would give us an idea of when consultations on the criteria could take place. It is important that we have confidence in the system. Amendment 180 is about building confidence in the system and ensuring that the criteria for listing are widely consulted on, and are specified, before the lists become operational.

I move amendment 180.

The Convener: As no other members wish to comment on the group, I ask the minister to respond.

Robert Brown: The first element of amendment 180 concerns a duty to consult. I am very happy to assure the committee that before using the order-making power to specify criteria for automatic listing or automatic referral for listing, the Executive will consult widely with stakeholders. Given that any such order would be subject to the maximum parliamentary scrutiny through the affirmative procedure, the proposed provision is not necessary.

The second element of amendment 180, which seeks to provide that an order about the criteria for automatic listing must be made before the lists are

operational, could be dangerous for the implementation of the scheme. That might be overstating matters a little, but what amendment 180 proposes could certainly be problematic.

I had hoped that Fiona Hyslop's concerns might have been assuaged following our discussions of the amendments on court referrals and automatic listing or automatic referral for listing, whereby no automatic listing will be provided for in the bill. What remains is the power in section 14 to provide for automatic listing in future, if that is deemed to be appropriate. To impose a requirement that an order specifying the criteria must be made before the lists are operational, as amendment 180 seeks to do, could delay the implementation of the lists. That applies not just to any automatic listings that we specify in future, but to those non-automatic listings that will be made following a full determination in which the individual will be able to defend themselves. That is an unintended consequence of amendment 180.

Amendments 182 and 184 probably do not provide what was wanted. They would mean that when someone was being considered for listing as a result of a referral from an employer, the central barring unit would need to have regard to the criteria for automatic listing. Under sections 15 and 16, the test as to whether someone should be listed is whether the central barring unit is satisfied that the individual is unsuitable to work with children or protected adults. Automatic listing criteria, on the other hand, specify the circumstances in which an individual is to be listed automatically because it is thought that the nature and seriousness of what the individual has done—murdered a child, for example—means that a determination process is not necessary before listing. Automatic listing criteria are not relevant to consideration for listing under sections 15 and 16. Amendments 182 and 184 may have arisen out of confusion between automatic listing and consideration for listing, which are different concepts.

I hope that Fiona Hyslop would accept that the second part of amendment 180 goes off in the wrong direction and that the part of it that deals with consultation—which I agree is necessary—does not need to be included in the bill because the Executive has already given repeated assurances on the subject. In any event, there is the stop-gap of the affirmative procedure arrangements. Against that background, I hope that Fiona Hyslop is prepared to withdraw amendment 180, although I understand her reasons for lodging it.

Fiona Hyslop: I thank the minister for his comments. It is helpful to explore the issue and to have on record his commitment that there will be wider consultation on the criteria.

Robert Brown: I am sorry—you also asked me about the timescale. As I have said before in other contexts, we hope to consult on the content of the regulations over the summer and to have a draft version available at some time in the autumn. That is not a specific timescale to which we are tied. If the process takes longer, it takes longer.

Fiona Hyslop: I thank the minister for both sets of comments. In a sense, automatic listing is the easy option. The difficulty arises with consideration for listing, which is where the criteria come in. That is why the content of the order will be so important. Any future committee of the Parliament that considers the order will have to reflect on the consultation process. I take on board the minister's points about amendments 182 and 184, so I do not intend to move them.

Amendment 180, by agreement, withdrawn.

Amendment 106 moved—[Robert Brown]—and agreed to.

Section 14, as amended, agreed to.

Section 15—Inclusion in children's list after consideration

Amendments181 to 183 not moved.

Section 15 agreed to.

Section 16—Inclusion in adults' list after consideration

Amendments184 and 185 not moved.

Section 16 agreed to.

Section 17—Information relevant to listing decisions

Amendment 186 not moved.

14:30

The Convener: Group 11 is on findings of fact in relation to information relevant to listing decisions. Amendment 107, in the name of the minister, is grouped with amendments 187, 188 and 33. There is information in the groupings list about pre-emptions in the group.

Robert Brown: Executive amendments 107 and 33 expand the scope of so-called "relevant findings of fact", which cannot be challenged by an individual under consideration for listing.

Amendment 107 expands the scope to include any finding of fact made in legal proceedings, whether they be civil or criminal. For example, that would include a finding of fact by an employment tribunal when a nursery nurse has been dismissed for assaulting or neglecting a child.

Amendment 33 brings in findings of fact arrived at by the health professions regulatory bodies,

such as the General Medical Council. Those amendments are necessary because the central barring unit does not have the expertise to unpick the findings of those bodies, nor is it the appropriate forum for an unhappy individual to contest such findings.

Amendments 187 and 188, lodged by Lord James Douglas-Hamilton, have the opposite effect to the amendments that I have just explained. Amendments 187 and 188 are problematic for the same reasons that amendments 107 and 33 are necessary. Amendments 187 and 188 would greatly increase the burden on the central registered body and require it to second-guess the findings of fact of other bodies, which are arguably better placed to come to a view on those matters. If an individual is unhappy with a finding of fact, it should be contested through the relevant appeal mechanisms provided for the body that came to that conclusion. I hope that Lord James Douglas-Hamilton will accept that that is the rationale behind both having the bar on the CBU examining those matters again in that context and behind our amendments that expand the scope to the other regulatory and court bodies. I hope that against that background he will be prepared not to move the amendments.

I move amendment 107.

Lord James Douglas-Hamilton: I thank the minister for his speech, which is almost a response before the argument has been put.

I will explain the Law Society of Scotland's reasoning. It was concerned that, under section 17(4), an individual would not be in a position to make representations that a relevant finding of fact was wrongly made. Such findings, whether made in a relevant inquiry report by the General Teaching Council for Scotland, the Scottish Commission for the Regulation of Care, the Scottish Social Services Council—or any other person or circumstance specified by order made by ministers—may well be regarded as findings, but frankly could not be regarded as findings of fact equivalent to the findings of a court.

The minister explained in his opening speech that having evidence from other regulatory and court bodies is absolutely necessary. Amendment 187 was a probing amendment, and in view of what the minister said, I will not press it.

Ms Rosemary Byrne (South of Scotland) (SoI): I seek clarification. What is the position if there are legal proceedings and someone is not convicted?

Robert Brown: If someone was not convicted, it would not be a finding of fact—that is the first relevant point. In the Ian Huntley situation, for example, soft information might still be on the vetting list and would fall to be dealt with under the usual criteria. However, it would not be relied on as a finding of fact for the purpose that we are discussing.

Let me turn more generally to Lord James's observations, and I am grateful to him for his approach. It is worth emphasising that the tribunals, which will make findings of fact, will go into the issues substantially. If someone is not satisfied with the findings, there are core procedures, as Lord James knows, under which they can challenge the findings in a more adequate way than the central barring unit is set up for. Against that background, one can readily see how it would not be in the public interest to have a long-drawn-out exchange at the central barring unit about the accuracy of something that a more appropriate body had already explored in depth.

Although I understand the concerns, there has to be an element of finality, bearing it in mind that a professional body may strike off the person and debar them from employment. Before such substantial consequences, individuals will be able to pursue remedies if they are dissatisfied. It would not be helpful for the accuracy of the information to be examined again by a body that is not set up as a tribunal.

The Convener: As Lord James has indicated that he does not intend to move his amendments, I will not complicate matters by going into the pre-emptions.

Amendment 107 agreed to.

Amendment 188 not moved.

Amendment 33 moved—[Robert Brown]—and agreed to.

Section 17, as amended, agreed to.

Section 18—Police information etc

Amendments 34 and 35 moved—[Robert Brown]—and agreed to.

Section 18, as amended, agreed to.

Section 19—Information held by public bodies etc

Amendments 36 to 38 moved—[Robert Brown]—and agreed to.

Section 19, as amended, agreed to.

Section 20—Information held by regulated work providers

The Convener: The next group is on guidance on information held by regulated work providers Amendment 189, in the name of Dr Elaine Murray, is the only amendment in the group.

Dr Elaine Murray (Dumfries) (Lab): I lodged amendment 189 after Ken Macintosh and I had a discussion with the Scottish Council for Voluntary Organisations, following concerns that organisations raised with it about information that they will be required to provide and about what would constitute a reasonable excuse for not holding or providing information.

It was pointed out to us that some small voluntary organisations hold only rudimentary information, if any, about people, particularly those who no longer work for them. It appears that such organisations would commit an offence if they did not have information, so I would like some clarification from the minister. What type of information is expected to be held, and what would the status of such organisations be if they did not hold much information, particularly on previous employees?

I move amendment 189.

Mr Kenneth Macintosh (Eastwood) (Lab): I echo Elaine Murray's comments. The procedures that have been designed for the statutory sector have been welcomed as providing no difficulty, but they have created disproportionate anxiety among the smaller voluntary groups to which Elaine Murray referred, which tend to meet in people's front rooms and hold few records, if any. Those groups are looking for guidance on what information they should hold on to. They want some reassurance from the minister about the records that they need to keep to avoid criminal prosecution.

Fiona Hyslop: Again, we need to strike the right balance in the bill. We must ensure that small organisations can continue to make a successful contribution by working with children and providing activities, but we must also recognise that we need to have a fairly robust system in place. Referring to guidance—and the publishing by the minister of guidance—is the key to resolving the issue.

Robert Brown: As I have said a number of times during our discussions on the bill, I am sympathetic to the position of smaller organisations. However, section 20 does not require organisations to keep any particular information. It states:

"Ministers may require a person … to provide them with any information held by the person which Ministers think might be relevant".

If people do not hold information, they cannot provide it, so they cannot be in trouble or be guilty of an offence. That is the first reason why amendment 189 is not relevant. It is based on a misunderstanding of what section 20 is intended to do. A careful reading of section 20 bears out that it does not say what Elaine Murray and Kenneth Macintosh think it says.

In any event, what would be a reasonable excuse as a defence against a criminal charge is probably best left to the courts to determine, according to the facts and circumstances of the case. It is not a matter for guidance from the Scottish Executive.

I make it clear that there is no implicit duty on organisations to hold information that they would not otherwise retain. The sanction is for organisations that have information but which fail to cough it up when required to do so.

There is a broader point on guidance. A later amendment seeks to remove a power to provide guidance on an aspect of the bill. If the committee is sympathetic to our approach, we will return to the matter at stage 3, with an amendment that contains a general power to provide guidance on a number of aspects of the organisation of the scheme. Strictly speaking, that is not necessary, because we can give guidance without there being a statutory requirement to do so. However, given the importance of guidance in many people's minds, particularly in smaller organisations, that will probably be a useful indicator.

I ask Elaine Murray not to press amendment 189, which proposes the production of guidance on a relatively limited aspect of the bill. We will lodge a stage 3 amendment about more general guidance on how the scheme will operate. It has always been our desire and intention to do that in any event. It might give people a degree of reassurance if the matter is included in the bill.

Against that background, I hope that Elaine Murray will withdraw amendment 189 which, for the various reasons that I gave, does not hit the nail on the head, understandable though it is.

Dr Murray: I am pleased to hear the minister's reassurance on guidance. The committee has discussed on several occasions the need for guidance to prevent—among other things—organisations becoming risk averse, overregulating themselves or carrying out continual checking, which would increase the amount of bureaucracy. I am reassured by the minister's comment that the Executive will provide general guidance on a number of issues.

Amendment 189, by agreement, withdrawn.

Section 20 agreed to.

Section 21—Appeals against inclusion in children's list

Amendments 190 to 193 not moved.

Section 21 agreed to.

Section 22—Appeals against inclusion in adults' list

Amendment 194 not moved.

Section 22 agreed to.

Section 23—Further appeals against inclusion in either list

Amendment 195 not moved.

Section 23 agreed to.

Section 24—Appeals against listing: supplementary

Amendments 196 and 197 not moved.

Section 24 agreed to.

14:45

Section 25—Application for removal from list

The Convener: Group 13 is on removal from list: applications and appeals. Amendment 108, in the name of the minister, is grouped with amendments 109, 110, 39, 111 to 115, 40, 116 and 117. Again, some issues arise with presumptions—I am sorry, I should have said pre-emptions. It is going to be a long day.

Robert Brown: I thought that we were doing quite well, all things considered, convener.

The amendments make changes to the way in which applications for removal from the list and related appeals work. First, amendments 108, 110 to 115 and 117 aim to streamline the application for removal process by requiring applications to go, in the first instance, to ministers rather than a sheriff. That issue was raised by the Faculty of Advocates and, in my letter to the committee of 12 December, I rejected it. However, having had another look at the matter, I see considerable merit in making the change, as it will enable ministers to screen out obvious cases and should reduce the number of appeals that end up in the court system. In turn, that will reduce costs for the Scottish Court Service and make application for removal more accessible for individuals.

It also seems logical that ministers, who will make the original decision that an individual is unsuitable, should also decide whether they are no longer unsuitable, at least in the first instance. Where ministers reject an application for removal from the list, the individual will have a right of appeal to a sheriff, then to a sheriff principal and, finally, to the Court of Session. The change to applications being heard at first instance by ministers will not, in any way, reduce the rights of listed individuals to apply for removal from the lists; it will just put the process into a slightly more workable context.

Secondly, amendment 109 allows for greater flexibility in the way that minimum times for making an application for removal from the list are prescribed in regulations. That means that the time limit can be set by reference to the event that triggers listing rather than listing itself. For example, that could enable individuals who were listed because of an event that took place some time in the past to apply for removal earlier than individuals who were listed because of a recent event.

Thirdly, amendment 39 clarifies that, where an individual is included on both lists, an application for removal from one list will not prejudice the opportunity to apply for removal from the other. I suppose that that situation will be rare, but it is not impossible to imagine the circumstances in which an individual is successful in applying to be removed from one list but not from the other.

Fourthly, amendment 40 restricts to points of law appeals that are made to the Court of Session on applications for removal from a list. That brings appeals on applications for removal into line with appeals against inclusion on a list in the first place, and with appeal arrangements more generally. Of course, in appeals before a sheriff or a sheriff principal, all issues of fact and law can be re-considered by the court.

Finally, amendment 116 brings appeals against applications for removal into line with appeals against listing by enabling court proceedings to take place in private, if the court thinks that that is appropriate. In some cases, a public hearing may deter an individual from making an appeal. Amendment 116 allows the courts to deal with that situation in an appropriate manner.

I hope that the committee agrees that the amendments in the group respond to a number of concerns that were raised, make the appeal procedure more sensible and logical, and provide a more coherent system for dealing with the situation.

I move amendment 108.

Fiona Hyslop: I seek clarification. I take it that the amendments put removal from the list on the same footing as application in the first place, in that sheriffs and the Court of Session will, in many ways, act as the court of appeal against either barring in the first place or later removal. I take it that that is the basis and logic for the amendments.

Robert Brown: Yes.

The Convener: I welcome the amendments. I was minded to lodge amendments on the issue. I am pleased that the minister got his in first. It seems eminently sensible that the first port of call for someone who seeks to be removed from a list

should be the ministers, who put the person on the list in the first place. It is also eminently sensible that the right of appeal to the sheriff should remain. The amendments are sensible—they balance the bill in terms of the rights of individuals, and continue to protect children and vulnerable people.

Robert Brown: Apart from observing that I have a bigger team than you have, convener, in terms of lodging my amendments first, I have nothing further to say. I am grateful to the committee for its interest in the amendments.

The Convener: The minister is correct: my team is a team of one.

Amendment 108 agreed to.

Amendment 199 not moved.

Amendment 109 moved—[Robert Brown]—and agreed to.

Amendment 198 not moved.

Amendments 110, 39 and 111 moved—[Robert Brown]—and agreed to.

Section 25, as amended, agreed to.

After section 25

Robert Brown: Convener, have you dealt with section 24? I think that it may have been missed out.

The Convener: The clerk confirms that I have. It was agreed to before the previous group of amendments was debated.

Robert Brown: My script is different.

Amendment 112 moved—[Robert Brown]—and agreed to.

Section 26—Determination of application for removal from list

Amendments 113 and 114 moved—[Robert Brown]—and agreed to.

Amendments 200 to 202 not moved.

Amendments 115 and 40 moved—[Robert Brown]—and agreed to.

Amendment 203 not moved.

Amendment 116 moved—[Robert Brown]—and agreed to.

Section 26, as amended, agreed to.

Section 27—Late representations

Amendment 204 not moved.

Section 27 agreed to.

Section 28—Removal from list

Amendment 117 moved—[Robert Brown]—and agreed to.

Section 28, as amended, agreed to.

Section 29—Notice of listing etc

Amendments 205 to 209 not moved.

The Convener: Group 14 is on power to publish guidance about individuals under consideration for listing. Amendment 41, in the name of the minister, is the only amendment in the group.

Robert Brown: Amendment 41 removes the power for ministers to issue statutory guidance that is aimed at organisations that have employees who have been placed under consideration for listing. As I said with reference to an earlier amendment, we are committed to ensuring that extensive advice and guidance are developed to assist all our stakeholders to gain maximum benefit from the new scheme. There is no need for a specific provision in section 29 referring to potential guidance on that section alone. As I have indicated, we intend at stage 3 to lodge an amendment to provide for a general power to issue guidance under the bill. Against that background, I trust that the committee will agree to amendment 41.

I move amendment 41.

Amendment 41 agreed to.

Amendments 210 to 212 not moved.

The Convener: Group 15 is on notice of listing etc. Amendment 42, in the name of the minister, is grouped with amendment 227.

Robert Brown: Regulatory bodies have an important role to play in ensuring that vulnerable groups are not placed at risk of harm by the professionals who provide services to them. Amendment 42 allows the Scottish ministers to provide relevant regulatory bodies with information on decisions relating to listing to assist them effectively to regulate their workforce. That will apply when it has and has not been decided to list an individual. The amendment will ensure that when an individual has been removed from a list, ministers will have to notify them and any relevant regulatory body where it would be appropriate to do so.

The provision that amendment 227 would introduce would be a major departure from the intended operation of the scheme and would raise a number of serious issues. Throughout the evidence taking, we have all—not least the committee—been keen to focus on proportionality and keeping costs down. Amendment 227 would take the scheme in another direction—it would

make it more ambitious and increase costs. We need to remember that the bill is about protecting vulnerable groups from unsuitable individuals working with them. It will do no more or less than that.

It is not a good idea that organisations should be notified of what is, by definition, irrelevant information that ministers or their agency have already considered and have decided does not merit placing the individual under consideration for listing. Organisations would be notified of the existence of the information without the consent of the individual. It may be that general consent will be given at the beginning, but we have always taken the approach—as has the committee—that there has to be proportionality in relation to the consent that is given and the information that is provided. Amendment 227 would take us a long way from the position in which generalised consent is given at the beginning.

Amendment 227 raises much wider issues than the protection of vulnerable groups. Notification of a road traffic offence is likely to be much more pertinent to a coach driver, who might have nothing to do with vulnerable groups, than to a teacher. If we are going to make statutory provision for the notification of new vetting information to employers without consent, there is a bigger debate to be had that goes far beyond the scope of the bill.

Against that background, I hope that Elaine Murray will not move amendment 227, which would make a big difference to the cost of the scheme and the extent of unhelpful and non-advancing information that would be given to organisations and individuals. It would not be a good way to operate the scheme and it would go against the proportionality that we are looking for. I know where the desire for the proposal is coming from, but one has to distinguish between the more serious cases—at the front of the queue, as it were—where there is information that leads the central barring unit to consider barring people and cases where the information is below that level, because it is not serious and ought not to go to employers, voluntary organisations and others.

I move amendment 42.

Dr Murray: Amendment 227 is a consequence of discussions that I had with the SCVO, which reported that some of its organisations had expressed the fear that unless they were told of new vetting information, they would be inclined to continue carrying out repeat checks to see whether there was anything that they ought to know about. It was keen that organisations should carry out only one full check in the lifetime of the individual's scheme membership, without having to fear that they were missing out on information that might change individuals' suitability for posts. However, I accept the minister's point that if somebody has a conviction for speeding, which is totally irrelevant to the job that they do with children and young people, it would be inappropriate for that information to be shared with either the statutory sector or a voluntary organisation. Therefore, I will not move amendment 227.

Mr Macintosh: Organisations have welcomed the fact that the bill will give them access to vetting information, as well as let them know whether an individual is barred. Notwithstanding the example of irrelevant information, there is a logic that, just as particular information might be of relevance to an organisation when it is hiring an individual, new vetting information might be of relevance when it is deciding on the suitability of an employee or volunteer for a particular post, even though the information does not trigger an automatic bar.

I appreciate what Elaine Murray said about the SCVO and voluntary organisations. The bill has created anxiety and an expectation among some organisations that they will be expected or obliged to constantly recheck their volunteers or employees to ensure that their information is thoroughly up to date.

I appreciate that it is a sensitive issue and that there must be a balance between the potentially excessive circulation of unnecessary information, as the minister suggested, and the rights of an individual to consent in the first place. We also need to consider the organisation's right to information to help it to decide on the suitability of a candidate for a post.

Given the minister's earlier comments, can he offer reassurance to voluntary organisations—and to statutory organisations, for that matter—that they will not be expected constantly to update their records and the vetting information that they hold on volunteers?

15:00

Fiona Hyslop: I have some sympathy with amendment 227. It asks the question, how do we ensure that the bill is meaningful and makes a difference? It also makes us reflect that whether someone is barred or not is no guarantee or predictor of future behaviour. Indeed, just as one of the merits of the scheme is that it will provide a system to continuously update information, whether someone is barred or not—as distinct from the existing system—that is also one of the problems. That is where the thinking behind amendment 227 comes from.

We have to make a judgment about who is best placed to protect children and how to do it. As everyone agrees, we need to be constantly vigilant. It is not just about barring or not barring

people; organisations want there to be constant vigilance. That is one argument for amendment 227.

A second argument is that if the proposed system is to make a difference and avoid the need for repeat applications, we must have reassurances that the scheme will work in practice. Practical walk-throughs of scenarios should alert ministers to some of the potential pitfalls if organisations are not satisfied when they realise that new information exists but they do not get it automatically. The easiest behavioural response to that is to say, "If in doubt, apply for another check." We have to guard against that. There is serious merit in amendment 227, both in principle and in practice, and I will be disappointed if Elaine Murray does not press it. I will be interested to hear the minister's response to our points.

Robert Brown: A number of valid and appropriate points have been made in this debate. As in many other areas, the issue is not black and white. We must consider issues of balance, proportionality and effect. As a general observation, I do not believe that under the current scheme organisations routinely go in for repeat checks. Perhaps they do that when they have their five-yearly examination of their leaders or whatever, but they do not go in for repeat checks. I cannot understand the argument that, under the proposed new scheme—which, after all, will give more information to people and will make available to organisations continuously updated information—there will be pressure to go for repeated update checks. I cannot see any reason or logic for that, and there is nothing in what ministers or other bodies have said to suggest that that is a sensible direction of travel. Individual organisations will get information about barring on a constantly updated basis. That is our major reassurance about the new scheme.

Ken Macintosh made the correct point that there is an anomaly between the approach to information when hiring someone and the approach to information that might be available later on. It is logical that people should take an approach to hiring somebody that is different from their decision to keep them in the job later. In fact, they are probably legally obliged to take a different approach to people whom they hire and people who are assessed for continued employment, as it were. That is a valid distinction to make. We have to ask ourselves what organisations could do with the information anyway—if it is not sufficient to lead the central barring unit to list people, then it must be questionable whether there would be any circumstances in which the information would give organisations the right to remove people from their employment or to take actions to change the terms of their employment. We do not need to get into all of that.

The reality is that the system provides for constant updating. Reassurance is provided by the continuous barring situation. The further information issue needs to be considered against the background that, as Fiona Hyslop rightly said, organisations should be looking at their general arrangements. As she also rightly pointed out, barring—or, rather, lack of barring—does not provide an absolute guarantee. People still need to have good employment practices, as the committee has heard throughout the passage of the bill.

It was suggested that we need to consider new vetting information in different scenarios. As the consultation goes forward, there will be plenty of opportunity to consider that in consultation with the sector, which will be able to highlight concerns. I imagine that officials will work through different scenarios as they develop practical arrangements for implementing the scheme.

To return to my original point, the committee and the sector—especially the voluntary sector—have been keen to ensure that we have a proportionate and cost-effective scheme. I have not heard cries from organisations that they need Elaine Murray's proposed system, which would cost more, involve voluntary and statutory sector organisations receiving more bureaucratic information, and add a lot of information into the system. We need to consider issues of consent, whether the individual concerned works for the same employer—if they change employer, information could be sent to the wrong people—and whether organisations want all this additional information. I accept that a balance needs to be struck, so I do not want to overstate the issue, but our strong, considered view is that amendment 227 would place a significant and undesirable bureaucratic burden on the sector. I hope that the committee will agree to amendment 42 and reject amendment 227.

I appreciate Elaine Murray's initial instinct, but we have explained the background. We have also given an element of reassurance about how the scheme will work in practice. We know as a matter of fact how the scheme works at the moment and whether people go for repeat disclosures. The sector can also take a fairly significant degree of reassurance from this afternoon's debate. It is useful that the issue has been raised in the form of amendment 227, but I strongly ask the committee not to agree to it, because it would place considerable burdens on the sector that we would be better off without.

Amendment 42 agreed to.

Section 29, as amended, agreed to.

Section 30—Relevant inquiries

The Convener: Amendment 213, in my name, is grouped with amendment 214. In essence, these are probing amendments to clarify what is meant by

"an inquiry held … by Ministers"

and

"an inquiry held … by the Scottish Parliament".

Section 30 needs to be considered in line with section 17(5)(b), which defines that

"A 'relevant finding of fact' is a finding of fact …made in a relevant inquiry report".

It is important to bear in mind that, under section 17, it is not possible to challenge or to make representations that a relevant finding of fact in a relevant inquiry report was wrongly made. My amendments seek to clarify what is meant by inquiries made by ministers and by the Scottish Parliament.

I believe that findings of fact need to have some degree of quality assurance to ensure that they have been established. Some form of determination of the burden of proof is needed. In determining whether to list a person, it is extremely important that the evidential basis is robust and that the person has had an opportunity to challenge the evidence at the appropriate time. I am not clear whether that would be the case in respect of inquiries that are held by ministers or by the Scottish Parliament.

In most of the situations that are referred to in section 17(5), a judicial or semi-judicial process will have gathered evidence and determined the findings of fact based on an impartial assessment of that evidence. The standard of a civil proceedings burden of proof—on the balance of probability—would probably apply. However, it is not clear that that would be the case in an inquiry that was held by ministers, unless the wording is intended to mean that during such an inquiry, which had been established by ministers and which would report to ministers, the person in respect of whom the finding of fact was established had the opportunity to put his or her case. When the minister responds to amendment 213, I would be grateful if he could clarify what is meant by

"an inquiry held …by Ministers".

Amendment 214 is perhaps more significant. I am not convinced that an inquiry that was held by the Scottish Parliament or one of its committees could be relied on to determine findings of fact in this context. In most cases, committees do not conduct inquiries on a semi-judicial basis. They call for written evidence, which can be provided by anyone who has an interest. Oral evidence is taken on a selective rather than guaranteed basis, although we hope that it is balanced. For reasons of time, a committee would be unlikely to be able to take evidence from everyone who had relevant information. Its conclusions would be based on the evidence that it received, but that might not include all the information that would be required for a complete picture. Moreover—this comment is perhaps judgmental—a committee's conclusions could be determined as much by political considerations as by the evidence that it received.

A further important point is that the person about whom a finding is made might not have had the opportunity to challenge it by providing evidence to the committee either before it reached its conclusion or once it had reached its conclusion. In any event, if an inquiry were to uncover a matter of serious concern, I assume that the committee would refer it to the relevant authority—be it the police, another public body or a regulatory authority—for appropriate action and the relevant facts would be determined by those means.

Therefore, I wonder whether an inquiry that is held by the Scottish Parliament should be deemed reliable for findings of fact.

I move amendment 213.

Robert Brown: I confess that I find this group of amendments quite complicated. I will deal with a number of points.

The first matter is the status of inquiries that are held by ministers or the Scottish Parliament. It is not clear to me why such inquiries should be reduced in status when other types of inquiries are thought to be suitable for the purposes of the bill. I take the convener's point about evidence and background, but it should be noted that sections 13 and 17 simply provide that, if an inquiry has investigated, taken evidence and arrived at a factual conclusion, that conclusion can be used to place an individual under consideration for listing. The case cannot be reopened before the central barring unit, but the entire matter can be reconsidered on appeal and the individual can challenge the inquiry's finding of fact in a hearing before a sheriff or sheriff principal. That is an important aspect of the provisions, given the bodies that have the standing and arrangements to test findings of fact.

Any individual who is named in an inquiry will not be listed automatically, but will be considered for listing. The number of people who are listed through that route is likely to amount to a handful per decade, but it could be an important presentational and practical step to take if an inquiry were to find that an individual's actions had led to serious harm to a series of vulnerable individuals. That is the context in which the provision will operate.

The Scottish ministers can hold inquiries under a large variety of statutory powers. With regard to child protection, those powers might include section 67 of the Education (Scotland) Act 1980, under which ministers can hold local inquiries for the purpose of exercising any of their functions in relation to education. Another example is section 6A of the Social Work (Scotland) Act 1968, under which ministers can cause an inquiry to be held into the functions of a local authority under the act, the functions of an adoption society, the functions of a voluntary organisation that maintains certain establishments under the act, the detention of a child under various statutes or the functions of the principal reporter of the children's hearings system. Major issues could be dealt with by such statutory inquiries, to which reasonably detailed rules are applied to ensure proper procedures. In such inquiries, the fears that the convener expressed would not usually be valid.

Under sections 23 to 27 of the Scotland Act 1998, the Scottish Parliament has extensive powers to call for witnesses and documents so that committees can inquire into matters. The Inquiries Act 2005, which is a UK-wide act, gives ministers from the devolved Administrations the power to establish inquiries into matters that are within their remits. Such inquiries are formal, independent inquiries that relate to particular events that have caused or have the potential to cause public concern or to instances in which there is public concern that particular events may have occurred.

There is a wide range of such inquiries. That makes it more difficult to specify more precise circumstances in which an inquiry might be called, but they might be similar to those that led to the Dunblane inquiry or the 1997 BSE inquiry—a slightly different sort of situation. An inquiry might also be called if it is considered that something has failed to happen or that particular systems have not operated properly, as was the case with the Victoria Climbie inquiry in 2001.

On balance, I take the view that a significant element of formality applies to the inquiries that I have mentioned, in particular to ministerial inquiries, which would allow us at least to get to first base. There would remain the potential to reopen an issue before the sheriff or sheriff principal—but not before the central barring unit, which is not set up to conduct inquiries into matters of fact in that way, as I said.

15:15

It might be argued that Scottish Parliament inquiries are a different ball game, because the procedure is slightly less formal and an inquiry might not deal with matters that are the concern of the central barring unit. That is important, because "finding of fact" is a term of art and does not just mean any old thing that appears in an inquiry report. The finding of fact would have to be relevant to matters that would go before the central barring unit in the first place before it could trigger action. Therefore an inquiry, whether it was held by ministers or by a committee of the Scottish Parliament, could feed into the system in the way that is suggested only in constrained circumstances.

I hope that Iain Smith is satisfied with the arrangements, but I am more than happy to discuss further with him his concerns about the two kinds of inquiry that he mentioned. The matter is complex, but as I said, an inquiry would not be the end of the story; it would simply trigger a reference to the CBU in the first place. The CBU might be prevented from reopening a matter of fact as a result of an inquiry's findings, but that would not take away from the individual concerned the remedy of being able to appeal to the sheriff or sheriff principal on the finding of fact, as happens in other circumstances. The implications of section 30 are perhaps not as far reaching as the convener thought that they might be when he lodged amendment 213. I understand where Iain Smith is coming from, but I hope that I have given enough background information on this difficult area.

The Convener: I had no query about inquiries that are held under the Inquiries Act 2005 and I welcome the minister's clarification of the term

"an inquiry held by Ministers",

so I have no further concerns in that regard.

However, I remain a little concerned about the inclusion of inquiries held by the Scottish Parliament, which are not generally conducted to establish findings of fact. I might return to the matter at stage 3, but at this stage I seek the committee's leave to withdraw amendment 213.

Robert Brown: I am interested in hearing—formally or informally—other committee members' views on the issue, which is quite important. We have heard the convener's well-considered view, but it is important that we hear a range of views.

The Convener: Thank you for that comment.

Amendment 213, by agreement, withdrawn.

Amendment 214 not moved.

Section 30 agreed to.

Section 31—Offences against children and protected adults

Amendments 43 to 47 and 118 moved—[Robert Brown]—and agreed to.

Section 31, as amended, agreed to.

Schedule 1 agreed to.

Sections 32 and 33 agreed to.

Section 34—Organisations not to use barred individuals for regulated work

The Convener: Amendment 215, in the name of Lord James Douglas-Hamilton, is grouped with amendments 216 to 219, 262 and 263. If amendment 217 is agreed to, amendment 218 will be pre-empted.

Lord James Douglas-Hamilton: The amendments in my name are amendments 215, 216 and 218. Amendments 215 and 216 are paving amendments for amendment 218. My amendments, and amendments 217 and 262, in Elaine Murray's name, and amendments 219 and 263, in Fiona Hyslop's name, would have a similar effect in that they all offer a means of staggering retrospective checking of existing employees, to reduce the administrative and cost impact. The three sets of amendments suggest, on behalf of voluntary organisations, different ways of achieving that purpose. I hope that the minister will find one approach desirable and that he will sympathetically consider the amendments that would deliver that approach.

As I said, amendment 218 is the main amendment that I propose. It would leave the minister with flexibility on retrospection and to whom retrospection should apply. My amendment is worded such that ministers could draw up by regulation a prescribed list, but organisations that were not on the list would be exempted automatically. It is for my colleagues to speak to their amendments.

I move amendment 215.

Dr Murray: The amendments in the group reflect some of the strongest concerns that have been raised with us during the bill's progress. I am sure that the minister has fond memories of convening the committee when retrospection was discussed in relation to the Protection of Children (Scotland) Act 2003. He will be aware of the concerns that were expressed then about the burden of retrospection.

We have heard the Executive's figures, which suggest that once full retrospection is in place, 1 million adults in Scotland could be a part of the scheme. Issues have been raised with us about the cost to voluntary organisations in particular and the cost of running the scheme if it becomes overburdened because a large number of people is involved. The minister has expressed sympathy for dealing with some of the concerns. The Executive suggests that we agree to retrospection now and use a commencement order to implement it after consultation and over a period.

Amendment 217 goes in a similar direction, except that it would allow Parliament another opportunity to scrutinise the secondary legislation. That is the difference and the extra reassurance. Although the vote would be yes or no, the amendment would mean that the committee's successor had considered the secondary legislation and that this Parliament's successor would have the opportunity to veto that legislation if the concerns that we have heard about had not been dealt with.

The minister has made many promises about his desire to consult the committee and the voluntary sector widely, and I appreciate that. Unfortunately, none of us knows who will be where after 3 May, when the task could fall to someone who has a different view from the minister. Amendment 217 would offer a bit of additional reassurance on an extremely difficult issue for many of the people who have spoken to the committee.

Fiona Hyslop: All the amendments in the group concern retrospection, which has been one of the most pointed concerns in consideration of the bill, as Elaine Murray said. Had we had sufficient information about the terms of retrospection, its application and the criteria on which it was founded, it might have been easier to include it in the bill.

I thank the SCVO for drafting my amendment 219—members will appreciate that the amendment contains a long and considered list of statutory organisations. The amendment would give the minister an opportunity to say that the Executive understands that retrospection for smaller organisations and those in the voluntary sector may need more consideration and may need to be introduced in regulations after the bill is passed.

The committee acknowledges that the statutory organisations that gave evidence were willing to proceed with retrospection, so amendment 219 would offer the opportunity to prescribe those organisations now while allowing the voluntary sector to be dealt with in regulations. That reflects the balance of the debate.

I have much sympathy with amendment 217, which would put all of retrospection into regulations. The issue has two aspects, the first of which is that the burden on voluntary organisations could mean that some of them cannot continue to exist, which would cause concern about the care and protection of children and their opportunities to participate in meaningful activities as part of their development.

As the committee must make the decision, it should have received information about the risk management of retrospection and about what retrospection unearths. I have received

information from a college in the Lothians area about what was unearthed following a retrospective check that it conducted on all its staff. We understand that Fife Council has had a study done, looking into retrospection in relation to all its staff. Such information could helpfully guide what should go into any regulation or prescription of retrospection.

There might be a time issue involved. We should consider the time and effort that might have to go into retrospective checking. That time and effort, and indeed resources, would be diverted away from looking after children and from on-going vigilance. We cannot eliminate risk, but we have to manage it, in both the day-to-day protection of children and in legislation. After the bill has been passed, the meaning of retrospection must, to some extent, move into regulation.

I hope that the minister has noted some of the criteria that we think ought to be considered for what retrospection means in practice. The proposal in my amendment 219 is probably the least worst option from the minister's point of view if he wants something to be included in the bill to give comfort to those statutory organisations that want retrospection. The minister should pay heed to the committee's concern. If we are to manage the process properly, sensibly and proportionately, we must move some retrospection provisions into regulation following the passing of the bill.

I hope that the minister will reflect on the different opportunities that are presented by the amendments in my name and those in the names of Lord James and Elaine Murray, which give a choice about the way forward.

Mr Macintosh: I will not repeat all the points that have been made about retrospection. We have debated the matter fully in the committee—we did so with the minister last week. We know that the minister is particularly sympathetic to the concerns of the voluntary sector and is mindful of the potential costs of making too speedy a rush towards retrospective checking. Each of the amendments before us gives some sort of legislative backing to any reassurance that the minister might wish to offer, and I think that they all therefore have a certain attraction.

I speak in favour of amendment 217 in particular, which would allow ministers, by regulation, to list prescribed organisations. By doing that, the minister would be able to differentiate between, on the one hand, the statutory sector and those voluntary organisations that provide statutory services and, on the other hand, small-scale voluntary groups, which are the most vulnerable and the least able to absorb the costs, the legislative impact or the bureaucracy of the system. By using a list of prescribed organisations, the minister would be able to differentiate between organisations in that manner.

Speaking as a parent, I believe that members of the public do not approach all organisations in the same manner. A parent has a different attitude when they put their child into the trust of a teacher or health service worker compared with when they hand over their child to a piano teacher or small local voluntary group, for example the scouts or the brownies. In those different situations, the parent places trust in the organisations concerned to a different extent. I think that it is okay for the Government to leave that decision on the degree of risk to parents.

Rather than taking a blanket approach to every voluntary organisation, no matter its scale, amendment 217 would give the minister a way of differentiating between those organisations that we expect to have the highest standards and those in respect of which parents may themselves make a judgment on risk.

Mr Adam Ingram (South of Scotland) (SNP): I will not repeat all the arguments that my colleagues have made, which I broadly support.

In asking the minister to accept amendment 217, I suggest that it would reassure those in the voluntary sector and demonstrate to them that their views will be fully taken on board during debates on the subordinate legislation that will be made under the bill. There has been some concern that, although the Executive has given reassurance to the voluntary sector on retrospection, some of that has in effect been taken back a little. Perhaps the minister could comment on that when he sums up.

The worst-case scenario for the voluntary sector is that, over the proposed 10-year period for implementation, retrospective checks will be front-loaded as soon as the act is commenced. That is another reason for pushing consideration of retrospection into subordinate legislation. I hope that the minister will respond to those points.

15:30

Robert Brown: Members have made a number of fairly familiar points about retrospective checks. The issue depends on timing. As I have said before, if we tried to bring everyone into the system in a year, the whole thing would collapse around our ears. Taking 10 years to do so is in line with the general direction of travel and, at that level, the administrative burden will be either negligible or non-existent. We simply have to strike the right balance. After all, we are trying to protect children and vulnerable adults and to give parents and other carers necessary assurances about the various people in the voluntary sector and professionals who look after the people under their care.

I have considerable sympathy for the voluntary and statutory sectors on this matter. As I have told the committee on a number of occasions, we have no interest in implementing the scheme in a way that damages voluntary and other organisations. As a result, we feel that phasing the introduction of checks for the existing workforce will be critical to successful implementation.

For the record, I want to make it clear that all aspects of implementation—including whether, when, how, at what rate and in what order the scheme will be implemented—will be the subject of consultation and careful consideration. In that respect, my previous statements on this matter and, indeed, the views that I expressed in last week's discussion on the pre-consultation documents cannot be any clearer. The scheme will certainly not be front-loaded in the way that Adam Ingram suggested, because the system could not bear it. Implementation will have to be phased.

That said, it is still very important for individuals who undertake regulated work to join the scheme, because failing to do so will leave a gap in protection in an organisation. I do not entirely agree with the distinction that Ken Macintosh drew between the voluntary and statutory sectors. We are talking about a plethora of different organisations, including big statutory bodies that have many professionals and some volunteers; big voluntary organisations that are, in fact, sometimes bigger than statutory sector bodies; middle-sized voluntary bodies that have a fair degree of organisation; and, at the bottom, many very small organisations. Although some of those organisations are central to the workforce that looks after children and vulnerable adults, others are on the edge, and the situation for each is considerably different. Any system that is introduced should apply across the board—although, again, that is open to consultation. We should also bear it in mind that the voluntary sector was taken into the system as a result of arrangements that were introduced under POCSA.

In my introductory remarks, in the meeting that we had a while ago with the SCVO and on other occasions, I have made it clear that we are more than happy to consider ways of encapsulating longer-term guarantees for the system. I thank members for applauding my sympathetic approach to this matter—as if the minister who might succeed me after the elections might be unsympathetic. That said, I take the point that, if certain matters are not set out in statute, a subsequent ministry, however it is composed, could decide to take a different direction. Against that background and in light of the fact that stakeholders seek reassurance on these matters, I accept the spirit of the amendments that Lord James Douglas-Hamilton, Elaine Murray and Fiona Hyslop have lodged and I intend at stage 3 to lodge an amendment setting out some kind of regulatory scheme to deal with the matter. Of course, we will need to think about and discuss the best way of introducing such a scheme.

I am not minded to prescribe organisations per se, but that is not so much the issue. The point is that if we introduce regulations on this matter, people will be able to engage formally with the system. That goes with the bill's explicit statement about consultation and takes us away from the bill's current yes and no commencement order arrangement. I hope that that reassures the committee and the outside world.

The amendment that we will lodge at stage 3 will provide for retrospective checking arrangements to be introduced by subordinate legislation, which will be subject to parliamentary scrutiny. Obviously, it will be up to Parliament to decide whether it is satisfied with that amendment. However, I want to reflect on the various points in members' amendments, which are all slightly different, and see whether we can come up with a reasonably workable and sensible proposal that fits with our proposed arrangements. We will ensure that the amendment is lodged in good time to provide a reasonable opportunity before stage 3 to consider it. I hope that that, too, reassures members.

The bill will not work if the stakeholders who have to implement it on the ground, including the voluntary sector organisations that do so much to bring colour into the lives of young people and adults, are not comfortable with the arrangements. The Executive has every intention of ensuring that they are comfortable with and reassured by the implementation of the arrangements. We do not want them to be worried about trying to implement any bizarre arrangements in the bill. Instead, we want them to get on with their job as effectively as possible and with as wide an impact as they have had in the past. The bill and the underpinning arrangements should reassure and support them in that work.

Lord James Douglas-Hamilton: I do not wish to press amendment 215. Instead, I thank the minister for his constructive contribution and for what sounded like a substantial concession that voluntary organisations will find enormously important. We eagerly await the exact wording of the stage 3 amendment that he mentioned. As far as I am concerned, the important issue is the principle, not the detail of the draftsmanship.

Amendment 215, by agreement, withdrawn.

Amendment 216 not moved.

Dr Murray: Given that the Executive intends to lodge a similar amendment at stage 3, I will not move amendment 217.

Amendments 217 and 218 not moved.

Fiona Hyslop: Like other members, I welcome the minister's comments and his responsiveness to the committee's concerns. We will pay close attention to the wording of the Executive's stage 3 amendment.

Amendment 219 not moved.

Section 34 agreed to.

Sections 35 to 36 agreed to.

The Convener: I suspend the meeting for 10 minutes.

15:38

Meeting suspended.

15:49

On resuming—

Section 37—Police access to lists

The Convener: Group 18 is on police access to lists and scheme information. Amendment 48, in the name of the minister, is grouped with amendment 237. If amendment 48 is agreed to, I will be unable to call amendment 220 due to pre-emption.

Robert Brown: The bill gives the police access to the fact that an individual is listed and such other information as may be prescribed. That will enable the police to investigate cases in which a listed individual might be doing regulated work and to use identity information to solve other crimes.

Given that the fact that an individual is listed is the most sensitive information and that the other information is simply about their identity, it seems unnecessary to specify the information in regulations. Amendment 48 will enable ministers to disclose administratively whatever information they consider appropriate. Of course, the police will be able to use such information only for the purposes of fighting crime or catching offenders. There is a framework that surrounds that, about which my justice colleagues know more than I do.

I turn to amendment 237. If continuous updating is to work effectively, the police must be able to provide ministers quickly with new, relevant information about scheme members. We propose to give the police access to the names of scheme members; information on whether they work with children, adults or both; and other information that is needed to confirm the individual's identity. That will help continuous updating by speeding up the sharing of relevant intelligence information; engaging front-line officers more directly in considering the relevance of intelligence; reducing the administration time that is required to take decisions on the relevancy of intelligence; and reducing the overall cost to the scheme of providing it with relevant police intelligence.

As with amendment 48, information on scheme membership will be accessed only if an officer has a legitimate reason for running a search, perhaps because the individual has been arrested. I ask the committee to support amendments 48 and 237.

I move amendment 48.

The Convener: I refer to amendment 237 and the purpose-and-effect notes that the minister circulated to committee members on Friday, for which I thank him.

As all applications to join the scheme will be referred to the police for a criminal history record check and for soft vetting information, the police will already have information on potential scheme members. Is there a bar to prevent the police from flagging that information on their system so that they know who the scheme members are?

Paragraph 5 of the purpose-and-effect note on amendment 237 states, in relation to individuals:

"It is not intended to include the detail of vetting information provided from non-police sources or detailed information about their employment status."

Is the amendment worded in a way that conforms with that intention? I am concerned that it might provide significant scope for the passing to police of information that it is not necessary for them to have.

Robert Brown: There are two points. First, most information will come from police sources, including, for example, conviction information. However, other information will come from regulatory bodies, either with or without conviction information. Such information may lead to the determination of scheme membership, so there needs to be a flag to link back to the police system at the other end.

Secondly, the intention is to restrict the information that is provided to information that is sufficient to confirm the identity of individuals. That is not intended to include the detail of vetting information that is provided from non-police sources or detailed information about the individual's employment status. Having said that, there might be issues about the width of the wording of amendment 237, particularly in relation to subsection (2), which relates to the administration of the scheme. I am not entirely certain whether it limits things enough, but it certainly reflects the intention.

The provision emanated largely from my justice colleagues. I will have further discussions with them about whether there is a need to narrow the

wording to deal with Iain Smith's point. However, the saving grace is the fact that the information flow to the police is determined by ministers. Subsection 1(c) in amendment 237 mentions

"any other information held by Ministers … which Ministers consider should be disclosed for any purpose mentioned in subsection (2)."

That involves Disclosure Scotland, so it is not just information that the police regard as appropriate. There is a double bar—with the police procedures on the one hand and the ministerial fiat on the other—before information can be released to the police under the arrangement. However, we will consider whether the wording—particularly in subsection 1(c)—needs to be narrowed.

Amendment 48 agreed to.

Section 37, as amended, agreed to.

After section 37

The Convener: Amendment 49, in the name of the minister, is grouped with amendments 50, 91 and 95.

Robert Brown: If I may, convener, I will give a slightly longer explanation of how the amendments in the group fit into the bill as a whole. I hope that that will be helpful to the committee, given that the effect of these complex, but important, amendments may not be immediately obvious. If my briefing notes say that, the matters involved must indeed be complex.

As the committee is aware, work is being taken forward in the rest of the UK to establish a similar scheme to that under the bill for Scotland. It is important that both schemes complement each other in a way that minimises bureaucracy for individuals and administrations and which avoids the opening up of any cross-border loopholes, which could be damaging to children or vulnerable adults.

Section 92 provides that an individual is barred from regulated work with children or adults in Scotland if he has been listed in the equivalent lists that were established under the Safeguarding Vulnerable Groups Act 2006 for England, Wales and Northern Ireland. In short, an individual who is listed by the independent barring board for England, Wales and Northern Ireland is barred in Scotland and, vice versa, an individual listed in Scotland is barred in England, Wales and Northern Ireland.

The amendments ensure that, when an individual has already been listed by the independent barring board, they need not be listed again in Scotland. Under section 92, the individual is already barred in Scotland by virtue of being listed by the IBB. I appreciate that there is a subtle distinction between listing and barring and that all of this may sound rather complicated—it sounds quite complicated to me—but it will ensure cross-border consistency within the United Kingdom. None of us would want cross-border loopholes that individuals may be able to exploit. The avoidance of such loopholes has been a key feature in the design of the bill, as it has been in these amendments.

By providing that the central barring unit in Scotland does not need to consider for listing an individual who has previously been considered for listing in England, unless new information about the individual comes to light, the amendments ensure that each jurisdiction does not waste public resource. Importantly, the provision will also mean that an individual will not have to face simultaneously two parallel considerations for listing, by the body in England, Wales and Northern Ireland and by the central barring unit in Scotland. That would be inappropriate and unfair to the individual as well as being particularly inefficient. We have started to discuss with Whitehall a protocol for determining which jurisdiction will lead on a consideration for listing. In most cases, that will be pretty obvious because the individual will work in only one jurisdiction. For people who work in both jurisdictions, the jurisdiction within which the incident that triggered consideration for listing took place will take the lead. Again, that is probably sensible.

Essentially, the amendments are about ensuring that the decisions to list—and the decisions not to list—that are taken in one jurisdiction are recognised by the other jurisdiction. In addition to streamlining the process, the amendments therefore ensure a high degree of consistency in decision making across the UK. I think that that will benefit us all. Against that background, I ask the committee to support amendments 49 and 50 and consequential amendments 91 and 95.

I move amendment 49.

Fiona Hyslop: I understand the need for co-ordination with English legislation, but my concern and questions relate to the process by which that will work. For example, if an appeal is made, either on initial application or—returning to a previous debate—on removal, who will the appeal be made to? Which legislative framework will pertain? For example, if an appeal relates to listing under the English system, will a Scottish sheriff have to make a determination, based on information from the English jurisdiction, on offences that were committed in that jurisdiction? Similarly, where does ownership lie, particularly in relation to appeals, for subsequent removals? Which jurisdiction will apply and who—the sheriff or their English counterpart—will be the point of reference for appeal?

16:00

The Convener: While the minister thinks about Fiona Hyslop's question, I will make a pedant's point about the IBB, which is mentioned in amendment 49. Not giving the IBB's full name in the first instance is not good drafting, even if it is defined in a subsequent amendment to another part of the bill. It would have been better to call it the independent barring board the first time, in the same way as the Safeguarding Vulnerable Groups Act 2006 is subsequently abbreviated to SVG. Perhaps that could be considered for a technical amendment at stage 3.

Robert Brown: I agree. I will make arrangements to deal with that point at stage 3.

The more substantive issue that Fiona Hyslop raised is being worked through at the moment but, as I have tried to indicate, there will be a principal jurisdiction that all procedures will go through. If there was a recall of the listing later, that would also go through the principal jurisdiction. I appreciate that there might be issues to deal with if an individual has changed address or whatever, but given the format of the provision, any inconvenience will not be particularly substantial when measured against the advantage of having a single point for consideration of all matters that, after all, fall between two schemes. Although the schemes are similar, they have differences in detail and practice behind them, and it is right that the principal jurisdiction should be the one to decide appeals. The procedure is followed uniformly and the decision is then recognised by the other jurisdiction.

Amendment 49 agreed to.

Amendment 50 moved—[Robert Brown]—and agreed to.

Section 38 agreed to.

Section 39—Power to regulate procedure etc

Amendments 221 and 222 not moved.

Section 39 agreed to.

Section 40—Transfer from 2003 Act list

Amendment 223 not moved.

Section 40 agreed to.

Section 41 agreed to.

Section 42—Participation in scheme

Amendment 51 moved—[Robert Brown]—and agreed to

Section 42, as amended, agreed to.

Section 43—Statement of barred status

The Convener: Group 20 is on statement of barred status: rename as "statement of scheme membership". Amendment 52, in the name of Elaine Murray, is grouped with amendments 53, 55, 58, 63, 73, 89, 90, and 98.

Dr Murray: The amendments would replace the phrase "statement of barred status" with "statement of scheme membership" throughout the bill.

I cannot remember which witness said that the term "statement of barred status" is slightly confusing and implies that someone has been barred, rather than checked and found to be appropriate. The phrase "statement of scheme membership" makes the bill's intention more obvious and removes the confusion that "statement of barred status" confers.

I move amendment 52.

Mr Macintosh: I echo that point, convener. The Council of Jewish Communities raised that issue very early on in written evidence, and it was raised by more than one group of witnesses.

Lord James Douglas-Hamilton: What has been said is obvious and true.

The Convener: For what it is worth, I agree.

Robert Brown: It makes the legislative process such a joy to have such abstruse and arcane but nevertheless important debates. The amendments will clarify the point. The replacement term is in plain English, which is also important. I therefore support the amendments in the name of Elaine Murray.

Amendment 52 agreed to.

Amendment 53 moved—[Dr Elaine Murray]—and agreed to.

The Convener: Amendment 54, in the name of the minister, is in a group on its own.

Robert Brown: Amendment 54 will enable additional information to be included in statements of scheme membership. It is necessary to ensure consistency with the Safeguarding Vulnerable Groups Act 2006, which makes provision for the scheme in England, Wales and Northern Ireland. There is no immediate intention to use the power to specify additional information from Scotland, but we intend to use it to prescribe corresponding information from other jurisdictions.

I move amendment 54.

Amendment 54 agreed to.

Section 43, as amended, agreed to.

Section 44 agreed to.

Section 45—Scheme record

Amendment 55 moved—[Dr Elaine Murray]—and agreed to.

Section 45, as amended, agreed to.

Section 46—Vetting information

Amendment 56 moved—[Robert Brown]—and agreed to.

Section 46, as amended, agreed to.

Section 47—Duty to notify certain changes

The Convener: This is getting confusing, because the numbers of the amendments are 10 more than the numbers of the sections. I will try to keep up.

Group 22 is on the duty on scheme members to notify changes of address. Amendment 57, in the name of the minister, is the only amendment in the group.

Robert Brown: Amendment 57 removes from the bill the requirement for scheme members to notify ministers of a change of address. The amendment was lodged in response to concerns from some stakeholders about the burden that the requirement placed on scheme members. Accurate address information is important for continuous vetting to work properly, which is why the provision was included in the bill in the first place. However, we believe that it may be possible to collect change of address information through applications for disclosure. We want to explore that option further with stakeholders. If it is necessary to revert to placing scheme members under a duty to notify a change of address, that could be achieved by prescribing it as a "change in circumstance" under section 47(1)(c). Ministers have not ruled out doing that.

I move amendment 57.

Mr Macintosh: I welcome the amendment.

The Convener: There is general agreement that the amendment is welcome.

Amendment 57 agreed to.

Section 47, as amended, agreed to.

Section 48—Correction of inaccurate scheme record

The Convener: Group 23 is on review of police information. Amendment 224, in the name of the minister, is grouped with amendments 225 and 239.

Robert Brown: The police have in place robust procedures governing the collection and retention of information that could be included in a disclosure certificate. The bill already requires ministers to issue a new scheme record if they are satisfied that any information included in the scheme record is inaccurate. However, a recurring theme in evidence to the committee and elsewhere has been a concern about possible inaccurate information on disclosure certificates.

We have decided that it will be helpful for scheme members to have a more explicit course of action if they are unhappy about information that is included on their scheme record. The amendments put it beyond doubt that an individual can contest the accuracy and relevancy of information included on both a scheme record and an enhanced disclosure certificate. The committee will find this a welcome series of amendments.

I move amendment 224.

The Convener: I welcome the amendment. I considered lodging a similar amendment, but I did not because I was aware of the minister's plans. I welcome particularly the inclusion in the bill of the review arrangements for relevancy of information. All vetting information will appear on a scheme record, so it is important that only relevant information is included.

I would be grateful if the minister could consider the following points in relation to potential amendments at stage 3. Is there a case for ministers to be able to request directly that chief constables reconsider the relevancy of information? The amendments that we are debating apply only when the relevance of information has been challenged. If the approach of one force to the issue of relevancy were completely inconsistent with that of other forces, ministers might ask the chief constable concerned whether they were including in scheme records information that was not relevant.

I ask the minister to confirm that the current appeal on relevancy is to the person who made the original decision—the chief constable. Can there be a further appeal if the chief constable does not agree to consider the request?

Finally, on the issue of accuracy, rather than relevancy, of information, I would like the minister to indicate what the process for challenging the accuracy of information is. Amendment 225 talks about information being found to be inaccurate; it does not say how an individual can challenge information in order for someone to determine that it is inaccurate. I ask the minister to clarify that process and say whether he thinks it should appear in the bill.

Robert Brown: The convener's points raise a number of technical issues. I would prefer to come back to the committee with the relevant answers before stage 3.

The question of the appeal mechanisms is complex. However, broadly speaking, different considerations apply to information at that stage than apply to information at the listing stage. I want to make sure that I can be accurate about that when I explain it to the committee so, if I may, I will put that explanation in writing. Once the committee has received it, we can discuss the implications.

Amendment 224 agreed to.

Amendment 225 moved—[Robert Brown]—and agreed to.

Section 48, as amended, agreed to.

Section 49 agreed to.

Section 50—Disclosure of short scheme records

Amendment 58 moved—[Dr Elaine Murray]—and agreed to.

The Convener: Amendment 59, in the name of the minister, is grouped with amendments 60 to 62 and 64 to 66.

Robert Brown: The amendments in the group are a response to helpful suggestions from stakeholders that short scheme record disclosures would be more effective if they were to say whether the last full scheme record disclosure contained any information, and that that would be a useful additional anti-fraud measure because it would make it easier to identify a forged blank certificate. Since such provision will have no detrimental effect but will improve user confidence in the system, I am happy to press the amendments.

The amendments also mean that a short scheme record disclosure will reveal whether any of the information that was included on the last full scheme record disclosure is now out of date. That will help to alert scheme members in the relatively rare circumstances in which they are not otherwise aware that information on their last disclosures has become out of date.

I move amendment 59.

Mr Macintosh: Amendment 59 will be welcomed by the voluntary sector.

Amendment 59 agreed to.

Amendments 119 and 60 to 62 moved—[Robert Brown]—and agreed to.

The Convener: Amendment 26 is in the name of Dr—I mean Mr Kenneth Macintosh. It is grouped with amendments 70 and 230 to 234. Agreement to amendment 231 will pre-empt amendment 232.

Mr Macintosh: "Dr Macintosh"? Excellent. I have had a promotion.

The Convener: I apologise, obviously.

Mr Macintosh: Do not apologise.

As the minister will be aware, the issue of fees has caused considerable anxiety in the voluntary sector not just because of the number of individuals who will be covered by the legislation but because of the record of the operation of Disclosure Scotland. I think that I am right in saying that the fee for a disclosure check was originally £13 but has risen to £20 and that the proposal in this bill is that it will rise to £26. I might have got my figures slightly wrong, but I believe that the fee in England and Wales might be around £36. There is considerable anxiety in the voluntary sector over the increases that have taken place, so—as members can imagine—it seeks reassurance that such rises will not continue, because that would obviously have a severe impact on the sector's finances.

Colleagues have made several proposals that address the issue of fees in general. I want to speak to amendments 226 and 234 in particular. Amendment 226 would ensure that if an organisation applied for a short scheme record and then thought that it must carry out a full check on an individual, it would be billed only on the difference between the cost of the short scheme record and the cost of the full scheme record, as opposed to being billed twice.

Amendment 234 would ensure that there would be a statutory duty to consult before major changes to fee levels were introduced. There is an expectation that fees will rise in line with inflation but, as I have said, the record of Disclosure Scotland shows that, despite the best intentions of individual ministers, it is difficult to rule out in practice rather large increases in fees. The example of the Scottish Commission for the Regulation of Care, whose fees were not in line with what was expected, is perhaps more worrying. Amendments 226 and 234 would provide the voluntary sector with practical statutory protection.

I move amendment 226.

The Convener: I apologise to all genuine doctors for my earlier mistake.

Robert Brown: We are not short of options for changing what the bill says about fees—several suggestions have been made.

The main point that I want to make is that we have already said that there will be a full consultation on fees. I do not want to pre-empt options by making bits and pieces of decisions in advance of that consultation. We want to explore with the voluntary sector and all the stakeholders what would be the most comfortable and convenient method of charging fees. We already

know about Disclosure Scotland's costs, but we have been through the ups and downs of the system and have arrived at a fairly stable level of costs. We know what the cost arrangements are, and it has been said that they are well below those in England.

I want to make a correction. The £26 to which Ken Macintosh referred is one cost option that has been suggested for consideration. That cost will not necessarily be the end result, although it is reasonably likely—

Mr Macintosh: That was an indicative proposal.

Robert Brown: Yes—but we should remember that we are not talking about an increase from £20 to £26, but about a proposal for £26 for the first check and £10 for follow-up checks, and that it is likely that that there would be the same net effect that there currently is across the board, or—I hope—rather less of an effect if that proposal is adopted.

We should bear it in mind that the fees options are open for consultation and that everybody can have a say on them. We are not trying to close off any options; rather, we want a system that works. An annual subscription for scheme membership and an approach that takes into account cost differences between the first check and the follow-up check in a short scheme check, for example, have been proposed. The approach that will be taken should be convenient for the sector, but we have no particular issue of principle relating to how things should be done. However, across the piece, there should be no increase in the overall cost of the scheme to the people who will be involved in it. We should consider the various options that have been suggested against that background.

Amendment 226 includes an option that I think we touched on in the consultation arrangements. The merits of the proposal are considerable, but the principal objection to it is that it should not be included in the bill in advance of the consultation because it may turn out to be the incorrect approach. The proposal has not yet been fully explored and it could have hidden disadvantages.

Our intention is that short scheme record disclosures could be done online, with immediate results. If new vetting information is revealed, a full scheme record disclosure could be ordered immediately. The bill already provides flexibility for the scheme to be implemented in such a way. Amendment 226 would force things in a rather unworkable manner, as it would contradict section 50. I hope that Ken Macintosh will seek to withdraw the amendment on the basis that, over the coming months, we will develop with stakeholders the details of the interaction between short scheme record disclosure and full scheme record disclosure.

Amendment 70, which I will move, will slightly widen ministers' potential powers, so that they will be able to set different fees in different circumstances, which will provide greater flexibility.

I have said already that we are committed to full consultation on fees—rightly so. I do not think that we should, through primary legislation, limit the options that are available. Taken together with the statements that I have made many times on the record about not introducing the scheme in a way that would damage the valuable work of voluntary and other organisations, the arrangement of full flexibility and parliamentary scrutiny that we have is the best for ensuring that the charging regime is reasonable. I have also made the point that there is an interrelationship between the fee levels and how they are charged and the detail of how we introduce retrospective checking.

Different arrangements are proposed in the amendments that have been lodged by Adam Ingram and Lord James Douglas-Hamilton—I will come to amendment 234, in the name of Ken Macintosh, about consultation shortly. I say merely that their amendments are subject to the same criticism: they would pre-empt decisions that should be made after proper consultation of stakeholders.

For example, amendment 231, in the name of Lord James Douglas-Hamilton, refers to a

"waiver of all fees for paid and unpaid staff in the voluntary sector."

We should bear it in mind that the Scottish Executive has already paid the fees for volunteers and will continue to do so—we have said that clearly. The issue of fees for paid staff is slightly different. I am happy to discuss the implications of the proposal, but it should be seen against the context of the overall scheme.

Lord James Douglas-Hamilton has a similar proposal in amendment 233 for a

"waiver of fees in relation to volunteers who work with children or protected adults".

I am not certain that that is necessary, because fees for volunteers are already paid by the Scottish Executive.

Amendment 234, in the name of Kenneth Macintosh, is slightly different, in that it would provide for consultation before any change in the levels of fees. I am hard pressed to think of other legislation in which that has been done and I do not think that it would be appropriate to do it in this bill. For example, fees could be routinely changed in line with inflation, which would not require a three-month consultation of the sector. If the scheme is developed in association with the voluntary sector and that sector is satisfied with

the original arrangements, should relatively routine later changes in the fees have such a high level of consultation?

It would not be appropriate to

"publish the changes not less than 6 months in advance of their introduction",

as is also proposed in amendment 234. That would be too inflexible against the background of what is required for what might be relatively routine and marginal changes in the system. For what it is worth, the amendment would also prevent minor and agreed changes from being made without going through the full gamut of arrangements. I do not think that that is the way forward.

As the scheme progresses, we will be in close consultation with the sector, certainly in the introduction of the initial scheme. I have no doubt that it will be fully aware of any later changes that are in prospect. One point that has some validity was made in connection with the care commission—for whose operations I am pleased to say my department does not have direct responsibility. The point was that arrangements can sometimes be made that change how the commission operates as it moves forward and develops experience. We are not in that ball game, as we know the situation, but we could consider detailing the need for the organisation to be economic and efficient in how it operates. Organisations are expected to be that in any event, but I am happy to consider whether there is the potential for including a provision in the bill as a directive towards the organisation. That is probably not necessary, as public sector provisions already exist in that regard, but I am happy to give that degree of comfort if people want to talk to me about it.

I am opposed to amendment 234, in particular because the consultation arrangements are inflexible. I hope that, on reflection, Ken Macintosh will agree that they are not a workable proposition in the context that we are considering.

I am anxious to reassure the voluntary sector. It should be reassured by both the history of Disclosure Scotland and the current situation. The sector knows the score and how the system works and is likely to work. It will be consulted about the options and fully involved in the discussions. That should give it a high degree of reassurance about both the Executive's intentions and the likely working through of the practical arrangements of the bill.

Mr Ingram: Ken Macintosh has already touched on the voluntary sector's concerns about fee levels and structures. As it is, organisations are already under financial pressure with other changes, such as the winding down of European social funding. Voluntary organisations have asked for some of the worst-case scenarios that they think they could face under the bill to be removed. Amendment 230 would remove the option of

"annual or other recurring fees"

over the 10 years of scheme membership. That option might suit local authorities, but the Scottish Council for Voluntary Organisations believes that it would be onerous for voluntary organisations so it would prefer the option that the minister outlined of a £26 initial charge, with a charge of £10 for nominal update checks.

Amendment 232 would provide comfort that ministers would in certain circumstances cap fees for the voluntary sector. I ask the minister to comment on that. With the regime that was set up under POCSA, fees have risen. In England, disclosure checks cost about £36. There is a limit to the fee level that the voluntary sector can bear and accommodate within its cost base. We should remember that local authorities do not recompense voluntary sector organisations for disclosure-check costs. Circumstances in which capping would be appropriate include the type of scenario that has arisen with POCSA, and the Executive getting its sums wrong. There are questions about the financial memorandum. A fees cap for paid staff in the voluntary sector would reassure the sector that the Executive is confident about its calculations and that, if the calculations are wrong, voluntary organisations will not suffer.

I welcome amendment 70, in the name of the minister, but I ask him how the results of consultation of the voluntary sector can be expressed in the bill. I presume that we must take on faith the minister's comments about agreeing with the voluntary sector and other stakeholders during the consultation. What reassurance can we give the voluntary sector before that process is complete?

Lord James Douglas-Hamilton: Amendment 231, which was lodged on behalf of the SCVO, would waive vetting fees for paid staff who work in the voluntary sector, which is different from the effect of amendment 233. The fee waiver would apply during phasing in of retrospective checking and during the more normal period of on-going checks once the retrospection period is complete. The set-up cost of retrospective checking is a particular worry. Based on the likely three-year phasing-in period, the SCVO estimates a total set-up cost of £24 million. Within that, £3 million is allocated to paying the fees for vetting the 120,000 paid staff who work in the voluntary sector. Although the Executive disputes the total figure of £24 million, I understand that there is much less doubt over the figure of £3 million for fees. Therefore, on the understanding that £3 million is

a great deal for voluntary organisations to find over three years and that it will be part of a considerably larger cost, amendment 231 asks that the £3 million cost be eliminated.

Amendment 231 would also waive the on-going fees after retrospective checking is complete. I concede that fewer on-going checks will occur than at present, but the cost of a check has increased by 47 per cent in just one year since the outgoing Protection of Children (Scotland) Act 2003 regime was introduced. The indications are that the introduction of the new system will at a stroke increase by 30 per cent the cost of a full check. On the basis that such increases may continue, the voluntary sector should be exempt from the fees.

16:30

I applaud the minister's commitment to continuing to waive the costs of checking volunteers, but I feel that the distinction between volunteers and paid staff who work alongside them is somewhat artificial in this respect. Any fee that is levied on a paid member of staff will still, in practice, be borne by the voluntary group. It is a mistake to assume that if a voluntary organisation can afford paid help, it is somehow able to bear the same financial burden as a local authority or a private company. Therefore, I ask that the fee waiver be included in the bill in case any future Administration is not as fair minded as the minister.

Amendment 233 was lodged on behalf of the Law Society of Scotland. The argument for this amendment is slightly different. The Law Society is concerned that the bill's overall complexity will undoubtedly impact on volunteers in the range of voluntary organisations, which will in turn render participation in such organisations more problematic and risky. It is concerned that any fee that is paid by a voluntary organisation would discourage volunteers from carrying out regulated work. Therefore, the amendment would waive fees for checking all volunteers. I understand that the Executive has already committed itself to doing that, but it would be helpful to include the fee waiver in case future Administrations are not as fair minded as the minister.

By suggesting that he is not interested in any of the members' amendments at this stage, the minister is asking us to take an enormous amount on trust. I hope that at the very least we will return to the subject with a great deal of energy at stage 3.

Fiona Hyslop: Clearly, there is too much uncertainty around section 67 and the policy principles that underlie it. The fact that the minister keeps referring to consultations that will take place in the future does not give the sector or the committee the reassurance that they need. The various amendments reflect concerns about the need to shore up the bill by adding something to protect the voluntary sector.

The Convention of Scottish Local Authorities witnesses said last week that they expect to receive finance from the Executive to fund the fee proposals, but the policy memorandum makes it clear that funding will not be made available. That shows that there is not clarity, not least in the voluntary sector. We should bear it in mind that COSLA also said that should the voluntary sector have to bear the burden of the fees it would expect to share that burden from funding it will get from the Executive to support the resourcing of the statutory sector. There is far too much concern about who will bear the burden for us to be comfortable with the situation.

The minister should pay heed to concerns that have been expressed and try to shore up protection for the voluntary sector to ensure that it has the protection that it needs. This is another matter on which it would clearly have been more helpful to have had the consultation results before we proceeded. The very least the committee can do is to support amendments that would allow the required protection.

Ms Byrne: I endorse that. I am concerned about the haste with which we are considering the bill and the large number of amendments. However, we have an opportunity to show the voluntary sector that we have listened to it and that we mean to support it.

I am sympathetic to amendments 231 and 233, in the name of Lord James Douglas-Hamilton. I am also sympathetic to amendments 230 and 232, in the name of Adam Ingram, but I realise that amendment 231 would pre-empt amendment 232. I hope that Lord James Douglas-Hamilton presses amendments 231 and 233 to send to the voluntary sector the message that we have listened and want to make progress. I appreciate what the minister is trying to achieve through amendment 70. It is a step forward from the bill as it stands, but I do not want to leave the matter and I hope that we can pass an amendment that is meaningful to the voluntary sector.

The Convener: It is important to bear in mind the example of the care commission. The voluntary sector felt strongly that the care commission established what it wanted to do, safe in the knowledge that it would be able to charge fees to cover its costs. I hope that we do not end up with a situation in which the new central barring unit will be able to establish whatever it thinks it wants—gold-plated taps or whatever—and then pass the cost on to the voluntary sector or other parts of the statutory sector. The minister's

reassurance that he is willing to consider amending the bill to say that the unit should have due regard to efficiency, effectiveness and affordability may reassure the various organisations.

I am not convinced that there is a case for consultation every time fees need to be increased—inflation will take its toll and fees may have to increase on occasion—but there may be a case for some form of consultation in the event that there are significant changes in the fee structure from what is agreed after the existing consultation, or indeed if there is a proposal for a substantial rise in fees. It seems a bit daft to consult on the initial fee structure and initial fees but not to allow future consultation. It might be necessary to provide for consultation in the event of a major change in the fee structure or the level of fees.

Robert Brown: Quite a few points have been made. I go back to the general arrangements. There is an element of trying to have both ends of the cake. Consultation means not closing off options before we have had the opportunity to explore them with stakeholders. It means not making decisions on which options are preferred until stakeholders have offered their input. It means genuine consultation, which people sometimes treat with scepticism. The only constraint we have imposed, which has been touched on in passing, has been the recovery-of-costs basis for the scheme, which is the basis of many schemes in different parts of the Government machinery.

I indicated earlier that I was sympathetic to a wording that might suggest that there will be an onus on the new agency to aim for efficiency and economy in its operations. However, there is a major difference between the care commission, and the central barring unit and Disclosure Scotland under the bill. The care commission is an independent body, but the arrangements that we are setting up in the bill are for an executive agency. Ministers will be accountable to Parliament in the normal way for operation of the agency.

There is another difference in that we know in broad terms the cost of the disclosure arrangements—we are not setting up something new. Our arrival at this position has had its ups and downs before becoming stable. We know exactly what we are dealing with. There are two areas of flexibility: first, in the way in which we will bring in retrospection until we have made policy determinations, again after consultation of the sector and against the reinforced background of the stage 3 amendment that we have discussed; and secondly, until we have agreed the fee structure with the sector, it is not possible to be any more precise about the detailed fees, other than to say that the overall cost will be equivalent to the overall cost that we are operating under at the moment, with which we are pretty familiar. There is not really a large degree of uncertainty, except that which is caused by the genuine and necessary desire to consult the sector on those matters.

On Fiona Hyslop's comments, COSLA may well have said that it expects funding, but expecting funding is one thing; dealing with how issues are taken forward is another. That applies right across the board. As we have discussed before, the level of outlays that we are talking about here will come out in practical terms in negotiations between voluntary sector organisations and their funding bodies, which are quite often local authorities or health boards. Any costs that are incurred under the arrangements are no different to other sorts of costs. They are much more minor in the overall scheme of things than the costs that would be incurred in other directions of travel. That is an important aspect to bear in mind.

I well accept that the sector wants stability, so I repeat that we have already given the assurance that we will be paying the fees of the volunteers. That is by far the biggest outlay in that regard. People are already paying the costs for paid staff through the current structures. There is nothing new in that; it is not being imposed or changed by the bill. The situation already exists and is not a change of which we need to take account in the bill.

There are issues of balance about the possible fees of £26 and £10 or however that works out, but I made the point that the level is significantly less than that in England and Wales, and that the cost ought to come down from the current overall totals, although it might be distributed differently.

It is not a good idea to micromanage the setting of fees as some of the amendments propose. The suggested claims are legitimate in their own context, but the proper way to deal with them will be in the fees consultation. Let us explore then all the issues and put on the table all the considerations of what the fees will cost us, the implications of different sorts of costing and retrospective checking regimes.

Lord James Douglas-Hamilton spoke about a three-year period of retrospection. We are not talking about a three-year period for retrospective checks; we have already explained that the three to five-year period in the financial memorandum is for illustrative purposes. Again, that is up for grabs through consultation of the voluntary sector. The assumption that we are talking about a three-year period does not have universal validity if we are not going to implement a three-year period. We have significant disagreement about what the

SCVO and others have suggested the whole scheme would cost them. That is largely because the cost levels relate to the period of retrospection.

Adam Ingram said that he wants the worst options to be removed. I see where he is coming from and I accept the direction of travel that he tries to obtain. However, for whom are those the worst options? Until we have explored the issue with the sector and gone through the pros and cons of different fee-charging regimes with the different parts not just of the statutory sector but of the voluntary sector—some of which has different requirements in this regard—I am not prepared to rule out any options.

I am prepared to look at the fee structures, about which the convener spoke in his closing remarks. It is perfectly reasonable to consider how such major changes are made and to try to encapsulate that on the face of the bill. Although I am happy to look at ways in which we can do that reasonably, as I have made clear before, I do not want every minor rearrangement of the scheme, inflationary increase or whatever to be the subject of a three to six-month consultation. That is not a workable proposition.

The debate has nonetheless been useful in its exploration of some of the issues that will emerge in later consultation, and in the attempts to identify some of the pros and cons of different approaches. Let us think of this as a first stab and leave arrangements to be dealt with, as they ought to be, through later detailed engagement with the sector.

I ask that the amendments other than amendment 70 in my name are not pressed. If they are, they should be rejected by the committee. If I have missed any points, members should feel free to come back to me.

Mr Macintosh: I thank the minister and other members for their comments. The minister will be in no doubt about the level of concern and uncertainty about the impact that the new regime will have on the voluntary sector, in particular.

Although the minister said that amendment 226 has considerable merits, he said that it is difficult to legislate for protection of a scheme that has not yet been introduced. I understand why the minister is reluctant to accept the amendment. I am encouraged by the minister's words about the consultation, which I fully accept will be a genuine consultation. The voluntary sector will be encouraged that it can participate with the expectation that it will be listened to, even if there is no guarantee of what will emerge at the end. That is the same in all such circumstances.

My reason for lodging amendment 234 was to prevent radical changes from being made to the fee structure. I speak as a member of the Subordinate Legislation Committee. I would not wish there to be a three or six-month consultation every time fees have to go up in line with inflation. When the time comes, I will not push for an overly burdensome measure.

16:45

The minister gave us a number of assurances about coming back with proposals at stage 3. I could not work out whether the regulations that will be introduced under section 67 will be subject to negative or affirmative resolution or whether there will be statutory consultation. I seek further reassurance about that. I do not want to take an overly burdensome approach to subordinate legislation. However, this is a sensitive issue. I ask the minister to consider the form of subordinate legislation that will be used. It is quite normal to attach statutory consultations to subordinate legislation. Perhaps there could be an open-ended consultation. There could be consultation on the first change and subsequent changes could be subject to either the negative or the affirmative procedure. I, and other members of the committee, would be relieved if the minister would confirm that he will consider that.

Amendment 226, by agreement, withdrawn.

Robert Brown: I am more than happy to look at Ken Macintosh's suggestion as part of our consideration of how to proceed. I hope that that gives the committee a wee bit of reassurance.

Section 50, as amended, agreed to.

Section 51—Disclosure of barred status

Amendment 63 moved – [Dr Elaine Murray]—and agreed to.

Section 51, as amended, agreed to.

Sections 52 and 53 agreed to.

Section 54—Disclosure restrictions

Amendments 64 to 66 moved—[Robert Brown]—and agreed to.

Section 54, as amended, agreed to.

Sections 55 to 57 agreed to.

After section 57

The Convener: Amendment 227, in the name of Elaine Murray, was debated with amendment 42.

Dr Murray: I do not wish to increase bureaucracy, so I will not move amendment 227.

Amendment 227 not moved.

Sections 58 and 59 agreed to.

Section 60—Power to use fingerprints to check applicant's identity

The Convener: Group 26 is on the use of fingerprints. Amendment 228, in my name, is grouped with amendments 229, 67 and 125.

The substantive amendment is amendment 229. The purpose of amendments 228 and 229 is to ensure that the power to make regulations in the bill is in line with the purpose of the regulations as outlined in the pre-consultation document. In essence, it should not be possible for ministers to set a general requirement to provide fingerprints if someone is applying to join the scheme. The pre-consultation document states:

"This power will be used to identify the circumstances in which it will be suitable for fingerprints to be taken, used and destroyed, for the purposes of confirming identity. Fingerprints will be used only in those cases where the other information provided by the applicant and separately gathered by the Scottish Ministers is not sufficient to satisfy Ministers of the applicant's identity, and where that doubt causes Ministers to believe that the applicant might have a criminal conviction."

The purpose of amendment 229 is to reflect that intention in the bill. Paragraph (a) of subsection (1A), which the amendment would insert into section 60, specifies that fingerprints may be taken only where ministers

"have been unable to satisfy themselves of the applicant's … identity".

The purpose of the amendment is to make it clear that there is not a general power to require fingerprints.

Paragraph (b) refers to "a criminal conviction", given that, presumably, there will be fingerprint records that can be used to confirm identity only for those who have a criminal conviction.

I move amendment 228.

Robert Brown: You said that some stakeholders expressed concern that the bill does not make clear when fingerprints that have been taken for the purpose of confirming identity should be destroyed. It has always been our policy intention that fingerprints should be destroyed as soon as possible after identity has been confirmed. Executive amendments 67 and 125 will make that clear.

I thank the convener for lodging amendments 228 and 229, which try to tighten up section 60. I agree with the principle behind the amendments, but they do not quite meet the policy requirement. Paragraph (b) of proposed subsection (1A) would be too narrow. There might well be situations in which there is every reason to believe that an applicant does not have a criminal conviction but that needs to be confirmed.

I reassure the committee that section 60 reproduces a power that already exists in respect of enhanced disclosure and which is used very infrequently. I am told that it has been used 400 times—out of 1.5 million disclosures that Disclosure Scotland has done since the system began in 2002. Furthermore, fingerprints are taken only when it is not otherwise possible to distinguish the person seeking disclosure from another person who has matching details and convictions on the criminal history system. I confirm what Iain Smith said in that regard.

I hope that the committee is reassured. I ask Iain Smith to withdraw amendment 228 and not move amendment 229 and I ask for the committee's support for amendments 67 and 125.

The Convener: I thank the minister for his assurances, but I hope that he will consider whether further amendments are needed at stage 3. It is important that people should have a clear idea about the circumstances in which fingerprints will be used and that ministers should not have an open-ended power to use fingerprints. I hope that we can reach a form of words in line with the policy intention behind amendments 228 and 229 that will satisfy everyone.

Amendment 228, by agreement, withdrawn.

Amendment 229 not moved.

Amendment 67 moved—[Robert Brown]—and agreed to.

Section 60, as amended, agreed to.

Section 61—Power to use personal data to check applicant's identity

Amendment 120 moved—[Robert Brown]—and agreed to.

Section 61, as amended, agreed to.

Sections 62 and 63 agreed to.

Section 64—Unlawful requests for scheme records etc

The Convener: Group 27 is on persons entitled to see disclosures. Amendment 68, in the name of the minister, is grouped with amendments 69, 71 and 93.

Robert Brown: These amendments will allow greater flexibility in the operation of the scheme record disclosure, without prejudicing an individual's control of their personal information. Amendments 68 and 69 enable councils, for example, to ask to see the scheme record disclosures of the employees of their contractors, without committing an offence by doing so. However, there will be no obligation on the individual to consent to that. The issue is a tortuous one, on which I think the committee heard evidence.

Amendments 71 and 93 cut the bureaucracy around disclosure in cases in which more than one body requires disclosure at more or less the same time. For example, a council that is employing a newly qualified teacher will be able to countersign a scheme record disclosure so that a copy can go to the council and to the General Teaching Council for Scotland at the same time. The amendments will be useful and I think that the committee will support that direction of travel.

I move amendment 68.

Amendment 68 agreed to.

Amendment 69 moved—[Robert Brown]—and agreed to.

Section 64, as amended, agreed to.

Sections 65 and 66 agreed to.

Section 67—Fees

Amendment 70 moved—[Robert Brown]—and agreed to.

Amendment 230 moved—[Mr Adam Ingram].

The Convener: The question is, that amendment 230 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

Livingstone, Marilyn (Kirkcaldy) (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 230 disagreed to.

The Convener: Amendment 231 is in the name of Lord James Douglas-Hamilton.

Lord James Douglas-Hamilton: I am reluctant to press this amendment to a vote now, but I wish to return to the subject at a later stage. I fear that the minister's offers might be insufficient to achieve the required purposes.

Amendments 231 and 232 not moved.

The Convener: Amendment 233 is in the name of Lord James Douglas-Hamilton.

Lord James Douglas-Hamilton: The commitment on this matter has been given by the minister, so I will certainly move the amendment.

Amendment 233 moved—[Lord James Douglas-Hamilton].

The Convener: The question is, that amendment 233 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

Livingstone, Marilyn (Kirkcaldy) (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 233 disagreed to.

Amendment 234 not moved.

Section 67, as amended, agreed to.

Section 68—Forms

The Convener: Amendment 235, in the name of Ken Macintosh, is grouped with amendment 236.

Mr Macintosh: I will give the background to amendments 235 and 236. There is some disquiet in the voluntary sector over the changes that were made to the forms that were used by Disclosure Scotland. The voluntary sector agrees that the new form that is now being used is an improvement, but it was introduced with little notification and many voluntary organisations were caught with thousands of unused forms on their hands.

It might be easy to dismiss such concerns but, bearing in mind our discussions about the precarious nature of the voluntary sector's finances, we should acknowledge that the impact of administrative changes can be more severe on organisations that are living from hand to mouth financially. A major burden of both time and money can be placed on what is entirely voluntary effort.

The voluntary sector would like there to be more discretion or leeway in using up old stocks of forms. People would like to have a period of transition to allow for common sense in the use of old forms while new ones are introduced. We know that we will have a period of a year and a half before the new system comes into operation. I wonder whether the minister might be sympathetic to holding some form of consultation with the voluntary sector on the introduction of

administrative changes that might have a severe impact on organisations.

I move amendment 235.

Fiona Hyslop: I have some sympathy with amendments 235 and 236. The big picture is vetting and barring, but experience shows that disclosure can succeed or fail on simple practicalities. That is perhaps what makes this bill different from others. It is retrospection, fees, administration and so on that will prove the practical success or otherwise of the bill.

Although this might seem a more trivial or minor matter, the practical everyday manifestation of the new scheme as it is used by individuals and smaller organisations will be the application forms. The forms are probably the only tangible thing that they will have in relation to the scheme. We should not underestimate the importance of the forms and the consultation on the forms in ensuring that the system works smoothly and effectively for all concerned.

17:00

Robert Brown: In another life, I saw how legal aid forms changed over time. I accept the importance of the issue, which is perhaps beyond its face value. We have to consider how the new system will operate in practice.

The forms will be available online and will be readily downloadable. As Kenneth Macintosh rightly said, the new scheme will come in over a fairly protracted period. The intention is to go with the grain of the way in which organisations operate on the ground and I entirely accept that forms are part of that. Our intention is to develop the infrastructure, including the application forms and the online access, in as user friendly a way as possible. Any subsequent changes would be made in consultation with stakeholders.

I do not think that such matters are suitable for prescription in the bill. We are talking about a subsidiary issue that will be dealt with following the consultation. I have no doubt that the arrangements that we have in place to consult on the implementation of the scheme and on how such matters as fees and retrospection will be dealt with will allow ample opportunity for such matters to be pursued. Members will recall that when POCSA was brought in, there was extensive consultation. Money was provided for training and the development of a manual and leaflets. The same process will be involved with the bill. The financial memorandum allocates substantial funding to training and guidance, so there is already ample provision for such matters to be dealt with satisfactorily. I assure Ken Macintosh that we will not implement the scheme without informing people about what is coming. However, I do not believe that the bill should contain provisions on such details.

As regards the using up of old forms, I do not think that the member's argument applies. The bill will bring in scheme membership in a particular format. It should be perfectly possible for old forms to be used up in the 18-month transition period between now and the introduction of the new system without specific transitional arrangements being necessary.

Against the background of the vigorous reassurances that I have given, I hope that Kenneth Macintosh will be prepared to withdraw amendment 235 and not to move amendment 236.

Mr Macintosh: I accept what the minister has said. My point was worth making, but it is not worth including in the bill the provisions that I have proposed, so I ask permission to withdraw amendment 235.

Amendment 235, by agreement, withdrawn.

Amendment 236 not moved.

Section 68 agreed to.

Section 69 agreed to.

Before section 70

Amendment 71 moved—[Robert Brown]—and agreed to.

Section 70 agreed to.

Section 71—Sources of information

Amendment 72 moved—[Robert Brown]—and agreed to.

Section 71, as amended, agreed to.

After section 71

Amendment 237 moved—[Robert Brown]—and agreed to.

Section 72—Statements of barred status: disclosure of whether individual under consideration for listing

Amendment 73 moved—[Dr Elaine Murray]—and agreed to.

The Convener: Members will be delighted to know that we have reached the final grouping for today, which is on extensions of the time limit for disclosure of whether an individual is under consideration for listing. Amendment 121, in the name of the minister, is the only amendment in the group.

Robert Brown: It gives me great pleasure to speak to the final amendment to be considered today. Amendment 121 is a technical amendment

that seeks to clarify the operation of section 72 in respect of court procedures. It will put it beyond doubt that more than one application can be made for a six-month extension to the period during which consideration for listing can be disclosed. In addition, it will enable such an application to be made much closer to the expiry of the relevant period, which will help to minimise the making of applications that later turn out to be unnecessary.

I move amendment 121.

Amendment 121 agreed to.

Section 72, as amended, agreed to.

The Convener: That concludes our day 1 consideration of amendments. On day 2, we will begin with section 73. Any further amendments to section 73 onwards or to schedule 2 onwards should be lodged by 12 noon on Thursday. I thank everyone for their attendance and forbearance and, in particular, I thank the clerks for keeping me right during this afternoon's complicated proceedings.

Meeting closed at 17:04.

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