OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 21 February 2017

Session 5

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JUSTICE COMMITTEE
6th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Oliver Mundell (Dumfriesshire) (Con)
*Douglas Ross (Highlands and Islands) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Harry Aitken (Former Boys and Girls Abused in Quarriers Homes)
Laura Baxter (Victim Support Scotland)
Sandy Brindley (Rape Crisis Scotland)
Graeme Garrett (Association of Personal Injury Lawyers)
Alastair Ross (Association of British Insurers)
Graeme Watson (Forum of Insurance Lawyers)
David Whelan (Former Boys and Girls Abused in Quarriers Homes)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 21 February 2017

[The Convener opened the meeting at 10:03]

Limitation (Childhood Abuse) (Scotland) Bill: Stage 1

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's sixth meeting in 2017. Agenda item 1 is an evidence-taking session on the Limitation (Childhood Abuse) (Scotland) Bill. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a paper by the Scottish Parliament information centre.

I am particularly pleased to welcome our panel members. We have two panels today, and the first comprises Graeme Garrett, a solicitor from the Association of Personal Injury Lawyers; David Whelan and Harry Aitken, both representing Former Boys and Girls Abused in Quarriers Homes; Sandy Brindley, national co-ordinator of Rape Crisis Scotland; and Laura Baxter, operations manager with Victim Support Scotland.

We move straight to questions. I will start with a general question. To state the obvious, the bill removes the three-year limitation period when the court action in question is about child abuse, with retrospective effect. What are your views on the proposed change? What impact would the new law have on survivors?

David Whelan (Former Boys and Girls Abused in Quarriers Homes): I am a victim of abuse. In my case, there was a criminal conviction, and then there was a civil case that was time barred. We commend the Scottish Government for introducing the bill, which has the support of survivors. The bill's benefit would be that injustices of the past would be righted. There is an absurd position in Scotland in which there is a conviction in a criminal case, but when your case goes into the civil court process, it is time barred.

I want to give committee members a little bit of personal background as it is important that you really understand in order to have a view on what has happened with those cases in the past.

Quarriers, its insurers and its legal teams have tried to usurp the criminal jury process with the tactics and antics that they have used in the civil process. They have made people such as me go to see so-called false memory experts such as Dr Janet Boakes; they challenged the testimony that I gave in the criminal court, which was upheld by a jury and an appeal court; and they have further damaged and harmed victims by not addressing the original harm. Therefore, the law needs to be changed.

The civil process is also antiquated—it is Victorian. Lady Smith made some comments in relation to my case about why I did not come forward, but I was never asked to give evidence to explain that delay. That is a major fault in the civil court process as, if I had been able to go and speak about that delay, that would have been helpful to Lady Smith, who—incidentally—is the chair of the Scottish child abuse inquiry.

The Convener: That is a helpful start. Do you feel that it is an anomaly that there is no time bar in criminal cases, but that there is in civil cases, and that the bill would right that anomaly?

David Whelan: We believe that it would. The time bar definition in the current legislation is too narrow and is a bar to progressing cases through the civil courts, so it needs to be widened. The insurers are organisations with a vested interest and they will challenge what needs to be done, but justice needs to be done and delivered for survivors.

Graeme Garrett (Association of Personal Injury Lawyers): My organisation strongly supports the bill, because victims of abuse have been denied a voice for the past 50 years. They have seldom been in the position of being able to say in open court what happened to them. That is because limitation has acted as a brick wall that they have come up against. The bill is not a panacea, as victims will still face a number of significant obstacles before they are awarded compensation, but it is an important step in giving them a voice.

The Convener: Thank you; that is helpful.

Harry Aitken (Former Boys and Girls Abused in Quarriers Homes): I support what David Whelan has said. David and I have been on this journey together for 15 years. This is the first time that I have ever exposed myself to the cameras. The issue is so important that I felt that today I had to come out into the open. I have a public face as well as a private face, which I have tried at all times to defend and protect. Today, because of the importance and significance of the dimension of access to justice for survivors, I wanted to come here to speak to you.

I support the bill on a number of grounds, but primarily because it has come at long last, after all our campaigning and our discussions across the spectrum—with Cabinet ministers and MSPs and with the Scottish Human Rights Commission and the centre for excellence for looked after children in Scotland at the University of Strathclyde. We

have spoken to all those agencies about access to justice, which is a fundamental requirement for survivors and the fundamental right of survivors.

So many barriers have been placed in the path of survivors—it has been a diabolical disgrace to the people of Scotland. The rights of survivors have been infringed; every impediment has worked to their detriment. It seems quite easy for a care provider to lodge a plea of time bar and then leave it to the courts to deal with, while the prejudice to the survivors in that situation is tantamount to further abuse.

David referred to Dr Janet Boakes. She absolutely abused people who had been in court and who had gone through all the child abuse, retraumatising them and causing so much consternation in the minds of survivors and the community that very few of them have come forward since that time.

However, on the books of Cameron Fyfe, a Glasgow lawyer, we have 1,000 survivors who were prepared to come forward when they thought that there would be an opportunity for access to justice. However, as soon as legal aid provision was removed, those 1,000 people were abandoned.

On the time bar and the discretion of the judiciary, in not one case from a historical situation in residence was the discretion of the judge invoked since 1973—not one case. That was from 1973 until 2013—40 years. Lady Smith presided over eight cases lodged by former Quarriers residents. In each case discretion was refused. Four of them had already been proven in the criminal court; the former residents had secured convictions against their abuser, but still discretion was refused. It was only in October 2013 that Lord Kinclaven saw the light and said, “This is the time when the discretion must be invoked. That is my power.”

Lord Kinclaven gave that opportunity to a well-known case of an uncle versus a niece. There was child abuse in the home—it was a kinship care abuse situation, not a residential care situation. Lord Kinclaven said that there was sufficient evidence from the criminal court to proceed with the case and, more than that, that there would be no prejudice to the defendant. There was no prejudice to the defendants that we had to face in our cases, yet Lady Smith presided over those eight cases and not one was allowed to proceed.

10:15

Therefore, we advise the bill, we recommend it and we support it. It will have a dramatic impact on the lives of survivors—the thousands of survivors in this country who have suffered the most terrible and horrific abuse. They are still suffering from that abuse to this day. That becomes much more evident as we get older. As they grow older, every survivor loses resilience and resource, and the effects of the trauma that they suffered in childhood surface. They have tried at all times to protect their families and friends. However, ultimately, the trauma surfaces. Do you know what happens to the survivors? In many cases, they end up in hospital, the criminal justice system or prison. Worst of all, there are friends of ours who have suffered so badly that they have taken their own lives.

The Convener: We very much appreciate all the panellists coming forward, because it takes a lot of courage to come before a committee and to give evidence in the public domain.

If I can paraphrase Mr Aitken a little bit, the bill is not a panacea, but it is a major step in removing some of the barriers that he eloquently described in his testimony. To go a little bit further, Mr Aitken is probably also saying that, although the discretion was there in the courts to remove the time bar, that has not really been used to anything like—

Harry Aitken: It has never been invoked—not once in 40 years.

The Convener: That is very helpful. Do any of the other panellists wish to comment?

Sandy Brindley (Rape Crisis Scotland): It is to survivors’ credit that they have had the bravery to fight for this change to what is seen—justifiably—as an injustice and a barrier to justice.

The nature of child sexual abuse or child abuse in general is that it can take people a long time to feel able to speak about it. Therefore, the time bar disproportionately affects child abuse survivors in a way that my organisation definitely sees as not being just.

The bill is welcome. I echo the comments about it not being a panacea, but it will improve access to justice, which is to be supported.

Laura Baxter (Victim Support Scotland): First of all, we warmly welcome and support the bill. We know that there are numerous reasons why child abuse victims are unable to speak about that abuse within the three-year time limit. The bill would give them a voice. It would allow them to be heard and what they have been through to be recognised.

I met these gentlemen only this morning. I echo Sandy Brindley’s comments that it is very courageous for them to come forward, to speak about their abuse and to campaign on the issues. I am very impressed with their work.

Rona Mackay (Strathkelvin and Bearsden) (SNP): When the Scottish Government consulted

on the impact of its proposals, some respondents said that a possible issue with the bill is that survivors would still have to revisit traumatic events with lawyers and in the court system. Is that concern about the need to relive traumatic events valid, or do the benefits outweigh the disadvantages for survivors?

David Whelan: The survivors have given their answer to that by publicly coming out and campaigning for the past 15 years for a change in the law. The survivors want this change.

The survivors who are in front of you today are stronger than other survivors. We are able to articulate what the possible benefits of the bill will be and to talk about everything else.

We have represented vulnerable people—many of whom are more vulnerable than ourselves—for many years. They have spoken in the media, they are speaking to the child abuse inquiry and they spoke through the national confidential forum. The Quarriers victims-survivors spoke to time to be heard.

It is false to say that people would not come forward if there was a change in the law. People would take the full benefit of such a change.

Rona Mackay: Do you think that that position represents the majority of survivors?

David Whelan: I definitely do.

Harry Aitken: The significance of the bill is that, at long last, survivors will have the choice. That element of choice has been denied to them up until now. We will make anyone we speak to aware of this. We speak to people quite frequently across the whole nation. Sometimes they are in England, but we will make people aware wherever they come from. My point is that they will already have heard that it will be a difficult task for them to go to court. They will have to have a robust case, that case will be cross-examined and it will have to stand up to the normal practices of the legal system. However, having made that choice and found the courage to go forward, I believe that that will fortify them.

The bill gives survivors an opportunity in their lives to demonstrate that they saw the matter through to the end and were not oppressed or suppressed by the system, which all of us have been from our childhood right through until now, when at long last the Scottish Government has given that opportunity. The impact on survivors will be dramatic, it will be positive and it will enlighten and enrich their spirit.

Rona Mackay: Thank you. That is very encouraging.

Douglas Ross (Highlands and Islands) (Con): I have a small supplementary question. I am grateful for the evidence that we have heard so far. I can understand that victims are prepared to give evidence and that some have already done so in a criminal case. However, is there a concern that, with the vast numbers who could come forward and our already stretched justice system, it is not just giving evidence that could be a barrier to some? If the bill passes, they may get a peek at it and think that it is a great opportunity, but because of the numbers there may be a huge delay in some people actually getting their day in court. How do you think that survivors will deal with potential frustrations arising from the fact that they may have the opportunity to go to court, but because of the pressures on the court system, that may not happen immediately?

Graeme Garrett: I will come in on the issue of vast numbers. As I said, there are still a number of pretty serious obstacles facing anyone who wishes to seek compensation for historical abuse. The first is that many victims will have been abused not in institutions but by individuals. There has to be someone who is worth suing before a victim can seek compensation. Foster carers are likely to pose a particular difficulty, and the age of many of the cases means that the evidence may simply not be there.

Douglas Ross: What I am trying to say is that the cases that come to court will be complex by their nature and will take time to go through the process. Someone whose case is in the first tranche will get the satisfaction of having their evidence presented in court and, potentially, getting the correct outcome. However, my question is about how survivors—who have waited so long to get to this stage—will deal with the frustration of having to wait while other cases are heard before their own and the justice system potentially struggles to deal with that increase in cases. That is what I would like to hear about.

David Whelan: I think that there is scaremongering about the "vast numbers" that are going to come forward. It is scaremongering by the insurance companies to stop the Scottish Government bringing the bill forward. It is just another tactic that is being used. We have said already that robust evidence will be required and that will need to be scrutinised. If there is a preliminary hearing on a case, it may not proceed to the next process. The issue for us is that the victim must be brought forward to give their personal testimony to the first hearing, if they are able to, and to explain.

With all due respect, delays in the court system are not an issue for us to deal with; they are probably an issue for the committee to deal with. The courts should facilitate the justice process in a proper and expedient manner.

Sandy Brindley: I echo that point. There are resource issues for the court service as a result of the bill, but that should not be used as a reason not to improve access to justice. That is an issue for the Government to consider.

The Convener: The point is that survivors should see that opportunity to move forwards. That has been covered quite well.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I have a relatively small point that can be answered concisely. I just want to be clear that you are satisfied that, where the victim themselves might not be able to act—where they are intellectually disadvantaged would be one example, and there may be others—the bill will allow others to act on their behalf.

David Whelan: Yes, of course. Clearly, victims will have legal representation if the bill is enacted, and those representatives will be there to support them.

Stewart Stevenson: I am not making a legal point. The point that I am making is about the carer for somebody who has been abused—it is about that side of the equation.

David Whelan: Whoever the person nominates to represent them, the bill should still assist their case.

Stewart Stevenson: I am sorry. I am going to be very precise. Some people might not have the capability to make such a nomination. That is the point that I am getting at. I am not trying to open this up too much. It is just to make sure that, when we talk about victims, we are not restricted to victims who have the ability to make all the decisions in their lives for themselves. I am just asking whether you are satisfied that we are covering that group of people.

David Whelan: Clearly, we would want every victim of child abuse who has a case to proceed no matter what their disabilities are or whether they are incapacitated. Many survivors will have been in the mental health system because of what happened to them. Again, it would be an indictment on the system if they were not allowed to be heard.

Stewart Stevenson: That is helpful. We have got that on the record, and that is what I wanted.

The Convener: Are we also talking about advocacy, where the person brings the case, but someone is the advocate for them—not necessarily an advocate in a legal sense but someone who is able to articulate their case perhaps better than the victim could?

David Whelan: Can I call you Margaret?

The Convener: Yes, absolutely.

David Whelan: Margaret, that has been happening in past cases, in which people from organisations such as Sandy Brindley's and Victim Support Scotland have acted as advocates for survivors. We would wish that to continue, because we are dealing with some of the most vulnerable people, who have been let down by society in that the state has failed in its duty of care.

The Convener: We have a number of questions, so we will move on.

Harry Aitken: I would like to make a comment. This is a practice that we have used for some years now and which is strengthening in Scotland. We have just established the survivor support fund, which has 26 partners, all with expertise in the different domains of trauma and the requirements that survivors have. There will be an opportunity, across the spread, in Scotland for people to have an advocate and to have support, which they already do—whether that is on children's files or in going to court or meeting any panel that they have to meet. That has already happened and it is embedded in the system now. It works extremely well, because we have very proficient, sympathetic and understanding support workers who do that for us.

Something that I meant to say on Douglas Ross's point is that, if it is really well organised, the first tranche of cases will be the frail, the infirm and the elderly. If going through that process helps them, they might die happy—I am sorry to be so blunt, but that is what we feel about it. The outcome of that first tranche of cases might provide the impetus for a further swell of cases coming forward. That is easily supported by evidence from around the world—from Australia, Ireland and Canada. All that has happened, so we have a good bank of information that will support us in understanding those processes.

I do not see any real problem if a person is, at long last, given the choice to make their own mind up as to whether they want to go through the court system or to wait until they get redress and take their case through that process. After all, we still have to deal with the 1964 issue, which might crop up in your questioning today. We know of survivors in their 70s, 80s and 90s, who will—I hope—be the first people to be exposed to that opportunity. The methods that are in place will suffice. They will work well, as they have done up until now, and I see no impediment to those people getting access to whatever means of support or outlet they want.

10:30

John Finnie (Highlands and Islands) (Green): Good morning, panel, and thanks for your evidence.

You will be aware that, although the bill enjoys a lot of support—I support it—there are critics of it. I would welcome your comments on one of the points of criticism, which is that, if the bill proceeds, in the new regime cases will be decided on the basis of poor-quality or limited evidence. Furthermore, it is said that the new regime will draw what are considered to be scant resources away from other areas. Could you comment on that, please?

David Whelan: What was the last bit of your question?

John Finnie: It was about the suggestion that the resources that will be required to support the new regime will be redirected away from other valuable areas.

Harry Aitken: I understand that concern, but we must look at the evidence from around the world. We must look outside Scotland, because we have fallen behind. However, we are catching up quickly. Fifteen years is not a long time in the life of a survivor compared with the length of time that people in other jurisdictions have had to wait.

The idea that there would be a paucity or a lack of evidence has been debunked. In many cases, people have been able to present their case to the criminal courts and have been successful on the basis of the evidence that is available. That has not happened in every case; I agree that it is extremely difficult. Among the obstacles that we have to confront are the loss and the deliberate destruction—which Tom Shaw reported in his systemic review—of children's files. All those matters can be taken into account, but in other jurisdictions sufficient evidence has been gathered to support a robust case, and we are happy to hear that.

On the point about drawing resources away from other elements of society, that does not really bother us. It is not our concern, because we are all taxpayers. Is it not time for the jurisdiction of Scotland to demonstrate what it means when it says that it will support survivors and Scotland's poor and vulnerable people? It would be quite easy for the necessary resources to be allocated.

The figure that the Scottish Government has come up with for survivors coming forward is 2,200, only 10 per cent of whom will go forward to the courts. Therefore, it is not a monumental task, but it is an important one. We say that we believe in the rights of people in this country, but although defenders' rights are very well protected through article 6 and article 1 of the European convention on human rights, over the years the rights of the individual have, in many cases, been flaunted and ignored.

If the Scottish Government is serious, I am sure that it will find a way of supporting the system and getting us through the process.

David Whelan: On the point about resources, the streets are littered with the damage that has been done to the victims. Significant resources have to be put into the NHS, voluntary groups and other areas to address and repair the damage that has been done. I think that another amount of resource to finish the process and ensure that justice is delivered will be a resource well spent.

John Finnie: Thank you. It is important that we address the criticisms, and it was helpful to get that on the record.

Mary Fee (West Scotland) (Lab): Good morning. An alternative approach that has been suggested by opponents of the bill would be to provide—whether by statute or by other means—for more guidance to be provided to judges on how they should exercise their discretion under the Prescription and Limitation (Scotland) Act 1973. Mr Aitken, you have already commented on judges' ability to use their discretion. Would you like to make any additional comments on that before other panel members say what they think about the proposal?

Harry Aitken: I confirm what I said. Judges were always advised about that. They knew the substance of the act and understood their discretionary powers. We should not forget that their discretion was full and unfettered—that is the language that is used—but they still did not allow cases to proceed.

I have read the judgments carefully, particularly the judgment of Lady Smith in the Quarriers case, and, in many cases, I, as a layperson, saw opportunities for the powers to be invoked. I certainly saw that Lady Smith had such an opportunity, but she did not take it. That is not to get at Lady Smith—she just happened to be the person who presided over these cases.

That is not something that I think will bother us in the future, simply because the robustness of the system as it is defined by the Scottish Government just now means that you have to have a case that is backed up by robust evidence that can be tested in court. If the limitation element is removed, the strength of the court case system will be predicated on the effectiveness of that survivor's case going further.

David Whelan: My understanding is that the bill will widen the awareness test. The judiciary have been very conservative—that is demonstrated by the fact that, as Harry Aitken said, judicial

discretion has been used in only one case in all those years. The judiciary have to take responsibility for the judgments that they have passed in these cases, and they cannot just pretend that they are somewhere up there and are not accountable to the people. They are accountable to the people.

The widening of the awareness test should mean that the judiciary do not have an excuse to time bar a case. The widening of the definition of what child abuse is and what its effects are will support the judiciary to make the right decisions the second time around.

Sandy Brindley: The other benefit to legislating rather than relying on discretion is that it gives greater certainty to survivors about what the legislative framework is and what their options are. I do not think that the evidence suggests that we can rely on an approach that is based on discretion. I absolutely think that we need to legislate in this area so that we can give greater certainty to survivors in these difficult circumstances.

Mary Fee: So the use of discretion does not give survivors any confidence.

Sandy Brindley: I do not think that it gives any certainty about what the approach is likely to be. I completely understand that, based on past experience, survivors would not have confidence in that approach, simply because discretion has been used so infrequently. In fairness to the judiciary, we are talking about a completely different legislative framework. I think that that is the right approach to take.

David Whelan: There must be certainty. The law needs to be clear—obviously, it is unclear at the moment. One of the lords—I cannot remember which—said that there is a mischief in the legislation that needs to be addressed, and I agree.

Harry Aitken: With regard to the opportunities that the survivors can avail themselves of, it is proposed by the Scottish Government in the bill that the awareness test will be looser in its interpretation. That is important. Research that has been done by CELCIS at the University of Strathclyde has found that it is, on average, 22 years before a survivor discloses their abuse—the time period is longer for men than it is for women. Under the new proposal, there is much more flexibility, which is important to how the system deals with the knowledge of the abuse and what people's rights are.

The other element is the fact that it is also recommended that other factors should be added and that an exhaustive list of factors will be considered in the case of a survivor coming forward. I can think of two examples that I remember from the consultation. One concerns the question of what the care home or the management did when cases of child abuse were reported, what protections they put in place, what investigations they undertook and what actions they took, if anything was proven.

Secondly, as a child leaves the care system, they have a right to be informed of their rights, and it has been suggested by survivors that those rights should extend to the possibility of raising any complaints that they may have of their care system experience. That dramatic, radical approach would place the onus on the Scottish care system to protect the youngsters after they leave care, which would help.

The bill is shaping up to have a lot of great things in it for survivors that will help them in every dimension of their lives.

David Whelan: The defenders will still have the right to challenge every case. We recognise that right, and the bill will not remove it. If someone challenges a case properly—not by trying to discredit the victims or undermine the testimonies that are given in criminal courts—we recognise that they have the right to make that challenge. Nevertheless, it should be done properly.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Good morning. In Scots civil law, the notions of limitation and prescription stand alongside each other. The focus today is on access to justice for survivors, and the proposed new regime for limitation is about enhancing that. However, the Scottish Government has decided not to reform the related area of prescription, deeming that it would be inappropriate for it to do so because that would breach the European convention on human rights. The effect of that decision is that, under the new regime, if the abuse occurred before September 1964, it will not be possible for someone to raise a court action in relation to it. What are your thoughts on that? Do you think that the Scottish Government's decision on prescription is appropriate?

David Whelan: I am a layperson. I place on record my thanks to Eleanor J Russell, who did the research into these historical abuse cases that I was able to submit to the committee.

Clearly, we would like every case to be able to proceed. However, through the Scottish Human Rights Commission's interaction process, which we undertook over 18 months with the Government and all the other parties, we recognise the difficulties with pre-1964 cases and we are in discussion with the Scottish Government—as are other survivor groups and other parties—about commencing a discussion about redress. We have focused initially on pre-1964 cases because we recognise that it might not

be possible for the law to be changed as much as we would like it to be changed for every survivor.

We recognise that there is an issue with the European convention on human rights that means that it may not be possible to change the law. In fairness, the Government has explained that to us in clear terms. I want to thank the Scottish Government because, over the past two years, ministers have taken time out from their brief to meet individuals and groups of survivors. They have taken the time to understand the issues that we have faced and they have brought forward a number of elements of the interaction review group's plan, although some elements are still outstanding.

It is difficult for us as a survivor group. We want the law to help every survivor, but the Government has explained the situation to us. We recognise its position and fully support its engagement with us, through the interaction review group, on the action plan and other elements that will address that particular issue.

10:45

Harry Aitken: May I chip in? We understand the problem. It is a dilemma for us, but I think that it has been resolved in the minds of the people that I have spoken to. Looking at me, you can tell that I am not 35 years old. We are able to talk the people we deal with through it as best we can. There has been a long negative problem with prescription, but it is substantive law, whereas limitation is procedural law. We understand that. When the law on prescription has to apply to pre-1964 cases, the minds of many—although not all—survivors are reconciled to the fact that the door is closed for them. It is a difficult pill to swallow, but at least we understand it.

There is a proposal that the best way to deal with the issue is to make sure that those people are treated fairly and appropriately in the redress scheme once that is up and running. If that is done sensitively and to the proper degree, it would satisfy the people who may not be with us for very much longer. At least they would see some recognition. They will take the pre-1964 dilemma to the grave with them.

Graeme Garrett: My organisation fully understands the reasons for the 1964 cut-off date. We feel that the class of case that this is likely to catch is the very class of case that would have struggled on evidential grounds anyway to establish a successful case.

The criminal injuries scheme, for entirely coincidental reasons, also operates a 1964 cut-off date. I sat as a tribunal judge on criminal injuries cases for 10 years and, during that time, I came across one or two cases at most that were caught by the 1964 rule. I do not believe that we are talking about significant numbers.

Ben Macpherson: That is reassuring. It is also reassuring to know from survivor groups that there is an understanding about the rule. One of the committee's fears was about the potential for the bill to raise expectations about cases where there would not be access to justice through the new legislation. It is reassuring that there is wide understanding among survivors about the balance.

David Whelan: The Government has had the conversations. They have been open and transparent, and supportive of what the survivors wish to achieve within the interaction plan. Where there have been difficulties, the Government has taken the time to explain them.

The Convener: To follow up that point, you are saying that there is a realistic expectation of what is possible and what is not, and an understanding of the difficulties arising with the pre-1964 cases. Does it help where there is some redress or recognition that the abuse took place? You will be aware of the Apologies (Scotland) Act 2016. Does it help if the abuse has been acknowledged and if there is a commitment to look into the circumstances to ensure that it does not happen again?

David Whelan: Within the interaction plan that was agreed, there are a number of elements—apology law, redress, the national confidential forum and the public inquiry.

The apology law is certainly helpful. It will be helpful for the pre-1964 people but also for those whose cases will be heard. Some people may come forward and go to the civil process if this bill is enacted. All that they might want is an apology. The organisations will be able to give that apology without the fear of liability.

I did not support the apology law initially, as Margaret knows, because of the liability element. We recognise fully, however, that organisations need to be enabled to give an apology without the fear of liability. Redress is also important.

What the individual survivor wants is up to them. Some survivors might want three elements, whereas some might want just one. A sincere and meaningful apology is probably one of the most powerful things that can be given to someone, no matter what hurt and damage has happened.

The Convener: There is also the provision to look into the circumstances and see whether anything can be done to ensure that what has happened does not happen to anyone else. I know that that is a huge issue for survivors.

David Whelan: One of the drivers for the survivor groups is that we want to ensure that organisations are fit for purpose for the next

generation of cared-for children in Scotland. We want to ensure that what has happened cannot happen to another generation of such children. We cannot prevent every single case, of course, but if the systems are robust and are investigated—for example, through the child abuse inquiry—we would expect institutions to be fit for purpose at the end of the process.

Harry Aitken: About six to eight years ago, a visiting professor came from Australia. That lady had dealt extensively with the apology law there—you might have seen her. I was present at a discussion that took place, which really allayed many of our fears simply because it gave the abused agency—for want of a better term—the freedom to express themselves to the survivors and give an apology. That was one good, human thing that worked extremely well. The visiting professor said that claims were accepted more readily in that process and fewer claims came forward on the basis of controversy. A pathway was made clear because an apology had been made.

An attempt was made during the time to be heard pilot forum under the aegis of Tom Shaw, Kathleen Marshall and Anne Carpenter. At the end of the process, it was said to the survivors, “By the way, we have this method called restorative justice. Would you like to take part in it?” Those people were at their most vulnerable, and some of them said, “Justice? Yes—that’s what I’m after,” so they were given that restorative justice method to pursue. Fifteen out of 98 opted to take it, and nine continued. My recollection is that only one person successfully completed the course. That was simply because the apology was meaningless and was given in the wrong context. It was not given by the right person in the right circumstances, and was not ratified and supported. That was a disgrace to the survivors. The people whom we had to support through that process were traumatised yet again.

I thank Margaret Mitchell for her sterling work in getting through the system an approach that has the stamp of authority, efficacy and permission. I believe that it will remove the burden from care providers and that the mighty and powerful insurers will no longer stifle and constrain them, so they will be able to make an apology. It will also remove another impediment. There will be no excuse, because people will be allowed to give an apology without liability. Therefore, I can see the merits of the approach.

The Convener: That is helpful. I think that you were thinking about Professor Prue Vines.

Harry Aitken: That is right.

David Whelan: It is important to say something about restorative justice. What Harry Aitken said about there being only one outcome demonstrates that that is not a model that would suit survivors.

Past processes have been criticised or have failed simply because we were not consulted. People put them there and said, “You’re going to be part of this.” The difference in the past two to three years has been that we have been consulted on the processes that directly affect us and we have been able to input into them. That is the way forward: the processes need to be victim-survivor centred. I recognise that the law might be different, but it should be able to support the survivors in getting access to justice.

Mairi Evans (Angus North and Mearns) (SNP): I want to hear from each of you about how the terms “child” and “abuse” are defined in the bill. There has been some criticism about the definition—or lack of it—of “abuse” in the bill. Do you think that “abuse” is defined with sufficient precision in the bill so that survivors can be confident that their case will fall within the scope of the proposed new regime?

Sandy Brindley: We support as broad a definition as possible. It is welcome that the definition of abuse has been broadened beyond the initial definition, which referred to those who were in care. The definition should cover any form of abuse. Certainly, given the work that we do, I feel that the definition must cover all sexual offences. My understanding is that the definition in the bill is sufficiently broad. If we tried to be more specific, we could potentially limit the range of experiences that it would cover. As panel members have said, we want as wide a range of people as possible to be able to access the legislation. We are therefore content with the wording in the bill as it stands.

Harry Aitken: There is a slight hiccup in what has been said. Mental, physical and sexual abuse are well catered for in the bill, but there is another form of abuse, which emanates from the church environment. Survivors have always said to us—we put this forward on their behalf—that spiritual abuse should also be considered. That abuse affects a different dimension of a human being and it has to be dealt with; it is not addressed through dealing with mental, physical or sexual abuse. It is probably more damaging, because it affects the soul, heart and mind of a person. I would like to have seen it considered, given that it used to be included in our consultation documents. I note that it has been removed, but I would like to see it included in consideration again.

David Whelan: People were indoctrinated in the institutions in relation to religion, and the damage that that has done to people is quite extraordinary, because they were also abused by someone who was a faith person, such as a priest or someone else with a religious connection. The damage that

was caused by that kind of mix is just unbelievable. What does indoctrinating a child in an institution with the Bible and abusing them at the same time do to them when they become an adult? We can see the damage that has been done in terms of people having mental health issues and being alcoholic and the fact that 40 per cent of former residents in the care system get involved with the criminal justice system. Not all those issues relate to the care system, but there is certainly an impact from people not being cared for properly as children.

Mairi Evans: Just to clarify, do you think that that should be specifically mentioned in the bill, or do you think that the current definition of abuse in the bill is broad enough to encapsulate that?

Harry Aitken: For the reasons that I have given, I do not think that the definition is broad enough. With regard to sections 19 and 17 of the 1973 act, discretion might come into play in a case, but we do not want any discretion, because with discretion comes confusion. With regard to the case that Lady Smith was involved with, I am not saying that she was confused, but she certainly did not use her discretion to our advantage. I would therefore like reference to spiritual abuse to be included in the bill for the sake of clarity and certainty so that the people who suffered that kind of abuse—not all of us did—will not be neglected, forgotten or abandoned. This brings together all the elements of our society in that it is not just the police, social services or the care providers; it is also the church, which is the foundation of our society, and we do not want it to escape the scrutiny that we hope the bill will allow us to do.

11:00

The Convener: Fulton MacGregor and Liam McArthur have supplementary questions.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I thank the panel for the powerful evidence that we have heard today. I ask my supplementary to Mairi Evans's question wearing my hat as convener of the cross-party group on racial equality. Following on from the discussion that we have just had, do you think that the bill and the definitions are broad enough to incorporate the challenges that many members of ethnic minorities face?

David Whelan: I support what Sandy Brindley said about the definition and widening the elements in the bill. Every bill should recognise every individual in society no matter their creed, religion or colour. One would hope that we are legislating for every individual in society.

Harry Aitken: There is no evidence in the bill that there will be exclusion, and that is comforting. If we take it that there is no exclusion, that means that everyone is included. With inclusion across the spectrum of creeds, genders and whatever, we will have the opportunity to allow people to avail themselves of the benefits of the law, and the bill as it stands will certainly support them in that endeavour. At this late stage, having gone through the whole process and, ultimately, attempting to right the wrongs of the past, we cannot make a simple mistake such as that, and from the way that I read the bill, I do not see any evidence that that could happen.

Fulton MacGregor: Thank you. It was important to get that on the record.

Liam McArthur (Orkney Islands) (LD): I join others in thanking you for the clarity of your evidence this morning. You set out clearly the point about spiritual abuse. Mr Whelan, you talked about the quality of the engagement that you have had with the Scottish Government at ministerial and official levels. Has there been an explanation of why they were reluctant to take that point on board? We can raise the issue with the minister in due course, but I am interested to know what explanation you have been given for why that has not been encapsulated in the definition of abuse.

David Whelan: To be honest, we did not ask that question. We discussed it in our survivor group, and Harry Aitken might have raised it, but it would be unfair of me to say that we asked the Scottish Government specifically about that. We asked about the definitions in the bill and we are satisfied that they are as wide as they can be at this point in time. Clearly, if they can be made wider, we would welcome that.

Harry Aitken: A particular section of our society, who are in the minority, feel the impact of spiritual abuse more than others. We did discuss it—it was discussed at the consultations—and I saw it in some of the literature, but it has not filtered its way through to the bill. I am putting forward a case for the views and fears of that substantial minority also to be represented in the bill. It would be to their detriment if we did not do that.

Liam McArthur: The Government will be following the evidence this morning and we can follow that up in due course. Thank you.

The Convener: The bill mentions "emotional abuse". Do you feel that that does not cover that particular aspect?

Harry Aitken: That is not sufficient, because we all feel emotion. We start with feelings, emotions and thoughts and then we move to actions. That is the way the human species operates. We all feel different scales and levels of emotion and there are different formats and expressions, but I am trying—as a layperson—to explain that this is something that is fundamental to a human being. It

is not just an item of experience; it is something that gets right into the bones and the soul. If we overlook that part, it will be to the detriment of the substantial group in the community that I have identified.

The Convener: I will probe a little further. As has often been said, show me the child at seven. From a religious point of view, it is almost as though a moral code has been tampered with in some way. Is that the kind of thing that emotional abuse would not cover but spiritual abuse might?

David Whelan: It is not one institution, so we would not want to define spiritual abuse as applying to one institution. It is about equality and recognising the issue. It does not matter what the label is on the institution, whether Catholic, Protestant or whatever; it is about that specific abuse type.

The Convener: Thank you. That is helpful.

We have covered all the supplementary questions on that, so Liam McArthur can ask his substantive question.

Liam McArthur: Just turning to the issue—

The Convener: Sorry, was it you, Liam? Yes it was, I think.

Liam McArthur: We have had a discussion about rights of discretion—

The Convener: I am sorry, it was not you, Liam.

Liam McArthur: I know. That is why I am slightly thrown. Do you want me to continue?

The Convener: We will go to where we should be. I do not want to throw you. It should be Stewart Stevenson.

Stewart Stevenson: Thank you very much. I will explore the effect of the insertion of proposed new section 17C into the 1973 act. I am addressing my questions to Graeme Garrett in particular. They are about the technical stuff that the committee gets involved in. I am concerned less about the underlying policies and more about whether the words in the bill implement the policies that we want.

Mr Garrett has some concerns about how new section 17C is drafted, particularly on the relationship between the amount that was paid out in a previous case and the pursuer's expenses. I want to ensure that he has the opportunity to put that on the record and that I have the opportunity to test it.

Graeme Garrett: Our concern is that, if it is the intention to permit people who have previously brought actions to bring fresh actions—which it clearly is—there is a provision in new section 17C that will eliminate a large group of those people at source. We fail to understand the rationale for saying that someone who may have received what would have been a trivial payment many years ago should be prevented from bringing a claim for full and proper compensation now. As far as we can see, the matter was not rehearsed in the consultation. We are not sure where it has come from and we simply do not understand the rationale behind it.

If the intention is to avoid double compensation, the provision goes very far beyond that. It would be relatively simple to say that anything that had been received as compensation in a previous action should be offset against any damages that were obtained in future. However, that is not what the bill says and new section 17C is likely to have damaging consequences for the group of people who previously attempted to do something about the abuse. That seems to us to be extremely unfair.

Stewart Stevenson: I take it that your issue is with new section 17C(4)(b)(iii), which reads:

> "any sum of money which it required the defender to pay to the pursuer".

Graeme Garrett: Yes, and section 17C(5), which follows on from that.

Stewart Stevenson: Indeed. As a committee member, I confess to being puzzled about where that might come from and exactly what cases it is intended to allow to progress and which it is intended to stop. Do you have any insight into that? I am not sure that I understand it from anything that the Government has said.

Graeme Garrett: It came as a great surprise to us when we looked at the draft bill. We simply could not see the rationale for that. We could not see what evil it was trying to correct. In fact, it seems to us to create an entirely new evil in that people who may have received what they regarded at the time as insulting levels of compensation will now meet yet another brick wall that will prevent them from pursuing a claim for full compensation. That seems to us to be entirely wrong.

Stewart Stevenson: I suspect it is simply confirming in my mind that we need to raise this matter with the Government when it appears before the committee.

I see that Mr Whelan wants to come in. If I may, I just want to finish with one particular point.

Mr Garrett, in referring to a previous payout being offset against any new payout, have you a proposal for how the previous payout, which might have been made two decades earlier, should be valued when deciding on the sum of money that should be offset against the new payout? If it was a small payout, and if nothing was done, that

would magnify the size of the payout that they would get now. If, on the other hand, it is index-linked forward to today, it will reduce the size of the payout. Have you views about what properly should be done?

Graeme Garrett: It could be offset as a straight arithmetical deduction. When the court does an interest calculation, which it would have to do, it would have to credit interest on the earlier payment, which would be offset against any payout. The earlier payment, together with accumulated interest, would then be offset against the fresh damages. That seems to be a perfectly workable system.

Stewart Stevenson: The courts would use the standard discount that is applied in those circumstances.

Graeme Garrett: The discount rate would apply only to future damages; it would not apply to past damages.

Stewart Stevenson: Yes, but there is a discount rate that could be used from the point of—let us not get too bogged down. We will ask the Government; that is what it boils down to.

Mr Whelan had a point while I was pursuing this quite technical point.

David Whelan: Part of our campaign for the bill was that we wanted the cases that had been tried in the criminal courts and had been time barred in the civil courts to be re-heard. That is definitely part of our campaign.

When a case has been time barred in the civil courts, they have used a Latin term—I am not sure that I can even say it: absolutum—which means that the case cannot be brought back to the court. To be quite honest, I did not understand that at the time. As I said in my correspondence with the committee, legal aid was withdrawn. I wrote to the Court of Session and I asked for my letters to be put on the record and put on to my file, and I said that, should the law ever change, I reserved the right to bring a case in future.

It is important that people whose cases have been time barred are given a proper opportunity. I specifically want to put it on the record that, when there has been a criminal conviction, those cases should never have been time barred.

I do not want to labour the point but, by their actions, the defenders and their organisations, including Quarriers, have made the whole process adversarial. If they had taken a different approach in the early days, I do not believe that the process would have become as adversarial as it has become. The defenders were very adversarial in 2003 to 2007.

Quarriers has to take some responsibility for that and for the actions of its insurers and its solicitors in the civil court processes. The harm and damage that they have done to people, including me, is enormous.

Stewart Stevenson: May I intervene there? I suspect that that is the point that Liam McArthur wants to develop with you. My point was quite a narrow technical point about new section 17C, which is about the civil cases, without reference to criminality.

Harry Aitken: I have a comment on your specific point. To take an example, the Dumfries and Galloway Monkland Home gave ex gratia payments to all its residents, to the tune of £20,000 each. That sum was compensation to cover any or all abuse that they had been subjected to, and we felt that it was one size fitting all. There was no gradation of the abuse that people had suffered.

Some people who said that their abuse was fairly slight and gained £20,000 might come forward under the new bill with the possibility of gaining compensation again. That is one possibility. The other possibility is that somebody who was severely abused and badly damaged, who was awarded £20,000, might come forward and that £20,000 would become the factor that you would manipulate to see fairness being done.

11:15

I do not think that the provision should be included in the bill. If you want to calculate any compensation using discount rates and net present values, that could be done, but not to the detriment of survivors; it must be whole-heartedly in the spirit of the legislation, taking into account the severity, gradation and duration of the abuse and all other relevant matters.

The Convener: What about the question whether the onus will be on the pursuer or the defender to prove to the court the details of any past settlement? You make the point that that is not clear in the bill.

Graeme Garrett: That is not at all clear. There are two issues. The first is a point of principle, and it is the main issue. Is it fair that, because of this proposed new section, people will end up receiving less than full compensation? I suggest that it is not.

Allied to that, there are a number of practical difficulties that claimants and insurers will face in working out what happened in a previous litigation. As we say in our paper, solicitor files may no longer exist and insurance records may be scanty. Most court actions are settled by a document called a joint minute, which does not set out the

settlement terms. The claimants may have been very young and the claims may have been settled on their behalf by parents or social work departments, so they may be completely unaware of the settlement terms.

If new section 17C remains in the bill, those will be the serious practical difficulties for claimants and some guidance needs to be given as to where the onus lies. Is the onus on the claimant to prove that he did not receive a payment, or is it on the compensator to prove that he did? It may seem a narrow issue, but we suggest that it is an important one.

Oliver Mundell (Dumfriesshire) (Con): I do not have the legal knowledge to know whether this is the case—we can ask the Scottish Government in due course—but I wonder whether, given that you are talking about previous settlements and other things for which some facts have already been established, there might be a difficulty in having a fair trial the second time if some of the issues have already been thought about and decided. Perhaps that is why the proposed new section has appeared in the bill.

Graeme Garrett: Bear it in mind that there will rarely have been a trial dealing with the facts of the abuse. The cases, by definition, will have been dismissed on a procedural debate because of limitation, so the facts will never have been aired. The cases will have proceeded on the basis of written averments by each side.

Oliver Mundell: However, some of the facts will have been agreed within the legal parameters that existed at the time. Is that correct?

Graeme Garrett: With respect, I do not think that it is. I do not think that there will have been agreement. The second category is where the case was settled by agreement between the parties, and the same difficulties will arise in evidencing the terms of any such agreement given that the case may go back 20 or 30 years.

Liam McArthur: We talked earlier about discretion and the importance for survivors of confidence in and certainty around the process. The bill affords the court discretion to dismiss cases in two circumstances—where it would not be possible for a fair hearing to take place and where, in retrospective application, there would be substantial prejudice to the defender. There is not a great deal of detail about the application of those tests; we are led to believe that some of the detail will flow only from future case law.

Whereas I think that there has been unanimity across the panel until now, Rape Crisis Scotland and you, Mr Garrett, have not offered a view on new section 17D. I think that Victim Support Scotland said that it was a "reasonable" provision, but Mr Whelan, you have expressed that it is appropriate for all cases to be given a

"fair hearing of facts and evidence".

I am interested to know where the panel members stand on those two tests, bearing it in mind that how they would be applied has not been tightly defined.

Graeme Garrett: I can be very brief on that point. My organisation recognises that those checks and balances are probably necessary. Whether they are in the bill or not, as a matter of law the court would have to apply them anyway, because of human rights legislation. Even if the bill were silent on those issues, the position would be much the same.

Liam McArthur: Given that, are you able to predict how the tests would be applied, because of how they are applied elsewhere in law?

Graeme Garrett: Yes. Those are not novel concepts for judges. Judges, by and large, are pretty good at dealing with them on a case-by-case basis.

Liam McArthur: Going back to the earlier point about the problem with discretion and the application of the time bar, is there a concern that new section 17D might be used in a way that could almost reintroduce the time bar, although perhaps not to the same extent?

Graeme Garrett: I think perhaps not to the same extent. Anyone who has looked at this matter over the years would be forced to conclude that the Scottish judiciary is an extremely conservative body and that it has operated the discretionary power in a way that has simply closed the door, which has not happened south of the border.

There is a legitimate fear that the provisions might simply transfer the discretionary power to a later stage of the case, but it would be our hope that, by getting rid of limitation, the damage that the provisions could do would be greatly reduced, if not eliminated.

Liam McArthur: Mr Whelan, does that bear out your concerns?

David Whelan: Again, I am not a legal person, but we would want any discretion and the provisions to be as wide as possible, so that there is no element of doubt. We would want certainty in the bill, so that it is clearly directing what the judges are able to do, without any element of doubt. In layman's terms, that is what we would like to see.

Sandy Brindley: I think that you are right. We did not pick up the point in our written submission, but we have been contacted by survivors who have expressed concern about how the tests

might operate in practice, particularly for certain religious institutions, and whether they might restrict the benefits of the bill.

The effect is very difficult to predict, since it will be dependent on case law. We do not know how the tests will be interpreted, and I have not seen any clarity from the Government on how it anticipates that they will be interpreted, so I think that they introduce uncertainty about how the legislation will be implemented.

Liam McArthur: Is there anything that could be done, in the bill or in ministerial statements during the passage of the bill, that might provide additional clarity?

Graeme Garrett: You could simply remove new section 17D and say that every victim of historical abuse will be entitled to a hearing in court. I am not convinced that that would necessarily be in the interests of all victims of abuse, because a case could be so weak that it was almost bound to fail because of lack of evidence. I am not sure that such a provision would be of assistance to every victim.

The Convener: Miss Baxter, did you have any view on that particular point?

Laura Baxter: I think that we said in our submission that it was reasonable to include that section. Not having a legal background, I do not have the full knowledge of what it means, but, to back up what my colleagues here say, I think that if it is clear and concise, leaves no doubt as to what it means, and whatever happens because of it would not be to the detriment of the victim, we would accept it.

The Convener: It was probably good to raise awareness of it as a possible stumbling block, so that it does not come as a shock if it perhaps becomes an impediment later on. Obviously, you want the bill to be as effective as it possibly can be.

That concludes our questioning for the panel. I thank you all for attending, and I thank Mr Whelan and Mr Aitken particularly. I realise what a huge amount of courage it takes to come and talk to a committee. Please be assured that it has been worth while from the committee's point of view. I hope that you feel that the effort has been worth it too.

David Whelan: I would like to thank the committee for taking forward the bill, for scrutinising it and for allowing us to come to give evidence. I gave the committee some personal documents relating to my court case and other issues. If I have said anything today that you need clarification on, I am more than happy to provide further information in relation to Dr Janet Boakes and other issues that we have raised with the committee.

The Convener: Thank you—that is very helpful. I suspend the meeting now to allow for a change of witnesses.

11:26

Meeting suspended.

11:32

On resuming—

The Convener: I welcome the members of our second panel: Alastair Ross, the assistant director and head of public policy at the Association of British Insurers, and Graeme Watson, a member of the sub-group on historical abuse in the Forum of Insurance Lawyers. We will go straight to questions.

We started questions to the previous panel with a general question, so I will ask such a question of our second panel, too. The bill removes, with retrospective effect, the three-year limitation period when a court action is about childhood abuse. Would you like to place on record your views about the proposed change and say what impact you think it will have on organisations that are defending claims and on their insurers?

Graeme Watson (Forum of Insurance Lawyers): From the outset, we recognise what a sensitive and difficult area this is. In particular, we acknowledge how difficult it is for victims and survivors to come forward in any forum, whether that is coming before the committee this morning, seeking legal advice or going before a court, and we believe that each case must be considered on its merits.

There are two particular aspects—the first is the policy and the second is the practice. We welcome the Government's policy of widening access to justice for victims and survivors. In responding on behalf of FOIL to the committee's questions, I hope that I can talk about some of the practical effects of the drafting as it stands and what their impact might be.

In particular, I draw your attention to two aspects of the drafting as it stands. The first concerns how the bill deals with cases of historical abuse that have been concluded. They fall into two categories. The first involves cases that have been dismissed, which means that, procedurally, the case was disposed of, but the right remains and the action can be reraised at any point. The bill would allow the actions to be raised again, as they could be anyway, and it would change the criteria by which the court decided whether the claim ought to succeed.

The second category involves cases in which there has been a final decree absolvitor—that is, a final substantive judgment. Those cases have been determined by way of a final binding decree.

I see that the committee has already written to the Government to ask for its views on pre-1964 cases and to ask why they were not included in the scope of the bill. At the heart of the Government's response is a concern that, in those cases, the substantive right has been extinguished, which means that there would be a risk of falling foul of the European convention on human rights.

The Convener: We are getting quite far down the line into detail, but my question was simply about your views on the removal of the three-year limitation period.

Graeme Watson: My views are that removing the three-year limitation period and reinstating the cases that have previously been disposed of is problematic. The proposal is to replace the power of discretion that is set out in section 19A of the 1973 act with a test of whether a fair hearing is impossible, and to substitute one form of discretion for another. I therefore have concerns about how much the bill will open the door for claimants and what clarity there is about how those cases will be dealt with. You heard the concerns about certainty, but I do not believe that the bill, as drafted, brings the certainty that survivors and victims are looking for.

The Convener: We can perhaps tease that out a bit later, but the second part of my question concerned the impact that you think that the proposal will have on organisations that are defending claims and on insurers.

Graeme Watson: The cases fall into a number of categories. Some organisations are insured so, ultimately, there will be a financial cost that insurers will bear. Some organisations might have been insured at the time but might now be unable to trace that insurance, or they might have had low limits of indemnity, which means that their insurance would be exhausted after some damages had been paid out in any given year. Other organisations will have had no insurance at all for such claims and will be meeting the cost directly and personally.

The Convener: Does Mr Ross have anything to add?

Alastair Ross (Association of British Insurers): I echo Graeme Watson's comment that the issue is incredibly sensitive, especially for victims and survivors, and it is correct that they should be at the heart of the legislation. This is probably the most sensitive type of claim that insurers deal with of all the personal injury claims and so on that they handle. Insurers recognise that and, over time, they have developed specific practices and protocols to recognise the distinctions in this class of cases, so that they can be handled differently. Our members have put a lot of work into that.

In our submission, we expressed our significant concerns about the implications of the proposals in the bill. I concur with the previous panel's recognition that the system as it stands is not working. The central issue seems to be the application of discretion, which the previous panel set out.

I draw the committee's attention to the fact that judges in England and Wales seem to be more inclined to use discretion. That relates to different legislation, although it is broadly similar in what it sets out. The nub of the issue is that judges in England and Wales are more inclined to exercise discretion in cases than Scottish judges are. Is this bill the best and most effective way to address that and to meet the needs of victims and survivors? We propose that there are more effective ways to do that—the committee might also have recommendations—whether that is by providing additional guidance to judges, looking at some of the criteria under which discretion can be exercised or bringing forward a different way of resolving claims. In our submission, we mentioned the idea of a pre-action protocol, which is a process that would sit outside the court but still be legally binding. It would have a number of advantages for all parties, not just for victims and survivors.

Rona Mackay mentioned the concept of secondary trauma. If we accept that the primary trauma was the abuse that was experienced, the secondary trauma is coming to terms with that as an adult, discussing it with friends and family, going to a lawyer and discussing the details with them, the lawyer sharing those details with other parties and possibly with the alleged abuser, and the details being read out in court or even having to stand up in court and retell the story of abuse. That is all incredibly significant and it asks a lot of the victims and survivors who take it forward.

Depending on the way in which a pre-action protocol was drafted, it could still achieve a legally binding settlement. It would probably deliver that more quickly than by going through the court system, where cases might be subject to a number of delays for various reasons. Again, depending on the way in which the protocol was drafted, there could be an option for victims, survivors or pursuers to move out of the pre-action protocol process and into court, if that was what they were looking for. Barnardo's, which is a leader in the field of supporting victims and survivors, has done a lot of interesting work on

secondary trauma, which I encourage the committee to look at and explore.

We have significant concerns about the bill and its implications for insurers. The interest of insurers is in the organisations that are insured and the significant financial exposure that they could face if the bill were taken forward as drafted.

The Convener: I suppose that you heard the earlier evidence. It came out loud and clear that survivors think that the bill gives certainty and choice—choice that would not come from having to go through the mechanism of a pre-action protocol. It was clear that, if the time bar were removed, they would have choice.

Graeme Watson: When a claim of any form is intimated, someone writes to the organisation, the person who is bringing the claim and the person who is defending it appoint solicitors—or they are likely to—and correspondence is exchanged between the solicitors. To put this particular area to one side for the moment, in many cases, that results in an agreed form of settlement and the matter is entirely disposed of. A pre-action protocol is a standardised way of doing that. The parties exchange what their positions are and, if it is possible to reach an agreement without the necessity for litigation, they do that.

Victims and survivors might be hopeful that, if the bill goes through, that will be a means by which they are heard in court, but that will not be any more the case than it is for other forms of litigation. In acting as lawyers to insurers, our job is not to defend claims that ought not to be defended. On the contrary, part of our role is to advise insurers when claims ought to be recognised and settled without the need for a court hearing.

11:45

Liam McArthur: Alastair Ross will have heard the exchange with the previous panel about how, under proposed new section 17D of the 1973 act, there would be discretion for cases not to be heard when a fair hearing could not be guaranteed or when, given the retrospective nature of the application, there could be significant prejudice. Concern was expressed that that discretion might be used in the same way as the courts have until now used their discretion on the time bar, which would in effect lead to the time bar being applied, albeit not as rigorously. Given what Alastair Ross said about the approach of judges north and south of the border, is it reasonable to assume that the approach of judges in Scotland to such discretion might lead to survivors not having an opportunity to have their cases heard?

Alastair Ross: That is an interesting point. The important thing to keep in mind is that we have a balanced and fair process. I appreciate the arguments that have been put forward for changing the limitation period but, if a case is to go to trial, we also need to keep in mind the need to deliver a fair trial and to have equality for all parties that are involved in the process.

Liam McArthur: What about having confidence and certainty in the process? You will have heard the concerns about how the courts' discretion to set aside the time bar has been exercised in only one case. It is not impossible to imagine that the two circumstances in the bill for not hearing cases could be used in a similar way, so that the time bar was applied almost by the back door, so to speak. Is that a realistic prospect?

Alastair Ross: An important point to bear in mind is that limitation or time bar—the two terms are interchangeable—is a legitimate defence. There might be occasions, as was touched on in the earlier session, when cases go back so far in time that there is no longer an alleged abuser to pursue. There might no longer be evidence, whether that is records or the testimony of other people who were there and might have witnessed abuse, and the organisation that had the duty and the responsibility might no longer exist. Your point raises a lot of questions and issues.

As I said, it is an issue that judges are not applying discretion in the same way north of the border as they are applying it south of the border. An option would be to provide greater advice on how they should act. I have not been able to find a record of the advice that is provided to the courts on the application of limitation and the discretion on that. The Government could have chosen to go down that road and explore that possibility, but I see no indication of that in the bill or in the supporting documents. There are other options and it would be useful for the committee to explore the issue in the round.

Convener, you said that survivors said in the previous session that the bill offers choices to pursuers. I appreciate that. A pre-action protocol could be an additional choice that might be preferable for some groups of victims and survivors. In the time that I have been working on and dealing with this area, I have come to appreciate that it is an incredibly complex field, with an incredibly complex group of victims and survivors who have different interests, priorities and expectations. No one process would meet all those different needs. The previous panel touched on that, when it looked at what people expected to see at the end of the process.

Does the removal of the time bar necessarily mean that a case would proceed? No. Other witnesses have set out how other factors will be taken into account. It is arguable that the removal of the time bar would provide for a day in court,

but that might not mean that the case proceeds—that could be for various reasons, including the quality of evidence and the existence of other parties.

It is important to bear in mind the choice of pursuers. Given the likes of the written evidence from the Former Boys and Girls Abused in Quarriers Homes, I suggest that it would be interesting to explore whether those people might be open to a solution or protocol outside the courts. I agree and appreciate the importance of choice for the pursuers, but I return to the point that we have to have a fair and balanced litigation process that observes the needs of all parties.

John Finnie: Good morning, panel. Mr Watson said something very interesting about his role as a lawyer and how he would suggest recommending a settlement. Can he say how often he has done that?

Could Mr Ross, as head of policy, give us statistics on how often that has been the case for perhaps the last 25 years?

Graeme Watson: Not often. I have been acting in abuse cases for 17 years or so; over that time, very few of those have progressed. In recent years, a larger number have been settled but, equally, it is fair to say that a lower volume of cases has been brought forward. If we go back 15 years or so, a high volume of cases was brought forward. As Mr Whelan set out, many cases ceased at the point when legal aid was withdrawn. However, where cases have been pursued on their merits, some have been settled, but the number is low.

John Finnie: Thank you. I would like to talk about time again. Criminal prosecutions are not subject to time bar, and that can lead to the situation where there is a successful criminal prosecution but there is not the facility to follow that up with civil action. That situation is surely not equitable.

Graeme Watson: The criminal position is striking because there is, by definition, an accused who is fit to stand trial and who does stand trial. I agree that the discretion seems to work in an obtuse way if there is sufficient evidence for a criminal trial to proceed but not for a civil trial. That comes back to what criteria we use to determine whether there is sufficient evidence to proceed, or how discretion is exercised.

The bill does not simply cover those situations in which there is a live accused who is available to give evidence and whose evidence can be heard and tested in court against the other available evidence.

John Finnie: Forgive me if we stick with a specific example. We have a historical case that results in a criminal prosecution. We could talk—I do not think that we necessarily should—about the degrees of proof required for criminal versus civil. Surely that is an inequitable situation.

Graeme Watson: The case of an uncle and his niece that Mr Aitken mentioned is a case in point. The discretion was exercised in favour of allowing the case to proceed where it would otherwise have been out of time, precisely because the evidence was available.

I agree with you; I agree that the discretion, or whatever is in place, ought to deal with that situation. However, the bill, as framed, covers the whole spectrum of cases where abuse is alleged, and that will include cases in which there is no criminal prosecution, and even circumstances in which there is a lack of witness or documentary evidence. That is why it is important that there is a means for the court to weigh up whether an action ought to proceed, precisely so that clear circumstances, such as those that you set out, can be dealt with equitably by allowing a case to continue, while cases in which there is a dearth of evidence are not taken to a full hearing.

John Finnie: Surely it is only by testing in court that it can be established whether there is a sufficiency.

Graeme Watson: That is a good point, and that question also arises from the drafting of the bill. The question is whether it is better to test all the evidence and then, at the end, to have the possibility that the court will say, having heard all the evidence, that a fair trial is not possible, or whether to have the opportunity of the court determining at an earlier stage that there is not sufficient evidence for there to be a fair trial and, therefore, not proceed to a full hearing.

There was a recent case in which that precisely was the issue. Having heard a preliminary trial on whether there was sufficient evidence, the judge determined that the equitable discretion should not be exercised in favour of allowing the action to continue but also stated in terms that a fair trial was not possible. In those circumstances, there would have had to be a full trial, which would necessarily have been stressful for all involved, particularly for survivors and victims, and would have had the outcome that a judge says that a fair trial is not possible. I am not sure that that is a step forward.

John Finnie: I take in good faith your comments about your concerns about victims and survivors. However, your obligation is to companies and organisations and your position on all this could be seen as simply about finance.

Graeme Watson: It would be naive to say that insurers have no financial interest in this: of course, they do. The interest is of their insureds—

companies and organisations that continue to exist and their continued ability to function. It is to ensure that, while survivors and victims have the opportunity to be heard, likewise those organisations that face allegations have the opportunity and the scope to put forward a reasoned response.

It was very well said by Mr Garrett that, even if the reference to the possibility of a fair hearing taking place was not in the bill, that would be the case anyway because of the European convention on human rights. Limitation has a purpose of itself. It serves use to all those who are involved in knowing the limits of what their involvement in litigation may be. It was described earlier as a barrier. I do not accept that. It is a hurdle, but it is not a barrier. It is an equitable discretion. Accordingly, a risk that arises from this is pushing back the point at which the court decides on similar criteria to a later stage in the proceedings.

Alastair Ross: I concur with what Graeme Watson has said, specifically on insurers and their interests. Insurance is a commercial contract. In this case, it is to indemnify an organisation for legal liabilities that may arise under the terms of the policy. Those can be very specific, or a lot broader.

To be absolutely clear, an abuser retains personal and primary responsibility for their acts. Insurers are providing insurance to organisations to cover certain liabilities that they may be obliged to deliver to third parties. Insurance is about managing risk. You pay a sum in terms of your insurance premium and that manages the risk of a claim. The alternative would be to reserve significant amounts of funds so that, if a case was raised against you—an abuse case, or some other kind of personal injury—you would have the money to defend yourself and to pay for any compensation that was due. Insurance is a device to manage risk that helps organisations to manage liabilities that they might not otherwise be able to meet.

Either a significant amount of money is tied up in an account in case somebody comes after the organisation, or the organisation receives significant litigation and has to meet the liability from current reserves. The existence of the organisation is put in some doubt if it cannot meet the cost.

We are talking in the main about public liability policies, which can cover compensation claims by victims and survivors of child abuse. I will be guided by Graeme Watson on this, but in terms of the extended no-fault vicarious liability principle, even if an organisation is not aware that it employs, or has a volunteer who is, an abuser, and even if it is not aware that that abuse is going on, cover is still provided for the organisation under the terms of the insurance policy.

That is what our interest is. It is about working with our insureds—our customers who have taken out insurance and entered into a contract. In cases that go back a significant number of years, whether that is decades or into the last century or whatever, we are looking at the contract that was entered into by all the parties. At the end of that contract, it was closed. We are now talking about revisiting that several years—in some cases, several decades—after the event.

12:00

Mary Fee: I want to be clear on something. We have had a fairly lengthy discussion on discretion and I would like your view on whether the guidance that is given to judges is sufficient to allow them to use that discretion properly or whether—as some think—new guidance should be issued to judges and courts.

Graeme Watson: There is no guidance as such. That is the principle difference between the Scottish legislation and the English legislation. In the Government response at the consultation stage, I was interested in the emphasis that the Government placed on how this seems to work in England and Wales but there seem to be greater difficulties in Scotland.

Certainly, one way of proceeding would be to have an equitable discretion with a non-exhaustive list of factors that judges have to take into account. There is nothing like that in Scotland; there is only past case law and the high point of that is a decision of the House of Lords that states that the court has to consider whether there is a real possibility of substantial prejudice.

I suspect that it is not controversial that where there is a real risk of substantial prejudice, a court should be slow in considering that an action should be allowed to continue. However, we are talking about one form of words against another form of words. It might well assist the courts and the judiciary in general if they were to have a list of factors that they were required to take into account in considering how to exercise their discretion.

Again, on the question of whether there can be a fair hearing, it does not provide certainty. It is another form of question for the court on whether an action has a sufficient basis to allow it to proceed.

Alastair Ross: I agree. As I touched on earlier, I have researched this and there does not seem to be any guidance afforded to judges on it. I find that quite surprising, but that seems to be the situation. One option would be to provide more detailed guidance and to include some of the conditions

that Graeme Watson has alluded to. I will defer to others on whether that should be the role of Scottish ministers or the Scottish Civil Justice Council—I am not sure who would have the responsibility for that. However, that is one alternative to the proposed actions in the bill.

We have not had discussions with Scottish ministers about this—certainly, I know that the previous panel made a lot of reference to having such discussions—and therefore, having read the bill and the supporting documents, I do not understand why that has not been considered as an option or why Scottish ministers have opted to go straight to the removal of the time bar as their solution to what I think everyone agrees is a problem.

The Convener: It might be because it gives certainty and then sufficiency of evidence can be looked at if the case comes to court or is considered. There is the certainty that it is being considered. Under your proposal, that certainty is not there. Things may be improved, but the certainty is not there.

Alastair Ross: I am sorry—I do not quite follow.

The Convener: The time bar is removed so there is no legal obligation. The court will not have to ensure its discretion so that certainty would not be there, even with the improvements that you are suggesting with the guidance. Is that not the key difference?

Alastair Ross: Yes, I can accept that point. I am sorry—I was confusing that with another point. I beg your pardon.

Stewart Stevenson: This is a question for Alastair Ross. You have a number of issues with the financial memorandum—some of the figures that the Government is using are perhaps not the ones that you would suggest. It would be useful to get those issues on the record and to explore them.

Alastair Ross: Of course. It is important that we all look at the financial memorandum because, by definition, for the reasons that have been set out, we are dealing with a fairly limited set of data.

I had some difficulty following the process by which the Scottish Government had arrived at the figure of 2,200 for the number of cases that it anticipated would come forward. I might have misheard what was said, but I think that a member of the previous panel suggested that only a percentage of those cases would go forward. That is not how I have read and understood the financial memorandum.

Setting that aside, the financial memorandum estimates that 2,200 cases will come forward, Police Scotland says that it is working on 5,000 active cases and a lawyer who was mentioned earlier has 1,000 cases, so it is extremely difficult to establish the quantum. It would be useful to get some independent analysis—that could be provided by actuaries or another independent group. I mention actuaries because they might have access to data that is held by insurers that they could use on an anonymised basis, from which they could extrapolate the range of numbers.

Bearing in mind the restrictions on the available data, 2,200 is a figure that should be tested a wee bit more so that we can understand whether it represents a mid-point, as the financial memorandum says, or whether it is an overestimate or a substantial underestimate. That will help us to understand some of the other material in the financial memorandum, whether on the implications for legal aid or the potential implications for public sector organisations that might be pursued subsequently as a result of the bill being passed as drafted. It would be useful for more work to be done on that.

I know that the Finance and Constitution Committee will consider the financial memorandum specifically and will report to this committee, and it would be useful to find out its views on the matter.

Was that useful? Is there anything that you would like me to expand on?

Stewart Stevenson: I suspect that your answer merely expanded the uncertainty rather than closing it down.

Are you of the view that the 5,000 cases that the police are pursuing are cases that would be time barred? I imagine that the 2,200 cases that the Scottish Government is talking about are ones that have a future, whereas the 5,000 figure is entirely different.

Alastair Ross: I cannot recall off hand what Police Scotland said in its submission about the 5,000 cases; you might have it in front of you. From memory, I think that that figure was the number of active inquiries, which dated back as far as 1964. Therefore, the time bar might apply, but there will be more recent cases that Police Scotland is dealing with in relation to which the time bar would not be an issue.

Stewart Stevenson: You might not have the answer to this, but has the insurance industry taken a position on what the liabilities for the industry might turn out to be?

Alastair Ross: It is incredibly difficult to put a figure on that, because different firms—

Stewart Stevenson: Forgive me. I am simply asking whether you have made a provision. You are representing the industry, and the provision would be in individual insurers. I am simply asking

whether a provision has been made; I am not necessarily asking what the quantum might be.

Alastair Ross: At this point, I am not aware of the measures that individual member companies might have taken by way of provision.

Ben Macpherson: Good morning. I want to pick up on something that Graeme Watson made brief reference to in his opening remarks.

As you hinted, the new limitation regime would sit alongside prescription, which is a related area of law. As you are aware, the Scottish Government has decided not to reform the law of prescription because, under the ECHR, it would not be appropriate for it to do so. The effect of that decision is that if the abuse occurred prior to September 1964, it will usually not be possible to raise a court action under the proposed new regime. Was the Scottish Government correct to take that approach to prescription?

Graeme Watson: The Government was correct to take that position, for the reasons that it set out. There is a difference between prescription, which extinguishes a right entirely, and limitation, which concerns the procedural issue of whether someone can exercise or enforce the right.

It is a long time since Parliament took the view that prescription is not appropriate in personal injury actions; the change to the law came into effect in 1984. No doubt it was right and appropriate that actions for personal injury should be subject to limitation rather than to prescription, but the effect of prescription has been that the substantive right was extinguished—it no longer exists—and the Government's concern is that that would run counter to article 1 of protocol 1 of the European convention on human rights if it were now to resurrect those rights. I would say that the same position arises for cases in which there has already been final judgment: that is a very similar position, with a substantive right having been extinguished rather than a right simply not being exercised.

Ben Macpherson: Does Alastair Ross have any comments on that?

Alastair Ross: There is nothing particular that I would add to what Graeme Watson said. I read with interest the correspondence from the Minister for Community Safety and Legal Affairs in the papers for this meeting, in which she notes that on the one hand the Scottish Government does not, on ECHR grounds, feel able to address the prescription issue, but it does feel able to proceed on removal of the time bar and limitation, although the minister recognises that in relation to things such as resurrected cases that is a highly unusual step. I was struck by the contrast between prescription and the application of the ECHR, and limitation, for which it is felt to be fair, reasonable and legal to proceed on that basis.

Ben Macpherson: Clarity has been provided, in this panel and the one before, that one is an aspect of procedural Scots law and the other is an aspect of substantial Scots law. It is good to have that on the record.

The Convener: Was not the issue at stake to do with time, in that prescription tends to go much further and legal rights would be extinguished, and therefore there is a question whether it would be fair, so much later, to look at possibly reinstating those rights?

Graeme Watson: The question of the extinguishing of rights was certainly at stake. It is undoubtedly the case—I think that Mr Garrett referred to this—that when we get to cases from prior to 1964, the question of sufficiency of evidence is going to be more difficult.

Of course, there is not a light-bulb moment with cases from 1965; there is a spectrum. We could be asking the courts to look at cases that were time barred in 2016, and which related to events in 2013: it would not be terribly difficult for the courts to look back four years rather than three. Equally, however, we could be asking the courts to look at events that took place in 1965. Again, the circumstances of some cases might mean that it is not terribly difficult to piece together what happened, but in other cases that will be difficult. Documentary evidence degrades and is lost over time, witnesses become unavailable—they are dead or untraceable—and so the challenges increase. That is precisely why it is beneficial to have some form of discretion. The bill will allow that, to the extent that there is the question whether a fair hearing can take place, which in turn cuts against the possibility of there being certainty.

The Convener: Is it not really that the further back a case goes the more the terms of article 1 of the ECHR—the right to peaceful enjoyment of possessions—come into play? Was that not more the factor that distinguished prescription from the time-bar limitation?

Graeme Watson: Article 1 is of relevance to cases that have been disposed of by final judgment rather than to pre-1964 cases. It can arise in relation to both, but in different ways. In cases where there has already been a final judgment, the European Court of Human Rights has said that if the judgment is that even if someone is not liable for something that has a proprietary value, interfering with it can be contrary to article 1 of protocol 1 of the ECHR. However, you are right, in that the further back we go in seeking to assess whether someone ought to be liable for events of a long time ago, the greater is

the argument that we are, in interfering in that, not exercising proportionality.

12:15

Liam McArthur: You have talked about the challenges that arise the further back we go, and I think that everybody has accepted that. Similarly, all the evidence suggests that one of the real incongruities with the time-bar limitation in relation to child abuse is how long it takes for that abuse to be, in a sense, revealed by the individual—even to themselves and their immediate families, let alone to the authorities. Therefore, the drive behind lifting the limitation in that respect is borne out by evidence that suggests that it is estimated that around 22 years is the average time for abuse to reveal itself. Do you accept that that absolutely needs to be addressed, because it is not being addressed through the discretion that is available to the courts?

Graeme Watson: Yes—I agree with that entirely. That is where we come back to the fact that we are acting on behalf of organisations that are being held vicariously liable for the acts of volunteers or employees. If events are coming to their attention for the first time 22 or more years later, they might simply have a dearth of material on which to proceed. That does not mean that there should not be an opportunity for the victim-survivor to come forward and try to make their case. However, it does mean that there has to be a balancing act in considering whether justice can be done in the circumstances. That is a reason for having some form of judicial discretion rather than a firm cut-off.

Mairi Evans: I want to ask you a question that I asked the previous panel, about the definitions of "child" and "abuse" in the bill. I understand from your submissions that you are critical of the fact that the definition of "abuse" is not exhaustive. What amendments to it would you like?

Graeme Watson: As far as the definition of "child" is concerned, there are reasonable arguments to be had about whether the age limit should be 16 or 18. Sixteen is the age of majority, but we do not take particular issue with the limit being 18—that is understandable.

There are two issues with the definition of "abuse". One is that it is currently framed as being non-exhaustive. The second is on what is encompassed within the term "emotional abuse". When the Scottish Government published its draft bill, the definition of "abuse" included sexual, physical and emotional abuse, "unacceptable practices" and neglect. The consultation referred to "unacceptable practices". After reflection, the Government took that out. The draft bill included "neglect", but that has also been taken out. That is recognition that there is a range of activity that is harder to define and in which it will be helpful to have clarity.

On the specific question about changes in drafting, the straightforward amendment that I would like would be the word "includes" being changed to "means", so that the definition would read:

> "'abuse' means sexual abuse, physical abuse and emotional abuse".

"Emotional abuse" itself is a not a well-defined term: it is quite straightforward to go to past case law and see what is meant by "sexual abuse" or "physical abuse", but it is much less so with "emotional abuse". You had a flavour of that in the discussion with Mr Whelan and Mr Aitken regarding spiritual abuse and what is encompassed within that. I encourage the committee to consider replacing the word "includes" with the word "means", but also to consider whether greater clarity can be brought to what is meant by "emotional abuse".

Alastair Ross: I echo what Graeme Watson said. The ABI supports the definition of "child" that is set out in the bill: we are happy to accept it. Similarly, we propose that "includes" be replaced by "means", in order to give a tighter definition.

I think that Mr Aitken, who was on the previous panel, spoke about the awareness effect and how that could bring forward a significant number of people. Clarity on what the bill refers to would be really useful. We have already had an interesting conversation about the concept of spiritual abuse, which I had certainly not previously considered in looking at the bill. That was very interesting.

The broader and looser the definition, the more scope there is for cases, so there would be a potential issue about the volume of cases coming forward. I think that Douglas Ross touched on that. That is not to say that the bill should not proceed just because it might create more business for the courts, but it will be necessary to ensure that the volume can be dealt with within the available resources. I am not arguing against the bill proceeding, but if the definition in question is significantly broad, it is fair and reasonable to suggest that it is likely to encourage more cases being brought forward. We would all then need to ask questions about whether the interests of victims and survivors were being met.

As I understand it, the bill as drafted will give certainty that people will have a day in court—I think the convener touched on that earlier—but I do not know that that correlates with giving certainty that cases will come to trial. We could still have issues to do with the availability of defenders and the calibre of evidence, which we have touched on before. I wonder how victims and

survivors would feel if they were, because there was a broad definition in the bill, encouraged to bring cases forward by whatever means—whether by representative groups, lawyers or claims management companies.

I will digress slightly. I hope that we do not end up in a similar situation with historical abuse cases as we have with other classes of personal injury. There is the phenomenon of people being cold called—approaches being made to them from out of the blue. The most common such cases involve whiplash claims. People get phone calls—I got one the other night—in which people say, “You have been involved in a car accident in the last three years.” If the person says definitively, “No, I wasn’t,” the person on the phone will say, “No, you were, and we can help you to claim for that.” I sincerely hope that there will not be similar practices with the class of personal injury that we are discussing, but organisations will probably approach people who have been in institutions that we have mentioned earlier and ask them whether they were affected by abuse or witnessed it. It is a matter of how people will feel, maybe decades on, about being asked to give evidence as a pursuer or a witness in something in which they would rather not be involved.

That is a slight digression from the point, but it is really important to get the definition of “abuse” right. Therefore, we support what Graeme Watson said about amending the bill to replace “includes” by “means” to give a greater level of clarity and certainty.

The Convener: By way of reassurance, we have heard how long it can take survivors to come forward, so I do not know that there is really a parallel with whiplash cases. People are quite happy to disclose or think about whiplash cases. Perhaps that was an unfortunate analogy.

Alastair Ross: No—that was my point entirely. I hope that the way in which organisations handle the pursuit of such claims would be entirely different from how they might approach historical abuse cases.

The Convener: When we talked about the volume of cases that would go through the courts and where that would come from, maybe it was not mentioned that, fundamentally, the issue is looked at as an access to justice one. The witnesses seemed to suggest that the proposed legislation would ensure that people who were abused would no longer face a substantial barrier to access to justice and that awareness would be raised that that was the case.

Alastair Ross: I accept that, but I repeat the point that, currently, the system is not functioning as it should. There is consensus between this panel and the previous panel that that is the case and that action needs to be taken. There are differences in views on the action to take to resolve that, but there is definitely an access to justice issue.

During the evidence from the previous panel, insurers were accused of having a vested interest: I would say that we all have vested interests in ensuring that victims and survivors can come forward and avail themselves of access to justice. However, the same access to justice must be provided to the other parties.

The Convener: So what happens in court in that respect is a separate issue from what is covered in the substantive legislation.

Alastair Ross: Yes.

Rona Mackay: In his opening remarks, Mr Watson mentioned his concerns about proposed new section 17C of the 1973 act and his preference for a pre-action protocol. I want to drill down into that a wee bit more and ask what your key concerns are. After all, you will have heard the evidence from survivors who are very much in favour of re-raising time-barred actions.

Graeme Watson: Our principal concern is about dealing with cases that have been concluded with a final judgment—in other words, there has been a determination that the right of action has been concluded. I draw a parallel with pre-1964 cases, in respect of which the Government has recognised that a right of action has been extinguished and, accordingly, is concerned that it would run counter to the ECHR if those cases were to proceed. Cases in which there is final judgment by way of absolvitor fall into the same category.

Rona Mackay: I do not quite understand how they are in the same category. I am having difficulty with that, given that the situation with time-barred cases pre-1964 is different from the prescription issue. Does that not give victims access to justice?

Graeme Watson: It does, and that is in the context of the victim having already brought a case in which there was a final judgment of the court. Weight and importance have to be given to the rule and certainty of law, and part of the right to a fair trial is the right to have the court’s determination enforced. We would rightly be concerned if in another jurisdiction a court had made a determination and the Government intervened to reverse that judgment. I recognise the Government’s concern in that respect with regard to the right being extinguished in the pre-1964 cases, but the same point arises for cases in which there is decree of absolvitor. To make it clear, there are two types of cases: those that are disposed of by dismissal, and in which there is an explicit recognition that the case can be brought

again at any point, and those in which there is a final judgment by way of absolvitor, in which the right has been determined.

Alastair Ross: We are talking about significant Scots law principles. I understand that at a future date the committee will hear from the legal fraternity in the form of the Faculty of Advocates and others. I certainly endorse what the faculty has said in its written evidence. We are talking about some substantial changes.

I appreciate that what we are talking about is entirely within the context of historical child abuse, but if we start to change the principles, might the Scottish Government or some other group come forward at some point and say, “The changes that have been made with regard to historical child abuse cases should also apply in other areas”? I appreciate that that is not the core business of, or the main interest in, this particular evidence-taking session, but the committee is dealing with some fairly fundamental principles of Scots law: obviously the committee will consider very carefully the changes that the Government is putting forward.

The Convener: You will also be aware that the circumstances in which the Government is talking about removing the decree of absolvitor are very specific. The measure would apply in cases in which, for the person settling, there was no realistic expectation of the time bar being removed and in which the insurers had put in a condition that, for the settlement to be agreed, a decree of absolvitor would be imposed when it was not necessary, instead of a decree of dismissal, which would allow the case to be raised again. We are probably talking about very limited circumstances, but I think that it would be disingenuous not to recognise that this particular section has been put in to cover what might be very few cases.

Graeme Watson: I do not recall that being the circumstance. I dealt with many of those cases at the time and, on the contrary, my recollection is that we were somewhat surprised that the claimants’ solicitors proposed absolvitor. It was certainly not proposed on the instructions of the insurer in the cases with which I dealt.

12:30

The Convener: Do you hold that it could have happened?

Graeme Watson: I can speak only for the cases with which I dealt and I think that I dealt with more than any other individual.

Alastair Ross: If I heard you correctly, convener, you suggested that insurers proposed absolvitor.

The Convener: As a condition of settlement.

Alastair Ross: I have no awareness of that so, if there is documentary evidence that we can see, it would be useful to be able to review it and understand the point in more detail.

The Convener: It is certainly my understanding that proposed new section 17C of the act is in the bill to cover that precise set of circumstances, so you might want to go back and look again at that.

Graeme Watson: Yes, I will certainly be happy to do that.

Stewart Stevenson: I will drill down a little bit. In your opening remarks, Mr Watson, you gave us two types of case: those that were dismissed and those that went to absolvitor. However, the absolvitor cases themselves fit into a number of different categories. There are those that went to proof, where the evidential issue was resolved and where a settlement was reached, but there are also absolvitors in which we are a long way short of that. However, there are also people outside that situation.

I will give you an entirely hypothetical situation. There are two boys who are twins. In 1970, going through exactly the same system together, they are abused. One goes to the courts and gets a settlement of absolvitor and a payoff that he accepts as being the best available settlement at that point. The other twin takes no legal action but, under the bill, will have the right to go to the court and, potentially, get a very different outcome financially and perhaps in terms of how much of the evidence is dealt with in the process.

Even if we know of no such circumstances as I described, is the provision not drafted to cover precisely that kind of circumstance? When the twin who took no action gets a result, is it not proper to reopen the case in which someone signed up to a settlement in the circumstances that were then available, which we now accept—as I hear from the current panel of witnesses as from the previous one—is not the proper way to deal with such cases? Is that not the point of principle as to why we set aside the absolvitor in certain circumstances?

Graeme Watson: Yes, and I understand the force of that argument powerfully. It is clearly made. The issue is not the morality of whether the cases should proceed any more than it is in relation to the pre-1964 cases. It cannot be said that there is a moral basis for saying that someone who was abused in August 1964 cannot come forward but someone who was abused in October 1964 can.

Stewart Stevenson: Forgive me. In my example, I deliberately said 1970 to dispose of the pre-1964 issue. I am not making a moral point. I am making a legal point that it is likely that the pursuer, whose circumstances were identical to

the other person's, accepted the legal circumstances in which an absolvitor was granted simply because that was what was then available. Therefore, if the law is changed now to grant the other twin an option to pursue a case, it is proper that that right should be extended to the person who took the absolvitor.

We have dealt with the moral points and this is a purely legal point. Is it a new thing in law? Should it be utterly resisted? If it should, does the whole bill not fall?

Graeme Watson: I will explain why I took it back to 1964 and the question of morality. The example that you gave highlights the challenge precisely because it looks unjust if one individual can proceed in one way and someone else who is in highly similar circumstances cannot. However, phrasing it as you did—as a question of law—is a good way of putting it.

You asked whether the proposal is, in effect, unique, and the answer is that it is. There is no precedent for legislating away final determinations. The issue has come before the legislature on a number of occasions. It has not come before this legislature, but it came before the Westminster Parliament in the lead-up to the 1973 act and again in the lead-up to its amendment in 1984, and concerns were clearly voiced about interfering retrospectively with rights that had already been determined.

The issue here is one of certainty of law, the rule of law, the importance that that has within Scots law as a system anyway, the way in which that is buttressed by the European convention on human rights, and whether looking to reinstate cases that were finally judicially determined runs counter to both Scots law and the convention.

Stewart Stevenson: It is helpful that you put it in those terms as it helps the committee to understand the great care that we need to take in dealing with this. However, it absolutely reinforces my personal commitment to make sure that we deal with it.

The Convener: I entirely understand what you say. This is a huge issue to get right, but we are talking about a specific circumstance where it can be proved that accepting a decree of absolvitor was a condition of settling and that people did that knowing about the time bar. The narrow issue that is being addressed is where it was a condition of settling that a decree of absolvitor be granted where we would normally expect it to be, in the circumstances, a decree of dismissal. In fairness to the Government, I do not think that there is any attempt in the bill to overturn the important principles that you have talked about.

I hope that that is helpful in closing the discussion on that, but can I get your opinion? In circumstances where that can be proved, is what is proposed in the bill the fair, proper and right thing to do?

Graeme Watson: I am hesitating because, again, I am going back to my experience of how these cases were dealt with and I simply do not recall that they were disposed of on that basis.

The Convener: We are talking hypothetically, then, about a situation in which it could be proved that the pursuer, in order to get the settlement, was required by the insurers to accept a decree of absolvitor where normally, in the same circumstances, it would have been a decree of dismissal.

Graeme Watson: There are two circumstances. One is where there was a payment of money in the form of an extra-judicial settlement, which we can see in any form of litigation. It would always be expected that that would be concluded with a decree of absolvitor because that involves both parties accepting that they have determined the dispute between them and it is at an end.

The other circumstance is where one party abandoned the case without seeking settlement. In that circumstance, they would not have received anything in return and those who defended the case would not have been in a position to insist on a decree of absolvitor. The vast bulk of these cases were legally aided and it is not as if the parties defending them were going to get an award of expenses anyway.

The Convener: I understand that they may not have insisted on it as a condition of settlement, but given that, at the time, we were not looking at the proposals in the bill, and that the pursuer may have realised that there was a time bar and there was no prospect of the case being raised again, that may have given the insurance company, if you like, an extra incentive or leverage for the pursuer to accept absolvitor when it should have been dismissal.

Graeme Watson: I do not believe that, in that circumstance, the defender would have had any leverage. However, let me put that to one side and answer the question directly. My concern about this is that it runs counter to the rule of law and the certainty of law, not the specific circumstances. In any hypothetical situation, the same would pertain.

The Convener: That is a helpful distinction.

I think that there is only one more aspect that we have not covered—the double compensation issue. How do you see that? Should the onus be on the defender or the pursuer to establish the settlement?

Graeme Watson: I was interested in what Mr Garrett had to say about that and what was in the submission from the Association of Personal Injury

Lawyers. He cited the example of a case that was settled on behalf of a child by a parent. However, by definition, that could not have been time barred. Any form of settlement was therefore not reached on the basis that there was a limitation issue. By definition, the time would not have started running, let alone have run out, until the child was 19 or 21.

I was also struck by Mr Garrett's concern about the paucity of evidence on the basis of which a settlement was reached. I ask the committee to bear in mind that we are talking about—

The Convener: I am sorry to interrupt, but we are talking about double compensation, where a case has been settled and compensation has been paid.

Graeme Watson: Yes. One of his concerns was that it would be difficult to establish retrospectively on what basis the case was settled—what amount was expenses, what amount was damages and how the decision was reached. I understand his concern about that. However, that only highlights the evidential difficulty that one faces in trying to investigate what happened years ago.

Putting that to one side, I recognise the force of what Mr Garrett says about an alternative means of addressing the issue being to offset whatever had been awarded or agreed in the earlier settlement. Nevertheless, trying to unpick the basis on which that was reached would be a very difficult exercise. I am trying to think of a situation in which an insurer would have said, "We'll pay your expenses plus a nominal sum for damages." There would have been little or no incentive for an insurer to do that. I have dealt with approximately 400 to 500 cases, and none has been in that situation.

I agree with Mr Garrett that it is not clear what ill the provision seeks to address, and I agree that there is another way of coming at the matter. However, I encourage the committee to reflect on what he said about evidential difficulties. Those are writ large for the circumstances of abuse itself and are why we have some form of discretion in how these cases proceed.

The Convener: Should the onus be on the defender or the pursuer?

Graeme Watson: It is a matter of fact. I do not have a strong view on where the onus should lie. The pursuer is bringing it forward as an aspect of evidence, so I would expect the onus to be on the pursuer in the ordinary run of things. However, that is secondary to the issue of how the matter is dealt with.

Alastair Ross: It seems to be a very specific point. I was not aware of the concept of double compensation having been raised in any other evidence that the committee has received. As far as I am aware, it is not set out in the bill or the supporting documents.

I am conscious of the fact that Graeme Garrett was talking about a hypothetical situation, whereas Graeme Watson has said that, in 400 or 500 cases that he has dealt with, that has not been the case. It would be useful to get some specific examples of that from Mr Garrett, other colleagues or whoever else. I understand the hypothetical point, but are there any specific examples of its having happened in the past, and does it need to be addressed in the legislation?

I defer to Graeme Watson because of the length of his experience of handling such cases in court. I am not aware of the issue from an insurer's perspective. I have not heard it discussed in all the time that I have been working on the bill or in preparation for this meeting. There has been no indication that there would be such an approach, in which a token sum—I think that somewhere in the region of £50 was suggested——would be paid. Neither I nor Graeme Watson has come across it at all.

12:45

The Convener: We have had a helpful discussion in the round and on the latter point specifically. I thank you both for coming. Is there anything that you want to add in closing?

Alastair Ross: If I may, I would like to raise an important point that has not come up in the session so far. The committee has a significant job to do—the implications of the legislation are substantial, and there is an expectation that the committee will consider all the evidence so that it is as well informed as possible before it makes recommendations at stage 1 and the bill goes forward. I am struck by, and concerned about, the fact that the committee has received fewer than half the number of submissions that the Scottish Government received when it ran a consultation on the measure in 2015.

The Convener: Your point being?

Alastair Ross: I am just struck by the contrast between the level of evidence that the committee has received from organisations that have an interest in the bill and the situation with the Scottish child abuse inquiry. At the end of last month, Lady Smith read out a list of literally dozens of organisations that could conceivably be affected by the legislation, given that her inquiry is already investigating allegations of historical child abuse, and yet their opinions on the bill and their voices do not seem to be represented.

The Convener: No doubt organisations will have noted your point. They will have the opportunity to submit evidence.

Alastair Ross: I am putting the point on the record—that is all. I am grateful to you for the opportunity to do so.

The Convener: I can assure you that one of the founding principles of this committee is access to justice for all in the criminal justice system. I hope that, if you take nothing else away, you take that away, having heard the questions and seen the evidence that the committee has received. Thank you for attending.

12:47

Meeting continued in private until 13:02.

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