OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 30 September 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 30 September 2020

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EDUCATION AND SKILLS COMMITTEE
22nd Meeting 2020, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Daniel Johnson (Edinburgh Southern) (Lab)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Paul Beaton (Scottish Government)
Donald Henderson (Scottish Government)
Barry McCaffrey (Scottish Government)
Lisa McCloy (Scottish Government)
Dr Maeve O'Rourke (National University of Ireland Galway)

CLERK TO THE COMMITTEE

Gary Cocker

LOCATION

Virtual Meeting

Scottish Parliament

Education and Skills Committee

Wednesday 30 September 2020

[The Convener opened the meeting at 10:17]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning, and a warm welcome to the 22nd meeting in 2020 of the Education and Skills Committee. I remind everyone to turn their mobile phones to silent for the duration of the meeting.

Agenda item 1 is a decision on whether to take items 3 and 4 in private. As no members object, we agree to take items 3 and 4 in private.

Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill: Stage 1

10:17

The Convener: Our second agenda item is two evidence sessions on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. I welcome from the Scottish Government's redress, relations and response division Donald Henderson, who is the deputy director, Paul Beaton, who is the unit head, and Lisa McCloy, who is the bill team leader; and from the Government's legal directorate Barry McCaffrey, who is a lawyer.

There will be no opening statement, so we will move directly to questions.

Daniel Johnson (Edinburgh Southern) (Lab): I am sure that the bill team will agree that, for the legislation to be ultimately successful, we need to ensure that the right decisions are made for the right reasons in the right way. As it stands, it is difficult to have confidence that that will be the case, because the bill does not set out the criteria or the process—it leaves that to guidance. What are your reflections on that? What should we expect to come forward on those matters?

Donald Henderson (Scottish Government): As you know, the bill sets out at a high level the factors that need to be taken into account by redress Scotland in making awards. More detail needs to be fleshed out. We would expect to provide materials to you before the end of the stage 1 proceedings, to allow the Parliament to step beyond the high-level principles.

It is vital that this work is done correctly. In addition to making redress payments, we are trying to address not only the failures that were made over many decades in allowing the abuse to happen and persist, but the treatment of too many survivors afterwards, who have felt ignored and belittled by society. If we do not have a scheme that addresses their needs, including an assessment framework, we will not have achieved our aim. More detail is undoubtedly needed, and we aim to have it with the committee before the end of stage 1.

Daniel Johnson: The only criterion that I understand is currently in the bill is that the decisions

"must have regard to the nature, severity, frequency and duration of the abuse".

There is no mention of the consequences, the costs or the wider social impact, nor is there any requirement to have regard to whether those

incidents could or should have been avoided. Those are clearly things that, at the very least, require clarification. Why are those high-level principles not in the bill?

Donald Henderson: The bill is intended to pick up activity—crimes—that should not have been going on in the first place. We are not trying to deal with activity that was perfectly legal and acceptable at the time, and we are not designing a scheme that is intended to replace the civil courts, which have a place in assessing the on-going impact on loss of earnings, for instance. That is not part of the redress scheme.

We will look at the nature and frequency of the abuse that took place, as you mentioned. The guidance that we produce, which we will discuss with survivors, and the work that we are doing with psychologists who are advising us will flesh out those high-level principles as we build the approach that redress Scotland will take in looking at individual applications and the circumstances behind those in order to settle on an award level.

Daniel Johnson: Given the broad scope that redress Scotland will have to develop assessment processes and criteria, even given the guidance that you have set out, would it not be a good idea to have an independent chair who is separate from the chief executive? I understand that the bill combines those two roles. Is good governance not absolutely critical, given the scope that redress Scotland will have?

Donald Henderson: I certainly agree that good governance will be critical. Alongside that, independence from the Government is also critical, which is why we have protected redress Scotland from ministers having any involvement in decisions on individual applications.

In order to set up the scheme quickly, we propose that the administration be done by the Scottish Government and that that arm of the Scottish Government be instructed by redress Scotland. That means that redress Scotland will be very small and the bulk of the work will continue to be done by staff in the Scottish Government.

We can continue to talk about that. Our conclusion was that, because redress Scotland will be so small, having a separate chief executive and chair was not the right approach. However, there will be other views on that and we will listen to them and learn.

Daniel Johnson: I am not sure that I understand why scale alters the requirement for good governance, but I will leave it there.

Beatrice Wishart (Shetland Islands) (LD): Good morning, panel. My connection dropped out briefly, so I hope that I will not be repeating the questions that Daniel Johnson asked—I do not think that I will.

My questions are about applicants who have convictions for serious criminal offences. There are differing views about the proposal that compensation should not be awarded to a survivor who has a criminal record for a significant offence. We now know that unresolved childhood trauma can lead to offending behaviour, so what account was taken of that understanding in the decision not to offer redress payment where it would be

"contrary to the public interest"

due to the applicant having been convicted of a serious criminal offence and

"sentenced to imprisonment for a term of 5 years or more"?

Lisa McCloy (Scottish Government): That is a good question. We recognise that that is a difficult and sensitive aspect of the bill, and we know that there are varied but strongly held and opposing views on it. We have listened to those views throughout the consultation, and we will continue to listen to the evidence that the committee hears on that aspect of the bill.

In the bill, we have set out what we think is a proportionate response to an incredibly complex issue. It is important to note that there is no blanket presumption or exclusion in the bill to prevent redress payments being made to people with criminal convictions, including serious criminal convictions. However, there is an acknowledgment of some people's concern about redress payments, which are obviously to be made in relation to abuse, going to those who have gone on to commit very serious crimes—particularly crimes of abuse.

The bill takes the position that the independent decision makers of redress Scotland will have an opportunity to look at cases on an individual basis to see whether there is a public interest argument not to make a redress payment in such cases. The bar is deliberately set high, and that power will be triggered only when applicants have convictions for murder, rape or serious sexual or violent offences for which they received a sentence of imprisonment of five years or more. I emphasise that there is no presumption to use that power and no blanket exclusion of those applicants. They would also have a right to review decisions that were made by the independent decision-making body, redress Scotland.

The other point to note is that applicants with very serious previous convictions would still be eligible for the elements of non-financial redress that will be offered by the scheme.

Beatrice Wishart: Thank you for that. Let us turn to support for legal advice. How will support

for legal fees and costs that applicants might incur in trying to find evidence work in practice?

Lisa McCloy: We recognise that support is an important aspect of any redress scheme and that some applicants will want it. The support that will be available will vary according to what the applicant needs or wants assistance with. We recognise that there is an obligation to ensure that the scheme is as accessible as possible, and we are working with partners to make sure that information on the scheme is in accessible formats and so on.

We also recognise that applicants might require practical support to apply for redress, such as support to access records. Another important aspect of the scheme is that we recognise that survivors might require emotional support to apply, because, for some, applying for redress could re-trigger difficult aspects of a survivor's past. There will be emotional support to assist survivors who are confronting that.

In terms of support for legal aspects, we understand that some applicants will want legal advice from the outset, but it is important to note that we are trying to design a scheme in which that will not be necessary. There will be a point in the survivor's application at which we will strongly advise that advice is given before acceptance of a payment—that relates to the signing of a waiver, which we may come on to discuss separately.

10:30

To focus on the provision and funding of legal advice for the moment, we have looked at what happened in other redress schemes, and we are aware that legal fees can escalate in some of them. That is not something that we want for this scheme—we want the majority of the money to go to survivors, although we do respect that there is a need for independent legal advice. We are therefore proposing that ceiling limits or caps are placed on the legal advice, to try to control the legal expenses of the scheme. However, we recognise that there will be cases that are more complex than the fee will allow for, so there is a mechanism in the bill for solicitors to apply to exceed the ceiling and a mechanism to review decisions on whether to allow someone to exceed the fees.

Iain Gray (East Lothian) (Lab): I will ask about the waiver. The bill means that those survivors who avail themselves of the redress scheme will have to sign a waiver giving up their rights to pursue compensation in the civil courts. When the cabinet secretary introduced the bill in Parliament, he made it clear that the reason was to use that incentive to encourage the institutions that were responsible for historical abuse to contribute to the fund from which redress payments would be made. Can the bill team see that, from the point of view of survivors, it would appear that the interests of the institutions that were responsible for their abuse have been put ahead of their interests?

Paul Beaton (Scottish Government): It might be helpful if I set out a little about what the waiver is designed to offer for survivors, as well as for providers. The scheme that is proposed in the bill looks to create a national collective endeavour, which, as you say, encourages those who may be responsible for abuse in the past to step forward and to acknowledge and respond to survivors in a way that does not require them to go to court. It is designed to give survivors a choice as to whether they would prefer to pursue litigation or proceed through redress. It is not a choice that is available to all, but it would be for the majority.

Through previous consultation and work with survivors, it has been made very clear that contributions from organisations are an important part of the scheme's acting in that collective way. The waiver is the most effective way of achieving that. It has been used in the majority of redress schemes worldwide, particularly where contributions are in play. There should be no suggestion that the operation of the waiver can silence survivors—those who prefer their day in court can absolutely proceed on that basis. There is no sense that participation in the redress scheme involves anything like a non-disclosure agreement, and participation does not prevent survivors from discussing their experience privately or publicly.

We have just touched on the issue of independent legal advice regarding the decision on whether to accept a redress payment. The waiver will be signed only at the end of the process, once the survivor is clear about what redress Scotland's proposal is and the organisations to which the waiver will apply.

As part of that national collective endeavour, it is fair to acknowledge those organisations that find a way to play their part in this. In encouraging them to do so, it is appropriate that they have the opportunity to fund payments to survivors, to offer that sense of acceptance and participation and, as I say, to face up to their historical legacy as part of that national endeavour rather than requiring survivors to receive it through another mechanism. Absolutely, we know that there are different views on that, and the matter has been given careful consideration as we have developed the bill. We will continue to listen closely to the evidence as it comes forward in the coming weeks.

I am happy to take any follow-up questions on that, as it is a crucial matter.

Iain Gray: We all understand that survivors wish to see these institutions playing their part in contributing to the redress fund, but they would want them to do that because of their historical guilt rather than as a good financial option on their part, which is really the argument that is being made here.

You said that survivors will be able to pursue the redress scheme and will only have to decide once they know what the outcome of that process is whether they accept that and, at that point, whether they sign their waiver. That will put survivors in an almost impossible position, will it not? In a hypothetical case in which a survivor has been told that the redress scheme will award them the maximum of £80,000, they will then have to decide whether to accept that as redress and give up their right to civil justice or reject it and go to the civil courts where, of course, they will not know what the outcome would be. They might feel that they have strong evidence and will receive a greater level of redress from the civil court, but they will not know that until they have gone through the process. Can you see that we are potentially putting survivors in a difficult, perhaps impossible, situation by asking them to make that decision at that point?

Paul Beaton: You are absolutely right to highlight the uncertainty of the civil court process. The redress scheme is designed very much for the majority of survivors, but we completely accept that there will be survivors whose experience, evidence or preference might be to pursue their position in court, but that might not be the case for all. The redress scheme is designed to offer something different and to allow people to exercise that choice.

However, you are right that there will be a choice to make at the end of the redress process and there is no certainty about what might emerge from the court at that stage.

Iain Gray: Surely, the way out of that dilemma is to allow survivors to pursue both routes. That is in the interests of the survivors, is it not?

Paul Beaton: It would be possible to have a redress scheme that proceeds on that basis. We have provision for legal advice, as we have discussed. There is also the point about contributions. If we are looking for organisations to step forward and seek to play an active part in this, the existence and operation of the waiver within the scheme as designed is a critical factor.

It is not for me to speak on behalf of any organisations, but it is clear that their considerations about whether to participate and, if so, to what extent, are on-going and are based on the scheme as it is designed. It will be a really interesting area of evidence as we go through the following weeks. There is, however, no question but that the waiver is right at the top of the list of issues that organisations are looking at when they consider whether to be part of this.

I absolutely share the wish that organisations would want to play their part and make contributions on the basis of the historical legacy alone. That may prove to be the case with some, but I would not be as optimistic across the range of organisations that we are looking at, representing 70 years of operation of the care system in Scotland.

Iain Gray: Have those institutions—

The Convener: Sorry, Mr Gray—Mr Henderson wants to come in, and we then need to move on to questions from Jamie Greene, followed by Alex Neil.

Donald Henderson: I emphasise that, in the Government's estimation, it is not possible to produce a redress scheme that will cater equally for the very small number of potential £1 million civil law cases and for the enormous bulk of survivors who, if they were able to take a case at all, would end up with far lower settlement levels.

There will be people who, on the basis of legal advice and their own judgment, decide that they will get more in the civil courts. We want to leave that choice for survivors as late in the process as we possibly can, and we want to allow them to lead and conclude civil cases before they find out whether they are successful under the scheme. We are giving as much choice as we can to survivors who already have choice, by introducing a mechanism for survivors who cannot bring civil litigation at all because they are—[*Inaudible*.]—and for those who know that they have no evidence, as it is sometimes difficult to gather evidence from past decades, or who have evidence but are certain that the last thing that they want to do is go through the type of disclosure processes that are necessary in a civil case.

Some will be involved but in quite small numbers, and we are leaving the choice for them as late in the process as we possibly can.

Jamie Greene (West Scotland) (Con): Good morning, panel. I will focus on the financial aspects. For the benefit of those people watching the session, who will not have reviewed all the documents to which we, as MSPs, have access, can somebody outline the estimated cost of setting up and operating the scheme?

What will be the on-going cost per annum of running it, aside from the compensation money? Can the panel indicate how they arrived at the projected forecast for the levels of compensation that will be paid out? What assumptions and

estimates were made, and how will those translate into reality when people start to apply for the scheme?

I appreciate that we do not know how many people will apply, but surely some thought has gone into the potential cost of pay-outs once the scheme opens.

Donald Henderson: My colleague Paul Beaton can go into some of the detail on that. Our overall estimate is £400 million for the scheme as a whole, but—as you recognise in your question—this is intensely difficult territory in which to estimate the final number of applicants and the average award that would be made.

In the considerable research that we have conducted into other schemes running internationally, we have not found a single case in which the initial estimates were correct. We have spoken to people in Ireland who are capable, accomplished civil servants, but their original estimates were out by multiples. We benefit from their experience and from the experience of colleagues in other countries. Our central estimate is £400 million, but there is inevitably wide uncertainty in that.

Paul Beaton: The uncertainties that Donald Henderson mentioned are live. We have tried to look as carefully as we can to see how many survivors might come forward to the scheme. You will see from the documentation that our central estimate is for 11,000 potential applicants. However, we accept that that will be inaccurate to one degree or another and that we will have to keep a close watch on it. We have made our estimate by considering the totality of those who have been in care over the period covered by the scheme, which, as things stand in the bill, goes up to 2004. Within living memory, that is perhaps 70 years of a care landscape, which changed fundamentally several different times over those years.

10:45

We have worked with Scottish Government analytical colleagues and with the Government Actuary's Department in London to try to understand what those numbers could mean historically in respect of the different sectors and institutions that were providing care over that time. There is some really good research on the numbers of children in care. Interestingly, the number of children in care is fairly consistent, but they were in very different places by the end of the period covered by the scheme. It is incredibly complicated.

The work that we were able to do with the Government Actuary's Department, looking at schemes elsewhere and the experience of our own advance payment scheme—500 applications or so—has given us some really good information, particularly around the earlier part of the scheme. We have also looked at the experience of schemes elsewhere in relation to their distribution of payment levels. We have done that without any sense of an objective or target. We are fortunate that we have a clear commitment that redress Scotland will take independent decisions and that survivors will receive payments decided upon through that process, rather than be subject to a more normal sense of financial drive. That is a very positive position to be in. However, it exacerbates the uncertainty.

Jamie Greene: I am sorry to interject, but that is rather a lengthy answer and I have some supplementary questions.

The Convener: Only one supplementary question, please, Jamie—perhaps you can wrap them together.

Jamie Greene: I will try, convener. However, they are important issues and unfortunately my initial question was not really answered. I want to press the point, although I am happy to receive an answer in writing if that would be easier, because I appreciate that there is a lot of detail. My first question was this: what will be the set-up and running costs? Those are fixed costs, which you must be able to estimate now, notwithstanding the levels of compensation.

I am concerned by the suggestion that you do not really know the compensation costs, given that other schemes have been massively out of kilter in their estimates. Could the £400 million easily become £800 million if 20,000 applications are made? What percentage of the compensation paid out will be paid out by the Government as opposed to the institutions that will contribute to the scheme? Has there been any indication of the levels or any caps on moneys available from the institutions that will participate in the scheme? How much will those institutions make available to pay compensation?

Paul Beaton: I can answer that element briefly, and then Donald Henderson and Lisa McCloy can answer on other matters.

The set-up and on-going programme costs are set out in the financial memorandum. As discussed in the earlier answer, the intention has been to provide a good balance of independence and efficiency in the set-up, to ensure that redress Scotland has the right structure and decision-making powers without taking anything away from the primacy of payments to survivors.

Discussions on contributions are on-going. The point about having a waiver bears repetition, because it is about organisations finding ways to participate in the scheme. Mr Greene is right. The

issue of affordability is being raised, particularly in respect of the protection of current services. As you will know from the bill, we are working on a set of principles around fair and meaningful contributions to the scheme that will take into account those aspects, and we are looking at issues of transparency as well. We want to get that right because we do not want to do anything that unreasonably jeopardises an organisation's existence and we certainly would not wish the scheme to have an adverse effect on any vulnerable person today. However, we clearly need to encourage significant contributions from organisations in the most effective way that we can. Again, that is where the waiver and the package as a whole comes in.

I am conscious of the time, so I will give way to colleagues to respond to other matters in your question.

Lisa McCloy: I will briefly answer the questions about the set-up and the on-going costs of implementation and delivery. As Paul Beaton said, we set those out as best we could in the financial memorandum and we have kept a keen eye on them in designing the delivery vehicle of redress Scotland, which is why we have gone for a small, independent decision-making body supported by the Government administrating the scheme. In that way, we can keep costs down and there is access to shared resources and services.

The financial memorandum indicates some of the different issues that we have thought about in terms of the programme costs, including recruitment and staffing, the digital and information and communications technology estate, other services and communications and engagement, because it will be important that we reach the survivors that we need to in order to be inclusive about those who can apply to the scheme. We estimate in the financial memorandum that the costs could be up to £34 million across the four years for implementation and delivery, which would not include money for legal fees or non-financial redress.

I do not know whether that is helpful, but we can follow up later on anything else.

Donald Henderson: I am grateful to Lisa McCloy for those details. That £34 million figure is the answer to Mr Greene's question—[*Inaudible.*] A lot is dependent on volume, however, because the actual set-up costs are pretty marginal. The real costs are in relation to the numbers of people who will need to be appointed through the public appointment process to make the decisions, and to the scale of the back-office activity in the Scottish Government. If we are wildly overestimating and there are only 2,000 applicants, we will clearly need to employ a lot fewer people; if there are 20,000 applicants, we will need to employ more people. However, there would be proportionate increases or reductions accordingly.

Alex Neil (Airdrie and Shotts) (SNP): As I understand it, the total costs have four elements: a £400 million estimate for compensation; £34 million in basic administration of the scheme; legal fees, which are indeterminate at present; and non-financial support. Adding all that up, what percentage of those costs do you anticipate being funded by the offending institution and what level of commitment can be got on that at the moment?

Donald Henderson: Others can come in with more detail if time allows, but I can say that it is too early in the process for us to have those numbers. Understandably, the conversations that we are having with organisations are dependent in turn on the shape of the bill that Parliament passes next March. Will it be passed as introduced or will there have been amendments to it? The reality is that we will not have signatures on bits of paper before organisations know the bill's final shape. A number of promising conversations are going on with providers, many of whom we know are keen to find a way to contribute, but the outcome depends on the work that we and they have embarked on for the parliamentary process.

Alex Neil: So, basically, we are being asked to pass a bill with a waiver provision that is supposed to incentivise the offending organisations, many of which are very rich and which I assume—given what Donald Henderson has said—have still not made any commitment in principle to significantly or even partially fund the costs. Even though those organisations have not made even a ballpark commitment, we are saying to survivors, "Take the money, but on condition that you don't pursue these organisations for civil action." Why should we pass a bill that is based on a wing-and-a-prayer hope that those institutions will live up to their responsibilities when, to date, many of them have quite blatantly not done so?

Donald Henderson: I am not sure whether it constitutes agreement in principle, but, as I mentioned, there are organisations that are very keen to find a way to join the scheme.

When it comes to a survivor's application, it would be at the very end of that process that the applicant would be invited to sign a waiver. At that point, they would know exactly who had contributed to—

Alex Neil: I am sorry, Donald, but once the bill has been passed, what leverage will you have over those organisations? We are being asked to decide whether to recommend to the Parliament that it should support all the principles in the bill. One of the key principles is the concept of giving

people a choice, whereby if they take the money, they will waive their right to civil action. Why should we vote for that at stage 1 when there is no guarantee even in principle that the organisations in question would live up to their responsibility? We are not talking about giving those organisations an incentive; we are talking about letting them away with what they have done for all those years. Surely, we are entitled to have some kind of commitment before we can be expected to agree to the general principles of the bill.

Donald Henderson: If an organisation fails to make a fair and meaningful contribution in the first place, or if it fails to make a fair and meaningful contribution that it has agreed, it will not be subject to the waiver and the question will not come up. It will have made the decision that it would prefer to have cases go through the civil courts.

Alex Neil: But the fundamental point is that, as a legislator, I do not want to know only that the organisations will make some kind of contribution; I want to know that they will make proportionate contributions, because they are the source of the problem. Their failure to protect the children concerned is the source of the problem—that is why we are here today. Quite frankly, a wing and a prayer does not do it.

Donald Henderson: I think that, sadly, we are here today because of wider societal and regulatory failures. There was not an understanding among regulators, which is why the Scottish Government has its responsibilities. There was not adequate scrutiny or adequate inspection and follow-up. By and large, it was other people, such as people in Government or our predecessors in Government, who were—

Alex Neil: That is like saying that we should help—

The Convener: I am sorry, Mr Neil. I understand that you want to pursue your questioning, but Paul Beaton and Lisa McCloy have both indicated that they want to answer. I will let them to do so, after which I will move on to Ms Mackay and Mr Gibson. I will come back to you at the end if there is time.

Paul Beaton: I hope that it is helpful if I emphasise that the protection of waiver will be in place only if the organisation concerned is making fair and meaningful contributions to the scheme. As I said, we are working on the principles of that at the moment. I hope that it will be reassuring for the committee to hear that one of the core elements that we are proceeding with is that we are looking to organisations to pay the equivalent of the individually assessed payments for survivors who come forward to the scheme, over and above a starting contribution from the Government to reflect the wide systemic concern that Donald Henderson referred to.

Therefore, the contribution that is made will be proportionate. It will relate directly to survivors and to the decisions that are taken by redress Scotland as to what is appropriate for survivors. If that is not forthcoming, and if the delivery does not begin in advance of redress decisions being determined, the protection—the waiver—does not apply, and survivors can continue to raise legal action in addition to receiving the redress payment. No survivor will be disadvantaged by not receiving a redress payment at any stage.

11:00

Lisa McCloy: As Paul Beaton said, the waiver extends only to those who have agreed to make fair and meaningful contributions; it is not a blanket prohibition on all who accept redress payments against any action in relation to the abuse that they suffered. Where there is a party to that abuse who has not made a contribution, a survivor will still be able to raise a civil action against them, regardless of their having received a redress payment.

That is not how all redress schemes operate—some schemes have a blanket prohibition on civil action should someone choose to receive a redress payment rather than going to court. However, we have gone for a model that means that survivors would be unable to raise actions only against those who make fair and meaningful contributions to the scheme. We understand the need for transparency around what makes up a fair and meaningful contribution. Donald Henderson may have something to add on that.

The Convener: We will move to a question from Rona Mackay, but if Donald Henderson wants to comment on that point in his answer, that would be fine.

Rona Mackay (Strathkelvin and Bearsden) (SNP): To follow on from Alex Neil's line of questioning regarding contributions, this is a historical redress scheme, and it strikes me that a lot of the care organisations and charities that would have been involved or culpable at that time will no longer exist. Has an assessment been done of how many of those organisations are no longer in operation and what financial impact that will have on the compensation scheme?

Paul Beaton: That process is on-going and is not yet final. As I said earlier, we are looking at a relentlessly complex picture of multiple responsibilities held by different actors and agents in different sectors over different periods of time. Some of the organisations from which contributions are being sought continue to provide vital services for vulnerable people today, some

are reconstituted in a different form, some are no longer operating in Scotland and, as you said, some no longer exist. We will have to make sure that survivors continue to receive the redress payments to which they are entitled, irrespective of the status of an organisation.

We have had discussions with a broad range of organisations thus far, including a number of trusts and other similar bodies that hold legacy responsibility for organisations that no longer exist. However, the conclusion to those discussions, and the ultimate financial impact, will depend on the survivors who come forward to the scheme and the organisations that are named in the applications.

As we move forward, we are looking to have discussions with and seek contributions from any organisation that is facing up to a historical legacy in this space, but the process is very much on-going.

Rona Mackay: Do you have a sense of how many of those organisations no longer exist?

Paul Beaton: To be honest, I do not. We have a number of different databases, as you would expect, and there are literally hundreds of names of organisations that may have had a role in the care system over the post-war period, by and large. We have made contact with all organisations that are subject to the Scottish child abuse inquiry, and we are now reaching out to others that may, although we cannot definitively say, have an interest in the process. Regrettably, therefore, I do not know how many organisations no longer exist, but we will continue to look into that.

Kenneth Gibson (Cunninghame North) (SNP): Good morning, panel. I notice that up to 11,000 people could apply for the payments. However, in the Republic of Ireland, which has a smaller population than Scotland, there were more than 15,000 applicants. What is the difference between Scotland and Ireland in terms of the pool of people who could apply? In other words, how many people were in care for the time period that we are looking at and what proportion of them does the panel believe were abused?

Donald Henderson: I do not know whether one of my colleagues has detailed figures on the number of people in care in Scotland to hand. If we do not have that, we will write to the committee. As Mr Beaton said, the number is relatively stable across the years—surprisingly so—but the distribution between foster care, residential care and other settings varies significantly.

Each country that has established a redress scheme has been dealing with its own circumstances. You are right that Ireland's population is about 4 million as against our 5 or 5.5 million, but the circumstances there were quite different from ours. Although the regulatory procedures in Scotland did not work as well in past decades as we would now wish that they had, by and large we did have them. In Ireland, there was a different set-up for the provision and inspection of education. For instance, Ireland lost a case in the European Court of Human Rights in 2014 that related to historical abuse—the O'Keeffe case—largely on the basis that the state just did not have the instruments that it should have had, rather than that they did not work. That is but an illustration of the fact that each country needs to look at its own circumstances, because those inevitably vary from one to another. We have learned a huge amount from colleagues in Ireland, but the historical situation in Scotland was not the same and therefore our answers differ.

Kenneth Gibson: The answer seems to be that we do not know what proportion of the people who were in care in Scotland were subject to abuse, as I am not getting a specific answer. I would like that information, if you can provide it.

Other members have asked about organisations whose lack of care contributed to the problem that we are trying to address, but what is happening about foster parents who may have abused people who were in their care? Will they be expected to make any payments through this legislation?

Donald Henderson: No. Children who were in foster care are eligible to make applications, but we are not even attempting to have conversations with individual foster carers. If survivors want to take civil action, that route is open to them, but we are not including foster carers in any potential contribution to the scheme. We are, of course, talking to the Convention of Scottish Local Authorities and through it to local authorities in relation to the wide variety of responsibilities that they had over the seven or eight decades that we are looking at. One of those responsibilities was for the foster care network.

Kenneth Gibson: Is that not a flaw in the bill? You are talking about institutions being responsible but, surely, if someone is personally and directly responsible for abusing an individual, they should not be allowed to get off scot free. That seems to me to be a weakness in the bill.

Donald Henderson: Any allegations of criminal offences or criminal cases can, of course, continue to be brought.

Kenneth Gibson: I appreciate that.

Donald Henderson: Cases can continue, if the survivor wants them to, and those can include individual foster carers. We have made a judgment on the basis of diminishing returns that, given the historical period that we are looking at,

we would spend more on finding people in order to have a financial conversation with them than we would get from them, so there would be no value to doing that.

Kenneth Gibson: On the evidential threshold, there is a real difference between those who are looking for the higher payments, who have to present documentary evidence, and those who accept the minimum £10,000 payment and who make, in effect, an oral declaration for that. If someone has suffered the more serious type of abuse, they have to come up with much more detailed evidence.

Is there not a huge gulf between the £10,000 award and the awards of £20,000, £40,000 and £80,000 when it comes to the proof that individuals are expected to provide—for what are often fairly modest amounts, given that they have suffered a lifetime of trauma as a result of what happened to them in care?

Donald Henderson: The structure of fixed-rate payments and individually assessed payments comes through work that we have done with survivors through the interaction action plan review group. Again, that was as part of trying to give survivors choice.

For an individually assessed payment application, redress Scotland will look at everything that the survivor is able to bring. That will certainly have to include a personal statement, but it can also include health records, complaints to police and wider environmental information about the children's home that they were in and any convictions relating to it—the wide totality of evidence that redress Scotland can find or which the survivor can bring to bear. All of that will be looked at and assessed.

When we have walked survivors through the advance payment scheme, which is very much simpler and has the equivalent of the fixed-rate payment, we have worked with them on proving that they were in care. Survivors have come to us thinking that they did not have evidence and we have helped them to find it. We have not rejected a single case because somebody could not establish that they were in care—sometimes very many decades ago. We have always found a way. That would be our intent for redress Scotland as well.

The Convener: I think that Ms McCloy wants to come in on that point as well.

Will you clarify that what was said in answer to Kenneth Gibson's question about foster care would apply to an informal foster carer arrangement, but if somebody was placed in foster care by a local authority, or a social work department, that would be covered by the bill?

Lisa McCloy: Yes, that is right; I give that clarification. Private fostering arrangements are not covered by the bill, but local authority arrangements, as you have described, would be covered by the eligibility criteria.

I add to what Donald Henderson has said about evidence requirements. Evidence will be required for both fixed-rate and individually assessed payments. It is absolutely right to say that more evidence will be required for the individually assessed payments, given the type of assessment that will be carried out for those cases.

As Donald Henderson has mentioned, we want redress Scotland to be well informed in making its decisions, so it will be able to consider the information that is provided by the survivor. However, if the survivor wishes assistance to obtain information, there are powers in the bill to offer that assistance. That may include getting information from third parties. There is also a power to commission reports to assist the survivor in the process, whether that is through a psychological assessment or a medical report.

We have an understanding of the historical nature of the abuse that we are talking about, and of the difficulties over the adequacy of record keeping and in evidencing abuse of that sort. We will therefore be taking a flexible approach, so as to make sure that the scheme is robust and credible but does not set unduly onerous burdens on survivors in their access to redress.

11:15

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): We have heard the phrase "fair and meaningful" a few times in the conversation about the contribution that might be made by organisations that had responsibility for children in the past, but I am not much clearer about what "fair and meaningful" means. Will you explain that?

You mentioned some of the reasons that organisations could give for not paying, one of which would be that the organisation was currently providing services that were useful. I do not dispute that that might be the case, but I am not sure why, morally, it gets the organisation round the issue of liability.

Will you also say more about how we get round the problem of an organisation arguing that although it has lots of resources they are all subject to restrictions that are contained in various bequests?

Paul Beaton: Discussions about what is fair and meaningful have been at the core of our work with organisations. I might ask Barry McCaffrey to talk about the law in respect of charity reform and restricted funds. We want to ensure that, if

organisations are looking to play their part and make contributions, there are no barriers to their doing so—but Barry can speak a little about that, if time allows.

On the point about services, affordability and so on, I agree that the issue does not bypass responsibility or liability, as you said. There is absolutely no intention to dilute the sense of "fair" that we are looking for in this context.

The word "meaningful" is about trying to offer survivors choices, as we said. It has something to do with that collective national endeavour, whereby everyone has a role to play in the effort to face up to the past. In doing that, we are looking for people to contribute without there being formal findings of liability or a scheme that proceeds on that basis and without requiring people to go through litigation in a way that builds as much of that collective effort as it can do.

The word "fair" is really tightly tied to survivors who come forward to the scheme. The Government accepts that there is a need to demonstrate commitment to and acceptance of the broader responsibility—others have mentioned the local government complexity in that regard over the period that the scheme will cover. We are proceeding on the basis that, above and beyond the initial commitment and contribution, "fair" is about the organisation delivering the remainder of the individually assessed payments for survivors—that is a contribution for the benefit of survivors across the scheme, which is why the waiver is designed in the way that it is designed rather than more narrowly.

The point that you raise is also ripe for discussion as we go through the bill process. Although the phrase "fair and meaningful" is in the bill, transparency is key in that space, too. We need to reassure survivors about the basis on which contributions are made and about the certainty that they will be delivered.

Also, in respect of organisational matters, we want to encourage organisations to play their part and to be willing to participate and deliver contributions, rather than shying away from doing so, for other reasons. I hope that that will prove to be the case.

Barry McCaffrey (Scottish Government): Dr Allan asked about bequests. We have engaged with the charity sector and the regulator; I suppose that the issues that we have been trying to address operate at two levels. In the context of general charity law, there are potential barriers to contributions that might be contrary to an organisation's constitution or that do not meet the charity test; we have tried to address that in section 14, by removing any doubt about contributions from charitable bodies contravening charity law in any way.

The issue of bequests is slightly trickier. In section 15, we have taken an enabling power to explore that further. A lot of contributions to charities may be tied up in what are called restricted funds, which are for a specific purpose. We continue to engage with the charity sector and the charity regulator on that, but our idea is to bring forward regulations that, in a similar way to section 14, try to remove barriers that would otherwise be in the way of contributions to the fund from charitable bequests that are tied up in restricted funds.

Dr Allan: I have a related question about the other side of the equation. Keep me right, but my understanding is that the £10,000 payment option involves a simpler process and there is less need to explain things than with higher sums. How do we avoid a situation in which the people who find it most difficult to talk about what has happened to them feel that their only option, or the simplest option, is to go for the £10,000, regardless of the severity of the offences against them? How do we balance that? I appreciate that it is a difficult balancing act, but how do we avoid situations where the people who find it most difficult to talk about this stuff go for the simplest option?

Donald Henderson: That is a very important point. We have some advisers to the Government on advance payment for whom the first person that they have told about the abuse is one of my colleagues who supports that work. There is no easy answer to that question, but the provision of support is part of the answer to it. We have been careful to design the scheme so that an application, and a settled application, for a fixed-rate payment will not preclude the survivor coming back later in the lifetime of the scheme to open an individually assessed application if that is what they decide to do.

Because of the delicacy and sensitivity and the difficulties that survivors have faced, I am afraid that that still does not wholly answer the question, but we are always trying to find ways to give choice and maintain that choice for as long as we can in the process.

Lisa McCloy: I was going to make the same points as Donald Henderson. We are ensuring that we have provision to support applicants through the process, and we will learn from our experience with advance payments. Donald Henderson makes the important point that those who receive a fixed payment will later be able to apply for an individually assessed payment. We know that survivors sometimes have staged disclosure and that they sometimes want to test services to see how those services will meet their needs and how

sensitive services can be to them. We hope that that approach will provide more choice.

Ross Greer (West Scotland) (Green): Construction work has just begun immediately outside my office, so I apologise if my microphone picks up the jackhammer that has just started up.

I have questions on the next of kin payments. If a cohabitant is to be eligible ahead of a spouse through marriage or civil partnership, they need to have lived with the deceased survivor for at least six months. That seems like a proportionate way of indicating that the person was the deceased survivor's partner at the point that the survivor passed. However, I seek clarification on whether there is a similar provision for the length of time that the cohabitant needs to have lived with the survivor for them to be eligible ahead of the survivor's children.

Barry McCaffrey: We have taken a proportionate approach on cohabitants, and we have looked at other legislative frameworks. There is similar provision in the Burial and Cremation (Scotland) Act 2016 as to who can make arrangements on the death of a person.

On the more general point, in every case, the next of kin has to be the spouse, civil partner or cohabitant. They rank ahead of surviving children because it was felt that the partner of the deceased survivor should have first call on whether to make a next of kin application. The surviving children would come into play only if there was no one in that category.

Ross Greer: To clarify that, Mr McCaffrey, does the cohabitant need to have lived with the survivor for a minimum period for them to be ahead of the children? The scenario that I am thinking of is that they need to have lived with the survivor for at least six months to be ahead of that survivor's spouse. If someone has lived with a survivor for a matter of weeks before they passed away, are they eligible ahead of that survivor's children? Do they become a cohabitant and rank above the child, without a requirement for a minimum period of residency, as is required to come ahead of a spouse?

Barry McCaffrey: I will double-check, but I think that the answer is that they do not.

The Convener: Will you come back to us on that? Thank you.

Ross Greer: I have a brief technical question. The next of kin payment is a fixed payment of £10,000. Will the next of kin simply need to present evidence in exactly the same way as the survivor would have done, showing that their deceased partner was at whatever the setting was and when they were there and simply state that they were abused? They will not be required to provide any more information than a survivor would have had to, were they still alive.

Lisa McCloy: We recognise that the evidence that next of kin have access to can be a challenging area. However, your general understanding of the bill is correct. They would not have to produce anything over and above what a survivor would have to produce. We will have to look carefully at the requirements for evidence for next of kin. We expect that we will need more than simply hearsay evidence from next of kin applicants that the survivor experienced abuse. They may need to access a previous statement or account by the deceased survivor. It is important to note that the next of kin provision entitlement relates to the deceased survivor's inability to access the redress scheme.

The Convener: Thank you, Ms McCloy. We have almost run out of time. I have a couple of final points, before we finish the evidence session. First, in relation to the definition of abuse, the bill refers to the time at which corporal punishment was administered. However, we would consider that to be abuse by today's standards. How can survivors have confidence that abuse will be recognised and dealt with? Secondly, I would like to understand a bit more about what non-financial redress will look like. Mr Henderson wants to come in.

Donald Henderson: I will come in on those questions. On corporal punishment and the definition of abuse, our aim is not to criminalise behaviour that was perfectly legal and accepted at the time, bearing in mind that we are going back to activities that took place after the second world war and even before the second world war in some cases. Our aim is not to penalise what was perfectly normal in Scottish schooling, including in my own school, where one could get the belt, for instance. If it was the normal experience of schoolchildren in Scotland, corporal punishment does not, of itself, constitute abuse.

However, it is possible that corporal punishment could constitute abuse if there are extreme patterns. We are looking hard at the various regulations that were in place as regards what was acceptable in residential care, because the rules and regulations were often different there as compared with normal day schooling.

The principal point is that we are aiming to address behaviour that was illegal and unacceptable at the time, but was ignored, and was ignored for too long. The ignoring for too long becomes a part of the injury. That is what we are trying to address.

The Convener: Who would like to comment on non-financial redress?

Donald Henderson: I will start, and then others may be able to comment.

That links to the support element, because we know from survivors that for somebody to just sign a cheque, regardless of how efficiently that is done, is not the answer that they are looking for. They are looking for acknowledgement and an apology. I refer again to our experience from the advance payment scheme. I or one of my senior colleagues have written out a personal letter of apology to each survivor, because we know that that makes a difference. We have had stories come back about survivors reading that letter each night before they go to bed. It helps them to sleep because it is the first time that somebody in authority has listened to them and acknowledged that what went on should not have gone on and that public services need to respond to that. Acknowledgement and an apology are vital aspects alongside the financial redress, and link closely to the support element.

A great deal of this will be for redress Scotland, but our aim is to understand what each survivor wants, and the process should do as much as it can to deliver that, because the package that will help each survivor may be different. We need to listen to their voices.

The Convener: I am afraid that we have run out of time, as we have another panel coming in this morning. I thank everyone for their attendance.

I know that Mr McCaffrey wants to come back to us with an answer. I apologise to Mr Gray, Mr Greene and Mr Neil, all of whom wanted to continue a line of questioning. I am sure that the committee will follow that up by letter, and we look forward to receiving your responses.

I will suspend the meeting for five minutes to allow the panels to change over.

11:32

Meeting suspended.

11:40

On resuming—

The Convener: We move to our second evidence session on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. I welcome Dr Maeve O'Rourke, who is a lecturer in human rights law and director of the bachelor of civil law, law and human rights programme at the National University of Ireland Galway.

We move straight to questions. What were the major lessons that were learned from the redress system in Ireland? What might you have done differently?

Dr Maeve O'Rourke (National University of Ireland Galway): Thank you so much for having me. It is a real privilege and no small responsibility to be here—I take it extremely seriously.

It is worth stating that I consider the survivors of abuse to be the absolute experts. I will offer what I can from my limited experience of working for more than a decade in the area. Alongside being a barrister in child law, doing a PhD on the rights of older people to freedom from torture and ill treatment and on redress for such harms, and now being a lecturer, I have worked voluntarily between 10 and 20 hours a week for the past 10 years on issues relating to so-called historical abuse in Ireland.

In relation to what we can learn, I will speak to the two themes that were mentioned in the briefing papers. I have great knowledge of one theme and less, but still a considerable amount, of the other.

The first theme relates to the Irish Residential Institutions Redress Board, which was established in 2002, two years after the Commission to Inquire into Child Abuse began its proceedings. The two measures—the inquiry and the redress board—were prompted by an apology, in 1999, by former Taoiseach Bertie Ahern to survivors of child abuse in industrial and reformatory schools. In the previous evidence session, the Scottish Government officials talked a little bit about Ireland's set-up. In essence, those were state-funded and statutorily based institutions, but they were left to their own devices in terms of how they were run. Ultimately, the Commission to Inquire into Child Abuse's report in 2009 found that abuse had been "endemic". The board was set up following the Residential Institutions Redress Act 2002.

I have less knowledge in that area, but a lot of the Magdalen laundry survivors are also survivors of industrial schools, because teenage girls were transferred from them to Magdalen laundries, which is where most of my knowledge comes from.

A very positive aspect of the RIRB was that, at the outset, there was the promise to provide compensation that was commensurate with legal proceedings. As the committee will know, the compensation was going to be up to—and, in some cases, beyond—€300,000. As the briefing notes say, as it transpired, the average award was in the region of €62,000, so although it had been promised at the outset that there would be commensurate compensation, that did not end up being the case.

Some survivors have stated that the redress board's procedures were deeply traumatising. It is very difficult to understand how exactly the redress board affected survivors, because there is what is

known colloquially as the gagging clause—section 28(6)—of the 2002 act, which underpins the redress board. That section prohibits everybody, including survivors, from discussing an application to, or an award from, the redress board in any way that could possibly lead to the identification of an individual or institution involved in a complaint. It has operated as a massive chilling factor. The only voices that we hear are well supported by, for example, our national broadcaster, Raidió Teilifís Éireann, when it reports. However, such reporting is minimal.

11:45

It is worth noting that the section 28(6) gagging order has never been legally acted on by the state. As I said, it has a massive chilling effect and it seems to be understood by the state to be not effective and, possibly, not constitutional. Unfortunately, that hampers our understanding of the impact of the procedures.

I made notes on the positive and negative aspects. When it comes to the redress board, I have to move on pretty quickly to the negatives, unfortunately. I will talk about the procedures, and then we can compare them to what I see in the Scottish bill.

The redress scheme was an ex gratia scheme and the underpinning legislation stated explicitly that an award could not be construed as a fault having been found against an institution or individual. Nonetheless, under the legislation and the guidelines, every person or institution that a survivor named in their application was entitled to a full right of reply. They were entitled to receive copies of all the survivor's documentation and were entitled to respond to the board in writing with any evidence concerning the application that the relevant person considered appropriate. They were entitled to request the opportunity to cross-examine the survivor themselves, or through a legal representative, for one of three purposes, which were

"(i) correcting any mistake of fact or misstatement relating to or affecting the relevant person made in the application,

(ii) defending the relevant person in relation to any allegation or defamatory or untrue statement, made in the application, or

(iii) protecting and vindicating the personal and other rights of the relevant person"—

the "relevant person" being a person or a representative of an individual named. The only reference to rights in the entire act is in relation to the rights of the alleged wrongdoers.

As I said, it was more or less an ex gratia scheme and the legislation said that none of the documents that were provided to the redress board could ever be used in future criminal or civil proceedings. We have extremely strong defamation law in Ireland so, in my academic view, the procedures were wholly unnecessary and, as we can tell from the survivors who have spoken out and taken the risk of breaking the gagging order, they have had a massively traumatising impact. It is welcome to see that there does not seem to be anything comparable in the Scottish bill.

Another downside of the fact that, under the 2002 redress act, awards were accompanied by the gagging order was that—even though, strictly, it should not have had this effect—many survivors felt that they could not even go to the police. There have been no prosecutions to speak of in relation to the industrial and reformatory schools, and access to the records relating to those schools is problematic.

Last year, the Department of Education and Skills introduced the Retention of Records Bill 2019, which sought to seal entirely for at least the next 75 years—even from survivors—every single document that was gathered and held by the Commission to Inquire into Child Abuse and by the Residential Institutions Redress Board. I accept that arguments for publication of some records are stronger in relation to the commission's state and other administrative documents, but when it comes to the redress board's records, survivors have an entitlement, under the general data protection regulation, to their personal data, which does not seem to be recognised in the Retention of Records Bill.

I would like to discuss interpretation of the GDPR. I do not know to what extent, if any, this is a problem in Scotland, but there is certainly no understanding in Ireland of the concept of mixed personal data and a survivor having an equal right of access to data that belongs to somebody else if it is also the survivor's data—that is, information about what somebody did to them. For example, you and I have a right to know who our doctors are and what they have done to us—our medical records are as much our data as they are theirs. Another example is the European Court of Justice case of Nowak v Data Protection Commissioner. Unfortunately, the concept has not been properly understood in Ireland.

Following the establishment of the redress board, there was also provision of non-financial support in relation to industrial and reformatory schools. That came partly from the controversy over the very small compensation contribution that the religious orders had given to the redress board. They were called on to give more; that went into a separate statutory fund that then began to administer other payments to survivors—and, to some extent, to second-generation survivors—for education. That turned into a fund called Caranua,

which is Irish for "new friend". Unfortunately, that fund is now being wound up. Survivors have the sense that the fact that their needs continue for as long as they live is not understood.

The Caranua fund provides things such as help with house renovations and educational support. If we have time, I would like to talk about the very real need for survivors of childhood institutional abuse not to be re-institutionalised. Home care and home renovations are massive issues. The fund provided some help for those, but it is being wound up now.

The last thing that I would like to mention about the industrial and reformatory schools is that there was, in July 2019, a pre-consultation report, done through consultation of 100 industrial school and reformatory school survivors. That was to find out what the method for fuller consultation of industrial and reformatory survivors should be. It was funded by our Department of Education and the report was written by Barbara Walshe and Catherine O'Connell. I would be happy to send the committee any documents relating to that. The 100 survivors spoke about their on-going needs. I would be happy to come back to that.

The Convener: Thank you. We have 10 committee members who all want to come in. If we can be succinct in both questions and answers, that would be helpful.

Daniel Johnson: I was interested by what you said about the controversial nature of the procedures for making determinations. You might have heard during the previous panel's evidence that I have some concerns about how that will be defined in the guidance that accompanies the bill.

What are your reflections on the safeguards? Given your experience as a barrister, what would you think about putting those safeguards and high-level principles in the bill itself? What we would have here would be a panel making determinations in private and then reporting them, whereas in Ireland you had public hearings. Can you compare and contrast the approaches?

Dr O'Rourke: The redress board was private, even though there was cross-examination as if it was a court.

That is an important question. Fair procedures must still apply, even if the panel does not in any way operate like a court. To give credit to the ministers who established the second scheme that we had more recently in Ireland, I point out that they wanted to avoid the traumatising effect of the previous industrial schools redress scheme.

The Magdalen scheme was established in 2013. The first problem was that there were no lawyers to help the women through the scheme. Secondly, the officials who administered it did not publish any guidance on what the criteria were or what the decision-making process was. They also did not seem to understand that it was an administrative scheme affecting rights, and that therefore the ordinary fair procedures should still have applied. I was ultimately involved in High Court judicial reviews of what was found and in a larger investigation by the Office of the Ombudsman into maladministration and denial of fair procedures. The women were dealing with something that was totally opaque and they were doing so alone.

It was said that all that they needed to show about their time in the Magdalen laundries was the duration of their detention. However, as is the case in the Scottish bill, there was an absolute requirement for records. As a result of the inquiries into the Magdalen laundries, it was known that the nuns did not have records for all the women. In fact it seemed that there were insufficient records, even back in 2013, for more than half of the women.

However, because the women had no lawyers, they were not able to swear a witness statement to an affidavit and there was no one to receive their evidence. Therefore, they were caught in constant phone calls, on their own, without even independent advocates to help them. I should say that there should be independent advocates as well as lawyers, because some things need done for which lawyers might be too expensive, or might not be well equipped to do.

The women were caught in a horrible situation in which they were told that they had to get records, and they had no way of proving their duration of stay. The ombudsman ultimately found that their own testimony and that of relatives and friends was not given any evidentiary value by the officials in the scheme. I would say that, even when you are engaged in something that is non-adversarial, there is a real need to be extremely strict with yourselves about ensuring that fair procedures are followed, because it benefits everyone, at the end of the day.

I noted that the briefings on the bill suggest that the Residential Institutions Redress Board's matrix might have been a problem; I am not sure that it was a massive one. I think that the procedures, which involved a full right of reply and the ability of the church to cross-examine the women, were a massive problem. However, having boxes that set out what kind of points are used to decide whether someone meets the criteria is not problematic, because there is a need for transparency.

The Convener: I do not know whether Dr O'Rourke is aware of it, but there is a lot of sound interference going on, so I think we should switch off as many microphones as possible.

Daniel Johnson has a brief question.

Daniel Johnson: Section 34(3) states:

"When determining an application, the panel must not consider or make a determination on any issue of fault or negligence arising from any matter to which the application relates."

Is it important that the process deals with fault, or should it be more about acknowledging the issue and putting the matter on the record for the survivors?

Dr O'Rourke: My feeling is that there should not be a waiver, so my view is connected to that. The measure that we are discussing should be an interim one to provide people with the beginnings of rehabilitation. Accountability is a different issue—perhaps we can speak about it afterwards.

If you accept that you are still willing to allow people to seek legal accountability, there is no problem with having something that is ex gratia in the meantime. Bringing in fault brings in causation, which was a massive issue in the work of the redress board for industrial schools and reformatory schools, because people had to be examined by psychiatrists, which led to the survivors feeling that it was they who were on trial rather than the wrongdoers.

I see that there is a massive relaxation in the bill of the notions that applied in our board, which required people to prove that the injury related directly to the abuse. That meant that, in cross-examination, people were asked questions such as, "Is it not because you were abused before you went into care that you are now the way you are?" That is not an acceptable position to put people in. In my view, the waiver is an issue, and I would say that there are other ways to do it.

12:00

Beatrice Wishart: Good morning, Dr O'Rourke. Your evidence thus far has been informative and helpful. On the basis of your experience of the Irish redress scheme, do you see anything specific that is missing in the bill and that should be included?

Dr O'Rourke: The first point that I noted was that, even though a non-adversarial procedure is proposed, there is a real need to ensure that there are still fair procedures, that people know what documentation they are supposed to be providing and that, if someone else is providing it, survivors get to see it.

I understand that, in the previous question session, one of the officials mentioned that a next of kin's sworn statement of what they know their spouse to have experienced, based on however many decades they lived together, would be classed as hearsay. There is a need to think through what a survivor-focused process entails and what we know about the abuse that has happened.

The bill contains some really good things that we have not seen in Ireland. For example, there is no ceiling on the information and no gagging of survivors. It is also positive that an initial decision cannot be reduced on appeal. That was a real issue with the redress board in Ireland. Survivors said that lawyers would go into a room without them, have a discussion with the board and come out with an offer, and the survivors would be told, "If you don't take this, you may well not get as much as you might get if you went through the whole process of being challenged and so on." It is also good that legal assistance will be provided during the course of making an application rather than just at the end, in relation to a waiver, which was the case with regard to the more recent Magdalen scheme in Ireland—no lawyers were involved, because the Government said that it wanted a non-adversarial approach. However, of course, lawyers were still involved at the end to help you sign away all your rights against the state.

I see some issues with the bill, though. I think that the time limit of five years is a problem. The redress board had a time limit of less than five years, I think, and I have come across many women, in particular, who did not realise that that procedure applied to the kind of abuse that they had suffered. Further, there were people, particularly in the diaspora, who did not find out about the procedure, and there are people who cannot come forward. One of the positive things about the Magdalen redress scheme was that there was no time limit. That was an explicit recommendation of Mr Justice John Quirke.

Another thing that concerns me, as a human rights lawyer, is the exclusion of corporal punishment that might have been allowed under domestic law. Of course, the fact that it was allowed under domestic law does not necessarily mean that it was compliant with the European convention on human rights or other international human rights instruments. To the extent that corporal punishment was allowed under legislation, I wonder how that relates to the particular circumstances that someone who was a child in care is in, and I wonder whether there should be an approach to understanding corporal punishment within the context of the broader abuse that that person suffered.

Lastly, I come to the issue of the waiver. I have six points to make about it—I really appreciate your patience. I recommend serious consideration of this issue. It would be possible to legislate so that, in any future court action, any damages could be reduced by what someone had already received in the scheme. Of course, the scheme is

doing that in relation to previous awards that survivors might have received from other places.

I see two main arguments in the briefing for the waiver. One, which makes sense, is that it is seen as a way of coaxing the private institutions to contribute. However, the other is that it would provide a swifter, non-adversarial and more trauma-informed response to historical child abuse. I think that that confuses the waiver with the scheme. I do not see any benefit of the waiver, other than to the taxpayer. Of course, that benefit to the taxpayer needs to be considered, but it must be weighed up against the harm that a waiver can cause not only to the survivors individually but to society, because accountability is about ensuring a restructuring in the interests of future child protection as much as it is about ensuring that there is an accounting to the individual.

The first thing that I would say about the waiver is that the abuses that are involved here are torture and other forms of cruel, inhuman and degrading treatment, which has already been recognised by the Scottish Human Rights Commission. As is well known, the right to be free from torture and ill treatment is absolute, and that includes the right to access justice as a survivor of torture and ill treatment.

On my second point, I note that I am a lawyer in the case of Elizabeth Coppin v Ireland, which has recently received an admissibility decision from the United Nations committee against torture—the judgment was published on 20 January and, although it is not yet on the committee's website, it is available online and I am happy to forward it to you. Elizabeth Coppin signed up to the Residential Institutions Redress Board and the Magdalen scheme, and she signed waivers signing away her rights against the state and, in the case of the redress board, religious institutions. For reasons that relate to Ireland and our particular procedures around secrecy of evidence, the state still says that there is no evidence that systematic abuse of a criminal nature or under the convention against torture occurred in the Magdalen laundries.

Elizabeth Coppin is claiming that the state has failed to investigate and has failed to provide her with full redress, which includes satisfaction guarantees of non-recurrence. The UN committee against torture had to issue an admissibility decision on the situation, because the Irish Government said that she signed waivers that mean that she cannot take legal action against it. In January, the UN committee, referring to its own general comment on article 14 of the UN convention against torture, found in Elizabeth Coppin's favour, saying that the waivers do not prevent her coming to the UN committee against torture, because the right to accountability that she has under the convention remains. You cannot sign away your right to not be subjected to torture and ill treatment, and nor can you sign away your right to accountability. General comment number 3 mentions that judicial remedies must always remain in place.

What the waiver says is just as important as what it does. We have already heard evidence that there are many barriers to litigation, and many people will not take that arduous route. However, ultimately, survivors are being placed in a position in which they have to choose between accountability and money. From our experience in Ireland, I can say that what that says to the public is that survivors chose money, and that that was what they were concerned about. However, most survivors cannot afford not to take the money that is available from the scheme, at least as an initial way of achieving some kind of rehabilitation. That issue must be considered.

We must also consider that court cases are not just about money—indeed, for many survivors of abuse, they are primarily not about money. They are actually about having legal findings about what abuse means and who is responsible, and, in that way, they have an impact on the whole of society.

I think that I have said enough on that, although I am happy to go into more detail if you would like. I feel strongly that Scotland could take a different approach to the waiver issue and could be world leading in that regard. That would be worth doing, because we are dealing with torture and other forms of ill treatment.

Jamie Greene: Good afternoon. I appreciate those fulsome answers, as these are complex matters. However, in the interests of time—we have only 10 minutes left and a number of members still have questions—I would be happy if you could respond to my question in writing.

If the bill, as it is currently drafted, were presented to TDs in the Dáil and you were reading and reviewing it and advising those members on anything that jumped out at you as being of concern, what would be the main thing that you would raise? What should we be looking at, as the people who will inevitably be amending and scrutinising the bill?

You said that around six points of interest jumped out at you in the Scottish bill. Can you put those in writing to the committee so that we can review your independent expertise? I have found what you have said so far extremely helpful and useful.

Dr O'Rourke: I would be delighted to do so. I will put that in writing.

Rona Mackay: I agree with Jamie Greene that what you have said has been very useful.

I want to ask about charities. The policy memorandum says that some charities might have a constitution that does not allow them to make redress contributions, so they do not have the power to do that. Also, a lot of charities' funds are tied up in restricted ways, such as in donations that have been given for a particular purpose. There is a fear that knowing that their funds will be used for redress contributions will stop people donating to charities.

The policy memorandum says that utilising restricted funds would be "a proportionate intervention". However, that power is not included in the bill. Do you foresee any problems with that, and should it be tightened up?

Dr O'Rourke: I do not have expertise in charity law. I can see that it would make it easier for private institutions to make contributions, and I cannot see a massive problem with that. The Parliament's powers in areas of very sensitive social policy such as this, and also in extremely strong public interest factors, are very broad. However, I could not say, because I do not know about charity law and I certainly do not know about Scottish charity law.

Kenneth Gibson: I was fascinated by the conversation about the Magdalen laundries. We had them in Scotland, and the last one closed in 1958. Therefore, I hope that, if there are any—albeit elderly—survivors from that time, they will be included in our legislation—indeed, along with those from the the Glasgow Lock hospital, which was an institution for women with venereal diseases that closed in 1950.

When speaking about Ireland, you talked about the "diaspora". Has there been any attempt to reach out to the diaspora, and do you feel that it is important that we do that in Scotland?

Dr O'Rourke: Yes, it is extremely important. My colleagues in the justice for Magdalenes research group and I have constantly brought the attention of ministers to the Magdalen scheme. They sent circulars, and I think that they have re-sent additional ones over time, to every consulate and embassy. We also recommended advertising in magazines such as *Ireland's Own* or online and in places where we know the Irish diaspora are easily reached.

I have to say that I do not know whether the Government reached out to emigrant support groups beyond the UK. They reached out to UK-based organisations, but we found that survivors live all around the world, so my colleagues and I made great efforts to send out notices beyond the UK.

It is absolutely vital, and it goes back to the time limit. I do not think that a time limit is justifiable when you weigh up the importance of this to survivors.

Kenneth Gibson: The issue of the time limit is really important. What kind of response did you get to your work to bring in people from the diaspora who had suffered in Ireland when they were younger?

Dr O'Rourke: In summer 2018, along with colleagues, I organised a gathering of more than 200 Magdalen laundry survivors. One of the aspects of the Magdalen scheme that had not been implemented was that the women had told Mr Justice John Quirke that they wanted to meet each other.

They also wanted to be consulted on and oversee memorialisation. I do not know to what extent this applies in Scotland, but in Magdalen laundries in Ireland, women's names were changed when they were in there. If they escaped, it was without warning and they never met anybody again. Therefore, bringing them together was hugely important for them. For the women from Australia, Canada and many countries in Europe, it was absolutely crucial to meet and connect with other survivors with whom they would otherwise have had no contact in their individual circumstances halfway across the world.

12:15

Kenneth Gibson: A lot of them would probably have felt a sense of betrayal by the country that they grew up in, and that might have been a way of Ireland providing restoration for that and saying that the country has not forgotten about them but that it feels their pain, albeit belatedly.

Dr O'Rourke: Yes, it is extremely meaningful. In Ireland, we often have those big initiatives for our diaspora. There was a year of welcoming people back to Ireland, and we would have heard from a lot of survivors around that time. The fact that the women were excluded from that did not sit well.

There is a mixed bag of effects from having left Ireland. We have found that it enabled some women to live in a different way from how they would have lived if they had still been in the same place. Because of the effects of post-traumatic stress disorder, people often feel that they could be picked up off the street at any time or they feel a sense of still being in the centre of the abuse that they suffered.

Kenneth Gibson: I have one more question on a different topic. We are talking about organisations that presided over that wrongdoing and the fact that they need to make a contribution to the fund. In Ireland's experience, given that nearly €1 billion was paid out, some of which would have come from those organisations, was a

limitation imposed, so that, if an organisation was going to go bankrupt because of the amount of money that it was supposed to pay, the Irish Government would step in? We have a lot of organisations and charities that might cease to exist if they had to pay significant contributions. Their wrongdoing might have been long ago and they might have got their act together since then. Was any action taken in Ireland to ensure that the organisations paid without killing the goose that laid the golden egg?

Dr O'Rourke: It is worth speaking to your parliamentary colleagues in Ireland about that, because there is a huge controversy around that issue. Before the scheme was established, the minister for education gave an indemnity to a group of religious orders that had come together and promised to contribute. However, it was a fight to get them actually to contribute, and my understanding is that they never contributed everything that they promised. I do not have the figures, but the indemnity was for €120 million; the scheme progressed and ultimately cost almost €1.5 billion. There was no way of going back, because the religious orders had already been indemnified. It is worth looking into what happened in Ireland, because the general public feel that the institutions got away almost scot free. That is also why access to the courts, legal accountability—and what that brings in terms of establishing legal standards—and lines of responsibility for things that happened are important. Those institutions often still operate, exercise control and provide services in that space.

Kenneth Gibson: Thank you, Dr O'Rourke. That is much appreciated.

Dr Allan: In our earlier evidence session, we talked a lot about financial redress, but I am keen to get your views on non-financial redress, such as apologies. What can Scotland learn from the Irish experience? How should apologies be made? How should we ensure that they are not half-hearted and that they meet survivors' needs? Was it the experience in Ireland that any institution or individual refused to apologise?

Dr O'Rourke: There have not been proper apologies from the four religious orders that ran Magdalen laundries, and they never contributed to the Magdalen scheme. The waiver that applies therefore applies only to the state. Part of the reason that they did not contribute is because it is not at all easy to sue them, and so they did not necessarily feel any particular need to safeguard themselves from being sued. We have a very strict statute of limitations. Unlike your changes, the costs regime allows the religious orders to pursue their costs if someone sues and loses, and they always do pursue their costs, saying from day one that they will do so.

The way that the inquiry has gone in Scotland is—to an extent—different, in that it is not wholly in private. In Ireland, all the evidence that was gathered by the state on the Magdalen laundries is, unfortunately, being held secret. It is being held in the Department of the Taoiseach for safekeeping and not for the purposes of the Freedom of Information Act 2014. There is therefore no way of people getting into court, so the religious orders did not join the scheme.

Interestingly, in relation to whether people feel that an apology means something or not, because the state has safeguarded itself from being sued—I have not found a single Magdalen laundries survivor who was able to not go into that scheme because of her current living situation—despite the political apology in 2013 and because there has been no court action, the officials still maintain that there is no evidence of legal wrongdoing.

Over the past seven years, the schemes on the Magdalen laundries have progressed and there have been judicial review challenges in relation to lack of fair procedures. The ombudsman got involved to try to ensure that the scheme was administered in, as he put it, "the spirit" of the apology that was given. He also mentioned "forced labour" at one point in his report. The Department of Justice and Equality responded to the ombudsman's report to say that, with some very limited exceptions, there has never been any statutory basis for committing a person to a Magdalen institution or any lawful basis for keeping a person there against their will. It is therefore relying on something that would be, in itself, evidence of arbitrary detention, but no court has ever been able to find that. It also said that there had been no court ruling that the state has any liability for women who entered such institutions, that it had never seen any legal advice or factual evidence that would give rise to the belief that the state has any legal liability and that it was also not aware of any successful legal action taken against the religious order concerned.

In response to that, the ombudsman said that, in his 10 years of being an ombudsman in Ireland and elsewhere, he had never come across such a refusal to co-operate with his recommendations. We can therefore see that the political apology is at major risk of becoming hollow if there is not proper accountability to go along with the financial payments. People have used the words "crocodile tears", which does no justice to the intention of the apology from back in 2013.

One of the big things that never transpired in the Magdalen scheme was proper healthcare, which elicits words such as "crocodile tears" from some of the women. For example, when they start to need homecare, they are told that the card that they were given is nothing better than an ordinary

medical card, when it was supposed to be something different. However, when they signed away all their rights against the state and got their money, the healthcare was something that they thought would come down the road, but it never materialised. That demonstrates that, even though there can be great intention in an apology, it absolutely needs to be followed through.

To be helpful, I could briefly mention the on-going needs that—in a consultation—100 survivors of industrial and reformatory schools said were required separately to financial payments.

The Convener: I have one final question before you go, Dr O'Rourke. On the issue of the issuing of an apology, the scheme that is suggested in Scotland is for those who experienced abuse up to the date of the apology. Did a similar restriction exist in either of the Irish schemes? What are your general comments on that issue?

Dr O'Rourke: That is a good question. Our schemes were for institutions that had closed by the time that the apologies happened, so that did not apply.

I would like to check whether, if there is time, you would like me to mention the key non-financial forms of redress? It is up to you whether there is time; otherwise, I can forward them.

The Convener: If you have time, I am sure that we can give you a few more minutes. If you can cover them in that time, that would be great.

Dr O'Rourke: This concerns industrial and reformatory school survivors now, in 2020—some 20 years on from the state apology. The redress scheme has come and gone, and Caranua has come and gone. The survivors are saying that they need enhanced medical and health care, in particular home care. I cannot stress that enough. We are starting to see survivors with dementia, who may well just be put into nursing homes. Reinstitutionalisation is a huge issue for survivors of institutional abuse.

Other measures include prioritisation for housing, a contributory pension, a designated drop-in centre and a confidential space where survivors can meet. The covering of funeral expenses comes up a lot, and the survivors mentioned it in the consultation. Free unlimited counselling is also mentioned.

It is important to mention second-generation survivors—the children of survivors. I would advise you to consider that, as the scheme's payment terms will not always apply to a child, even if their parent is deceased. There is a real need to consider the needs of the second generation. In the consultation, survivors said that there was a need for counselling and psychiatric services for children and grandchildren. Information is very important for both survivors and their family members. Education is highlighted, too.

It is important to remember survivors by way of memorials. In the context of national education, more than 200 women came together as Magdalen survivors in the summer of 2018 and spoke to us about memorialisation. It has to be not just about plaques or statues; it should be about ensuring that such abuse does not happen again. Many of those women have gone on to work in the care system or the care sector. We are so lucky that they wish to speak to us about what they see today that needs to be different and that is reminiscent of their experiences. They want children and young people to learn in schools about what happened and for us to know about it. I am involved with colleagues in Ireland, seeking a national archival and educational centre by way of memorialisation, where archives can be made available, where the gagging clauses are got rid of and where survivors can volunteer if they wish. Oral history projects are important, as is information tracing for family members.

A further issue came up in relation to the Scottish bill, which seems to need to be caught before it happens. In Ireland, the non-financial measures were attached to the person already having gone to the redress board. There was a short deadline for going to the redress board, so many people did not manage to get in. If they did not get an award from the redress board, they were also barred from everything that might come along in the future. There will also be people who simply do not want money, for their principled reasons. For whatever reasons they have, they do not want to go to the redress board, but they should still be entitled to the non-financial measures.

The Convener: Thank you so much for your time this morning, Dr O'Rourke—that evidence was exceptionally helpful to the committee. I think you have agreed to have an exchange with us regarding some questions, and we look forward to that.

12:29

Meeting continued in private until 13:01.

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