OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 7 October 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 7 October 2020

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EDUCATION AND SKILLS COMMITTEE
23rd Meeting 2020, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Daniel Johnson (Edinburgh Southern) (Lab)

COMMITTEE MEMBERS

George Adam (Paisley) (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:

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP) (Committee Substitute)
Gaynor Clarke (Social Work Scotland)
Una Doherty QC (Faculty of Advocates)
Kim Leslie (Association of Personal Injury Lawyers)
Joanne McMeeking (CELCIS)
Iain Nicol (Law Society of Scotland)
Janine Rennie (Wellbeing Scotland)
Judith Robertson (Scottish Human Rights Commission)

CLERK TO THE COMMITTEE

Gary Cocker

LOCATION

Virtual Meeting

Scottish Parliament

Education and Skills Committee

Wednesday 7 October 2020

[The Convener opened the meeting at 08:45]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning, and welcome to the 23rd meeting of the Education and Skills Committee in 2020. I remind everyone to turn off mobile phones.

We have a change of membership. I am delighted that George Adam MSP will be joining the committee. He sends his apologies today, and his substitute will be Dr Alasdair Allan. This is Dr Allan's last meeting with us. I thank him for all his work over the years and wish him the very best in his new parliamentary duties.

I also welcome Professor Andrew Kendrick, who has been appointed as our adviser for the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. We are grateful that he can join us today—[*Interruption*.]

I will pause while the fire alarm goes off. I will persevere, but we may have another interruption.

Agenda item 1 is a decision on taking business in private. Do members agree 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

08:46

The Convener: Agenda item 2, which is our main business for the morning, is our third and fourth evidence sessions on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. [*Interruption*.]

I will pause again for the fire alarm. I apologise to our witnesses, who are waiting to come in.

I welcome our first panel: Kim Leslie, representative of the Association of Personal Injury Lawyers and a partner at Digby Brown; Una Doherty QC, from the Faculty of Advocates; and Iain Nicol, solicitor and convener of the Law Society of Scotland's civil justice committee.

We are tight for time, so I ask members to be brief and witnesses to be concise in their answers. I remind members to put an R in the chat box—[*Interruption*.] I apologise again for the interruption from our fire alarm test.

I move to questions from members.

Iain Gray (East Lothian) (Lab): There is a requirement in the bill for those who avail themselves of the redress scheme to sign away their right to pursue civil justice. The evidence that the witnesses and their organisations have submitted suggests that that is not necessary. Will they enlarge on that so that we have that on the record?

Kim Leslie (Association of Personal Injury Lawyers): Our organisations are legal representatives. We see the waiver provision as the most dangerous one in the bill.

I represent a number of survivors, and I put on record that survivors are very concerned about the waiver provision, as it will benefit only the scheme contributors. The retention of the waiver provision is likely to make the survivors and their legal representatives more cautious about take-up of the redress scheme, because signing the waiver will, in effect, waive their civil rights for all time.

The bill expects survivors and their legal representatives to elect to sign the waiver at a time when not all the information is necessarily available. By that, I mean that the changes in the law have only recently come in, so there is a changing and evolving legal landscape. The Scottish child abuse inquiry is still undertaking its work and publishing its case study findings periodically. Therefore, there can be changes in the factual position as well.

My concern is that a legal adviser could be faced with a set of circumstances that are not black and white. A black and white case would be, for example, where there is no hope under any alternative route, either through the Criminal Injuries Compensation Authority, or a civil claim. In all but the extreme cases, such as those in which there is no—[*Inaudible*.]—case, or, by contrast, there is a convicted case with an identified and solvent defender, there will be shades of grey, as the legal landscape is changing all the time.

I think that that will prevent legal advisers from being confident at this stage to advise on the ramifications of signing a waiver. In a situation in which there is a live perpetrator, there may not be sufficient evidence to go ahead with a civil action at that stage, but would a legal adviser be confident enough to advise a survivor to sign a waiver for all time coming when there is the potential for prospects of success to improve?

Iain Nicol (Law Society of Scotland): There are a number of issues with the waiver. The bill requires a survivor to "abandon" existing civil proceedings. It may be a relatively minor point, but abandoning an existing civil action requires the pursuer to offer their opponent legal expenses for the work that has been done in court up to that point.

One danger of the scheme is that it undercompensates, and experience shows that significantly higher awards of compensation can be achieved through civil litigation. If a carrot is dangled in front of a vulnerable survivor, they may be tempted to take it. However, if they have been pursuing an existing civil action for quite a long period, they could then be put in a situation in which they are forced to walk away from the civil action with no compensation from the defender, and potentially have to offer the opponent their court costs.

Even if agreement can be negotiated to terminate the civil action on a no-expenses basis, the survivor of the abuse will still have to account to their solicitor for the costs of the civil action up to that point. That puts the solicitor in a conflict situation, because they have to advise their client on potentially settling a case without any recompense through the civil courts and then bill the client for the work that has been done up to that point.

That is a fundamental flaw of the bill. I said in my submission on behalf of the Law Society of Scotland that the waiver provision should not be kept in the bill.

Una Doherty QC (Faculty of Advocates): In our response to the consultation, as well as our response to the bill, we said that there should not be such a waiver scheme and that applicants should not have to choose at the outset between accepting a redress payment under the scheme and pursuing a remedy in the court. Kim Leslie and Iain Nicol have explained some of the reasons for that.

A potential award under the redress scheme may be much less than a potential award in court. The potential success of an action in court will be difficult for a solicitor to determine quickly, and it will involve quite a lot of work. To expect all that to be done without finance just cannot be right. That concern has been raised in the faculty's response. As things stand, the costs to an applicant of getting advice on whether to proceed under the redress scheme rather than litigation would not be funded. To give up the right to pursue an action in court is a very big decision. As I have said, the potential award in court could be much higher.

Obviously, pursuing a court action is difficult, and a potential applicant would have to decide in any event whether to proceed with that, but I think that requiring an applicant to say at the outset that they would give up all right to a court process is fundamentally wrong.

Iain Gray: Thank you. Those answers were very clear.

The argument that has been put to the committee, which has been alluded to, is that the waiver is necessary in order to make it worth the while of contributors to the fund to actually contribute. The point is that they have to have that reduction in their liability in order to make it viable for them to participate.

What other legal remedy might ensure that contributors contribute to the fund? We have heard evidence that that is an important element of the scheme for survivors. They would like the organisations that are responsible for their abuse to make a contribution. If that is not incentivised through the waiver, what legal way would be possible to ensure those contributions?

Kim Leslie: We have to accept that complexity is not an argument against an offset provision. The scheme works the other way, in that previous payments can be deducted. The logic is simply not there. Offset is certainly an available option.

As the bill is currently framed, an applicant may approach redress Scotland without any legal advice. They are strongly encouraged to seek legal advice only at the point of an offer—when they have an offer or an award has been made. At that point, and at that point only, they have 12 weeks to assess whether they should accept the redress payment and sign the waiver. In those circumstances, that simply will not be sufficient time for proper informed advice to be given.

Optimally, a redress payment would be made and there would be an offset provision. However, if the waiver is retained, there ought to be safeguards so that there can be a pause at any point during the redress process to enable proper advice to be obtained.

Regarding incentivising the scheme, there will still be take-up by scheme contributors, because there will still be a number of applicants whose cases can resolve through the scheme, even if the waiver is removed. I understand that it is important to have accountability, but nothing should be taken away from the survivor unless it is replaced with something better. In my opinion, the waiver is too high a price for a survivor to pay.

09:00

Iain Nicol: It is possible to make the waiver optional in cases where there is no intention of proceeding with civil litigation. That situation gives contributors the assurance that they will not be sued, and they may be more inclined to contribute in that situation.

It is important to bear in mind that there is no argument for doubly compensating victims. It is anticipated that the redress scheme will be quicker than civil litigation, although timescales have not been clarified. If a victim got a settlement of £40,000 or £80,000 relatively quickly from redress Scotland and then proceeded with civil litigation, it is expected that there would be an obligation on them to account to redress Scotland and to repay any compensation to avoid double compensation. If a survivor went to the court and got £100,000 when they had been paid £40,000 by redress Scotland, they would be obliged to repay that £40,000. That might give contributors some reassurance that they would not be doubly penalised.

Other than that, I echo what Kim Leslie said.

Una Doherty: The question was about how contributors can be encouraged to participate in the scheme if the suggested waiver is not part of it. The difficulty is that a potential contributor would normally be entitled to rely on any legal defence that they have. If there is litigation and they have a legal defence, they could rely on that.

It may be that contributors recognise the wrongs that have been done and that they therefore would not defend any civil litigations. They might be prepared to acknowledge their wrongs and contribute voluntarily to the scheme.

It is more difficult if a contributor does not voluntarily accept responsibility. They might not be prepared to contribute to the scheme unless there is some establishment of their liability. There is an on-going inquiry into child abuse, which will make certain findings.

All of those things could influence whether parties are willing to contribute to the scheme. I do not think that the fear that contributors will not get involved in the scheme is sufficient to justify the extreme measure of the waiver that we have discussed.

Alex Neil (Airdrie and Shotts) (SNP): I have two follow-up questions. First, should there be an element of compulsion of contributors? It seems to me rather ironic that, if organisations are responsible for abuse, albeit historically, we should be in a position of incentivising them to do the right thing. They should be made to do the right thing. Is that not the right principle to adopt, despite the difficulty associated with that and any amendments to the bill?

My second question, which is very specific, goes back to what Iain Nicol said. He said that the scheme undercompensates people for the abuse that they have experienced. In his view, or in the view of the Law Society of Scotland, what should the levels of compensation be?

The Convener: I ask Dr Allan to ask his question, as well.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): Thank you, convener—and thank you for your kind remarks earlier.

On the back of a couple of previous questions, I want to ask about contributors. I think that the bill refers to a fair and reasonable contribution—or something like that. Do the panellists have a view on whether that is clear enough? What do they understand fair and reasonable to mean? I am referring to the financial contribution by the organisation to the scheme.

Kim Leslie: On Mr Neil's questions, first, I could not agree more. That is how I practise my role. I rarely call on people to do the right thing. If I believe that there is a legal remedy for my client, I take steps to bring their case to a conclusion and deliver a result. However, I can confirm that there has been a variance in attitudes to how collaborative and forward thinking organisations have been in dealing with cases.

I appreciate that we are primarily pursuing financial redress, but it should also be made clear that, in any negotiated case, we are entitled to ask for ancillary things, such as apologies or a meeting with safeguarders. There is absolutely a range of attitudes to how organisations are dealing with the issue. If there was a way of making things compulsory in such a scheme, I would welcome that.

On the level of awards, I take it from the bill and the underpinning policy that the scheme is meant

to be a national collective redress scheme, so it moves away from individual impact to systemic failure. In effect, it looks at the nature of the abuse and the physical acts themselves rather than the individual psychological impact. By contrast, civil litigation is about the impact on an individual, which is often a lifelong psychiatric impact that results in a reduction of work capacity and the ability to pay into a pension scheme. We have to look at the impacts on each individual in terms of their injury and their consequential losses.

Members will appreciate that, in those circumstances—we deal with reparation, which involves trying to put somebody back to the position that they would have been in but for the abuse—there can be quite high figures for damages. The levels of awards that are proposed move away from the individual impact and are simply about systemic failures and descriptions of the acts rather than the psychological consequences.

The question about being fair and reasonable is very difficult to answer. The concept of the polluter pays is well recognised. I suspect that the number of applicants and the description of the abuse would determine the tariff award and, in turn, what the fair and reasonable contribution would be that the polluter would pay the applicants who have made applications for redress.

Iain Nicol: On the point about undercompensation, my experience—and Kim Leslie's experience, too, I think—is that the level of compensation that is achieved in civil claims is higher than what is being suggested under this scheme. For example, in the most recent sexual abuse case that I settled, earlier this year, the victim received £160,000, which was predominantly for the injuries; very little was built in for any other heads of claim. If the top end of the scheme is £80,000, which we anticipate would cover the worst-case scenarios, it seems likely that higher awards are achievable in court. However, we recognise that a quick and efficient redress scheme that pays out significant sums would be a good thing, because it would give certainty, and it may give money slightly quicker than would be expected in court.

As Kim Leslie has explained, it is important to understand that every case in a civil court is looked at on its own merits. There are seldom two cases, even with broadly similar circumstances, that will attract identical awards of compensation. It is impossible to come up with alternative figures for the redress scheme, although it can be suggested that the figures in the scheme are less than would be achieved in court.

On a fair and reasonable contribution, all that I can really say is that clients often want to see the offender pay. That is one of the disadvantages of a criminal injuries compensation scheme that is simply a tariff-based scheme that pays out without any contribution from the offender. The answer to that is that the higher the contribution towards the total settlement that comes from the contributor, the better. I do not have any answers on what percentage that should be, but survivors of abuse would certainly like it to be as high as possible.

Una Doherty: I think that three specific questions were raised, the first of which was about making organisations contribute rather than letting them volunteer to contribute. As we said in the faculty's response to the consultation, one problem is that an organisation should be able to rely on any legal defence that it has, and there could be an engagement of article 1 protocol rights under the European convention on human rights if an entity is made to contribute when there is insufficient evidence to establish that it had done anything wrong.

That is the problem with saying, "We can just make people contribute." Unless there is good evidence that an organisation has committed the abuses or is responsible for the abuses having been committed, there is a difficulty in making it pay. I think that that is why it is hoped that organisations would voluntarily accept responsibility. As I have said, some of them may well do that. There is evidence that that has happened elsewhere. Alternatively, if there was evidence through litigations that events had taken place for which an organisation was responsible, that is another thing that would be useful in establishing that it really should be paying.

The second point was about undercompensation. I concur with what has been said. What can be achieved in litigation is potentially far higher than the sums that are set out in the redress scheme. Litigation involves a lot of hurdles, but there could be higher awards in some cases.

On what would be a fair and reasonable contribution, the faculty's response was that the level of contribution is a matter of policy. I agree that, from the survivors' point of view, there would probably be satisfaction in knowing that a decent contribution has been made by the organisation, but what proportion the contribution should be is a matter of policy, so I would not want to comment on that.

09:15

Jamie Greene (West Scotland) (Con): It has already been a very interesting opening to the discussion. It is important for context that the committee is aware of the role that the organisations that are presenting evidence have in this matter. How does the Association of Personal

Injury Lawyers, which is represented today, participate in such schemes? Is it paid on a fee basis? Does it normally receive a percentage of the award? Are the fees paid by the claimant or bundled in with the award? Those questions are important because I am keen to understand what advantage there would be in a claimant pursuing their claim through a redress scheme that is deemed to be more simple and easier than going down a legal avenue.

Is it not the case that a claimant could go down a legal avenue and participate in the redress scheme, and that they would have to make the choice on which avenue they would like to complete only when they had sight of the potential value of the award? I have been led to believe that there is not an up-front choice; rather, the choice is made at the end of the process.

The Convener: I will bring in Ms Leslie. All the witnesses do not have to answer the questions, but if they have something to say, I will bring them in.

Kim Leslie: Those are very interesting questions. In relation to the process that I see as being set out, Jamie Greene is absolutely correct to say that the only time that there is an election requirement is when the applicant has to sign a waiver. The bill sets out that an applicant can go to redress Scotland without having consulted a solicitor at that point. It is only when they receive an award—for example, of £40,000—that they are strongly encouraged to seek legal advice.

At that stage, the clock is ticking, because the offer is valid for 12 weeks. In special circumstances, and at the discretion of the panel, that period can be extended. My view is that it should be mandatory that such a request be granted, because that is too short a window for someone to make that critical decision, and it will not work in practice. At that point, legal advice is sought. People have to work out what they are giving up and, at that stage, it will be very difficult for a legal adviser, because considerations include the individual impact and the viability of a claim. A number of factors have to be weighed in the balance by a legal adviser in order to advise the client comprehensively about what they would be giving up, for all time coming, if they were to sign the waiver.

It is critical that claimants get legal advice. I suggest that, on receipt of an application and before an award is made, people are strongly encouraged to take legal advice, and we have to build the safeguard into the bill that, if a request for a pause is made, it is granted.

I draw an analogy with the Criminal Injuries Compensation Authority, which provides a scheme to compensate innocent victims of crimes of violence. Often in practice, an application is put in and then paused or stayed immediately, without any administrative burden or any payment being made, until the civil case is considered and concluded. That is done only, in effect, to preserve the option, in case the civil claim does not result in any financial redress to the claimant.

There are a variety of ways in which things are funded, and it is the same for any litigation. A no-win, no-fee approach is in operation in this field.

Iain Nicol: There are three main ways in which a civil claim would be funded. One way would be through a success fee agreement, in which the solicitor would operate a no-win, no-fee arrangement and charge a percentage of the recovered damages as the success fee. Claims can be pursued under legal aid or with the client paying privately. In my experience, they are predominantly pursued with success fee agreements. I do not do much legal aid work, but I have dealt with such cases under legal aid as well.

Success fee agreements are a relatively new concept; the legislation came in earlier this year to allow solicitors to operate on a damages basis. I think that they are working well and are improving access to justice. However, Kim Leslie made the very important point that the possibility of pausing an application to redress Scotland arises only prior to an award being offered. The Law Society's view is that the ability to apply for a pause should subsist throughout the whole application process, even when an offer has been made, because that would give the survivor the opportunity to put things on hold and give them sufficient time to investigate the prospects of a civil claim and determine whether it is in their best interests to raise that or persist with it. It will take a lot longer than 12 weeks to properly investigate a civil claim. If the applicant is encouraged to go to a solicitor only at the time that the award is offered, there will be insufficient time to let the lawyer do their job properly.

I respectfully suggest that the guidance that is issued at the outset should encourage applicants to seek legal advice from day 1, before they even put their application in. We are dealing with vulnerable individuals who may have no idea how best to present their application, which could prejudice their ability to get the appropriate level of redress. If they are encouraged to go to a solicitor at the outset, they will be given advice about all the options and how best to present their application.

The Convener: After we have heard from Ms Doherty, we will move on to a new question from Mr Johnson.

Una Doherty: I do not have anything to add to what the others have said.

Daniel Johnson (Edinburgh Southern) (Lab): Some of the issues that I want to ask about have been touched on in previous answers, but it is important that clarity and detail are provided, particularly when it comes to the evidential requirements and the assessment criteria that are set out in the bill.

The simplified application requires only documentary evidence that individuals were in residential care and a statement of the abuse that was suffered. Last week, we heard that the experience of the Irish scheme is that it is not always straightforward to provide such documentary evidence. With regard to the individually assessed payment, the bill does not specify particular evidence that would require to be submitted. Does the panel have any concerns about those issues?

Kim Leslie: That is another insightful question. One of the points that I have picked up from the bill and the explanatory notes is that, for the fixed payment of £10,000, all that is required is a statement from the applicant and a document confirming their residence at the place of harm. However, for the assessed payments of £20,000, £40,000 and £80,000, there is an expectation that more documentary evidence will be required, so there will still be a standard of proof. There are ways in which that can be demonstrated for the individually assessed payment; the documents involved are familiar to me, because they are the documents that we would look to ingather to support a civil claim.

Tom Shaw's report highlighted clearly that record keeping and record retention is patchy and that having to find records causes difficulties, not only for survivors but when it comes to identifying defenders or opponents. As the law currently stands, there should be records that allow us to identify managers—local dignitaries were often involved—but there is an issue around the recovery of documents. It might be well within the means of some applicants, but by no means all of them, to obtain the records, but those documents might contain distressing facts that are unknown to the applicant or difficult for them to review, so it would be perfectly acceptable—[*Inaudible*.]

There are issues there that are built in, but a bigger issue is raised that I want to highlight to the committee. I direct the committee to my Digby Brown response, which makes a call for a change in the law in relation to the ability to pursue litigation where the entities are defunct. An insurance company has been identified and traced, but there are difficulties in identifying the managers or local dignitaries who ran the school. That is different from the situation in England and Wales, which means that survivors in Scotland are worse off than survivors in England and Wales, where there has been a transfer of liability by statute to another entity that is capable of being pursued. I bring that access to justice issue to the committee's attention.

Daniel Johnson: That is helpful. Do the other panellists have views on the issue?

The Convener: Mr Nicol has indicated that he wants to come in.

Iain Nicol: I echo what Kim Leslie has just said. There are often practical difficulties in coming up with even a basic level of evidence. If the bill's premise is to make access to redress easier for vulnerable survivors, we should be thinking about the possibility of not insisting on proof of residence other than by way of an affidavit. In the scenario in which an applicant cannot come up with documentary evidence to prove residence, the statement that they are expected to produce could simply contain confirmation of the basic requirements. I suggest that redress Scotland could accept a sworn statement to justify the basic level of payment, just to make life easier for people in the scenario in which all the documentary evidence that is expected is not available.

09:30

Una Doherty: I agree with what has been said. In the faculty's response, we flagged up—I do not know whether anybody else will raise this—the fact that the bill is silent on the standard of proof. As Kim Leslie mentioned, things have to be proved, and we are concerned that there is no mention of that in the bill. In civil litigation, the standard of proof is the balance of probabilities, so it is just "more likely than not".

In this scheme, it is not envisaged that the organisations that are criticised will enter into the process, so if the evidence is produced and it is one-sided, it might not be difficult to satisfy the panel that it is more likely than not that abuse happened. However, we are concerned that there is no mention of that. Section 34 makes it clear that

"When determining an application, the panel must not ... make a determination on any issue of fault or negligence".

That is fine, but section 34(6) goes on to say that the

"offer of a redress payment"

should not

"be taken as a finding as to whether or not a person ... in an application acted, or failed to act"

in such a way. The way in which section 34 is worded suggests that the panel does not even have to decide whether abuse happened. That cannot be right, because they must be satisfied

that it happened or there should not be a payment at all.

That needs to be addressed, otherwise there will be no consistency in the approach. The panel members have to know that they must at least be satisfied that abuse happened. That is not saying that the organisation was negligent; that is a different thing, which the panel is not to look at. We have concerns about that.

Daniel Johnson: That neatly prefigures my next question, which is about the criteria for making awards—individually assessed payments, in particular. On my reading of it, the only provision on that in the bill is section 38(4), which states:

"In considering what further sum, if any, is appropriate for the purpose of subsection (1)(b), the panel—

(a) must have regard to the nature, severity, frequency and duration of the abuse to which the application relates, and

(b) may have regard to any other matter it considers relevant."

The issue there is similar to the point about the burden of proof. Although the bill is clear about eligibility, it says nothing about how to make an assessment for a final award. The first part—section 38(4)(a)—is only about the nature of the abuse and says nothing about the consequence or whether it was avoidable and should have been prevented. Section 38(4)(b) is altogether very open.

Does the panel think that that aspect of the bill needs to be improved? Should those matters be set out in regulations, rather than being left to guidance? I am especially interested in hearing from Una Doherty on that.

Una Doherty: At the moment, section 38(4) gives discretion to the panel. Section 38(4)(a) sets out that

"the nature, severity, frequency and duration of the abuse"

has to be taken into account and that the panel

"may have regard to any other matter",

so it provides discretion.

Elsewhere in the bill, mention is made of the Scottish Government issuing guidance. Giving the panel discretion about what level of award is to be made is fine, but there must be transparency about how awards are made. The guidance—if that is what it is to be—would have to offer more explanation about what is expected. At the moment, it is troubling that there is no indication of how those determinations are to be made. From what I have read, the plan is for detailed guidance to be made available quite soon. Until that can be seen, it is very difficult to take a view on whether the process will be robust enough.

Daniel Johnson: I find the status of guidance troubling in this context. Although reference will have to be made to the guidance when decisions are made, that does not have the same legally binding nature as would be the case if those things were in the bill or in regulations. Essentially, it means that cognisance will have to be taken of the guidance, not that it will have to be followed. Is my understanding of what the nature of the guidance would be in those circumstances correct?

Una Doherty: It depends on how the guidance is described. Until we have seen what is suggested, it is difficult to give a clear answer on that. It is not unusual for an act to refer to regulations that will be made, for example. There is scope in the bill for regulations to be made. However, the effect of the guidance or the regulations should be set out in them. Until we see what is planned, it is difficult to comment definitively on that.

Iain Nicol: I would take that a stage further and say that it is imperative that regulations are introduced to explain what is required to justify each level of award. Even regulations are not ideal. I would have preferred to see the explanation for the level of awards in the primary legislation, because secondary legislation is not necessarily subject to the same burden of scrutiny. It is important to be clear on such matters so that if discretion is exercised, advice can be given to the applicant on whether it is appropriate to seek a review. As has been pointed out, guidance is not mandatory—it is just guidance. Legislation imposes an obligation. For that fundamental reason, clarity on that should be included in the bill or in secondary legislation and not simply in guidance.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. I want to ask about the duration of the scheme and the historical cut-off point for it. The scheme will be open for five years. Is that reasonable? The scheme covers abuse up to December 2004, while the child abuse inquiry is examining abuse up to 2014. Will you comment on the time constraints on the scheme and whether those are reasonable?

Una Doherty: The faculty's response on the five-year duration of the scheme has been that it seems a reasonable amount of time for people to know about the scheme and apply to it, but I have read the response from the Association of Personal Injury Lawyers; its view is that five years is not a sufficient period of time. However, I will let Kim Leslie speak to that.

In relation to the historical cut-off, the faculty's response to the consultation was that we thought that the time that had been picked seemed arbitrary. If there has to be a date, although some

justification was given for the date that was picked, a later date could just as easily be picked.

Kim Leslie: In our response, we make the point that we believe that the inception of the scheme would be equally justified as a date. One thing that I will pick up—[*Inaudible*.]—is that the bill talks about when abuse "occurred"; in our response, we have suggested that the term "commenced" should be used, because we do not want a situation in which abuse is a course of conduct that extends beyond the date that is provided for in the bill.

I think that five years is too short a period, but there is a policy issue, which is that we are trying to avoid at all costs a sense of going, going, gone. In a situation in which someone has a live and on-going civil litigation, the sunset provision will be like a guillotine, and we do not want applicants or claimants coming under that pressure of time. Therefore, we advocated for any timeously made application to be honoured, but for the applicant to be allowed to conclude their civil litigation before a determination is made in relation to their application for redress.

Iain Nicol: [*Inaudible*.]—I am not entirely sure why it is felt necessary. One way around that would be for the bill to provide for a review of the redress scheme after a set period, such as three or four years, in order to determine whether it was appropriate to continue the scheme beyond five years. That option has been taken in other areas of law. That would give everyone the opportunity to see how effective the scheme is, to establish whether it is working and, if appropriate, to continue it.

I echo what Kim Leslie said about the cut-off date of 2004.

The Convener: I move to questions from Ross Greer and Kenneth Gibson on the next-of-kin procedure.

Ross Greer (West Scotland) (Green): I have a question on one specific aspect of the next of kin procedure. I would like to get the witnesses' views on the provisions for cohabitants. Cohabitants can make an application for the £10,000 compensation if they have lived with the abuse survivor for at least six months. In that situation, they would come before any spouse or civil partner that the survivor might have had. However, there is no length of cohabitation requirement for them to come above the children of the survivor. Officials explained that to us on the basis that it was simply in line with other areas of legislation, where there is no length of time of residency requirement for a cohabitant to have that status; they simply need to have been living with—in this case—the survivor as if they were married.

There is potentially some concern, because we are talking about a vulnerable group of individuals. For cohabitants to come before a spouse, there is a minimum period of six months, but it appears that they could have lived with the survivor for a matter of days before the survivor passed away, for them to be eligible ahead of that survivor's children.

I would be interested to hear the witnesses' thoughts on the matter. Would an equivalent length-of-residency requirement for cohabitation be appropriate in a case in which it was necessary to decide whether to prioritise the cohabitant or the children of a survivor? Alternatively, would the lack of such a requirement, consistent with other areas of legislation, be an appropriate path to take? Perhaps Ms Doherty can start.

09:45

Una Doherty: We raised that issue in the Faculty of Advocates' submission on the bill. We noted that, although a cohabitant of six months plus is able to apply rather than the spouse,

"there is no qualifying period"

in relation to a cohabitant where there are children of the deceased involved. We identified that as "an anomaly" and suggested therefore

"that a similar period of 6 months cohabitation should apply before a cohabitant can be the specified next of kin in preference to the deceased's children."

That is our view on the matter.

Ross Greer: My second question touches on the evidence requirements, which we have just discussed. To go back to Mr Nicol's point about what should be in the legislation and what should be for the guidance, it is not at all clear what level of evidence next of kin would have to provide. They would clearly have to provide evidence that the survivor had lived in a particular setting. Beyond that, there seems to be a suggestion that the guidance will say that the next of kin would have to provide evidence that the survivor, before they passed away, had stated somehow that they were a survivor of abuse.

To go back to the wider discussion about what should or should not be in the legislation, I would be interested to hear views from the witnesses, starting with Mr Nicol, on what would be an appropriate level of evidence for next of kin to have to provide in order to become eligible for the payment.

Iain Nicol: [*Inaudible*.]

Ross Greer: Sorry, Mr Nicol—your microphone was not on, so I ask you to start again.

Iain Nicol: The bill states:

"A next of kin payment is a payment of the relevant share of the fixed rate payment."

My reading of that provision is that the person just has to prove that they are next of kin and that the applicant would have been entitled to a fixed-rate payment. I do not think that it is any more complicated than that. I am not entirely sure that there would be any requirement to produce any additional evidence beyond those few things. To keep it simple, that would be appropriate, unless I have misunderstood the wording.

The Convener: As Kim Leslie and Una Doherty do not want to come in on that point, we move to questions from Kenneth Gibson.

Kenneth Gibson (Cunninghame North) (SNP): [*Inaudible*.]

The Convener: Mr Gibson, your microphone is still off.

Kenneth Gibson: Okay, convener—that is broadcasting, not me.

Good morning, panel. A number of the questions that I wanted to ask have been touched on, which is always an issue with a committee of this size. I will follow up on the questions about the next of kin procedure. The bill states that the survivor of abuse must have

"died on or after 17 November 2016".

Does Mr Nicol, for example, believe that that is an appropriate date? Should there even be a date?

Iain Nicol: We do not have any strong views on that particular point. Kim Leslie, on behalf of APIL, is probably in a better position to give an opinion on that issue.

Kim Leslie: With regard to the next of kin payment, I would advocate that the more inclusive it can be, the better. We have already had two clients die before the processes had concluded or even really commenced.

The tragedy of all this is that there are a number of people who have just not made it to this time, so it is a great thing and a really welcome part of the bill that the next of kin will be recognised. The more inclusive the provisions can be, the better. It is a matter of policy what the date is, if there has to be a date at all.

Kenneth Gibson: One of the issues that I have been concerned about in relation to the bill is the differential, or the leap, between the amounts of evidence that people must provide for the £10,000 fixed payment and the £20,000 payment. As we know, it is just a declaration for the £10,000 payment. When we go up to £20,000, there seems to be a significant jump in the requirements. Other colleagues have touched on that point about the standard of proof and evidence.

Do colleagues on the panel believe that there should be a substantial revision? Daniel Johnson was probing on this point, too. I would like to get more information from people on whether they would like there to be a substantial revision in that regard. How can we ensure a level playing field when we consider evidence? It seems to me that different panels could assess different levels of evidence differently unless the requirements are spelled out more clearly in the bill or perhaps in regulations and guidance, as we have touched on previously.

Kim Leslie: According to my reading of the bill and the explanatory notes, you are absolutely right: for £10,000, it is simply a matter of making a declaration. To make that leap to the individually assessed payment, documentary evidence must be produced. What is noted as being able to be used might include a statement to the Scottish child abuse inquiry although, under the general reporting restrictions order, those statements ought not pass through the hands of a third party. Previous disclosures to police might be used, as might social work records or medical records.

Part of the aim is to recognise that, given the silencing effect, there will often be no medical or other records. The social work records might not contain any description of abuse, because they were written at a time when the person was not speaking out. [*Inaudible*.]—with documentary production that is sufficient to prove abuse, and it is really a matter of—[*Inaudible*.]—that that will be satisfied. For an individually assessed payment, it should be made clear that the panel cannot be satisfied on declaration alone; there must be some other form of proof. That is a big leap.

Kenneth Gibson: It is, indeed, a big leap. Going from £10,000 to £20,000 is not a particularly huge increase in additional funding, and the evidential requirement seems to me to be out of all proportion to the additional funds that may be awarded to the individual claimant, particularly considering the stress that they would have to go through in trying to claim them. Whereas someone has 100 per cent likelihood of getting the £10,000 payment, they may or may not get a payment on an evidential basis. That could weigh on whether or not people go forward with a claim.

I am keen to hear what Ms Doherty has to say about that, too.

Una Doherty: Our view was that it was reasonable to expect more evidence for something above the basic payment. That could come from a number of different sources. In our response to the consultation, when we were asked what type of evidence might be suitable, various types were listed. We thought that they would be potentially suitable. They include an existing written statement from another source, oral testimony, a

short written description or a more detailed written description, and documentary evidence of the impact of the abuse. That could come from medical records or a medical assessment, or there could be supporting evidence from a third party. There are a number of different possible sources of evidence.

Given that the individual payment can go up to £80,000, it is reasonable that more than just a declaration is required. That is certainly the view that we took about it.

Kenneth Gibson: But given that the payments are fixed at £20,000, £40,000 and £80,000, how do we ensure that award panels look at matters consistently across the board? One person might get £40,000 from one panel, but they might have got £20,000 or £80,000 from another panel for the same level of abuse. How can we narrow the margin of error on awards, so that we do not end up in a situation in which there is almost a postcode lottery, if I can put it that way, with regard to what is awarded?

Una Doherty: Absolutely. We have already touched on the need for transparency and consistency. That is why proper guidance will need to be provided, whether in regulations or—as is suggested at the moment—in guidance, about what criteria will need to be met for the different levels. At the moment, it is discretionary—section 38(4) just says what must be taken into account. More examples will need to be given so that there is consistency. Achieving consistency in the levels of awards will be the major issue.

Kenneth Gibson: This question is for Mr Nicol. Will there be a hierarchy of, for example, physical, sexual and emotional abuse? How should we go about achieving such consistency?

Iain Nicol: It is very important that what has to be produced is not prescriptive, because, as Ms Doherty has confirmed, every case will be different and will have its own evidential basis. Some evidence might exist in one case that will never exist in another.

What will have to be produced is evidence of

"the nature, severity, frequency and duration of the abuse".

It is not difficult to imagine that a situation in which the nature of the abuse was horrific and the abuse was frequent and lasted for a long period would be at the top end of the scale. The opposite would also be true. If we were dealing with relatively minor—I am cautious about using that phrase—abuse over a short period of time, we would expect the individual payment award to be at the lower end of the scale.

I suspect that the panel that considers such applications will build up precedent over time. Whether that precedent could in some way be published to give guidance as to the reasoning behind the panel's decisions would have to be considered. That information would certainly be available within redress Scotland, so that it could take consistent approaches, in the same way that a court would look at precedent in personal injury cases.

To go back to the point that was made earlier, it is fundamental that clear indications are given in regulations of what is expected and what the individual assessment must consist of to allow applicants and any advisers who are involved to know whether the award that is made is appropriate or whether it requires to be reviewed.

Kenneth Gibson: Does the capacity exist in our system to deal with the huge number of cases that we expect to receive over the next few years?

Iain Nicol: The beauty of this will lie in keeping the system simple so that the anticipated volume of cases can be processed quickly and efficiently. We should not expect the vulnerable survivor to have to produce massive amounts of evidence. If we keep things simple and require basic levels of evidence to be produced, that should, I would have thought, allow redress Scotland to process significant numbers of applications quickly. That would certainly be the hope and the expectation.

Kenneth Gibson: Thank you.

10:00

Beatrice Wishart (Shetland Islands) (LD): Good morning. I am sorry about my connection problems, but I am here now, and hopefully you can hear and see me.

I ask the panel to expand on their written evidence about applicants with convictions for serious criminal offences. Is it appropriate for a decision on that to be left to the discretion of redress Scotland panels?

Kim Leslie: For the scheme to have credibility, it has to be possible for previous convictions to be considered. However, we all know the correlation between adverse childhood experiences and consequential offending behaviour, and it is an issue in the existing Criminal Injuries Compensation Authority. When I am doing my analysis, I look at all potential lines of redress. For many criminal injuries, there is a blanket ban under the 2012 scheme. We need to have some discretion. It might mean that there is inconsistent decision making—the more discretion there is, the more room there is for inconsistency. However, discretion would reflect the reality that there are some individuals who have offended but still ought to receive a payment, provided that it goes through the criteria for a period of rehabilitation. Discretion means that the facts and circumstances

of each case would have to be looked at, but discretion in this particular area is necessary because, under the CICA scheme, the offender would be out, and that is not always the right decision.

Iain Nicol: Survivors of abuse often find themselves on the wrong side of the law because of the consequences of what they have been exposed to. It is therefore extremely important that they are not barred from making an application when the conviction has resulted from the abuse that they were subjected to. Taking that to its logical conclusion, it should always be open to a survivor to produce evidence that can effectively link any conviction or wrongdoing to the abuse that they suffered. That should be taken into account by any panel in determining their application.

Una Doherty: We addressed that in our response, and the faculty position remains that a criminal conviction should not be a bar to an application. The purpose of the scheme is to

"provide acknowledgement and tangible recognition"

of harm as a result of historical child abuse. A person's character or conduct after the abuse should have no bearing on any redress scheme, and so it should never be in the public interest to preclude an applicant from receiving a redress payment on the basis of a conviction. In our view, that would also be consistent with the approach for proposed non-financial measures, which would always be potentially available to applicants—even applicants with serious convictions. The bill allows for discretion to exclude such applicants, but, in our view, that should not be there. There is no need for such a public interest exception to be possible.

The Convener: A couple of members wish to ask supplementary questions on this area. Do you want to ask another question, Ms Wishart?

Beatrice Wishart: No, I am fine. I will let other colleagues come in.

The Convener: I will go to Mr Greene and then to Mr Johnson.

Jamie Greene: I have a question about what is perhaps one of the more controversial elements of the legislation. I wonder whether members of the panel can see the conundrum that we face. The public will be scrutinising the bill that we pass and they will be concerned that somebody who has been convicted of, for example, a serious sexual assault on a child is able to participate in and receive £80,000 in redress money from a publicly-operated scheme. They may see that as unfair or, in some senses, immoral. How should we address that?

The Convener: I will also take Mr Johnson's question, then go back to the panel.

Daniel Johnson: In relation to Jamie Greene's and Kenny Gibson's line of questioning, there are questions about what the panels will take into consideration and how they will make their deliberations. I note that, in relation to both awards and reviews, the panels are required to provide only a summary to the applicant and ministers.

Do members of the panel feel that more substantial records should be kept, including a record of the evidence that was considered? In addition to that, should that requirement be in the bill?

Kim Leslie: On previous convictions, APIL agrees that, for the scheme to have credibility, certain applicants ought to be barred. However, we welcome the discretion so that each case can be considered on its own facts and circumstances. I accept that some crimes might be so serious and violent in nature that there could be an argument that, in order to retain the credibility of the scheme, such an applicant should be barred.

A safeguard is built in so that consideration can be given by the panel and everybody can make an application and put forward their own facts and circumstances. However, for consistency of decision making, those types of discretion areas may benefit from very prescriptive guidance or, indeed, from a policy decision about whether that guidance needs to be put into regulations.

Forgive me, what was the second question?

Daniel Johnson: It was about record keeping and the details of decision making.

Kim Leslie: Yes, those are important. I will draw an analogy with the Criminal Injuries Compensation Authority. At present, an applicant to it will receive an offer of an award and, at that point, unless they have a legal adviser who is aware of a certain case of Regina v Criminal Injuries Compensation Authority, ex parte Leatherland, Brammall and Kay, they might not necessarily know that they can request all the documentation that the panel or decision maker used in making that decision.

If we are to advise whether there is the potential for a review, we have to see the workings that show why the panel came to that conclusion, so that we can scrutinise it. Ultimately, that could be an issue for judicial review. We need to see the basis of a decision.

Una Doherty: On the question about previous convictions, the Faculty of Advocates takes the view that the scheme is intended to address the harm done to children and, therefore, that what an adult has done by means of a conviction should not be taken into account. As has been mentioned, the fact that something happened to a child might influence their behaviour as an adult.

To keep it simple, the view of the faculty is, basically, that such applicants should be treated in the same way as all others. I appreciate that a public interest exception is now allowed, but, as I said, the faculty's response is that that is not needed.

On the second question about evidence being kept so that the basis on which the decision has been made is clear, the panel will have to give reasons for its decision, because there is the potential for a review and a judicial review. All decisions will therefore have to give reasons so that it is clear to somebody else why that decision was made. On the documentation relied upon, that does not seem to be a complication, because the applicant will have submitted the documentation and should therefore know what documentation has been relied upon. However, the view that the panel has taken of that documentation and the reasons for its decision should be set out in a decision.

Iain Nicol: The key point about that is that the record keeping should be detailed to the extent that it records clearly what the panel took into account under section 38(4), because that is the evidence that the applicant will have been obliged to submit. It must be clear from the record keeping what weight was put on the evidence, what factors were taken into account, and what the basis of the decision was, having regard to those requirements, so that advice can be given about whether the decision is reasonable or should be challenged.

The Convener: The final question is from Dr Allan.

Dr Allan: We have talked a fair bit about financial redress but I want to talk about non-financial redress. What non-financial redress would you consider to be effective, particularly in terms of an apology, and does the bill cover that adequately?

Kim Leslie: Earlier, I said that it would be wrong to assume that financial redress is the only form of redress, because non-financial redress can be and has been agreed in the past. That is a question for a survivor to speak on, and it means different things to different people. An apology or an acknowledgement is important, but what form it takes will depend on what a survivor says would be meaningful to them. I know from experience that a letter of apology has been mentioned, and we have brokered meetings with chief executives and safeguarding officers. It is difficult to imagine something that will cover every individual's particular needs. The bill's inclusion of non-financial redress for everyone is to be commended. For some, that will be a progressive step.

Iain Nicol: It is absolutely right to say that what constitutes non-financial redress will vary significantly from case to case, so it will have to be looked at on that basis. Provided that the panel or redress Scotland as a whole will be able to consider the evidence that an applicant provides on what they are seeking by way of non-financial redress and can take that into account, I hope that the scheme will meet people's needs in that regard.

Because non-financial redress is not part of the award, one element to consider is that legal costs should be adequately covered. We have not quite touched on that area this morning, but it seems to me that sections 88 to 90 create a whole unnecessary layer of bureaucracy in requiring assessment of legal costs.

10:15

I suggest that, in order to ensure that legal costs are properly dealt with and are certain, so that everybody knows where they stand, a set scale should be introduced that would effectively set out the amounts dependent on the level of redress that is offered to an applicant. That would give everybody certainty, and it would allow the legal advisors for the applicants to know that the costs are going to be recovered and that the client will be able to retain the full level of redress that they are awarded. I highlight that as food for thought; three pages of the bill could be cut out if there was simply a set scale of legal costs prescribed for redress applications.

The Convener: I thank all our panel members for their contributions this morning and for their written submissions to the committee, which have helped our deliberations. I suspend the meeting briefly to on-board the new panel.

10:16

Meeting suspended.

10:18

On resuming—

The Convener: We will now proceed to our fourth evidence session on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. I welcome Joanne McMeeking, who is the head of improving care experiences at CELCIS; Judith Robertson, who is the chair of the Scottish Human Rights Commission; Gaynor Clarke, who is the chair of the historical abuse practice network at Social Work Scotland and the programme manager at Aberdeen City Council; and Janine Rennie, who is the chief executive of Wellbeing Scotland. I invite the witnesses to

introduce themselves briefly, and we will then move to questions.

Joanne McMeeking (CELCIS): I am the head of improving care experiences at the Centre for Excellence for Children's Care and Protection, which is based at the University of Strathclyde.

Judith Robertson (Scottish Human Rights Commission): Good morning. I am the chair of the Scottish Human Rights Commission.

Gaynor Clarke (Social Work Scotland): I am the chair of the Social Work Scotland historical abuse practice network.

Janine Rennie (Wellbeing Scotland): I am the chief executive of Wellbeing Scotland, and we run the In Care Survivors Service Scotland.

The Convener: Thank you. We will move to questions from the committee.

Iain Gray: One of the key issues on which the committee has already heard evidence is the requirement for survivors who access the redress scheme to waive their rights to also pursue civil justice in regard to their claim. All members of the panel make some reference to the waiver in the written evidence that they have submitted; however, I would like to give panel members the chance, as briefly as possible, to put their views on the waiver on the record this morning.

Joanne McMeeking: In 2017, in partnership with the Scottish Human Rights Commission interaction action plan review group, we carried out a consultation around the frame of the redress scheme. As part of the consultation, we did not specifically ask about the waiver. It is important that I note that point to the committee early doors. Our questions were designed in partnership with the review group, and the intention was to have high-level initial questions with a first dialogue with survivors specifically on the matter of redress. There is a descriptive summary of the consultation that we carried out. The waiver provision is a particularly complex area, which involves balancing efforts to secure contributions in a way that works for the scheme and for survivors while, at the same time, respecting rights and choice. That is incredibly challenging.

Judith Robertson: Much of the discussion around the waiver has been focused on incentivising organisations to contribute. I am sure that we will come on to it later in the evidence session, but, in the consultation that was carried out by CELCIS, survivors were clear that the responsibility of providers to contribute to the scheme was uppermost in their minds. However, the commission believes that we need to refocus on the needs of survivors in relation to the waiver and its impacts. Survivors would be asked to give up key rights to receive redress, and, from our perspective, that is not best practice. Often, more than one avenue is needed to achieve different aspects of the right to effective remedy, and asking a survivor to sign a waiver is asking them to effectively give up the right to take a civil route.

In our submission, we sought to encourage the Government to explore an alternative option. We proposed the offsetting option, which would involve offsetting payments that are received through the redress scheme against any future payment that might come from a civil case. We think that there should be a discussion about the potential of that option.

In the whole process of developing the scheme, one of the issues in relation to the waiver is the transparency around it. We are very aware of the confidential nature of discussions with commercial bodies, and other providers who seek confidentiality, but transparency will shed the most light for everybody who is involved, including Parliament and the people who may benefit from the scheme. Therefore, we call for full transparency around those discussions and the whole process of developing the waiver aspect of the scheme, should it go ahead. There should also be transparency when decisions are made during the process on various other aspects of the scheme, including the "fair and meaningful" aspects.

Gaynor Clarke: The priority for Social Work Scotland is the operation of the scheme itself, the process and the support that is available to applicants in relation to the non-financial redress. We also have an interest in the impact on social work departments, including those that are responsible for the right to access through subject access requests.

All that notwithstanding, Social Work Scotland is of the view that, for the waiver to operate effectively, it must be clearly and specifically aligned with the period, the people and organisations involved and the instances of abuse for which the survivor is accepting the redress payment. It is crucial that survivors have independent legal advice at that stage in order to make a fully informed decision on the waiver.

Janine Rennie: Survivors have expressed many concerns specifically about the waiver. When we carried out our own consultations on the bill with survivors, it was the biggest issue for them.

In the Scottish Government's original consultation, the question on the waiver aspect was not clear to people who were answering the questions. I personally went through a lot of the responses and found that, excluding responses from people who did not understand the question, 58 per cent of people were opposed to the waiver.

In our survey and consultation exercises with survivors, we found that only 4 per cent were in favour of the waiver. When survivors were asked whether organisations should still be accountable through civil justice, only 2 per cent were opposed to that.

We work with a huge number of survivors, and the overwhelming view from them is that they are opposed to the waiver. A lot of them expressed extreme anger about the waiver scheme and wanted to take significant action against it.

I totally echo what has been said already: survivors need to have the appropriate legal advice to enable them to make a decision on whether to forego their civil rights. Many survivors have been waiting for a number of years—indeed, decades—for the redress scheme, and many will accept the £10,000. A lot of survivors are living in extreme poverty and have high levels of debt, so they will think, "I need to accept this."

Many survivors have said to us that they will accept the payment, but they will essentially then forego their rights to potentially much more in terms of redress. They think that that will have a significant impact on their mental health down the line, because they will have gone ahead and accepted something out of desperation and not given themselves the opportunity to see if they could have gone further elsewhere. There are huge concerns among the survivor community about the waiver scheme.

Iain Gray: Ms McMeeking, I would like you to clarify one point. In your answer to me, you referred to the consultation that you carried out and how survivors felt. I cannot remember the exact words that you used, but the most important point was that survivors felt that the organisations that were involved in their abuse should contribute to the redress scheme. However, Janine Rennie said that, if the consequence of that would be the waiver scheme, survivors do not want to accept the idea of that.

I wonder whether you could clarify the point that you were making, Ms McMeeking. Was it about the consultation that was undertaken and the way in which the question on the waiver was asked, or were you suggesting that survivors would accept the waiver if it meant that there would be contributions?

Joanne McMeeking: I am happy to clarify my point. It was specifically about the national consultation that was carried out in 2017. There were no specific questions on the waiver in that consultation. It is important to note that there was no evidence coming through from survivors at that point to say that they would be either in favour of, or concerned about, the waiver scheme.

10:30

I want to add something about the complexity around the waiver. There is a real understanding that survivors need to access justice. Some of that might come through financial compensation and some of it will come at a cost, because the evidence that is given in a civil court case might re-traumatise survivors. At the same time, there is a tricky balance to be struck in relation to civil liberties and the opportunity for survivors to have the right information to make informed decisions at the right time about whether they want to sign a waiver, move into the civil court or pursue their case to a conclusion.

This is an incredibly tricky and complex area, and there is a balance to be struck in relation to what providers will contribute. Those issues need to be teased out.

Alex Neil: My first two questions, which are about human rights, are directed to Judith Robertson. In her first answer to Iain Gray, she said that the current proposal on the waiver is not best practice. Is it only not best practice, or is it a breach of the human rights conventions? How strong is the Scottish Human Rights Commission's view on the rights of people who have been abused in relation to the waiver?

The bill provides that redress Scotland will have a discretionary power to refuse a redress payment to people who have been convicted of a serious criminal offence. What is the Scottish Human Rights Commission's view on that provision?

Judith Robertson: We do not think that the offer of the waiver is a breach of any convention rights. If we thought that it was, we would have said so in our submission. We say that the proposal is not good practice, because one of the avenues or routes for remedy is being taken away from survivors. That is not good practice, and we do not think that it is necessary, so we are looking for an alternative.

We recognise that there is a balance to be struck in relation to the role of, and the contributions to be made by, providers and those who have undertaken the abuse. However, we do not think that that necessarily needs to be done at the cost of sacrificing the rights of survivors in the process. I listened to the earlier discussion, and I agreed with much of what the witnesses said about the process of engaging providers in a meaningful and transparent discussion on that. The terms of those discussions should be open to the light, and survivors should be able to review the terms of those discussions, so that they have some insight into them.

I am sorry, but something distracted me when Alex Neil asked his second question. Were you

asking about prisoners and people with a criminal conviction receiving payments?

Alex Neil: Yes.

Judith Robertson: From a very positive human rights perspective, nobody should be disbarred from receiving remedy and access to justice for harm that has been done to them, in this context, when they were a child, as a result of historical abuse. However, we do not think that the bill's provisions breach the convention rights, because cases are considered on a case-by-case basis, the provisions enable an application to be made and recognise the harm that has been done, and the panel has the discretion to make the assessment. That, in and of itself, enables the bill to be compliant with human rights law. That is our view.

Alex Neil: Do you think that there is a need, from a rights point of view, for criteria to be laid out in regulations or guidance on when discretion can or cannot be exercised?

Judith Robertson: Providing more clarity is always helpful. Enabling case-by-case assessment provides a balance, so some criteria could bring that into play.

Alex Neil: I would like to ask Joanne McMeeking about the waiver, specifically. I hear what she and her organisation are saying, and I assume that they do not regard the waiver as the best option but think that it would be better to have an offset system whereby any moneys received from the redress system could be offset against a successful higher claim in a civil court. Am I interpreting that point correctly? Is that the view of Joanne's organisation and of the people she is dealing with?

Joanne McMeeking: What I am saying is that this is an incredibly complex area. When the consultation took place in 2017, we asked respondents about contributions, but we did not ask about waivers. That is important, and I have noted that before in giving evidence.

With contributions, 94 per cent of survivors who answered the relevant question believe that the Scottish Government, care providers and local authorities should contribute and should provide strong views to explain their response. There was a very strong sense from respondents that there should be contributions. We did not specifically ask about waivers. I was listening to the earlier evidence from the legal reps, and I was really interested in some of their views around civil liberties and civil rights, on the complexity of this area and on the need for very significant support for survivors in making a decision whether or not to sign a waiver.

Alex Neil: Presumably, the overriding consideration is the need to ensure that contributors do not get off the hook, if I may put it that way—that, one way or another, they are forced to make a contribution. Is that right?

Joanne McMeeking: Yes—

Alex Neil: Thank you.

Joanne McMeeking: Is it possible for me to finish, Mr Neil?

Alex Neil: Yes.

Joanne McMeeking: When it comes to providers making a contribution, we would have to be really clear that they were going to follow through on that. We know that there are a number of organisations across Scotland with different structures and levels of governance, including charitable trusts and so on. There would have to be fine detail about each organisation, taking that through to a conclusion. We would be looking to the Scottish Government to consider that in more detail.

I know that the Government is working on some of the detail on conversations with partners, particularly care providers, and it would very much be the view of CELCIS that it should be possible to robustly move in and around that, and also—[*Inaudible*.]—some of the changes that happen at organisations across Scotland, as with any organisation. For example, a board of trustees, the chief executive officer, staffing or the culture may change. What might be agreed at the beginning needs to be concluded and fulfilled at the end.

Alex Neil: We heard in evidence from Ireland last week about one organisation that was allegedly one of the main parties that was guilty of abuse, but it has absolutely refused to contribute a penny and has taken a very robust position in not coming forward to pay any reparations whatever. I presume that, like me, you want to ensure that such a position does not arise in Scotland.

Joanne McMeeking: I am also mindful of the trickiness for care providers. They will be asking a number of questions to understand their responsibility and the consequences for their liability and for insurance. What does it mean if they sign up to the scheme or if no survivors from their organisation come forward yet they have contributed? What if a number of survivors come forward? What would that mean for them financially?

The Convener: Does Ms Robertson want to comment on those points from Mr Neil?

Judith Robertson: I will come back on a couple of them. We note that section 12(7) of the bill provides:

"Removal of a scheme contributor from the contributor list ... does not affect any waiver signed"

in respect of

"that ... contributor."

Ultimately, if a provider does not contribute to the scheme even though they had committed to doing so, that would not then enable the removal of the waiver. If a survivor signed the waiver in the belief that the organisation responsible for their abuse was going to

"make a fair and meaningful contribution",

and then the organisation did not make that contribution, the waiver would still apply.

The SHRC strongly believes that, should the waiver scheme go ahead, there should be a mechanism in place whereby organisations that do not make agreed-upon contributions cannot benefit from a waiver, if that makes sense.

If you choose to proceed with the waiver scheme, there are ways of strengthening the current provisions that would make them more compliant and balance the different aspects of the bill.

The Convener: I have a couple of supplementaries from Jamie Greene and Alasdair Allan. I will take those together and then come back to the panel.

Jamie Greene: Thank you, convener—I am waiting on my video to click back on.

On the cost to contributors, I will throw something out there as devil's advocate. I am thinking of a situation in which one of the contributors is a charitable organisation, as a number of them may be. It may be suffering financially in the current climate and may be concerned about the open-ended nature of the potential liability of organisations and how that may affect its current ability to do good charitable work, notwithstanding the wrongs of the past.

How would survivors feel about organisations being asked to contribute in a way that may damage charities' ability to do such work? What should we do about organisations that no longer exist? Should the liability be spread around other contributors, or should contributions be topped up by the taxpayer to cover what would have been contributed by an organisation that does not currently exist?

The Convener: Dr Allan, do you want to come in on the point about the amount of money?

Dr Allan: Yes. Ms Robertson raised the question whether the bill should be altered to remove the possibility of organisations benefiting from the waiver if they do not make a fair and reasonable contribution. I will ask the same question that I asked the previous panel. Do you have a view on how the fair and reasonable test for contributions should be measured or met? What is fair or reasonable?

The Convener: I think that that question was directed to Ms Robertson, so I will bring her in first, followed by other panel members.

Judith Robertson: In response to Mr Greene's questions, the survivors with whom we have been working in relation to the process are very much aware of the potential impact on existing and operating organisations and the provision of their services. Survivors believe that that has to be factored in—well, maybe not factored in, but it should be recognised as something that has to be balanced and brought into the discussion. That is a live and appropriate conversation.

That perhaps relates to the question from Mr Allan on what is "fair and meaningful". That has been discussed in the review group that I chair. The discussion of the sense of what is fair and meaningful is very much live, but I do not think that we are in full receipt of all the information around it.

I come back to my point about transparency. In order for the conversation to be given a bit more substance in some respects, it is important that those discussions and the parameters around what "fair and meaningful" looks like are fully aired and explored and are part of the conversation in the Parliament as the bill goes through. We are keen to see more elaboration of that and for that to be understood and interrogated fully by survivors themselves. We will be doing the same, and we will be supporting that process.

The Convener: I will let in Ms McMeeking now. If Ms Clarke and Ms Rennie want to reply to the question, they can put an R in the chat box.

10:45

Joanne McMeeking: I think that the concern has been to do with whether it might make things particularly fragile for particular organisations if they are having to fund elements of the redress scheme. That concern has come through to us, and it echoes what Judith Robertson has been saying, too.

Janine Rennie: [*Inaudible*.]

The Convener: Sorry, Ms Rennie; we missed the start of what you are saying. I ask everyone to pause before speaking, because the microphones are taking a little while to kick in.

Please start again, Ms Rennie.

Janine Rennie: I take on board what everyone is saying about the organisations that have carried on doing good work, but that has to be balanced

against the views of the survivors. Many of the survivors have gone through years of trying to engage with those organisations. Some of them have gone through restorative justice processes with those organisations that they have found lacking, and others have gone through combative legal processes with the insurance companies of those organisations, in which they have been appallingly treated. Survivors are not of the view that any organisation should be able to pay less to the scheme.

In the work that we have done, we have also found that those organisations were the ones that perpetrated the most abuse—in other words, they were the ones that had the largest number of survivors. Further, a lot of them were the organisations that told survivors who were trying to access records that those records no longer existed.

Survivors believe that there should be an equitable process with regard to people paying into the scheme. They are of the view that people should pay into the scheme—not for the purpose of waiver, but from the point of view of the abuse that was perpetrated over decades. It should be a separate issue. It should not be that the fact that someone has paid into the scheme means that there is a waiver in place. All the organisations should be treated in the same way, based on the historical abuse that they perpetrated, just the same as any state organisation.

On the issue of meaningful contributions, some organisations have hundreds of survivors of abuse while others have perhaps only one. That needs to be taken on board.

It was quite rightly pointed out that some of the organisations no longer exist. We have found that in a lot of cases, and it is difficult for survivors to take a case forward against an organisation that does not exist. Many survivors have told us that, in those cases, they think that it should be the responsibility of whoever placed them in that organisation to fund any kind of compensation payment.

There are a number of issues involved. As someone who runs a charity, I understand how stressful this must be for the charities involved. However, my ultimate goal is to make this process fair and equitable for the survivors.

The Convener: As Mr Neil has finished his questions, we move to questions from Mr Johnson.

Daniel Johnson: We know that the intention is that the scheme should be straightforward and it should not be burdensome for applicants. However, we have already heard this morning that the evidential requirements might not be straightforward in terms of obtaining or demonstrating certain things. Likewise, we are well aware of the fact that, because of the waiver, accepting any compensation will have significant consequences for that person's subsequent rights to legal redress. Do you think that sufficient support is being made available to applicants? On the legal point, although compensation for legal fees is possible, do you think that the scheme needs to more proactively provide applicants with, at the very least, advocacy, if not legal advice, in relation to the consequences of accepting any compensation payment?

Janine Rennie: I completely take on board what you are saying. One of my biggest concerns, which I discovered only yesterday, is that legal advice was not being provided on whether to accept the waiver. That, for me, is the key area on which somebody should have legal advice. It is a moot point, because I do not think that there should be a waiver in the first place, but if there is one, survivors should have access to legal advice on it and support while they go through that process. The whole situation, even the discussion about it, is potentially re-traumatising for survivors. We need to ensure that appropriate support is in place.

Another of my concerns relates to support for accessing records. Aspects of the bill mention that people would have support from members of the Scottish Government or the panel to access records. I have serious concerns about that, because one of the important things when someone is accessing their records is access to emotional support. If they access their records and read really judgmental things that were said about them as a child or they find out that they have a sibling they did not realise existed, it is absolutely key that a survivor has appropriate emotional support to go through that process. Just having support for the practical and advocacy side of it does not take into account the severe trauma that somebody might experience from accessing their records and what is within them.

My concern about a lot of the process is that it has not been trauma informed. I have heard a lot of legal arguments about the legislation, but not a lot about what it actually means for individuals. We cannot separate those two aspects. We need to look at what it would mean to a person to go through the process—how it would feel for you. One of the biggest things is having to provide evidence about the scale and duration of abuse. We have survivors who do not want to mention their sexual abuse to anybody—it may have been five years before they even told us—but we are expecting them to tell a panel about the complexity of the abuse that they experienced when they have often not even told family members. A lot more thinking needs to be done to get it fully trauma informed and survivor centred.

Gaynor Clarke: I want to reiterate what Janine Rennie is saying. From Social Work Scotland's perspective, the bill is not merely transactional or administrative; it is about the non-financial redress that is critical. Survivors have lived through experiences that they come back to and they are accessing records which will potentially re-traumatise them. At the start of the process, people need that input of psychological, professional and therapeutic support when applying to the scheme, alongside independent legal advice that is robust and impartial so that people can make the best decisions. There is the emotional impact and there is also the independent legal advice.

As Janine Rennie said, in relation to the practical support of the application, the bill states that the team will support the person to apply to get their records, but there is a broader picture around that. We know that survivors are already asking for their records in preparation for seeking financial redress through the bill and there is the aspect to consider of how the records are written. As Janine says, people may not know information about their life. It is about making sure that survivors are fully supported throughout the process. It is critical that they get emotional and practical support as well as the legal support.

Judith Robertson: I reiterate what has been said. The whole process needs to strike the right balance between not re-traumatising survivors and being robust enough that both survivors and the public have confidence in it. That is a difficult balance to achieve, but everything that has been said by the previous two speakers underlines the degree of support that survivors require and will require in order to make successful applications to the scheme. The process must also recognise that, from a human rights perspective, effective redress goes beyond financial redress and into the areas of providing support and ensuring that people's records are available to them. There are a whole range of areas beyond redress for which the scheme must also make some provision.

I also want to touch on the issue of legal support. The bill makes some provision for legal support being provided to survivors. Obviously, that includes payment for legal advice on whether a person should sign a waiver. We think that the importance of access to such legal advice is heightened due to the operation of the waiver and that survivors need to be in a position to make informed decisions about whether that is in their best interests. However, as Janine Rennie has said, section 89(3) of the bill excludes payment of

"any fees incurred in connection with legal advice and assistance on whether to pursue litigation as an alternative to making an application for a redress payment."

We question how that provision can operate in practice, given that a solicitor will be required to fully assess the prospects of success and likely damages award in any litigation, in order to advise a person on whether to accept a redress payment at a particular level and sign a waiver. We think that that is the same work and that excluding that work from being part of the process does not seem practical.

We are also concerned that the financial memorandum—albeit that it may not be so much the concern of this committee—puts a potential cap on that of £1,000 plus VAT. We do not think that that cap is viable, in view of the costs that are potentially attached to unpacking cases that might be quite complex. It might be fine if somebody is seeking only the £10,000 payment, but if we are going further up the scale, when it comes to the level of individual assessment, our assessment is that that cap is too low.

Joanne McMeeking: I want to underline the evidence that colleagues have given. Emotional support is absolutely critical, particularly for survivors who are considering or making a claim. Each survivor is an individual. They may have existing support, they may need additional support or they may need to access advocacy and legal support—that has to be carried out in a way that is specific and bespoke, and it involves an understanding of the trauma that survivors have experienced. The construction of any scheme needs to pay attention to that, because each survivor is unique in their needs.

Specifically on access to care records, we know a lot about that in Scotland because the Shaw report told us in 2007 about the complications in accessing residential childcare case records, the quality of those records, and some of the effects on survivors of reading information about themselves that they might not have known and that may have traumatised them. Having the right support for them at the right time is absolutely critical.

We also know, as children and young people are still telling us, that accessing case records is, at times, very distressing, even though the information itself might not be distressing—it is more about understanding what happened in their lives and the fact that someone is telling a story about them. Support with that is really important for survivors if the scheme is to be successful.

Daniel Johnson: Judith Robertson, I note that, in your written submission, you have gone into some detail about what the compensation should be for: it is essentially about the consequences and costs that the original issues have had for the individuals. I am interested in that, because that is different from what is set out in the bill. As I set out to the first panel, the reasons for the award are the

extent and the duration of the original incident—there is no mention of the consequences.

Can you go into that in a bit more detail? Do you think that the bill needs to be revised? Also, can you make a proper assessment of how the bill—or regulations—should establish precisely how and for what reasons different levels of compensation should be made, particularly regarding individual assessments?

11:00

Judith Robertson: The definition of compensation that we included in our written submission is from the human rights framework, and we think that the bill broadly complies with that. It is left to the discretion of the Government and intermediary providers of this kind of scheme to determine the parameters for payments, and the bill broadly fits within that frame.

Can you remind me of your second point, Mr Johnson?

Daniel Johnson: The issue is really about compensation for the consequences of these incidents for survivors, rather than compensation simply for the issues themselves. It struck me that your written evidence considered compensation from a different perspective from the one that is set out in the bill.

Judith Robertson: That is correct. Normally, under a civil justice route, the principle of compensation as it is determined in our submission would be applied. However, we think that the broad principles that are being applied in the bill are good and compliant, and therefore they can proceed.

This is not so much an issue that relates to that definition, but the question that requires to be more robustly tested in this process is about the assessment—the criteria for making one payment versus another and how those criteria apply to the different payment scales.

At this point in the process, we do not feel that that issue has been fully explained or explored enough for us to be able to say whether the payments are set at the right level or whether the levels themselves meet the criteria for each of the different payment amounts. We do not think that enough information is in the public domain to determine that, and we have concerns about the amounts being noted in the bill when those amounts have not been fully interrogated by Parliament, survivors or anybody with an interest in the process. We said that in our written evidence, and we do not think that there is enough information currently available to determine whether the right amounts of payment have been applied.

Jamie Greene: Do the witnesses have any views on some of the timescales—for example, the period during which the abuse occurred relates to the validity of a claim? What about those who suffered before the kick-in date?

Also, there seems to be a perception that, because an apology was given and things have changed, everything is okay from 2004 onwards. The arbitrary line that is drawn in the sand—the 2004 date—essentially acts as a bar. What else could the Government do to help the people who are on either side of the window of opportunity for claiming?

Janine Rennie: That is another area that we have concerns about. When we analysed our statistics on clients, we realised than 30 per cent of them fell into the category of cases that fall outwith the period when claims are allowed. We are concerned that that will exclude a large number of people.

We are not sure why that date was decided on. We think that the point at which the inquiry was established, or something similar to that, might have been more appropriate. The decision will cause significant distress and, again, I think that it will create a two-tier system, with some survivors being able to access the scheme and some not, which is a bit like the pre-1964 situation, before we got to this point, with the overturning of the time bar.

Our experience of working with survivors shows that that sort of two-tier system causes a great deal of distress in the survivor community. If that approach is to be kept, something significant will have to put in place for the people who are excluded. I was seriously concerned when I saw that cut-off point, because I was quickly able to find out how many people would be excluded.

Judith Robertson: The SHRC shares that concern. We think that setting the date at 1 December 2004 means that almost a generation of children in care would have no right to claim redress for historical abuse, despite the potential for serious abuse of their rights to have taken place. Therefore, we believe that a more reasonable cut-off date would be three years before royal assent was given to the Limitation (Childhood Abuse) (Scotland) Act 2017, given that someone bringing a civil case within that timeframe would not have been outwith the limitation period in the Prescription and Limitation (Scotland) Act 1973, which would have a bearing on whether their case could reasonably be claimed to be historical. Basically, we share Ms Rennie's concern and are proposing a different date.

Jamie Greene: I am sure that your point is noted and that the Government will view your proposal with great interest.

I want to move on to an issue that we have not asked about before. This is not really a technical question. I have read the submissions, and some of the feedback that was given to Wellbeing Scotland specifically was quite eye opening. I am thinking, in particular, about some of the anecdotal comments from survivors, which you present as bullet points. You are at the front end, dealing with these people on a day-to-day basis, so I think that you probably know them better than we do.

My office has already taken quite a few calls on the issue, given that I am on the committee that is working on the bill, and we have heard a few accusations of whitewash and cover-up. People have told us that the Government is trying to sweep things under the carpet and let the organisations off, and that this process is an easy way out for the organisations. All the witnesses will have heard such feedback, and I can understand where some of it is coming from. Therefore, how can we, as MSPs and as people who deal with survivors directly, take the public with us through this process? I have huge sympathy for the survivors, but we are struggling from the point of view of public relations. I want to get the bill right, but I think that we need help to do that. What would be your advice to the committee in that respect?

Janine Rennie: I think that that question was directed at us. A lot of the comments from survivors express the views that you are talking about. Throughout our history, we have seen that survivors do not trust authority—quite rightly: they went into a care setting and they were abused, and they feel that it was authority that abused them. Quite a lot of survivors have told me that they will not be going near the panel because it is a Government body and so on. We hear that a lot.

I think that, from a PR point of view, huge mistakes have been made in the bill. When I read it, on the Friday when it was published, I was shocked at some of its content, so you can imagine how survivors felt after waiting all this time for it. To get survivors to go with you, you need to listen to them. They feel that what was taken from the original consultation was what Government wanted rather than what they said.

It is really important to be transparent and fair about survivors' views. Survivors feel that it is always the same people who are consulted, not the wider survivor community. Our network of survivors has asked me to write to every MSP in Scotland, which I have done—I have had a handful of responses—and survivors want to have a Zoom call with MSPs to tell them how they feel. We could potentially get a huge number of survivors on that call to speak about how they feel, and unless you hear from the people who will be affected by the bill in so many different ways, you cannot possibly make an adequate decision. That decision may be one that benefits the public purse or the organisations, which is why the conspiracy theories are coming out. They are asking, "Why does the bill not benefit us?" That is what you all need to consider.

I have heard all the legal arguments, but I still think, "Where are the voices of survivors?", because it is the survivors who will be ultimately affected by the bill—it will not affect me as the person who runs the service or any of the rest of us. They are the people who will have to go through that process, and going through the process would feel intimidating to me, so how will it feel for the people it affects? If you want survivors to come with you, listen to them.

Jamie Greene: We understand that sensitivity and I know that every member of the committee will work with the clerks, the legislative team and the rest of the parliamentary team to make sure that anyone who wants to be heard is heard in a way that works for them. Not everything has to be done in the way that we are holding this meeting, which is televised and broadcast—there are many ways that we can engage, and we will pursue those. I am sure that the clerks will speak to you about that. We want to hear as many voices as we can, and that is a genuine point of feedback to you. Everything that you have said has been noted. Thank you so much for your frankness.

Beatrice Wishart: I want to take the witnesses' views on applicants who have convictions for criminal offences, which is an issue that Judith Robertson touched on in response to Alex Neil's questioning. Could I ask Janine Rennie first for her views on making redress payments to children who were abused but then later convicted of serious criminal offences?

Janine Rennie: Thank you very much for asking that question; it is an important one, but it is also a difficult one to answer because a lot of emotions are involved.

We delivered a service in the Scottish Prison Service for a large number of years. More than 50 per cent of the people we worked with in prison had been through the care system and a large proportion of them had been abused in care. You can draw a correlation between the number of people who were raised in care and had missed opportunities and those who ended up falling into the prison system.

Murder has been mentioned, and some people have killed their abuser. There are huge aspects that need to be looked at, and I welcome such

issues being looked at on a case-by-case basis, which is the only way that we can look at them.

I echo what somebody on the previous panel said about the impact of adverse childhood experiences on an individual's future involvement in crime. Every opportunity was taken away from that individual. Often, they suffered abuse and torture for years and years, and we know the impact of that on people. However, I know that some survivors would take issue if somebody had gone on to abuse children. We need to look at that on a case-by-case basis.

As an aside, I add that, in the work that we did in prison, people did not go on to reoffend. Somebody who had perhaps committed quite a serious crime could go through a period of rehabilitation and not go on to commit any further crimes. However, the opportunity for rehabilitation and getting appropriate support might not have been there. We need to look at the issue in its entirety rather than make a blanket decision based on different criteria around crime.

11:15

Beatrice Wishart: Thank you. Does Ms McMeeking or Ms Clarke have a view on that?

Joanne McMeeking: Evidence indicates that children who are in the care system pick up offences, particularly for smaller crimes. More attention is drawn to their looked-after status in relation to issues that would normally be dealt with in a family, through parental sanctions and so on. We welcome the openness of the Scottish Government to consider that, because a number of our children who are looked after and survivors tell us about their experience of difficult, complex situations that are specific to the criminal justice system. I appreciate that more serious offences have to be considered in much more detail and on a case-by-case basis, and I absolutely support that, too.

Gaynor Clarke: I reiterate what Joanne McMeeking said. Social Work Scotland's perspective is that the issue must be addressed on a case-by-case basis and that a public interest and human rights-based approach must be adopted.

Rona Mackay: I would like to ask about the definition of abuse in the bill. The bill describes abuse as "sexual abuse", "physical abuse", "emotional abuse" and

"abuse which takes the form of neglect."

Corporal punishment, where it was permitted under legislation at the time, is not included, and nor is abuse by peers. What are the witnesses' opinions on that? Should those categories of abuse be included in the bill?

The Convener: We will go to Joanne McMeeking first.

Joanne McMeeking: That is a really complex area, and my hesitation is due to my thinking about the continuum of abuse that can happen peer to peer. It would be difficult to bring that into the scope of the bill.

I was also thinking about some of the legislation around corporal punishment, particularly in the 1980s, when a child could still be given the belt at school in Scotland. There was a clear, formal legislative process, and there were instruments that allowed that to happen, so I can understand why that issue is not included in the bill.

Judith Robertson: We are content with the absolute definition in the bill, which would comply with the international framework in relation to this area.

The issue of corporal punishment is slightly more problematic, not so much in relation to the standards of the time as possibly in relation to the context of the culture in the institution. There is the issue of the effective abuse of corporal punishment within a process and whether that would then constitute abuse in the system. I would be concerned about a blanket exclusion of corporal punishment; instead, it could be included as something that might be taken into account when looking at the scale of the abuse, if that was established in a cultural setting. There is definitely an issue of degree involved.

I take Ms McMeeking's point about the legislative or policy basis for corporal punishment in the past. We have moved on from that, but the culture in specific settings could have undermined the intention of that policy, tipping it into something that would be considered abusive.

Janine Rennie: The best way for me to answer Rona Mackay's question is to give a couple of examples. A lot of the care establishments kept punishment books, so there are records of punishments that were given to children who lived in those care homes. How the punishments were expressed in those books might be seen as evidence of significant abuse being perpetrated on individuals. It is a risky area, because what the organisations deemed corporal punishment is what we would deem abuse. We need to give the issue serious consideration. What legislation allowed at the time perhaps should not have been allowed. Again, that was the fault of the state with regard to what people were allowed to do to children.

A lot of the survivors feel that, as they were under the care of an establishment, they should have been protected. To give a case study example with regard to peer-to-peer abuse, I know of a case of somebody who was abused by an

older child who was abusing a lot of the children in the care establishment, which did nothing to stop it happening. Where there has been a case of negligence by the organisation in allowing peer-to-peer abuse, that should be considered under the bill.

Ross Greer: I will ask the panel members one specific question and a more general question about next-of-kin payments; they might have caught the same line of questioning to the previous panel. I am interested in their thoughts on the requirement for a cohabitant to apply for the next-of-kin payment. If the survivor who has passed away has a spouse or civil partner, the cohabitant has to have been living with the survivor for six months prior to the point when they passed away in order to be prioritised ahead of the spouse or civil partner for the payment. There is no six-month or other length of cohabitation requirement for the cohabitant to be prioritised over the survivor's children. I am interested in the witnesses' thoughts on whether there should be some requirement, whether it is a minimum length of time for cohabitation or something else. Should there be that automatic presumption that a cohabitant is prioritised over a survivor's children for the purposes of payment?

Joanne McMeeking: My head goes to the choice of the survivor, in terms of the decisions that they make about their next of kin and the need for that to be ironed out. At the same time, I am thinking about the rights of the partner over the children. Where my head is going is that it is a very technical question that I would seek legal advice on. I know that—[*Inaudible*.]—this morning were also talking about it and thinking it through. I do not have a strong view at this point. I am happy to go back and read more on that in order to provide more information and a more substantial view to the committee in writing.

It is incredibly tricky—[*Interruption*.] I understand that, because of the depth and importance of the survivor's relationship with their partner, they might want their partner to stake a claim. At the same time, I understand that children who have been around for a long time feel a sense of loyalty and also deserve the money.

Judith Robertson: We do not have specific views on those aspects; it is much more about survivors' views being reflected in how decisions are taken. I do have views on next-of-kin payments, however, and I am happy to share them afterwards.

Janine Rennie: I return to what I have said from the start. The survivors' views should inform the approach. Survivors may have different views, but it is really important to hear from them.

As an aside, I will mention the cut-off point for when people could apply to the scheme as next of kin if somebody had passed away. We have lost a number of survivors in the service over the years, and I have seen the impact on the family of the abuse that the survivor experienced. The proposed measure will be very disappointing for quite a few families, but I really think that it should be about the survivors' views rather than mine.

Ross Greer: I appreciate that this question is both technical and complicated. I take on board the point about the approach very much having to be led by survivors. The tricky element is that something needs to be set out in legislation for circumstances in which a survivor has not expressed a clear view before they pass away. We need to iron out exactly what the requirements should be, as set out in legislation.

I have a wider question on safeguarding the wellbeing of survivors. In any situation in which a payment or sum of money is involved and which concerns a vulnerable individual—in this case, a survivor who is coming towards the end of their life—there is the potential for that individual to be exploited. Consideration needs to be given to how to safeguard in a situation in which other individuals receiving a substantial payment of £10,000 is dependent on their relationship with the survivor and what that relationship is established as being. I am interested in hearing the panel's views on how to safeguard the wellbeing of survivors in that situation, at the end of their life, when other individuals in their immediate vicinity would be eligible for a payment and there might potentially be contested views between those individuals—cohabitants, children and so on.

Could we start with Ms Robertson? You mentioned that you had some wider views on next-of-kin payments, and it would be great if you could share those now.

Judith Robertson: Thank you—I will do that, and I will come to your more specific point after that, if that is okay.

We wanted to make two points about next-of-kin payments. It is not clear to us why the next-of-kin applications should be for payments that are smaller than those that survivors themselves get if evidence can be provided to meet the requirements for individually assessed payments. That is one basis.

It is worth adding that we really welcome the fact of the next-of-kin payments, which we think are an important aspect of the scheme. The provision also reflects the views of survivors in the original consultation. Although there was a diversity of views, on balance, there was a strong view that next-of-kin payments would be valued and appreciated.

We also have concerns about the timescales that have been mooted—that the survivor must have died on or after 17 November 2016 for their family to be eligible for a next-of-kin payment. We think that that is extremely tight and time limitedf, and that the period should be extended. The rationale for enabling next-of-kin payments is that the family should receive some acknowledgement and remedy on behalf of the person who experienced the abuse. By setting the cut-off date as late as is proposed, opportunities for redress for families are really limited. We think that the timescale is too tight.

I wish to return to the point about vulnerable people. It comes down to the question of support. While a survivor is still alive, they are the uppermost person whose views need to be taken into account, where capacity is such that that is possible.fWe have some concerns that section 49 provides powers to redress Scotland to give

"directions relating to the payment and management of the redress payment for the benefit of the applicant as it considers appropriate."

That raises questions about applicants who might be vulnerable to risk—either of harm to themselves or others or of exploitation by others—on receipt of payment.

11:30

We are also concerned that the bill as drafted places too much discretion with redress Scotland to assess the capabilities of a person to manage the payment. In particular, references in the bill to "illness" and "disability" are concerning. A formal safeguarding framework was put in place through the Adults with Incapacity (Scotland) Act 2000, and we think that any restrictions or directions on payment should be made in accordance with that recognised legal procedure, or through things such as the power of attorney or financial guardianship. We do not think that this scheme should set up a different legal basis for establishing capacity. The schemes that we have are sufficient for doing that, and they are what should be used in this context. We have real concerns about that section of the bill.

The Convener: Ms Clarke, do you want to say anything about safeguarding issues?

Gaynor Clarke: No, thank you.

The Convener: Do other panel members?

Joanne McMeeking: I will come in on the back of that answer to support the legislation on safeguarding that we already have in Scotland. I would be curious to know why we were potentially setting up something different or new with redress Scotland. That would certainly be a flag for me, particularly with regard to the strength of power of attorney, guardianship and so on. It is a bit curious that, because it is a survivor who—[*Inaudible.*]—not manage it properly. I think that that is a bias that we have to step up and acknowledge, and then challenge.

The Convener: Do you have another question, Mr Greer?

Ross Greer: That is all from me, thank you, convener.

Iain Gray: I want to ask a question of Judith Robertson, although Janine Rennie might also want to comment. It is about the position of those who were sent to fee-paying schools not directly by the state but by their parents. In its written submission, the commission suggests that the state still had a duty of care to them, and therefore their right to seek redress under the bill should not be excluded.

Judith Robertson: It is a sensitive issue, and we are very aware of that. There is a broad diversity of views. The human rights framework would say that, when any child had suffered harm in that kind of setting, they would be eligible for financial redress.

The scheme excludes that, and, from our position, that is okay. We feel that the scheme can draw parameters and make those assessments from a human rights perspective, although that does not remove the obligation of the state to make provision for financial redress should it be sought in another process, or to support the setting up of other processes, such as by those private institutions, or to ensure that those processes are established. Therefore, although we do not necessarily seek a broadening of the terms of the bill, we recognise that, under human rights law, there is an obligation that, if a child is harmed in such settings, a provision for redress should be made.

Iain Gray: Thank you. That is helpful. Does Ms Rennie have anything to add?

Janine Rennie: We are very clear, as an organisation, that any situation in which a child suffered abuse should be included in the inquiry and in any other subsequent processes, simply because it was a failing of our whole society in the years and decades during which children experienced abuse. We feel that any establishment where children experienced abuse should be included under any terms, so that we, as a society, can learn the lessons about what went wrong.

Those children suffered abuse in a society that accepted that that abuse took place, and there was no protection for them. Therefore, we feel that all establishments where children were abused should be included.

The Convener: This is a final call for any members who have outstanding questions at this stage. Ms Clarke wants to come in on Mr Gray's last point.

Gaynor Clarke: Social Work Scotland expressed unease about the exclusion of children who were in the care of medical professionals, children who were hospitalised or institutionalised specifically for a learning disability or their mental health, and children in boarding schools other than through parental choice. I would like it to be noted that Social Work Scotland has engaged with the Government on that point and recognises the complexity and financial challenges that would be involved in that regard.

Judith Robertson: I will add to that point. We would like it to be recognised that children who are disabled were often placed in care, sometimes not under the provision of the state, and, under the terms of the proposed scheme, there is a risk that their claims would not be accepted. That needs to be reflected in relation to the redress Scotland panel's discretion to consider the basis on which people were taken into care institutions, particularly for long-term care in hospitals.

Jamie Halcro Johnston (Highlands and Islands) (Con): Road works have just started outside where I am, so I apologise if there is any noise.

Most of the questions have been well covered by my colleagues, but I have one question that is specific to my region of the Highlands and Islands. With regard to a claimant's ability to be supported through the process, legally or otherwise, do the panellists have any concerns about those who live in rural areas, who perhaps do not have access to the same services that are available in other places?

Judith Robertson: Accessibility of provision is a key issue, as people from across the country will have a range of needs. We are advocating that the system should be paper based and online, and that people should be able to talk on the phone and use whichever instruments they are able to use to provide evidence and talk to those who can give them support and advice. We are also advocating that the costs that are attached to support for survivors across the scheme should recognise different requirements in accessing the scheme, such as the requirements of people who have communication issues, perhaps because they are deaf or blind, or because they have another disability. The issues of accessibility are paramount. There are legal requirements to provide such support anyway, but for this scheme, in particular, resources need to be applied to the processes in a way that enables the participation of people from not only rural areas but across Scotland, as the issues also apply to them.

I take your point about the issue of access to lawyers and legal support in rural areas, but the access to provision generally needs to be thought through. It is more of a process point than a legal point, but it should be recognised.

Joanne McMeeking: The accessibility of the scheme is important not only in terms of geography but in how it is tailored, so that it is trusted, responsive, flexible and supportive. Our experience of consultations is that we have to develop and define very bespoke consultations in order that survivors are able to engage in lots of different ways that feel comfortable to them and so that they trust that their information will be listened to and responded to. That will be important in the construction of the scheme, as well as with regard to its accessibility and the geographical aspects of that.

Janine Rennie: [*Inaudible*.]—in terms of the wider accessibility. Obviously, we are dealing with Covid just now and we do not know what we are going to be like next year. A lot of engagement might have to be virtual. A lot of people are suffering severe digital exclusion.

Another concern that we have looked at in a number of processes through the years is that a lot of people suffer significant mental or physical health issues, so it would be impossible for them to go to a location. A lot of people are suffering from severe agoraphobia and do not want to leave the house, and their access to anything is very much restricted because of that. Accessibility is key, and that will have to be considered not only in rural areas, although we accept that even access to support in rural areas is sporadic, as is access to transport networks. All of that needs to be taken into account when considering how people can engage.

Gaynor Clarke: The priority for Social Work Scotland is the operation of the scheme itself and the process. I am thinking about the person-centred support that people require when they apply to the scheme. Emotional and psychological support is critical, as is making sure that the support is a moveable feast and that people's needs are considered. That is Social Work Scotland's priority in working with the Government to develop the bill.

The Convener: Jamie, did you have another question?

Jamie Halcro Johnston: No. I was just going to say thank you. I am sorry that it was fairly brief, but that was helpful.

The Convener: I have a final question. We have not covered the position on the deduction of prior payments. What are the witnesses' views on that rule? Is it correct that not deducting prior payments would mean that survivors would be

compensated twice for the same matter? Ms Rennie can go first on that.

Janine Rennie: Most of the survivors that we have spoken to feel that it would be fair for them not to be compensated twice. That is why a lot of them are saying that there is really no need for the waiver. They would be quite happy to accept the payment that was most suitable for them and to subtract any other payment that they had already had, if it made the process easier.

Judith Robertson: I completely agree with Ms Rennie's point about survivors' views on that. That seems to be fair, and survivors want the process to be seen to be fair. It would also provide a balance. There is a lack of balance in the legislation if that offsetting cannot be provided around the civil route. It would not really make sense—it would be slightly illogical—to make sure that it came off on one side but not on the other.

Joanne McMeeking: I support what Judith and Janine have said. There is a very strong desire for fairness among survivors in that they do not want to receive payments twice. They have a strong ethical sense of duty, and it is important that that is heard and listened to.

The Convener: Thank you. That is very helpful. Ms Robertson, do you want to come in again?

Judith Robertson: I just want to make a final point about disregard in relation to benefits. A payment that is received from the scheme is not income and should not be regarded as income by the Department for Work and Pensions. I know that it is not within the power of the Scottish Parliament to decide that, but we totally support the Scottish Government's efforts to ensure that a payment is disregarded as income and is regarded as reparation for harm done.

The Convener: I think that negotiations on that point are going on at the moment between the Scottish Government and the Westminster Government.

I thank everyone for their attendance this morning. It has been really helpful. I also thank you for your submissions to the committee, which will help our deliberations.

We will now move into private session, and I ask members to come out of the current video streaming system. We will meet in BlueJeans in about five minutes.

That concludes our public business this morning. Our next meeting will be on 28 October.

11:44

Meeting continued in private until 12:30.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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