OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 17 February 2021

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 17 February 2021

CONTENTS

EDUCATION AND SKILLS COMMITTEE

6th Meeting 2021, 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)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Oliver Mundell (Dumfriesshire) (Con)
*Alex Neil (Airdrie and Shotts) (SNP)
*Beatrice Wishart (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Simon Mair (Scottish Government)
Carolyn O'Malley (Scottish Government)
John Swinney (Deputy First Minister and Cabinet Secretary for Education and Skills)
Maree Todd (Minister for Children and Young People)

CLERK TO THE COMMITTEE

Gary Cocker

LOCATION

Virtual Meeting

Scottish Parliament

Education and Skills Committee

Wednesday 17 February 2021

[The Convener opened the meeting at 08:30]

European Union (Withdrawal) Act 2018

Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/28)

The Convener (Clare Adamson): Good morning, and a warm welcome to the sixth meeting in 2021 of the Education and Skills Committee. I ask everyone to turn their mobile phones and other devices to silent.

Agenda item 1 is consideration of whether an instrument has been laid under the appropriate procedure. Because this Scottish statutory instrument relates to European Union exit legislation, we are asked to agree that it has been laid under the correct procedure before we consider it later today. The Government has allocated the negative procedure to it, and the Delegated Powers and Law Reform Committee has reported that it considers that to be the appropriate procedure. Further details appear in papers 1 and 2 of the committee papers.

Are we agreed that the instrument has been laid under the appropriate procedure?

I believe that we are agreed.

Subordinate Legislation

Children and Young People (Scotland) Act 2014 (Modification) Order 2021 [Draft]

08:31

The Convener: Item 2 is consideration of draft subordinate legislation that is subject to the affirmative procedure; details of the instrument appear in paper 3. The consideration of an affirmative instrument has two agenda items: the committee will first have an opportunity to ask questions of the minister and then item 3 will be a debate on the motion.

I welcome to the committee meeting Maree Todd, the Minister for Children and Young People; Simon Mair, the head of 1,140 strategy and delivery at the Scottish Government; and Carolyn O'Malley, principal legal officer in the Scottish Government legal directorate.

I invite the minister to make an opening statement to explain the order.

The Minister for Children and Young People (Maree Todd): Thank you. When I attended the committee on 9 December, I reported that the early learning and childcare programme joint delivery board had recommended a new 1,140 hours delivery date of August 2021. Following careful consideration and agreement to that recommendation by the Scottish ministers and Convention of Scottish Local Authorities leaders, I confirmed that date to Parliament on 14 December. We took another important step towards the delivery of the transformational ELC expansion programme on 22 January, when I was pleased to lay the Children and Young People (Scotland) Act 2014 (Modification) Order 2021 in Parliament. That instrument will reinstate the duty on education authorities to make 1,140 hours of funded ELC available to eligible children in each year for which they are eligible, with a pro rata amount for each part of a year from August 2021.

I assure the committee that the Scottish Government continues to work closely with local government to assess the impact of the current lockdown on the delivery of 1,140 hours and address any emerging risks to the programme.

In spite of the difficulties of the pandemic, including the current restrictions on ELC provision, local authorities and early learning and childcare providers have continued to work extremely hard to progress the expansion. The Scottish Government also continues to support local authorities to deliver the new entitlement in advance of the new statutory date, where it is possible to do so. We have agreed with councils a shared commitment that, where they can deliver

expanded hours ahead of August 2021, that will be offered to families.

I am pleased to report that, since I attended the committee on 9 December, the number of local authorities that are delivering the expanded 1,140 hours in full has increased from 14 to 15 and many more local authorities are providing part of the 1,140 hours where they can. By reinstating the duty on education authorities to provide 1,140 hours, the instrument is crucial to the expansion of funded ELC. We know that the ELC expansion programme can provide transformational benefits for children and families and we remain committed to delivering it.

I am happy to respond to questions from the committee.

Daniel Johnson (Edinburgh Southern) (Lab): I thank the minister for that update. I think that we all welcome the reintroduction of the 1,140-hour target. Having adequate childcare in place is clearly important, perhaps more so now than before the lockdown.

Before Covid-19, a key concern, as highlighted by Audit Scotland, was the availability of the buildings that are required to deliver the 1,140 hours. A significant proportion of those buildings were required to be completed through last summer in order to be ready for the autumn. Can the minister update us on the preparedness and readiness of the buildings and on the capital requirements for meeting the 1,140 requirement?

Maree Todd: I thank the member for that excellent question, and I am pleased to be able to answer it. Data that was available in January 2020 showed that the ELC infrastructure programme was on track to deliver about 90 per cent of the forecast number of additional spaces that are required in August 2020. That, combined with contingency plans having been identified for 100 per cent of the critical capital projects, provided us with confidence this time last year that sufficient spaces would be available for the beginning of the academic year.

The pandemic has, of course, had an impact, which has largely been felt in construction and in recruitment. Although recruitment is very much on track, construction is not back to full pre-pandemic capacity. Despite that, we are confident that the construction that we require for the project will be completed in time for the reinstatement. We have worked closely with COSLA and the Association of Directors of Education in Scotland, and we have interrogated the evidence that we have in an extremely detailed way to assure ourselves that local authorities are ready.

That process included data and intelligence gathering across local authorities, and all the components of delivery were assessed. As you will remember me discussing at the committee in December, we requested that an independent health-check review be carried out on the programme, and the findings of that review supported the readiness of assessment.

We do not underestimate the challenges ahead of us, particularly given the second wave of pandemic that we have faced, but we are confident that we can deliver the programme in August this year.

Jamie Greene (West Scotland) (Con): Good morning, minister. I have some questions on the roll-out of the policy. Although the numerical increase in August 2021 is welcome, what consideration has been given to the principle of the funding following the child? One of the primary concerns that we have heard is about the limited availability of hours on offer to parents, primarily as a result of the additional hours being available only at public-provided nurseries, which have limited hours of the day on offer or indeed limited days of the week available—and certainly no availability during school holidays. What consultation has been carried out on that principle, and will the policy improve the situation?

Maree Todd: Funding follows the child is a cornerstone of the expansion and is underpinned by the national standard, which all providers have to meet in order to be signed up as funded partners. Thus far, local authorities have used more capacity from the private, voluntary and independent sector than they anticipated—the PVI sector is more involved than they predicted at the beginning of the expansion.

You are right in saying that that sector is precisely where we see the greatest flexibility. However, we are also seeing increased flexibility in local authority provision, with many more local authority nurseries open from 8 am until 6 pm, 52 weeks a year. I expect that aspect to continue to progress. At the moment, early learning and childcare are open only to key workers and vulnerable children. As we progress, I hope, towards a more normal, full opening, particularly come August 2021, I expect that flexibility to increase.

Mr Johnson mentioned how aware we all are of the need for early learning and childcare because of the pandemic. With the pandemic, we have learned just how vital that provision is and what an incredible support it is to families that our focus has always been on the quality of provision for children.

A secondary part of the programme has been ensuring that families get the support and the flexibility that they need. Funding follows the child will deliver those aspects when it is fully rolled out in August 2021. It will put the power into the hands

of parents to choose the type of childcare—the hours and the provision, including childminding, which we have talked about many times previously—that suits their family.

Jamie Greene: I thank the minister for that helpful answer. We all hope that that will be the case; the proof will be in the pudding. I wonder whether the policy will assist with another area of concern that has been raised, which is the sustainability of the PVI sector, and with the role of childminders, which is also important.

One of the key issues that nurseries that I have spoken to have raised is the rate that is negotiated with their local authority. I accept that that is negotiated between councils and nurseries that choose to participate in the 1,140 scheme, but the general feedback has been that there seems to be either a presumption in favour of service provision by council-operated nurseries or a limit on the budget that the council has to negotiate with the PVI sector. Are we likely to see any improvements in the average rates that are paid to the PVI sector in order to make those funded places more sustainable? We are often told that we are heavily subsidising them with private paying places in the PVI sector, which is completely unsustainable for nurseries that choose to participate in the Government scheme.

Maree Todd: I might ask my colleague Simon Mair to say a bit more about that issue. The payment of sustainable rates to funded providers has been vital in supporting financial sustainability throughout the pandemic. The landmark multiyear funding agreement that the Scottish Government and COSLA reached in April 2018 fully funded the expansion and included funding for the payment of sustainable rates, on which we have given extensive guidance. From August 2021, those rates will have to reflect the cost of delivery to providers.

Local authority funding to the private and third sectors has increased significantly in recent years. Average rates for delivery of 600 hours have increased by 26 per cent between August 2017 and August 2019. In April 2019, we issued guidance to local authorities to set sustainable rates for funded providers in the private and third sectors. That included childminders. Does Simon Mair have anything to add? It is an old question that we have gone over many times, and I genuinely believe that significant improvements have been made.

08:45

Simon Mair (Scottish Government): I think that you have covered the main points. There is an important point about the level of guidance that has been provided to local authorities and the emphasis on local authorities working with their partners in the private and voluntary sectors to set rates that cover the true costs of delivering 1,140 hours. The only addition that I would make to your comments is that a key component is funding follows the child, which you have been talking about already, in that parents have the ability to take their provision in partnership settings or local authority settings, which to some extent directs the use of funding, as the funding goes with the child to the partnership setting.

The Convener: I see no other questions, so we will move to item 3, which is the formal debate on motion S5M-23949.

Motion moved,

That the Education and Skills Committee recommends that the Children and Young People (Scotland) Act 2014 (Modification) Order 2021 [draft] be approved.—[*Maree Todd*]

Motion agreed to.

Special Restrictions on Adoptions from Nigeria (Scotland) Order 2021 (SSI 2021/30)

Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/31)

Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/28)

08:47

The Convener: Item 4 is consideration of three negative instruments, details of which are in papers 4, 5 and 6. Do members have any comments on the instruments?

As no member has any comments, we will move on. I thank the minister and her officials for attending the committee this morning.

Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill: Stage 2

08:48

The Convener: Item 5 is day 2 of our consideration of stage 2 amendments to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. I confirm to members that I intend to pause for a comfort break between 10.00 and 10.30. If members wish to break before that, they should indicate that by entering "break" in the chat function.

I welcome the Cabinet Secretary for Education and Skills, John Swinney, to the meeting and move immediately to consideration of the bill.

Section 27 agreed to.

Section 28—Cases where more than one application permitted

The Convener: The first group of amendments is on second application in light of new evidence. Amendment 59, in the name of the cabinet secretary, is grouped with amendments 108, 67, 74 to 76, 78, 80, 82, 83 and 94.

The Deputy First Minister and Cabinet Secretary for Education and Skills (John Swinney): Good morning. In speaking to these amendments, I acknowledge last week's contribution on the subject from my colleague Mr Neil, who raised his concern about the need for further options for survivors should additional information come to light after they have already accepted a redress payment and signed a waiver. I thank Mr Neil for raising that concern and, although I think that the amendments that I have lodged in this group take significant steps to address it, I reiterate my commitment to consider further options to address it in advance of stage 3. If more can be done to strengthen the safeguards for survivors, we will certainly aim to do that.

Throughout stage 1, I listened to the concerns that survivors and representatives of the legal profession have raised about the challenges that can be faced in evidencing an individual's abuse in care. I want to ensure that survivors get a redress payment that properly reflects their experience. That means ensuring that, should new material evidence become available after they have made an application and received a redress payment, they will be able to make a further application based on that new evidence and might be awarded a further redress payment.

The amendments that I have lodged are to address the committee's concern that survivors are asked to take decisions on an all-or-nothing basis, solely relying on the evidence that is available at the point at which the redress payment offer is made, with no opportunity to seek a further payment should new evidence come to light. The principal amendment in this group, amendment 59, will allow a survivor, in the light of new evidence, to make a further application to redress Scotland, which will decide whether that evidence is sufficient to move the determination from one payment level up to another. To maintain the appropriate rigour of the scheme, redress Scotland will require to be satisfied that there is a reason why the new evidence was not provided previously and that that reason justifies a further application.

I do not consider that the need for survivors to rely on that provision will be a common occurrence in the scheme, as the inclusive design and approach to evidence will mean that it should rarely be necessary for a survivor to submit new formal evidence in order to have their experience fully recognised by redress Scotland and reflected in their redress payment. However, it is important that the scheme is flexible and can adapt to the changing landscape of knowledge and evidence that relates to historical child abuse.

The other amendments are consequential to amendment 59 and ensure that the consequences of an application for a further payment are reflected, as appropriate, in other provisions of the bill. These amendments further strengthen the survivor focus of the scheme and illustrate that the process and outcomes of redress are different from those that are available through litigation where it can be difficult to revisit awards or settlements.

I invite committee members to support the amendments.

I move amendment 59.

The Convener: Thank you, cabinet secretary. No member has indicated that they wish to contribute to the debate on amendment 59.

Amendment 59 agreed to.

Amendment 108 moved—[John Swinney]—and agreed to.

Section 28, as amended, agreed to.

Section 29—Application period

The Convener: The next group of amendments is minor and technical. Amendment 60, in the name of the cabinet secretary, is grouped with amendments 113, 115, 119, 130 and 101.

John Swinney: This group consists of a number of technical amendments on various provisions of the bill. Amendments 60, 101 and 130 ensure that, for consistency throughout the

bill, references to the term "application period" will have the meaning that is provided for in section 29, which sets out the application period for the redress scheme.

I also, separately, lodged substantive amendments to section 29 concerning the anticipated duration of the scheme, which will be debated later.

Amendments 113 and 115 simply ensure consistent references in provisions of the bill concerning nominated beneficiaries who may take over redress applications when the original applicants have died.

Amendment 119 amends section 85, which concerns the provision of support to persons in connection with an application. It clarifies that those support provisions apply to those who have applied for redress as well as to those who may still be in the process of preparing or considering an application.

I move amendment 60.

The Convener: No member has indicated that they wish to contribute to the debate on amendment 60.

Amendment 60 agreed to.

The Convener: The next group of amendments is on the period for submission and prioritisation of applications. Amendment 109, in the name of the cabinet secretary, is grouped with amendments 110, 111 and 62.

John Swinney: I thank the committee for raising the issue of scheme duration in its stage 1 report, and I am in whole-hearted agreement with its conclusion that the duration of the application period should not represent a barrier to redress for survivors. Amendment 109, along with amendment 110, amends section 29 so that the application period will last either for five years or for two years beyond the lifetime of the Scottish child abuse inquiry—whichever is the longer period. Although the amendment provides for potentially longer application periods, under subsection 29(2) there will still be scope to make regulations to extend the application period beyond that, which would be subject to the Parliament's consideration and approval under the affirmative procedure.

Amendment 111 places a new duty on ministers to review the length of the application period that is set out under amendment 110. That must be done 15 months before the period is due to end unless steps have already been taken to extend it. Furthermore, amendment 111 requires that the findings of the review be published and laid before the Parliament.

I believe that those changes will instil confidence that the question of whether to extend the application period will be given thorough and timely consideration and that there will be transparency around the decision-making process. Subject to the Parliament's approval, regulations could subsequently be made to extend the application period in line with the conclusions of that review.

Although the bill as introduced provided that the redress scheme would be open for a period of five years and gave the Scottish ministers power to extend that period by way of regulations, the amendments that I ask the committee to support today will make sure that the scheme remains open for applications for a substantial period after the Scottish child abuse inquiry has concluded and produced its final report. That is to ensure that those who might be encouraged to come forward—or who, as a result of the inquiry's findings, ask for an earlier award to be reviewed—will have the opportunity to do so. Also, by providing that the scheme will remain open for a sufficient length of time to take account of potential changes to the evidence that is available to survivors, we will ensure that survivors will have the time that they need to fully explore other options that are available to them. The scheme will be open for long enough for survivors to pursue a civil action in the first instance, if that is their preference, and to apply to the redress scheme if they are unsuccessful in the court action or if the outcome is a financial award that is lower than what they might receive by way of a redress payment.

Amendment 111 will also guarantee that there is proper consideration of whether the application period should be extended beyond the period that is being set today under amendment 110, with appropriate transparency around that.

Amendment 62 relates to the requirement that redress Scotland must have regard to an applicant's age and state of health when determining which applications are to be prioritised. The amendment strengthens what is currently provided for in section 32, ensuring that action is taken around ill health when that is disclosed later in the application process, including after an application has been submitted to redress Scotland. I hope that members will support those amendments.

I move amendment 109.

09:00

Daniel Johnson: I should say at the outset that I welcome these amendments. It is important that we maximise the opportunities for survivors to make applications. However, especially bearing in

mind that it can take many people a number of years to come to terms with their experiences and even to acknowledge them to themselves, let alone to others, and given the length of time that has passed, could we go further than the amendments that are in front of us? My simple question to the cabinet secretary is this: why does there need to be a finite period at all for applications to be made? I acknowledge that we would expect the bulk of applications to come forward in the early years, but I am not entirely clear, at least in principle—I recognise that there may be practical reasons—why there should be any time limit whatsoever. Will the cabinet secretary set out the logic and thinking behind that?

John Swinney: There is no absolutely precise answer to that question; it is a matter of judgment. The thinking behind the timescale has essentially been that it provides an opportunity for applications to be made. We have extended the timescale beyond the duration of the reporting of the Scottish child abuse inquiry to provide adequate opportunity for individuals to come forward. There is also provision in the bill for ministers to extend the timescale should they judge that to be appropriate.

I suppose that there is an argument—I accept this point from Mr Johnson—that we might never know the moment at which an individual will find it possible to address the issues. That might not be within the timescale that the bill prescribes; it might be some time afterwards. I take Mr Johnson's point that somebody might be able to face up to the issues long after the timescale that is set out has formally been reached, and I suppose that they would have just as much right to have their circumstances addressed as anybody else.

I am happy to reflect further on that point in advance of stage 3. There are provisions in the bill to allow the timescale to be extended, but not, I think, in the fashion that Mr Johnson highlights—in the scenario in which, some years later, an individual is able to face up to all the issues and wishes to pursue them. I am certainly prepared to give the committee a commitment that I will consider that point in advance of stage 3 in addition to the proposed changes in this group of amendments.

Daniel Johnson: I thank the cabinet secretary for those remarks.

Amendment 109 agreed to.

Amendments 110 and 111 moved—[John Swinney]—and agreed to.

Section 29, as amended, agreed to.

Section 30 agreed to.

Section 31—Withdrawal of application

The Convener: The next group of amendments is on initial determinations. Amendment 61, in the name of the cabinet secretary, is grouped with amendments 65, 68, 77, 79, 81, 92, 95 and 99.

John Swinney: Last week, I said to the committee that I want to make sure that the operation of the waiver is fair to survivors. Some of the views that the committee heard at stage 1 and that the Government has heard throughout the engagement with survivors indicated that the provisions in the bill on interim payments could undermine that objective. In particular, there was a concern that some survivors could choose to sign a waiver before knowing the final outcome of the individually assessed redress application and, crucially, whether they are satisfied with that.

Although the option to receive an interim payment was only ever intended to increase survivor choice, given the concerns that have been raised and the commitment that I made in the stage 1 debate, I have lodged amendments that will remove the concept of interim payments in relation to individually assessed applications.

The principal amendment, which is amendment 68, will remove section 36, which is the source of redress Scotland's duty to make an initial determination. The other amendments in the group make consequential adjustments to the other provisions of the bill that refer to initial determinations, including the provisions on the waiver. The amendments will mean that survivors who apply for individually assessed payments will only ever be asked to sign the waiver when they know the final outcome of their application and the full details of any redress payment that they are being offered.

As I have said before, the process of redress is intended to be faster than civil litigation and is intended to feel different from traditional court-based processes. That will be uppermost in our minds as we progress with scheme design and build capacity to deliver. We will make sure, in all respects possible, that the processes and timescales to consider and assess applications deliver a swifter, more accessible, survivor-focused and trauma-informed alternative to court proceedings.

The bill also provides that redress Scotland must prioritise applications, having regard to the age and health of applicants. That will allow the elderly and those with significant health issues the opportunity to have their applications determined properly and to receive their full individually assessed payments as quickly as possible thereafter. The amendments are part of a package of stage 2 amendments that are designed to enhance—[*Inaudible*.]

The Convener: Mr Swinney, we lost your connection there, so we missed the last few sentences.

John Swinney: Okay. The amendments are part of a package of stage 2 amendments that are designed to enhance the protection for survivors. I ask the committee to support the amendments in the group, for the reasons that I have set out.

I move amendment 61.

Amendment 61 agreed to.

Section 31, as amended, agreed to.

Section 32—Prioritisation of applications

Amendment 62 moved—[John Swinney]—and agreed to.

Section 32, as amended, agreed to.

Section 33 agreed to.

After section 33

The Convener: We move on to determination of applications. Amendment 25, in the name of Daniel Johnson, is grouped with amendments 63, 112, 104 and 104A.

Daniel Johnson: It is a fair reflection of the evidence that the committee took and the discussions and deliberations that the committee carried out in public and in private that the most sensitive and delicate issue in relation to redress Scotland and the way that it is proposed to work is the determinations of individual payments that it will make.

In essence, we are asking redress Scotland to determine the veracity and, indeed, the seriousness of the testimony that it will receive from survivors. Clearly, that is a very delicate and sensitive matter. Determinations need to be carried out with that in mind, but they also need to be carried out in a robust and understandable manner. Therefore, understanding of the burden of proof that will be applied to applications and of the evidential requirements for the testimony and information that is provided by applicants to the process is critically important.

As it stands, the way that such matters will be determined will be subject to guidance. I and the committee questioned whether that was robust enough for the purposes of redress Scotland. I understand that the intent behind it is to provide sufficient flexibility, which is important given the difficult nature of the subject matter and the time and complexity surrounding it. However, although I recognise that, we have to bear in mind the independence of redress Scotland in carrying out its work. Once the body is up and running, it will do so very much independently of Government, which is right and correct. It is therefore important that we set out in the bill the principles that it will work under in relation to evidential requirements and the burden of proof. However, it is also important that we continue to have flexibility.

Amendment 25 sets out a number of principles under which applications will be determined and the burden of proof that will be applied. Those are important in order to provide clarity for people who are applying so that they understand what will be required of them and how things will be understood, as well as for legal robustness; having in the bill the principles under which those decisions will be made means that they can be scrutinised and legally challenged if required. Those principles will be expanded and made more substantial through regulation, which is important in providing the flexibility that was initially sought and in recognising that these issues are complicated and therefore require more substantial elaboration than is provided for in the bill.

I will explain some of the detail. Subsection (3) of amendment 25 sets out key principles, which I acknowledge are complex and untested. However, I seek through the amendment to provide key principles by which redress Scotland could sensitively but coherently assess the evidence that it receives from survivors. It is important that we do not have principles that may put undue stress on individuals. It is therefore important that we have an assumption of coherence regarding evidence; that is, that we move away from ideas of consistency, which is sometimes problematic for survivors. Given the stress and trauma that they have endured, they may not necessarily have given consistent accounts over time or even in a specific period. What is important, therefore, is that evidence is assessed as to whether it is coherent in the broader context of the experiences that they endured and whether it fits within the pattern of other survivors' evidence and the information that we know about the broader context in which they may have endured the abuse that they suffered. That is why paragraph (b) states that

"evidence of the experience of an applicant may be inferred from"

other accounts. It is also important that there is a presumption that applicants are to be believed, in relation to which I note Alex Neil's amendments later in the group.

Subsection (3)(d) of amendment 25 is about how it is important that the overarching responsibility to establish the facts of the application falls on redress Scotland rather than the individual applicant. The process will be traumatic and difficult, and if we are seeking a process that is substantially different to going

through court, it is important that there is an obligation on redress Scotland to seek to establish facts itself in partnership with the applicants, and not to be a passive body that simply receives evidence on behalf of applicants.

09:15

Indeed, it is also important that we do not ask survivors to produce evidence or give testimony when they have done so elsewhere. That relates to quite a powerful, personal representation that was made to me following our initial evidence taking, that many survivors give their stories time and time again, and, every time they do so, they relive their experience, which is traumatic. Therefore, when that evidence has already been provided—in particular, to the inquiry—it is important that that is taken into account and used as a primary source, and that we do not require survivors to retell their stories when they do not have to because they have already told their stories elsewhere. It is also important to establish that the standard applied should be no higher than the balance of probability.

I hope that that sets out my logic. I apologise for having gone on at some length, but this is a complicated area. I recognise that an awful lot of these principles are untested and that there will be significant legal complexity. Therefore, these are probing amendments and I am minded not to press or move them when we come to that point. However, I would like to establish with the cabinet secretary and other members whether they think that principles along these lines may be appropriate. I certainly think that the bill must set out more substantial principles than are currently set out or that would be provided for in the other amendments in the group. It is important that we have legal robustness and that we have clarity for those seeking to make applications to redress Scotland.

I move amendment 25.

John Swinney: I thank Mr Johnson for lodging amendment 25. I agree in principle with elements of the approach that is set out in the amendment, some of which have been included in my amendment on the standard of proof and in Mr Neil's amendment on the presumption of truth.

We all want the redress scheme to operate with integrity and robustness but without placing unduly onerous burdens on survivors. On that point, I agree very much with the sentiments that Mr Johnson has expressed and in no way wish further trauma to be inflicted on survivors by the application process that is envisaged under the bill. Indeed, my contention is that we are trying to minimise that trauma where we possibly can through the approach that we are taking. We must make sure that individuals are able to obtain redress without the trauma that Mr Johnson refers to.

However, there are a number of practical and technical issues with Mr Johnson's proposal, and I welcome the fact that he told the committee that his amendments are probing amendments, because, once the committee has disposed of these sections of the bill, I would be happy to reflect with Mr Johnson on whether there are any further outstanding issues that need to be addressed to take into account the legitimate points that his amendments raise.

There is a judgment to be made—it runs through a number of the comments that I could make in relation to this area—about just how much detail to put in the bill and how much should be left to the guidance that we put in place. However, I would be happy to engage further with Mr Johnson on those points once the committee has expressed its view on the various amendments in the group.

I will sum up my observations by saying that I share Mr Johnson's commitment to a trauma-informed approach and that I want to apply the proposed test to the provisions of the bill once the committee has completed its scrutiny in advance of stage 3.

On the presumption that applicants are to be believed, I am committed to delivering a scheme that tells survivors from the outset that we believe them. That is important when, so often in the past, they were not believed. I give my support to amendments 112 and 104A, lodged by Mr Neil, which call for a presumption of truth in the bill. I thank Mr Neil for amendment 112, which maintains the integrity of the scheme by selecting the presumption of truth as the starting point, while leaving the panel the flexibility that it requires to ensure that decision making is robustly credible. That supports our non-adversarial approach to all aspects of the redress scheme, it recognises the challenges for individuals having to disclose abuse and it underlines our commitment to a trauma-informed approach and to providing practical and emotional support to applicants throughout the application process and beyond.

Turning to Government amendments 63 and 104, I have heard the evidence from the committee and have reflected on calls from survivors and organisations for greater clarity as to the standard of proof that will apply in determining redress applications. I lodged amendment 63 to apply the civil standard of proof "on balance of probabilities", which means that something was more likely than not to have occurred. Survivors have asked for a standard of proof that provides clarity for the applicant and safeguards the integrity of the scheme. Organisations need to be

confident that their contributions will relate to redress payments that are determined by the panel in accordance with a clear and consistent standard of proof; amendment 63 provides the clarity that is sought.

Although the standard of proof that is applied by amendment 63 is the same as the civil standard, that does not mean that the process would be the same as in a civil court. Civil court rules on admissibility of evidence are not applied to the redress scheme by the amendment or otherwise, and the matters that require to be demonstrated apply only to eligibility, not to liability. Adversarial processes that are raised to establish liability have no place in the redress scheme.

The practical measures that are put in place through the design of the scheme will more broadly support survivors to access redress by helping them to access, so far as is possible, any and all available information and evidence to support their application in meeting the desired standard of proof. It was always intended that redress decisions would be taken to a clear and consistent standard. It is vital to ensure that all of us—including survivors, organisations and others—have confidence that decisions on redress applications will be based on a clear and appropriately robust standard of proof. The balance of probabilities provides that confidence.

I therefore ask the committee to support my amendments 63 and 104, as well as Mr Neil's amendments. I invite Mr Johnson not to press amendment 25, and I give the undertaking that I will engage constructively with him and the committee on what further steps need to be taken to address any outstanding issues that he has raised in amendment 25.

Alex Neil (Airdrie and Shotts) (SNP): I thank Daniel Johnson and the cabinet secretary for their supportive comments in relation to amendment 112 and consequential amendment 104A.

As we all know, survivors of abuse in care have campaigned with dedication and perseverance to access justice—[*Inaudible*.]—and redress. There have been too many times in the past when survivors have taken the brave step to disclose abuse experience, but have not been heard or, indeed, believed. Like everyone else on the committee, and like the cabinet secretary, I have heard from survivors. They have stated that being heard, being believed and having their abuse acknowledged are important elements in accessing justice. For many individuals, those things are vital in helping them to move forward.

In response to those calls, I lodged amendment 112 to place a presumption of truth in the bill. It will mean that applicants will be in no doubt that, when they apply to the redress scheme, the default position will be that they are believed. The amendment forms part of an unwavering commitment to listen to survivors and to act with dignity, respect and compassion in acknowledging and accepting the truth of the abuse that they suffered in care.

The presumption of truth will work alongside the standard of proof. Together, they will reinforce the supportive and trauma-informed approach to survivors and to the robust review of applications, with each element promoting confidence in the scheme. Survivors can be assured that they will be believed, and that will be in the text of the bill.

Jamie Greene: I have two brief comments on the amendments in this group. One is on the evidence threshold. In theory, we would have supported Mr Johnson's amendment, on the basis of principle rather than technical precision—I appreciate that there are some difficulties with the wording. The idea that the evidence that is provided must be proportionate to the award that is made is a fair principle, and I hope that the Government will consider that.

The only issue that I have with Mr Johnson's amendment concerns the provision that those who participate in the schemes should not have to present evidence that has already been given. In theory, that is ideal, but in reality the situation will not always be ideal. There might be cases in which it is necessary for the panel that is making the award to request evidence or information that would be a fair ask of participants in the scheme. Again, however, I come back to the first principle of the proportionality of the evidence that is required, given the nature of the scheme, which is very different from civil action. We should, and could, avoid that situation in almost all cases, but the scheme needs to be given the flexibility to empower the panel—and its members themselves—to make reasonable and rational decisions around what they think is required of them in order to allow them to make an overall decision. What might seem quite easy in theory, and what might look practical in the text of a bill, might be quite difficult in reality.

I look forward to seeing how Mr Johnson and the cabinet secretary progress the matter. The Scottish Conservatives would support any measures, and any future amendments at stage 3, to make the process as easy as possible for those who come forward.

Oliver Mundell (Dumfriesshire) (Con): Like Jamie Greene, I support Daniel Johnson's approach while recognising that there are technical issues with his amendment. I am keen to see what progress is made ahead of stage 3.

However, I draw the attention of Mr Johnson and the cabinet secretary to Alex Neil's comment

in relation to the interaction between the presumption of truth and the standard of proof that is required. What concerned me at stage 1, and what continues to concern me, is how those who cannot provide documentation or hard evidence will be treated when they can nonetheless provide circumstantial evidence and other compelling information that would, in the view of most reasonable people outside the court process, meet a balance of probabilities test. For example, will a sworn statement or previous remarks to the inquiry be taken as being enough evidence? What happens when documentation does not exist? How do those two principles interact when they are both in the bill? I am keen to get a better understanding of that from the closing remarks.

The Convener: Mr Mundell, the cabinet secretary has requested to intervene.

Oliver Mundell: I am happy to take the intervention.

John Swinney: I am grateful to Mr Mundell for accepting the intervention—I do not have the opportunity to sum up in this debate, so it gives me a chance to respond to the legitimate points that he has raised.

I hope that members conclude that the support that I offer to Mr Neil's amendment 112, which proposes that there be, in essence, a presumption of truth being told by applicants, combined with the standard of proof applied in my amendments on the balance of probabilities—meaning that something was more likely than not to have occurred—provides a framework that addresses the points that Mr Mundell raises. I accept that documentary evidence is unlikely to be available in every circumstance to a level of certainty that would satisfy other tests within the judicial system.

It is interesting to reflect on the Scottish child abuse inquiry's approach, in which it has felt to me, as a layman, very much as though survivors presenting evidence have been believed from the outset. That has enabled the inquiry to produce such powerful reflections on the issues about which we are all troubled. I have tried to reflect some of that thinking in the amendments that the Government has lodged and the amendments that Mr Neil has lodged, which I am happy to support in relation to the points that Mr Neil has raised.

I hope that that goes some way to addressing the points that Mr Mundell has legitimately raised, which I acknowledge he raised at stage 1, as well.

09:30

Oliver Mundell: That is exceptionally helpful. I am grateful to the cabinet secretary for that, as I know that it will provide a lot of reassurance to survivors and victims, as will the amendments. Thank you.

Daniel Johnson: I thank the cabinet secretary and committee members for their comments on the amendments to this section. I acknowledge that the amendments proposed by Alex Neil and the Government will move us forward. However, the comments by Jamie Greene and Oliver Mundell point to the fact that there is at least the scope to look at whether we could move further. It is a simple fact that many survivors will struggle to provide documentary evidence and that they will have provided evidence elsewhere. We need to be mindful of the fact that redress Scotland will not just determine whether testimony is true but will establish the extent of the trauma in the particular circumstances of the applicant, because it will have to discriminate between different payment levels. Obviously, we will come on to that when we deal with section 38.

It is therefore a question of establishing not just whether abuse occurred but the extent to which it did. Because of that, we require to elaborate on the valid ways in which redress Scotland can substantiate testimonies, which is the point that Oliver Mundell was getting at and very much the point that I sought to probe through the principle of inferring evidence from the accounts of other applicants or the wider context.

However, it is important, as Jamie Greene pointed out, that redress Scotland seeks evidence that might be available elsewhere. I acknowledge the complexity here, so I will not press amendment 25. I urge committee members to support the amendments in the names of John Swinney and Alex Neil.

Amendment 25, by agreement, withdrawn.

Section 34—Determination of applications

Amendment 63 moved—[John Swinney]—and agreed to.

Amendment 112 moved—[Alex Neil]—and agreed to.

The Convener: The next group is on findings of fact. Amendment 64, in the name of the cabinet secretary, is grouped with amendments 66 and 97.

John Swinney: A fundamental aspect of the redress scheme is its non-adversarial nature. It is intended to be an alternative to a court-based process, and its purpose is not to determine liability for abuse in a way that a court would or in a way that would have legal consequences outside the redress scheme itself. Rather, its purpose is to provide tangible recognition of abuse and a survivor-focused, non-adversarial route to redress.

Thus, section 34(3) states that redress Scotland,

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

Further, section 34(6) provides:

"Neither the offer of a redress payment nor the failure to make an offer"

is to be construed as a finding that a person named in an application acted in a particular way.

In the evidence that was received at stage 1, concern was expressed that those provisions might prevent redress Scotland from determining whether abuse actually took place. That is certainly not the intention. Indeed, making such determinations is obviously essential to the performance of redress Scotland's functions. In our view, it is entirely possible for redress Scotland to make a determination that abuse occurred without having to make a specific finding as to whose fault or negligence led to that abuse. However, it is clear that the concerns that were raised relate not to the principle of the provisions but only to how they are expressed. I am content to present the three amendments in this group to clarify our intention.

Amendment 64 amends section 34(3) to provide that redress Scotland has no power to

"rule on, and has no power to determine, any person's civil or criminal liability"

when considering a redress application, as that would be the role of a court. The intended effect is to make it clearer that, while redress Scotland has no power to do those things, it will nonetheless be able to make determinations on the key question of whether or not abuse took place for the purpose of offering a redress payment.

The purpose of amendment 66 is to put it beyond doubt that neither the offer of redress nor the failure to make such an offer can be relied on in other court proceedings as evidence that the acts complained of occurred. That was already the intention, but the amended wording of the provision puts it beyond question that we are talking about how the outcome of a redress application is viewed in other proceedings.

For the sake of consistency, I also lodged amendment 97, which amends section 72(6). That provision contains similar wording to that of section 34(6), but in the context of a reconsideration of a determination where there has been a possible material error. Similarly to amendment 66, amendment 97 is intended to put it beyond doubt that, for the purposes of other proceedings, nothing done under a reconsideration is to be taken as a finding that someone acted or failed to act in a way suggested in the application for redress.

I move amendment 64.

Amendment 64 agreed to.

Amendments 65 and 66 moved—[John Swinney]—and agreed to.

Section 34, as amended, agreed to.

Section 35—Assessment of amount of redress payment

Amendment 67 moved—[John Swinney]—and agreed to.

Section 35, as amended, agreed to.

Section 36—Applications for individually assessed payments: initial determination

Amendment 5 not moved.

Amendment 68 moved—[John Swinney]—and agreed to.

Section 37 agreed to.

Section 38—Individually assessed payment

The Convener: The next group is on payment amounts. Amendment 69, in the name of the cabinet secretary, is grouped with amendments 70, 26, 27 and 71 to 73. I draw members' attention to the pre-emption information that is shown in the groupings. If amendment 27 is agreed to, I cannot call amendments 71 to 73.

John Swinney: Before discussing the amendments in the group directly, I would like to acknowledge the sensitivity of this part of our debate. It is one of many difficult topics in the context of redress. I know that committee members have said that they are uncomfortable with drawing lines between experiences of abuse and attaching a monetary value to each level; I share that discomfort and I must say again that we know that no amount of money can adequately reflect the reality of abuse and the harm caused. Nothing that we discuss here should be considered to diminish any abuse experienced by any survivor, but if we are to provide individualised payments, as survivors have asked us to do, this is a discussion that we must have.

The work on the assessment framework will continue, so that survivors have clarity when they are considering applying for redress. We must recognise that not all experiences of abuse are the same, and therefore it is right that the redress scheme provides for those distinctions in a way that is fair and makes sense for survivors. The matter of payment levels is therefore critical but sensitive.

I have considered carefully the evidence that the committee heard during stage 1. I want to provide fair payment according to a fair structure that is

sensitive to the needs and circumstances of those who apply to the scheme. I have revisited the level of the increase between the different payment levels and lodged amendment 71 to introduce a new £60,000 payment level to address concerns that the gap between the current £40,000 and £80,000 payment levels in the bill is too great. Amendment 72 is consequential to amendment 71.

I have also considered the evidence that the committee heard during stage 1 that, for some cases, redress payments might be lower than would have been awarded by the courts or provided by some other redress scheme. The redress scheme is an alternative remedy for survivors. It does not follow the same rules and procedures as courts and it is not designed to achieve the same outcome. The redress scheme is driven by the needs of survivors and is designed to operate in a supportive and non-adversarial way, while still providing contributions from the organisations responsible.

09:45

It is important that the redress scheme offers choice in the form of a meaningful alternative. Having listened to the evidence, particularly the views of survivors, I have also lodged amendment 73, which introduces a new top-level payment of £100,000. A revised financial memorandum will be published to set out what impact that will have on the anticipated cost of the scheme, if the amendment is agreed to today. Amendments 69 and 70 are further consequential amendments.

Those payment levels will allow survivors' experiences to be further differentiated and the application process to be further individualised.

Mr Johnson's amendments 26 and 27 would also amend payment levels. Although I agree with the need to increase the top-level payment, I believe that his suggestion that there should, in effect, be no upper limit presents a number of challenges. The biggest challenge is that the lack of clear parameters around the payments available would lead to a lack of transparency for survivors, either in advance of applying, or once they have received an offer of a redress payment. There would also be difficulties in seeking contributions from providers worried about affordability if payment amounts had no upper limit. That could undermine other measures that we have considered and debated previously that seek to ensure the affordability of financial contributions for providers and to secure their contributions.

We should provide clarity for survivors wherever we can. Mr Johnson's amendments would, instead, provide uncertainty around the payment levels available and how decisions are made. They would also likely increase the number of requests for a review of decisions, which would slow the settlement of applications and the capacity for the redress scheme to help survivors move swiftly through what is undeniably an emotional process.

I listened to the points that Mr Johnson raised previously about the survivors whose experience might take them to the highest level of redress payment available. As with all applicants, and perhaps even more than others, it is right that those survivors have the opportunity to access independent legal advice, that they know the options that are available to them and that they can carefully consider whether pursuing court action would instead be in their best interests.

Supporting survivors to make the right choice for them would, I suggest, not be helped by failing to provide clear levels of the redress payments that are available. However, a matter that could be further explored is how the scheme ensures that survivors are adequately signposted to the alternative paths available to financial redress. For some, those paths might result in a higher settlement than those that can be afforded by the redress scheme.

I note Mr Johnson's previous powerful contributions on the matter and I want to see what more can be done, whether by stage 3 amendment or otherwise.

I have listened to the concerns that were voiced to the committee about payment levels. As I have set out, I have lodged amendments to introduce further individually assessed payment levels at £60,000 and £100,000. I believe that my amendments strike the right balance and respond to the concerns that we have heard while still ensuring that there is certainty and transparency. I therefore ask Mr Johnson not to move his amendments today.

I move amendment 69.

Daniel Johnson: I acknowledge that the cabinet secretary's amendments in this group move us forward substantially. The £60,000 payment level removes the large jump between the £40,000 and £80,000 payment levels, which is important. I also welcome the introduction of the £100,000 payment level, which, again, is useful.

However, it is important to acknowledge two critical issues. There may well be people who come forward whose experiences are very serious and who may well be successful if they pursue the matter through the courts. Indeed, their experiences might be such that, if the matter was successfully pursued through the courts, it would attract a much more generous payment than

would be currently available through redress Scotland.

I fully acknowledge that it is people's choice to pursue a particular avenue, whether that is making an application through redress Scotland or taking the matter through the courts. However, it is still problematic—certainly for me—that we could have a scheme that would knowingly settle claims in such a way that those individuals would have no further possibility of pursuing their claims through the courts and that they could receive substantially less through the scheme than they might receive through the courts.

It is critical that redress Scotland acts in the best interests of survivors, both in the way that it handles their claims and in the awards that it makes. The intention behind my amendment was to remove the upper limit so that redress Scotland could make larger payments on an exceptional basis. I acknowledge that that would require further fleshing out, but it is an important consideration.

During last week's consideration of amendments, I made the point that there might be circumstances in which individuals were able to receive higher claims and that redress Scotland would need to act in their best interests. I ask the cabinet secretary to consider whether there should be provision in the bill for exceptional payments, with whatever caveats may be deemed warranted, so that in circumstances where it is clear that large awards could be achieved redress Scotland is able to make such awards on an exceptional basis.

John Swinney: I acknowledge the points that Mr Johnson has made. I addressed a lot of them in earlier comments, so I will not rehearse them again. Mr Johnson raised the specific scenario of the provision of payments in truly exceptional cases. The difficulty is that such provision would conflict with the aspiration to have transparency within the system, which is essential so that all applicants know where they stand—so that they know the available parameters of the scheme and what they are making a judgment about. That enables them to make a judgment as to whether the scheme is for them or they wish to reserve the right to pursue civil litigation, which lies at the heart of survivor choice.

I am happy to give further consideration to the points that Mr Johnson has put on the record today. I acknowledge the issue that he raises, but I would be concerned that it could undermine the transparency of the scheme. I give the committee an undertaking that I will reflect on it further and I will be happy to discuss the issue with Mr Johnson in advance of stage 3.

Amendment 69 agreed to.

Amendment 70 moved—[John Swinney]—and agreed to.

Amendments 26 and 27 not moved.

Amendments 71 to 75 moved—[John Swinney]—and agreed to.

Section 38, as amended, agreed to.

Sections 39 to 41 agreed to.

Section 42—Deduction of previous payments: further provision

Amendments 76 to 78 moved—[John Swinney]—and agreed to.

Section 42, as amended, agreed to.

Sections 43 and 44 agreed to.

Section 45—Waiver

Amendments 79 to 84 moved—[John Swinney]—and agreed to.

Amendment 6 not moved.

Section 45, as amended, agreed to.

Section 46—Form and content of waiver

Amendment 7 not moved.

Section 46 agreed to.

Section 47—Period for which offer valid

Amendment 85 moved—[John Swinney]—and agreed to.

Section 47, as amended, agreed to.

Section 48—Acceptance of offer and making of payments

Amendments 8 to 10 not moved.

Section 48 agreed to.

The Convener: It is approaching 10 o'clock. I suggest that the meeting be suspended for seven minutes or so before we move on to the next group of amendments.

09:58

Meeting suspended.

10:06

On resuming—

Section 49—Payments to vulnerable persons

The Convener: We move to payments to vulnerable persons. Amendment 28, in the name

of Kenneth Gibson, is grouped with amendments 29 to 31.

Kenneth Gibson (Cunninghame North) (SNP): Good morning to colleagues and the Deputy First Minister.

In its stage 1 report, the committee raised concerns about section 49, stating that the section is unnecessary due to existing legislation that was designed to protect vulnerable people. It therefore recommended that section 49 be removed from the bill. The committee's concerns related primarily to the fact that the Adults with Incapacity (Scotland) Act 2000 already provided sufficient safeguards. Although I realise that section 49 is well intentioned, I agree with the concerns that the committee raised. For that reason, I propose that the paragraphs referring to adults with incapacity and to people whose capacity "is otherwise impaired" be removed from the bill.

However, I think it important to consider the other group of vulnerable applicants who are included within the scope of section 49. In certain circumstances, children will be able to apply to the scheme, as next of kin. Some might receive significant payments, as nominated beneficiaries, should a survivor unfortunately pass away prior to their application being fully determined and a payment being made. In those circumstances, we must consider the impact that a large lump-sum payment might have on a child—in particular, one who might be dealing with additional vulnerabilities such as having experienced trauma, being at risk of exploitation or dealing with bereavement.

For that reason, I suggest that the committee take an approach that is similar to that of the Criminal Injuries Compensation Authority, whereby redress Scotland would have the power to make directions on payment and management of an applicant's award, when the applicant is under the age of 18. As we know, that is the age at which the bill draws a line between children and adults. That power would mean, for example, that a payment could be made in instalments or retained until the child turned 18.

In the group of amendments, I have also reflected the criminal injuries compensation scheme's approach by including a subsection that would allow a child to request a payment advance—for example, when the applicant lives independently or to assist with their education costs. In any event, amendment 31 would guarantee that once the applicant reached the age of 18, the whole of the redress payment or the balance would be paid to them, as it would be paid to an applicant who is aged over 18.

I feel that the group of amendments to section 49 would deal with the committee's concerns about treatment of vulnerable adults while ensuring that appropriate safeguards and protections for children remain in place.

I move amendment 28.

Amendment 28 agreed to.

Amendments 29 to 31 moved—[Kenneth Gibson]—and agreed to.

Section 49, as amended, agreed to.

Section 50—Review of direction made under section 49

Amendment 86 moved—[John Swinney]—and agreed to.

Section 50, as amended, agreed to.

Section 51 agreed to.

Section 52—Right to a review

Amendment 87 moved—[John Swinney]—and agreed to.

Section 52, as amended, agreed to.

Sections 53 to 55 agreed to.

Section 56—Period for which reviewed offer valid

Amendment 88 moved—[John Swinney]—and agreed to.

Section 56, as amended, agreed to.

Section 57—Withdrawal of review request

Amendment 89 moved—[John Swinney]—and agreed to.

Section 57, as amended, agreed to.

Sections 58 and 59 agreed to.

Section 60—Review of a section 58 determination

Amendment 90 moved—[John Swinney]—and agreed to.

Section 60, as amended, agreed to.

Sections 61 and 62 agreed to.

Section 63—Nomination of a beneficiary

Amendment 113 moved—[John Swinney]—and agreed to.

Section 63, as amended, agreed to.

Section 64 agreed to.

Section 65—Review of determination made under section 64(3)

Amendment 91 moved—[John Swinney]—and agreed to.

Section 65, as amended, agreed to.

Section 66 agreed to.

Section 67—Applicant's death after offer accepted

Amendment 92 moved—[John Swinney]—and agreed to.

Section 67, as amended, agreed to.

Section 68—Invitation to nominated beneficiary to take over application

Amendment 93 moved—[John Swinney]—and agreed to.

Section 68, as amended, agreed to.

Section 69—Application taken over by nominated beneficiary

Amendment 94 moved—[John Swinney]—and agreed to.

10:15

The Convener: We move on to legal fees. Amendment 114, in the name of the cabinet secretary, is grouped with amendments 117, 120 to 126, 131 to 133 and 136 to 139.

John Swinney: Funding for applicants to obtain independent legal advice is a key element of the redress scheme. It is essential that we give survivors a meaningful opportunity to obtain all the support and advice that they need to allow them to make fully informed decisions when they are considering an offer of a redress payment.

However, as the committee commented in its stage 1 report, there is a need to manage legal costs. We are learning lessons from other redress schemes in which legal costs have escalated and which have been subjected to criticism. We do not want that for this scheme; we want the majority of the money to go to survivors, so we need to respect the importance of independent legal advice for survivors, while providing to those who provide the advice clarity about the arrangements that will apply.

In the evidence that the committee heard, there was criticism of what some felt to be the complex nature of the legal fee provisions in the bill. There was concern that the approach introduces an unnecessary bureaucratic burden on solicitors in applying for legal fees, and on redress Scotland in assessing them. A desire was also expressed for greater certainty as to what payment solicitors would receive for their work.

After reflecting on that evidence, I have lodged stage 2 amendments to introduce fixed fees for legal advice. The new provisions are more straightforward and will give more surety about legal spend. Furthermore, the new approach will mean that there are simplified processes in which, rather than all fee requests being passed to redress Scotland for assessment, only those that require an element of judgment and decision making will be forwarded. That will cut administration costs further, and will allow redress Scotland to apply its expertise and to focus on assessment of redress applications, rather than on assessment of legal fees in every case.

At the same time, the provisions will retain an element of flexibility. Although the amendments provide for fixed fees, solicitors will still be able to apply for a bespoke assessment to be carried out in cases in which there are exceptional or unexpected circumstances that the solicitor believes might justify payment of an additional sum.

The bill as introduced provides that legal advice that is paid for under the scheme would not include advice on whether to pursue litigation as an alternative to making a redress application. We have heard criticism of that approach. My amendments recognise that giving notice of civil litigation as an alternative to the redress scheme can legitimately be funded by the scheme, to the extent that the advice is part of other work on making an application. Where advice is essentially about deciding whether or not to sign a waiver, that is covered.

However, it will still be the case that the amount at which the fixed fee is set will not be based on the expectation that extensive advice on civil litigation will form part of the process. That type of advice can often involve significant investigation by the solicitor, and expert reports and opinions from various professionals—for example, from counsel or medical experts.

Although complex and thorough legal analysis can be necessary in civil litigation, the redress scheme is deliberately designed to remove some of the complexities. Existing funding routes, including legal aid and no-win, no-fee arrangements, are in place to assist people who wish to pursue a civil case. I encourage survivors who have an interest in exploring potential litigation to take legal advice on that and to use the existing available funding options. If a survivor is unable to do that prior to submitting their redress application, or if they decide that they want to explore that after they have submitted their redress application, the redress scheme will allow them to pause their redress application.

My officials will continue to work with the Law Society of Scotland and other stakeholders, and to learn from other redress schemes, in order to ensure that the fees that are paid by the scheme are reasonable, and that applicants can access good-quality legal advice without unnecessary or excessive costs being incurred by the scheme.

I am grateful to Mr Gibson for lodging amendment 124, which will prevent solicitors from being able to top up the fee that they receive from the redress scheme and to recoup further fees from applicants. I fully support the amendment, which will provide survivors with reassurance that they will not have to top up the scheme's legal fees from their own funds or their redress payment.

I move amendment 114.

Kenneth Gibson: Survivors should have the security that they will not face legal fees in addition to those that are paid for by ministers under the redress scheme, and I want to ensure that solicitors who obtain fees under the scheme cannot bill their clients for the same work. They cannot do that under the legal aid system, so they should not be able to do it under the redress scheme.

Amendment 124 will offer protection to survivors by assuring them that the scheme is designed to pay all reasonable legal costs in connection with redress applications. Survivors should fully expect to keep the entirety of their redress payments without more legal fees being deducted; amendment 124 will ensure that that is the case. The legislation cannot be a dripping roast for lawyers, as appears to have been the case in Ireland, so I therefore warmly welcome the Deputy First Minister's amendments.

Amendment 124 also recognises that survivors might receive some advice on civil litigation prospects as part of the advice and assistance that they receive in connection with the application process—in particular, with regard to signing a waiver and choosing to accept an offer of redress, rather than going to court. That will be paid for under the redress scheme. However, if a survivor decides instead to pursue the court route, and commissions extensive legal advice on that, the solicitor should not be prevented from billing them or from receiving legal aid funding for that work.

I urge committee members to support amendment 124, which will add clarity to the provisions on legal fees and provide reassurance to survivors and those who advise them.

Jamie Greene: I thank the cabinet secretary and Kenny Gibson for their important amendments. I flagged the matter as an area of concern in the early days of the bill's proceedings.

I am, however, unsure about the net effect of the amendments. Could they result in a scenario whereby, if an award were given to an individual, that individual would retain 100 per cent of the award, come what may? I ask that in order to establish whether there is any technical opportunity under the bill, and through the amendments, for a solicitor, who has been appointed by an individual to act on their behalf, to deduct, through fees or some other means, a portion of the award money that is paid? Are we 100 per cent sure that the effect of the amendments will be that, even if they have had third-party help from an organisation, including a solicitor, applicants will keep 100 per cent of the money that has been awarded by the panel, regardless of whether the money is paid directly to them or through a third party?

Daniel Johnson: I begin by reminding the committee that my wife is a practising solicitor. At the outset, I state that I agree whole-heartedly with the sentiments and intent behind the amendments from the Government and Kenneth Gibson.

In particular, Kenneth Gibson is correct in saying that we must ensure that legal compensation is not used by solicitors to, in essence, unduly gain compensation through the scheme. We must learn the lessons from such schemes in other jurisdictions.

However, could some clarity be provided? I am concerned about unintended consequences of the amendments—for example, where an application is made and an individual subsequently seeks clarity. It is possible that mistakes could be made and clarification sought, and decisions and awards that have been made by redress Scotland could then be challenged legally.

Amendment 124 is very understandable and important, but I would not want people to be barred from getting legal advice as a result of the amendment, if they legitimately seek to clarify or, potentially, to challenge decisions. The ability to do that is an important principle in a democratic society and is, I believe, a requirement under human rights law. I seek clarification that the amendment will not restrict people's ability to get legal advice and to seek legal redress.

The Convener: I am conscious that this platform makes debate quite difficult. There were some direct questions from Mr Johnson and Mr Greene. Would Mr Gibson like the opportunity to address those?

Kenneth Gibson: Yes. Solicitors will not be able to top up the fee that they receive from the redress scheme and recoup fees over and above those that are paid by the scheme in relation to an application. Therefore, crucially, the approach that is proposed in amendment 124 will not impact the

final sum that is received by the applicant. However, it does not restrict applicants from pursuing additional legal advice, which would, I hope, be paid for through legal aid. For example, a survivor could pursue the court route and commission legal advice from a solicitor. The solicitor would not be prevented from billing them, and that would be paid for by legal aid work. Therefore, there should be no impact on the redress payment, which I believe is what Jamie Greene and Daniel Johnson are most concerned about.

John Swinney: I am grateful to colleagues for their comments on this group of amendments. In response to Mr Greene's point, there is no opportunity in the redress scheme for a solicitor to secure payment beyond the legal fees that are envisaged from the sum awarded to a survivor. A survivor could conceivably make a private arrangement with a solicitor, but that would be outwith the scheme. Within the scheme's provision, the point that Mr Greene raised is assured. However, as he has raised it, I will undertake further scrutiny of the issue before we get to stage 3.

I think that Mr Greene wants to make an intervention. I would be happy to accept it.

Jamie Greene: Thank you, cabinet secretary. That is the power of the chat box.

I want to probe the cabinet secretary on the issue ahead of stage 3. If there is any benign loophole in the system, it is that the people who might apply for assistance are perhaps those who are most likely to be vulnerable. I think that the cabinet secretary knows where I am going with this. Private arrangements might well be legal and bona fide, but that does not necessarily make them morally right. Will the cabinet secretary work with members on the issue?

John Swinney: I take that point on board. Although I am giving what I hope is a reassuring response to Mr Greene, I want to take the issue away once we have settled stage 2 and consider, in the cold light of day, whether there are any other such loopholes. If necessary, we will take steps to address them, and I will happily discuss that with Mr Greene and colleagues in advance of stage 3.

In relation to Daniel Johnson's point, there is flexibility for solicitors to seek sanction to increase the fixed fee, so cases and survivors would not be prejudiced in that process. A rigid shape is in place to enable survivors to access independent legal advice in connection with the scheme, and those who are providing that advice know what arrangements for fees will apply. The provisions provide certainty to everybody involved—survivors and providers of legal advice—and we acknowledge in the bill the importance of individuals having access to independent legal advice to enable them to make appropriate decisions for their circumstances.

I invite members to support the amendments in this group.

Amendment 114 agreed to.

Amendment 11 not moved.

Section 69, as amended, agreed to.

10:30

Section 70—Nominated beneficiary's death etc

Amendments 115 and 95 moved—[John Swinney]—and agreed to.

Section 70, as amended, agreed to.

Section 71—Liability for payment made in error

The Convener: We move to the group on error. Amendment 116, in the name of the cabinet secretary, is grouped with amendments 118, 127, 128 and 134.

John Swinney: This group of amendments is concerned with the approach that is set out in the bill to payments that are made as a result of an error. By that, I mean both when an administrative error has occurred in the making of the payment—such as payment of an incorrect amount or payment to the wrong person—and when an error has led to the decision to make the payment having being made incorrectly, or its having being made correctly but on the basis of incorrect or misleading information that materially affected the decision to make the payment. That covers fraudulent information, for example. The bill as introduced contained provisions to allow for the recovery of redress payments in those circumstances. That is an appropriate financial control and ensures that the scheme has the powers that it needs to deter fraud or to effectively deal with the consequences of fraud, should it arise.

Amendment 127 is the main amendment in the group. It ensures that errors can be addressed properly in all aspects of the redress scheme while allowing for the recovery of other payments that are made in connection with applications for redress payments. As I mentioned, the recovery of redress payments is already covered by sections 71 to 75 of the bill. The payments that are covered by amendment 127 are all other payments under the bill: payments to people providing support to survivors before and after they apply; payments for professional reports; fees for legal work; and

other costs and expenses that an applicant for a redress payment might have incurred.

A person who has been paid for any of that work, either directly or indirectly, might have to pay the money back if there has been an error in the making of a payment. The error must relate to the payment that has been made and not, for instance, to any redress payment with which it is connected. For example, if a redress payment was initially made due to fraud, the provisions would not allow for the recovery of the legal fees connected with that application if the solicitor was unaware of their client's behaviour.

However, I want to be clear that amendment 127 would not allow for the recovery of a payment made due to error from a survivor. Instead, the amendment allows for the recovery of payments made due to error to be recovered from those who benefit from the error—that is, from the professional who was, for example, overpaid for support services or legal work, or from the expert who fraudulently invoiced for assessments that were not carried out or reports that were not submitted.

Amendment 128 would insert a regulation-making power into the bill so that further detail about how recovery of payments made due to error can be set out. Section 75 contains a similar provision in relation to the recovery of redress payments.

Amendment 134 is consequential to amendment 128. Amendments 116 and 118 make minor technical changes to the sections on the recovery of redress payments that have been made as a result of error.

I hope that committee members agree that it is essential that the scheme has the power that it needs to ensure that any error in payment can be effectively dealt with separately and in addition to any criminal or professional sanctions.

I move amendment 116.

Amendment 116 agreed to.

Section 71, as amended, agreed to.

Section 72—Reconsideration of determination where possible material error

Amendments 96 and 97 moved—[John Swinney]—and agreed to.

Section 72, as amended, agreed to.

Section 73—Review of reconsidered determination

Amendment 98 moved—[John Swinney]—and agreed to.

Section 73, as amended, agreed to.

Section 74 agreed to.

Section 75—Power to make further provision about reconsiderations

Amendments 117 and 118 moved—[John Swinney]—and agreed to.

Amendment 12 not moved.

Section 75, as amended, agreed to.

Sections 76 to 78 agreed to.

After section 78

The Convener: The next group of amendments is on "Information: access by applicant". Amendment 32, in the name of Daniel Johnson, is grouped with amendment 33.

Daniel Johnson: The amendments relate to an issue that I raised at last month's additional evidence session. It is the very sad situation that many survivors simply do not know precisely what happened to them. They did not necessarily know where they were, who placed them there or the reasons and rationales for that—or about other such circumstances relating to their time in care.

Amendments 32 and 33 seek to establish the survivors' right to gain information that might be in the possession of redress Scotland. It is very likely—it is certainly possible—that redress Scotland, during its activities, will gain access to evidence to which the survivors have not previously had access. The amendments seek to establish their right to have access to that information through the course of their application. That right cannot contravene any pre-existing data protection legislation, as amendment 32 seeks to clarify. Amendment 32, which is straightforward, is important to a number of survivors who are keen to establish that right.

I move amendment 32.

John Swinney: I thank Mr Johnson for lodging amendments 32 and 33. I agree that we should do all that we can to maximise survivors' access to their records and ensure—as far as is possible within existing legislation—that applicants are aware of the form and contents of evidence relating to their application that is submitted by others to redress Scotland.

Amendments 32 and 33 represent a positive addition to the scheme, but there are some points of detail that require to be looked at further and that will need adjustment at stage 3. On that basis, I am pleased to support the amendments today. I will work with Mr Johnson to make the necessary technical proposals for Parliament to consider at stage 3.

Daniel Johnson: I am keen to work with the cabinet secretary to make any corrections or adjustments to the amendments at stage 3. I press amendment 32.

Amendment 32 agreed to.

Sections 79 to 82 agreed to.

Section 83—Confidentiality of information

Amendment 33—[Daniel Johnson]—moved and agreed to.

Section 83, as amended, agreed to.

Section 84—Power to share information with third parties

Amendments 13 to 15 not moved.

Section 84 agreed to.

Section 85—Provision of support to persons in connection with an application

Amendment 119 moved—[John Swinney]—and agreed to.

Section 85, as amended, agreed to.

Section 86—Provision of support to certain persons eligible for a payment etc

Amendment 99 moved—[John Swinney]—and agreed to.

Amendment 16 not moved.

Section 86, as amended, agreed to.

Section 87 agreed to.

Section 88—Duty on Scottish Ministers to pay certain legal fees in connection with applications

Amendment 120 moved—[John Swinney]—and agreed to.

Section 88, as amended, agreed to.

After section 88

Amendments 121 to 123 moved—[John Swinney]—and agreed to.

Amendment 124 moved—[Kenneth Gibson]—and agreed to.

Section 89—Assessment of amount of payment

Amendment 17 not moved.

Amendment 125 moved—[John Swinney]—and agreed to.

Section 90—Notification and review of payment

Amendment 126 moved—[John Swinney]—and agreed to.

After section 90

10:45

Amendments 127 and 128 moved—[John Swinney]—and agreed to.

Before section 91

The Convener: The next group of amendments is on "Advance payment scheme: report". Amendment 18, in the name of Iain Gray, is grouped with amendment 19.

Iain Gray: These amendments are designed to reflect evidence that the committee heard not about the redress scheme but about the advance payment scheme. The point was made quite strongly to us that, in the circumstances of the pandemic, there is a case—I think that a case was made—for reducing the qualifying age for applying to the advance payment scheme. Currently, that age is 70; the suggestion was that it should be reduced to the normal retirement age, which is now 66.

The evidence that the committee heard on the advance payment scheme, particularly on the way in which it had dealt with the evidence and testimonies of survivors, was almost entirely very positive. The proposals are in no way a criticism of the advance payment scheme. We are in a very particular circumstance, and they would be a way of recognising that in line with the fundamental purpose of the scheme, which is to allow redress for those who may not have a great deal of time to wait for it.

The advance payment scheme was set up by separate legislation, so it is quite difficult to amend it in the bill that we are considering. I also recognise the fact that the redress scheme that we are legislating for is to replace the advance payment scheme. We are therefore really talking about the potential for a change in the window between now and when the new redress scheme comes into play, which I hope will be very soon.

The amendments are designed to allow for some consideration of that circumstance. It is suggested that, immediately after the bill receives royal assent, ministers should lay before the Parliament a report that sets out the timetable for the introduction of the new scheme, which would give members the opportunity to state whether any changes should be made in the admittedly brief period up to the introduction of the advance payment scheme and, in particular, whether any changes should be made in response to the pandemic.

I move amendment 18.

John Swinney: I am grateful to Mr Gray for lodging these amendments.

I understand the need for clarity and transparency in relation to when survivors can expect redress Scotland to be established and, more important, when they can make an application to the scheme and receive their redress. I am determined to deliver redress to survivors as soon as possible following parliamentary consideration of the bill, and I am grateful to members from all parties who have made clear their commitment to redress. Survivors have waited long enough. We have all put that point on the record.

It would be unusual to enshrine in parliamentary legislation such a short-term commitment as is proposed. That said, I understand the importance of survivors and others having an early update on implementation.

An election is scheduled. We obviously do not know what the outcome will be, but, should the Government be re-elected, I am happy to commit to updating the Parliament before the summer recess on the matters that are set out in amendment 18. I will do that by laying a report, if that is the preference. Indeed, I fully expect to provide more of an update to Parliament at stage 3 on the scheme's implementation. I therefore ask Mr Gray to accept the commitment that I have given and not to press amendment 18.

It is important to bear in mind that the advance payment scheme was set up on the grounds of urgency, using exceptional common law powers. I can confirm that the current minimum age for the advance payment scheme is 68—we reduced it from 70 in the original scheme—and that any changes to the scheme will have to be consistent with the legal powers underpinning it. The advance payment scheme was always intended to be a precursor to the main statutory scheme. Our priority now is to ensure that the development and implementation of the statutory redress scheme continues at pace and that redress Scotland is established and begins to assess redress applications from survivors as quickly as possible.

We regularly monitor the effectiveness of the advance payment scheme, and, where minor changes to improve the scheme can be made in a way that respects the legal basis and purpose for which it was set up, we welcome the opportunity to consider those changes. I will further consider what options are available to me, while being mindful of the limited nature of the powers under which the advance payment scheme operates. If the Government is re-elected, I commit to updating the Parliament on that before the summer recess.

The Convener: I invite Mr Gray to wind up and to say whether he will press or withdraw amendment 18.

Iain Gray: I appreciate the cabinet secretary's response. On the basis of the commitments that he has given and in the certainty that he will remember, when we get to stage 3, to make those commitments again on the record, I will not press amendment 18.

Amendment 18, by agreement, withdrawn.

Sections 91 to 93 agreed to.

Before section 94

The Convener: We move to the issue of a survivors' forum. Amendment 129, in the name of Daniel Johnson, is grouped with amendment 135.

Daniel Johnson: One of the issues that the committee has grappled with while scrutinising the bill is what the appropriate involvement of survivors should be in redress Scotland. That issue is difficult not just for us, because there are a range of views among survivors as to what is appropriate. Some views state that survivors should be involved not just in the scheme overall but in the panels; others think that that would be entirely inappropriate. However, what is important is that there is a role for survivors in the scheme's operation and that that is a provision in the bill.

Amendment 129 flows directly from representations that were made to me by survivors and seeks to establish provision in the bill for a survivors' forum and to set out the broad functions of that body—that it should seek to improve the scheme, to provide scrutiny and assessment of how it operates, and to ensure that it operates overall in a trauma-informed way that is sensitive to survivors' needs and requirements. I think that amendment 129 would provide clarity for survivors about the role that they will have in the functioning of redress Scotland.

I move amendment 129.

John Swinney: I am grateful to Mr Johnson for lodging amendments that would include provision in the bill for a survivors' forum, and I am happy to support them in principle. As you know, we are already fully committed to establishing the forum. I share Mr Johnson's intention that survivors should play a key role in improving and enhancing the delivery of the scheme throughout its lifetime. It will be invaluable to have the forum's feedback and perspectives on survivors' experiences of the scheme. We need to know whether applicants feel that they are being treated with dignity, respect and compassion, and whether more could be done to support them and to make the application process as straightforward as possible.

I believe that Mr Johnson has sought to reflect those principles through his amendments. I share those objectives, and I hope that he agrees that we might work together to introduce technical improvements at stage 3 to the specific wording of the provision. For example, we might want to make it slightly more flexible in order to make it possible for family members of survivors, such as next of kin, to be forum members, too. It might also be helpful to provide—

The Convener: I am sorry to interrupt, cabinet secretary, but I think that Ross Greer would like to intervene. Can you confirm that, Mr Greer?

Ross Greer: Yes, convener. I am sorry—I should have typed I rather than R in the chat box.

John Swinney: I am happy to give way.

Ross Greer: Thank you, cabinet secretary. With regard to your point about further changes at stage 3 to improve the provision, I have been contacted by a number of survivors who, although they understand the principle behind the forum, have a significant concern—as you and committee members will be aware—about perceived hierarchies in the survivor community, with some voices being heard more than others. I simply urge that, in the process of developing potential amendments for stage 3 and in the further process of setting up the forum, there is extensive consultation with survivors to ensure that those who are sceptical and concerned about the forum have their voices heard in addition to those who are already confident that the forum is required.

John Swinney: I am happy to give an assurance that there must be consultation with survivors on all these issues. That principle runs through all the steps that the Government has taken to design the scheme, and I want it to characterise all our remaining actions. It is vital that we build confidence around these arrangements in the survivor community, as that confidence has not always been present. I am wholly committed to that objective, and I am happy to give that assurance to Mr Greer and to survivors.

With regard to possible changes at stage 3, it might be helpful to provide flexibility so that others who are not survivors themselves can nonetheless contribute to the forum—potentially to chair it, to support the survivors or to represent a supportive organisation. My commitment to Mr Greer is that we will tread with care and openness to ensure that we get the detail correct.

We might want to look at whether regulations under the new provision would always require to be subject to the affirmative procedure or whether there should be some degree of flexibility in the exercise of those powers—for example, if we were simply amending provisions on levels of forum members' expenses in the light of inflation.

We would also want to consider carefully the proposed functions of the forum. For example, the bill refers to a process of offers rather than awards. In addition, we need to be careful about what is said about scrutiny. Given the confidential and independent nature of the decision-making process, the idea of providing feedback may be more appropriate.

Although some points of detail will need further refinement, I will support these amendments today, and I propose to work with Mr Johnson on those points of detail with a view to lodging further amendments at stage 3.

Daniel Johnson: I thank the cabinet secretary for those constructive remarks. I am happy to work with him and with others to modify the amendment at stage 3. I certainly have no objections to the details that he raised in his remarks.

I also thank Ross Greer for his remarks. He is absolutely right: although the forum is vital for redress Scotland, it is clear that there are sensitivities regarding its composition and functions, and I understand and recognise the concerns that he has voiced.

Amendment 129 agreed to.

Section 94 agreed to.

11:00

Schedule 2 agreed to.

Section 95—Dissolution of Redress Scotland

Amendments 130 and 131 moved—[John Swinney]—and agreed to.

Section 95, as amended, agreed to.

Section 96—Interpretation

Amendments 101, 132, 102 and 103 moved—[John Swinney]—and agreed to.

Section 96, as amended, agreed to.

Section 97—Guidance

Amendment 104 moved—[John Swinney].

Amendment 104A moved—[Alex Neil]—and agreed to.

Amendment 104, as amended, agreed to.

Amendment 133 moved—[John Swinney]—and agreed to.

Section 97, as amended, agreed to.

Section 98—Regulation-making powers

Amendments 105, 106 and 134 moved—[John Swinney]—and agreed to.

Amendment 135 moved—[Daniel Johnson]—and agreed to.

Amendment 107 moved—[John Swinney]—and agreed to.

Amendments 136 to 139 moved—[John Swinney]—and agreed to.

Section 98, as amended, agreed to.

Section 99 agreed to.

Section 100—Commencement

Amendment 19 not moved.

Section 100 agreed to.

Section 101 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. The bill will be reprinted as amended at stage 2, and the amended version will be published tomorrow morning. The Parliament has not yet determined when stage 3 will be held. Members will be informed of that, along with the deadline for lodging stage 3 amendments, in due course. In the meantime, stage 3 amendments can be lodged with the clerks in the legislation team.

I thank everyone for their input in our stage 2 deliberations and previously. I thank the clerking team and the bill team for their support during the process, and I thank Professor Kendrick for his advice to the committee at stages 1 and 2. Finally, I thank once again all the victims and survivors who engaged with the bill process. We could not have achieved what we have today without their input and their willingness to come forward.

Meeting closed at 11:07.

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