OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Education and Skills Committee

Wednesday 4 November 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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EDUCATION AND SKILLS COMMITTEE
25th Meeting 2020, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Daniel Johnson (Edinburgh Southern) (Lab)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
Kenneth Gibson (Cunninghame North) (SNP)
*Iain Gray (East Lothian) (Lab)
*Jamie Greene (West Scotland) (Con)
*Ross Greer (West Scotland) (Green)
*Jamie Halcro Johnston (Highlands and Islands) (Con)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Alex Neil (Airdrie and Shotts) (SNP)
Beatrice Wishart (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dr Ron Culley (Quarriers)
Viv Dickenson (Church of Scotland)
John Swinney (Deputy First Minister and Cabinet Secretary for Education and Skills)
Dr Judith Turbyne (Office of the Scottish Charity Regulator)
Derek Yule (Convention of Scottish Local Authorities)

CLERK TO THE COMMITTEE

Gary Cocker

LOCATION

Virtual Meeting

Scottish Parliament

Education and Skills Committee

Wednesday 4 November 2020

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning, and welcome to the 25th meeting in 2020 of the Education and Skills Committee. I remind everyone to turn their mobile phones to silent.

We have received apologies from Kenneth Gibson. Our colleague Beatrice Wishart has other committee business and will be joining us as soon as it is practical.

Agenda item 1 is a decision on taking agenda items 3 and 4 in private. I am looking for confirmation from members.

Thank you. We have agreed to take those items in private.

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

09:01

The Convener: Agenda item 2 is the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. We have with us a panel representing organisations that may wish to contribute to the redress scheme. We welcome Viv Dickenson, chief executive officer of the social care council of the Church of Scotland, which is known as CrossReach; Derek Yule, adviser on local government finance at the Convention of Scottish Local Authorities; Dr Ron Culley, chief executive officer of Quarriers; and Dr Judith Turbyne, senior manager for policy and improvement at the Office of the Scottish Charity Regulator.

I invite each witness to provide a brief description of their organisation and their interest in the bill.

Viv Dickenson (Church of Scotland): Thank you for inviting me to give evidence. I am the chief executive of CrossReach, a large voluntary sector organisation that provides services across the country for users ranging from the youngest children all the way to those needing end-of-life care.

We have an interest in the bill. We support the bill and support survivors' rights to redress. However, we face a number of challenges with the bill as presented. Those would make it difficult for us to contribute in the spirit in which we would like to. I am happy to give evidence.

Derek Yule (Convention of Scottish Local Authorities): You will all be aware that COSLA is the member organisation for the 32 local authorities in Scotland. It is a councillor-led, cross-party organisation that champions the vital work that councils do to secure the resources and powers that they need to deliver a wide range of services across Scotland.

The issue of legislation on historical child abuse falls within that remit, as councils are the main providers of social care services, and particularly of children's services, in Scotland. COSLA is likely to be a key financial contributor to the proposed redress scheme.

Dr Ron Culley (Quarriers): I am the chief executive of Quarriers, which is a Scottish charity that has existed for around 150 years. Our modern organisation delivers children's and adult services across Scotland. We support around 5,000 people in Scotland and employ about 1,700 staff.

Our interest in the bill is central to us as an organisation. We are committed to the rights of survivors and have a recent track record of working productively with survivor organisations. We think that the bill can be improved in some areas. We have significant concerns about the affordability of participation in the redress scheme. As an organisation that wants to participate, we would like to work with the committee, the Scottish Government and the Parliament to ensure that that can happen.

Dr Judith Turbyne (Office of the Scottish Charity Regulator): Many of you will know that OSCR is the regulator and registrar of Scotland's 25,000 charities. I thank the committee for inviting us to talk about this important bill. We support the desire to remove any real or perceived barriers to contributions by charities. Our submission is about the mechanics of the scheme and the resulting potential impacts on charity law, and we will confine our comments today to that.

The Convener: I remind members to put in the chat bar an R and an indication of when they want to speak. We are tight for time and the committee is big, so I say to the witnesses that, if they want to answer a question, I will not call them unless they put an R in the chat bar. Without further ado, we move to questions and answers.

Iain Gray (East Lothian) (Lab): All the witnesses have talked in their introductions about their support for survivors' rights to redress, but the committee has heard evidence from survivors that they feel that those rights will be compromised by the waiver that is in the bill, under which they would have to give up the right to civil justice in order to benefit from the redress scheme. All your submissions talk about the need for the waiver as an incentive to participate in the redress scheme. Is there a moral—albeit historical—obligation to participate, without the need for a financial incentive?

Viv Dickenson: We are well aware that there is a tension between our current position and that of survivors, and we are all keen to resolve that if we can as the bill passes through Parliament. We absolutely acknowledged in our consultation response that children were harmed in our care and that there is a moral obligation to put that right through apology and through a tangible contribution to the scheme.

The waiver situation is material to the ability to have wider conversations about financial contributions. We had hoped at some point to engage insurers, but they will contribute only if they have some certainty that they will not also be pursued for civil claims. We recognise that that goes to the heart of civil rights for survivors.

We understand now that insurers will not commit until the bill is passed, which puts us in a difficulty with the waiver. If there was another way for us to contribute meaningfully, carry out our charitable purposes and not be hit several times by costs for the same claims, we would be keen to explore it and find a resolution.

Dr Culley: I agree with Viv Dickenson. To answer Mr Gray's question, we absolutely have a moral obligation—I do not think that any provider would contest that idea. The question is how we can create the conditions that will support participation in the scheme.

As Viv Dickenson said, the waiver has been proposed to create an incentive—principally for insurers, to be honest—by capping liabilities. However, even with the waiver's inclusion in the bill, I am not sure that insurers will support the participation of the organisations that they are working with. If insurers were to participate, the waiver would be important, but that is highly doubtful at this stage.

Dr Turbyne: Absolutely, yes, there is a need and a moral imperative to deal with the harms of the past. Our interest in a waiver is around the assurance that it would give to charities. Under the Charities and Trustee Investment (Scotland) Act 2005, trustees of the charity have to act in the best interests of the charity at all times. That means weighing up those historical harms, which will have a very serious weight, with the impact of any contribution on current and future beneficiaries, many of whom will be vulnerable. In a sense, the waiver would be a way to give a level of assurance, so that that decision making could be as good as possible. It would be worth exploring another way of doing that.

Derek Yule: Mr Gray's question goes to the crux of the dilemma, because he is absolutely right that there is a moral responsibility here. COSLA recognises that the collective and national responsibility must be addressed. To illustrate my response, I have had discussions with colleagues across the country who are dealing with this. There are about 200 litigation cases in progress, and I am hearing from colleagues that there is real difficulty in identifying where liability or responsibility falls.

Some of that has to do with local government reorganisation, some of it is to do with the passage of time and some of it is to do with the fact that some councils place children in other authority areas. Therefore, it has been difficult to identify where responsibility lies. That goes to the crux of the moral argument, because, if you are a claimant, you could be passed from pillar to post, with nobody really accepting responsibility.

We have to balance that moral argument against the financial argument of who contributes to the waiver, which is where the question about insurance comes in. Over the years, local authorities have generally carried liability insurance, which should cover them for claims in such instances, but, as you have heard from other contributors, the waiver potentially rules out the possibility of being able to get insurance to cover the cost of claims. Therefore, we have a dilemma: there is the claimant's point of view about the ease with which they can have their claim heard and addressed quickly and there is the financial issue of who pays. I hope that that makes sense, but I am happy to expand on that if necessary.

Iain Gray: I ask for your forbearance, convener, as it strikes me that I should probably put on the record that I am an elder of the Church of Scotland, given its presence on the panel today. I am sorry—I should have done that earlier.

Those responses raise a lot of questions, and I am sure that colleagues will pursue some of them. However, everyone on the panel said that they are interested in discussing alternatives to the waiver, particularly those alternatives that could avoid the same claim having to be paid twice. In evidence to the committee, it has been suggested that an offset would achieve that, so that redress payments would be offset against any further compensation awarded through the civil courts. Do the witnesses consider that an offset could achieve the balance that they have all talked about?

The Convener: Ms Dickenson is first. Please could the other witnesses indicate if they wish to answer as well?

Viv Dickenson: The offset is a partial solution to the waiver. We have just started to consider it, but there are still legal costs that organisations will incur on top of that if they are to defend claims without insurance sometimes. Therefore, it is a partial solution. We would like to hear more about what is being proposed on that.

Dr Culley: We must be interested in any conversation about options that avoid the diminution of survivors' rights. We are committed to exploring those options. The Parliament must decide to what extent it wants to set up a scheme that relies on funding from insurers rather than on funding that comes more straightforwardly from the participating organisations.

09:15

The waiver exists to incentivise insurers. I do not think that it will do that well anyway, and the offset erodes the incentive for insurers to participate. I would rather dispense with insurers altogether and look at the option of participation without relying on the insurance contribution. That, however, raises a far more direct question about affordability. We are unable to participate now due to the level of contribution that the Government is asking for.

Derek Yule: I have a slightly different view. I am not a lawyer, although I have been involved with insurance for a long time due to my length of experience in local government.

I do not see the waiver as an alternative to insurance. My understanding of how the scheme would operate is that the individual would make a claim to redress Scotland. If redress Scotland found that the individual had a valid claim, they would be given the opportunity to sign the waiver. I see it as being like an out-of-court settlement. I am not sure whether that is a good comparison. My understanding is that a person who signed the waiver would not take out further litigation against anybody.

I do not see why insurers would want to contribute in that situation. The possibility for somebody to take out litigation against local authorities, voluntary organisations or charities would still be available to them until they signed the waiver. Are we encouraging people to make claims that might otherwise never have got as far as civil litigation? My perception—real or not—is that a lot of the people who will make claims are probably not people who might be prepared to go as far as court with civil litigation. That is where the insurers would come in: they might decide to defend a case at that stage.

An element of this goes back to the moral debate about the collective national responsibility for wrongs that happened in the past. There is a difference between that and what the waiver is intended to do. I think that, because there is the possibility that litigation might still be taken out, insurers will not be interested in the scheme and will see the risk for them as still coming from cases that will be settled in court. Councils and others will carry liability cover as insurance against that sort of situation.

That becomes a funding question, which may be the point that Dr Culley was making. The resources used to contribute to the waiver scheme might cover a risk that councils are currently insured against and that they have been insured against in the past. There would be an additional cost to councils for contributing to the waiver scheme, and they would still pay for insurance cover for cases that were taken through the court system.

Alex Neil (Airdrie and Shotts) (SNP): The replies are interesting, and they raise a number of issues. I will begin with two simple questions.

First, what do the witnesses think about the waiver and the idea of offset? Are we better to do away with the waiver on the understanding that, should there be civil action and an award as a result of it, any payments that the participating organisations or insurers make as part of redress will be taken into account before any settlement is agreed in the civil court?

Secondly, Mr Yule raised an interesting point that we have not heard before, which is the question of who, at the end of the day, has liability in a civil action. What is the answer to that question? How do we resolve the matter of liability, and should it be addressed in the bill? I will welcome comments on those questions.

Derek Yule: Mr Neil has asked a question on, again, the legal perspective. I refer to my previous comments and to the experience that I hear colleagues and councils across Scotland that are dealing with claims are having around the difficulty in identifying responsibility. The collective argument perhaps comes in when we talk about funding the scheme.

There is recognition that local authorities are liable—there is genuine recognition, given the areas of responsibility, that there is a collective national responsibility. I suggest that it is better to consider the issue as a responsibility of local government as a whole than it is to try to identify which council might have been responsible. The latter approach makes it difficult for a claimant to identify where responsibility might lie—partly because of the reorganisation of local government over the period that the bill covers.

Cases in which councils might have placed children in care outside their authority area should go in the records. One of the strengths of the bill is that it might consider collective responsibility and resolve some of those cases, although one of my concerns is that that process could take a considerable time. I have heard examples of cases being batted from one council to another, as people argue about who is responsible. That issue needs to be recognised in the bill.

If it goes ahead, an offset, in my understanding, would consider the different levels of waiver, which would be a resolution to a case if the claimant accepts redress through the scheme.

I guess that, at some point, claimants would have to decide whether they believed that their claim was likely to be accepted through redress Scotland and whether the significance of the claim justified taking it into civil litigation action. The success of the claim would be strengthened if they took the discussions through redress Scotland and got to a stage at which redress Scotland believed that a settlement would be justified.

I am not sure where the matter would be left with a claim being made to the courts—one would have to identify a responsible party against which to raise a court action. One of the benefits of a redress scheme is the possibility of considering collective, rather than individual, responsibility.

Dr Culley: Alex Neil's question is really good. There is less complexity for us at Quarriers, as an organisation, than there is for colleagues in the local government sector. If a survivor brings a case against us through the civil courts, the court will then establish liability as part of its judgment, and the liability will connect to whether an insurance payout will be made as part of the proceedings.

That point creates a dilemma with regard to the bill. What the bill does not and cannot do is establish liability, because it uses a non-adversarial process, and, by virtue of not establishing liability, the only way to involve the insurer is to create an incentive. I hesitate to use that language at all, given the sensitivities of the issue and the importance of the conversation about survivor rights and reconciliation, but the alignment of incentives is really important in all this. An insurer may take the view that, if there is a waiver that caps liability, it would be in their commercial interests to support participation. By contrast, if the offsetting mechanism was used, that would not, itself, limit liability. My reckoning is that it would weaken the incentive for an insurer to support participation by organisations that it supports.

Colleagues in Government have tried to put everything together to create a bill in which the incentives align. Unfortunately, however, I do not think that it will, in the end, be strong enough to secure the involvement of insurers. I come back to the issue of affordability: without insurance, we will not be able to afford to participate.

Viv Dickenson: I will pick up on that point. Ron Culley highlighted the importance of getting the conditions right so that we can contribute. As I said previously, offsetting might be part of the solution, but the real solution is to overcome the barriers to voluntary contributions. The way in which some of the policy documents around the bill are written—I am thinking of the financial memorandum, in particular—is based much more on an algorithm. The wording is not about voluntary contributions but about subscriptions to the scheme. That is one of the difficult issues, and it predicates against affordability.

Liability is a difficult area. The Church of Scotland has had a civil case in which we took absolute liability and made the best settlement that we could for the people who raised the case. What we did not do was fight the case on the basis that we had involved the police and the police had

found that there was no case to answer at the time. We had asked the local authority to remove the children, because we felt that there was something going on, but the police could find no evidence for that. There was police and local authority involvement, but, at the end of the day we did not want to put in place a barrier to prevent the survivor from getting just recompense, so we settled. We did not want the survivor to have to go through a more adversarial process than was already encapsulated in the civil action.

The area is really complicated. The committee has a lot of work to do to understand some of the complexities around liability and to work them out as the bill goes through Parliament.

The Convener: We will hear a quick supplementary question from Alex Neil.

Alex Neil: I go back to the issue of collective liability. Perhaps Mr Yule can expand on how that would operate with local authorities, in particular, because they potentially have dual liability in some cases—as a provider of services, where there was alleged abuse, and as a regulator, where institutions in which abuse took place were not properly regulated.

Is Mr Yule suggesting that, in the charitable and non-local-government sector, the charities and the insurance companies could come together to provide a collective compensation fund instead of acting as individual organisations?

The Convener: We will go to Mr Yule first, and the other witnesses can indicate if they want to come in.

Derek Yule: I was responding specifically from a local authority point of view. First, we have to look at streamlining the process for survivors. That is a moral argument—we need to make things simpler. In examples such as I mentioned, it was difficult to identify which local authority was responsible.

I have had discussions about what the funding of the scheme might look like. There is a will for money to come from local authorities to pay into a redress scheme. That is certainly a potential solution, and it would streamline the process for survivors so that they would not have to take a case against a particular local authority; rather, there would be collective responsibility. There are advantages in trying to streamline the process for survivors, which is where I was going with my suggestion.

09:30

It is about recognising the difficulties of funding, but, if local authorities do make a meaningful contribution, it should be paid collectively rather than by trying to assess liability at individual council level for each claim, which would lengthen the process substantially and, in many cases, be extremely difficult to prove.

Dr Culley: The charitable sector is slightly different to local government, for which there is probably a stronger argument for a collective or shared arrangement. We would be open to discussion on that, but I underline that I do not see there being sufficient incentive in the bill as drafted to involve insurers. It is difficult to say, because, up to this point, the insurers have not taken a view. However, at this stage, I cannot see insurers participating at all.

Jamie Greene (West Scotland) (Con): Following Dr Culley's comments, I am looking for education or clarification. Your comments seem to imply that you will have a choice with regard to how you fund the various claims and about whether you participate in the scheme, pay out voluntarily or through other means, or engage in civil litigation and that, therefore, insurers will also have a choice about whether they pay out or allow you to participate.

I am a bit confused, because a number of witnesses from victims' organisations from whom we have heard seem to have the expectation that insurance companies will bear the brunt of the financial liability of charitable and third sector organisations such as Quarriers. Therefore, they feel less worried about the implications of making claims against such organisations, which they accept do good work. However, despite their understanding that insurance businesses will underwrite claims, you have suggested that there is uncertainty about whether the insurers will participate. Will you talk me through that?

Dr Culley: Yes—no problem.

It is worth distinguishing between the two routes by which survivors may achieve compensation: accountability and liability. The traditional route is through the civil courts. It is right to say that, in such circumstances, organisations will normally have taken the trouble to acquire insurance over the years and that the claim will normally be contested on the instruction of the insurer.

The survivors are right to say that, in most circumstances, as the claim goes through the civil courts, the first question is about the position of the insurer in respect of its decision to settle or contest the claim. Of course, I underline that there is a limit to all insurance policies. Most organisations will have exposure beyond the point at which they are insured. That is a real concern for organisations such as Quarriers, because we have to be alive to the limits of our insurance as cases are taken though the civil courts. Of course, we do not have a choice at all—nor should we—if somebody wants to pursue a legal case. It is

completely correct that that should go through the appropriate civil court process.

The choice that we have relates to the scheme that is being proposed by the Scottish Government, through the Parliament. We want to participate in the scheme, because it is the right thing to do, but we do not think that the conditions have been created to allow for our participation. One of the reasons why that is the case is that there is no mechanism in the bill that requires insurers to participate or to fund the participation of organisations such as ours.

There are probably three scenarios that could play out. The first is one in which the Scottish Government identifies a large sum that needs to be paid by way of participation, in the hope that that is supported by the insurer. The second is one in which a more modest sum can be made available that does not require the participation of the insurer. In both those circumstances, we would participate. My worry is that we are in the third position, in which the Scottish Government is asking for a large sum, but there is no indication that insurance will cover the cost of that. Therefore, we will be asked for a sum that goes significantly beyond what we can afford to contribute. For me, that is a deeply frustrating position to be in.

Jamie Greene: I am sorry to interject in what is a very helpful answer, but I am not sure that, from a technical legislative point of view, the bill could bring in the insurance business anyway. You seem to be implying that, unless it is guaranteed that insurers will underwrite the pay-outs, you will not participate. Is that what you are saying?

Dr Culley: No. We want to participate, and we will participate if the sum that is asked of us is affordable. However, the sum that is being asked of us is a million miles away from being affordable.

The Convener: Ms Dickenson and Mr Yule want to come in.

Viv Dickenson: [*Inaudible*.]—as things stand.

The Convener: I am sorry, but we missed the start of your answer. Could you start again, please?

Viv Dickenson: No problem. On the point about insurance, my feelings are even stronger, in that I think that insurers are not likely to participate. I would be extremely surprised if, at the end of this process, the conditions will have been created for them to participate. That means that organisations will be left to make contributions ourselves.

Ron Culley's point is entirely appropriate. He is saying is that there is a level of contribution that we are currently being asked for that is predicated on insurance backing it up. That amount is not affordable for many organisations, which is why we are saying that the financial memorandum needs more scrutiny so that members understand what we are being asked to contribute. The way in which the algorithm works means that we are in the invidious position of saying that we really want to support the scheme, but the current conditions make that unaffordable.

Derek Yule: My understanding is that the level of proof that will be required under the redress scheme will be lower than the level that is required to take a civil case to court. From a local authority perspective, councils will have insurance cover that covers civil litigation going to court. The insurers will recognise that they are carrying that risk and that they require to have sums of money available for that.

As I said, the redress scheme will involve a lower standard of proof. We can turn the question around. Why should insurers put money into a fund to meet the cost of that, which could be in addition to the cost of claims that they might face through civil litigation? We are talking about recognising the moral responsibility, but from the insurance companies' perspective, their responsibility is to their shareholders. That is where the difficulty will arise when it comes to insurers being prepared to put money into the scheme fund. Putting money into that fund will represent an additional cost, which I do not believe will be covered by the insurance premiums that have been paid over a number of years. It presents itself as an additional cost that would have to be met; given the pressures in the current climate, that is a significant additional pressure.

Local authorities are perhaps in a slightly different position from other organisations that the committee has heard from as regards scale and affordability, but there is no doubt that the scheme would create a significant financial pressure and that it could put pressure on services that are required—social care, in particular.

I think that there is a dilemma. For me, the issue is to do with the level of evidence that would be required for a redress scheme, as opposed to a civil litigation scheme. Insurers will not contribute to the former if they need to keep their funds available to meet the costs of civil cases.

Dr Turbyne: I will be brief, because I know that the issue is taking up time. I go back to the decision making and the balancing act that trustees have to undertake in acting in the best interests of their charity. If the insurers are not on board with the scheme, affordability will be a serious issue for charities to take into account when they are working out what the impact will be on their current and future beneficiaries. I want to reinforce the point about the decision-making process that trustees will have to go through.

Daniel Johnson (Edinburgh Southern) (Lab): I am somewhat troubled by some of the answers that have been given. Ultimately, we are looking at a scheme whereby responsibility for historical wrongs and abuse is acknowledged and compensation is provided on behalf of organisations, some of which the witnesses represent. The scheme is not to look at redress for historical wrongs that were undertaken by insurance companies. Although I clearly understand concerns about affordability, the fundamental point is surely about the responsibility of those organisations, not insurance companies.

I am not sure that we can legislate for how well organisations in Scotland that might be part of the scheme have done in putting in place and negotiating their insurance policies. Furthermore, if matters were taken to court—I acknowledge Mr Yule's point about the burden of proof—ultimately, a court decision would not be predicated on affordability considerations, so why should the scheme be predicated on them?

Dr Culley: In many respects, I agree with the central thrust of the question. Do we acknowledge the moral responsibility to participate in the scheme? Absolutely. As part of the work that we have done with survivors over the recent past, we are absolutely committed to doing the right thing. The question, therefore, becomes whether we can create the conditions that empower and allow us to do the right thing.

To some degree, I agree with the point about the insurance sector. We almost need to set that aside and focus on affordable contributions from organisations such as ours that want to participate just now. Our great frustration is that we want to participate, but there is a hurdle to doing so that we cannot jump. The costs are so significant that there is no way we could meet them in the absence of other funding arrangements.

I would much rather the position be streamlined. We have had discussions with survivor groups about that. Incidentally, those groups are doing great work on the issue, and we have developed positive relationships with them. We need to get to a place where as many organisations as possible can participate, so that the primary policy objective of reconciliation is achieved. My great concern is that that policy ambition will be frustrated because the financial ask is too great.

Viv Dickenson: Of course, affordability is not taken into consideration by the court but, to go back to Dr Turbyne's point, the major difference is that, when you are asking for contributions directly from charities, the trustees will have to say what they believe is affordable in relation to what they might be able to use from unrestricted reserves and what they can do in terms of fulfilling their charitable purpose. My worry is that there will be a conflict of interest between those two positions, so that needs to be removed.

Derek Yule: On Mr Johnson's point, the various functions that councils carry out carry a number of risks, and councils have insurance cover in place for many of them. Some are self-insured and some are covered by insurance policies. All that we are flagging up here is Mr Johnson's point, which is that the responsibility lies with local authorities, not with the insurers. Councils have insurance policies to manage a whole range of risks. If there were a successful claim against a council, it would look to its insurers to meet that. We are saying that the way in which the redress scheme is drafted would mean that there could not be valid claims against insurers, so to contribute to the scheme would require a financial contribution from councils. That is the same point that others have made.

Different organisations, whether they are in the charitable sector or local government, have other financial pressures. That is where the problem lies—the affordability of contributions to the redress scheme. That is not to take away that real—not just moral—responsibility. We think that the scheme would invalidate the insurance cover and that is why the committee is getting the negative responses to the proposed legislation.

09:45

The Convener: I am conscious of the time, so I ask people to be as succinct as possible. I know that that is difficult, but it is a big committee. Are you finished with that question, Mr Johnson?

Daniel Johnson: The issue of restricted funds was just raised, and I was wondering whether I should ask about that or whether there are other supplementary questions.

The Convener: Let us come back to that as a separate item.

Daniel Johnson: I will wait.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, panel. I want to explore your concerns about the proposed "fair and meaningful" contribution test. Section 13 requires the Scottish ministers to publish a statement of principles in determining whether bodies have made a "fair and meaningful" contribution. Some of the submissions from charities state that there is a lack of transparency in how that will be done, for example, in relation to distinguishing between children in long-term care and those who were temporarily in care, and on whether contributors will be consulted prior to publication. They also question whether those principles should be included in a bill or a statutory instrument. COSLA

believes that there is a lack of clarity about the likely amount that would need to be contributed.

We have heard what you have said and it has been very useful and interesting, if a little concerning. Can any of you come up with a fix for this? Should there be more negotiation between the charities as to how the decision on the level of contribution is reached? Should there be agreement on how much money you have and what it would be fair to contribute?

Derek Yule: The issue is what is meant by "fair and meaningful" and how we convert that into a cash sum. Some of the discussions that I have had with civil servants preparing the bill have referred to potential liability of £350 million. That is coming from actuarial assessments. The local authority share of that could be around £200 million. It is a substantial sum.

There are ways of spreading that cost over a longer period. I understand that the proposed redress scheme would operate over a five-year period. If there were a way to spread it over a longer period, perhaps with the Scottish Government carrying some of the cash flow across financial years, that would certainly help.

There is the question of what "fair and meaningful" means on the one hand, and what is affordable on the other. Local authorities are in a different position from the charitable sector in relation to what is deemed affordable. The more the councils have to contribute to the scheme, the more it will take resources away from a range of services and contribute to the pressures that are already there. In that sense, it is not about what is affordable but about the alternative use of the funding.

Dr Culley: Affordability and what is a "fair and meaningful" contribution is another important question. As the committee has heard earlier, and from elsewhere, that will be understood through the application of an algorithm. My worry is that that is relatively inflexible, and challengeable, as it is taken forward. I have concerns that its detail is not in the bill.

The bill places a duty on the Scottish ministers to consider whether a contribution is "fair and meaningful". I think that we should add to that by asking the Scottish ministers also to have regard to its affordability, because that then becomes a negotiation. We are committed to being open and transparent on all our finances, so if that were to be taken forward, we would want to sit down with Scottish Government officials, put all our books in front of them and ask what would be a reasonable contribution for us to make in the circumstances.

My worry is about the algorithm—a big number pops out at the other end and we are stuck with it. I think that that is very important.

I will add that, in contrast to where I think local government may be on this, a big sum sitting on our balance sheet that is potentially repaid over a long number of years might not solve the problem for charities. It would still be a liability and, if it is a big number, it would affect the charity as a going concern. On the face of it, long-term repayment might help, but we need to be alive to its potential impact on the books of charities.

Viv Dickenson: We were surprised at the algorithm, when it came out. It is the tool that is being used to judge what is "fair and meaningful". We had thought that there would be individual negotiations about that. We, too, are committed to the bill. We are committed to making redress to survivors. However, I think that the element of individual negotiation is what is missing. The algorithm is getting in the way.

Dr Turbyne: I think that transparency on what is "fair and meaningful" for charities is extremely important. I also throw into the mix that the proposals have been developed at a time during which more and more charities are very vulnerable, in terms of their medium to long-term survival, because of Covid. That should be taken into the equation, so that we can think about how charities can address the harms of the past and contribute to the scheme but also carry on supporting their vulnerable beneficiaries, now and in the future.

The Convener: Thank you. I had hoped to move on to another area, but I think that Mr Johnson has a pertinent question on the use of restricted funds.

Daniel Johnson: That was one of my main questions, and the topic has been referred to.

Obviously, significant concerns have been raised, and I think that they are very similar to those that have been raised by the insurance sector, regarding the use of restricted funds to meet the cost of contributions.

I put a very similar point to the witnesses. Although I understand their concerns about affordability, my point in essence is that, if we did not have a redress scheme, and people were taking those claims to court, a court decision would not look at whether the award could be met from unrestricted funds alone or would require restricted funds. Why should we make that distinction with the scheme if a court settlement would not—especially if using those funds was affordable? Again, I do not know that the concerns of fundraising teams from individual charities are a matter for the committee. What is the witnesses' response to that?

Dr Turbyne: The use of restricted funds is one of our greatest areas of concern. I take your point that where the money comes from is not the

concern of somebody who is making that decision. However, restricted funds are held for a particular reason. An individual or group of individuals might have given money for a particular project, there might have been an emergency appeal, the money might have been to fund a grant, or it might be a legacy or contract that charities are running with. That principle of the money being used for what it was intended for is key; it is the bedrock of confidence in how charities use funds. The worry is that legislating to remove donor conditions on restricted funds and enabling them to be used in a manner that is not consistent with their current charitable purposes might undermine that fundamental principle and have a longer-term effect by impacting future donations.

There are already regulations out there. The Charities Restricted Funds Reorganisation (Scotland) Regulations 2012 set out a clear policy intention for the reorganisation of restricted funds, in order to enable the resources to be applied to better effect for the charity's purposes, but only when we cannot ascertain the donor's wishes. In order to reorganise, a clear set of conditions have to be met. We are concerned because the restricted funds element has been placed in law and it is very important. It is not about fundraisers; it is about the beneficiaries of the charities. We want to make sure that money that has been given for a certain purpose—to support trusts and charities—does so. Undermining that principle could be very detrimental going forward.

Daniel Johnson: Before we bring in other witnesses, I will come back on that a little. Although funds are given for particular purposes, there is a cost for organisations of doing business. There will be administrative costs that come from running and maintaining the organisations and there might be costs if they get things wrong when pursuing the project that the money was given for. If the organisation was taken to court in the process or was fined, I assume that, in those circumstances, the restricted funds would and could be used. I would argue that this is a cost of doing business; there is an organisational legacy based on what has happened in the past. It is a cost of those organisations doing business and, therefore, the use of restricted funds has to be factored in and priced into the cost of those organisations carrying out their work.

Dr Turbyne: No, those restricted funds cannot be used in that way; the money would be prescripted to the specific piece of work. Although you are right to say that, if the charity had to cover a cost of business, it would do so, the money would not come from those restricted funds; it would have to come from other areas of unrestricted reserve that the charities hold. If the donor is still alive, if the funder or foundation is still in business or if it is a contract, there might be negotiations with them to use the restricted funds in a specific way. That can be done and it has been done during the Covid crisis, when charities have sometimes engaged actively with funders to change the use of restricted funds, but that is with the consent of the donor, so it is different. However, we cannot take a restricted fund and use it for another purpose or activity, because it has been earmarked for a specific thing.

Dr Culley: I agree with everything that Dr Turbyne said around the position that charities find themselves in. To go back to Mr Johnson's original question, I am not sure that the analogy with the court process is fair because, although it is correct that courts do not have regard to the affordability question, it is also true that organisations can protect themselves against risk by taking out insurance. There is no mechanism by which organisations can protect themselves against risk in relation to participation in the scheme. We need to create conditions that support participation, but we are creating conditions that prevent it, and that is not a good thing for public policy in Scotland or the delivery of reconciliation, which has to be the primary policy objective.

10:00

In relation to the bill, I am concerned that it is asserted—almost—that any contribution made is not

"contrary to the interests of a charity",

but that is demonstrably not the case in some instances. If the board of Quarriers was asked to make a multimillion-pound contribution by way of participation in the scheme to the degree that it endangered the charity, by definition that would not be in the interests of the charity, but by reading the bill one would infer that it was perfectly fine, so that is highly problematic.

Viv Dickenson: I do not want to get into an adversarial position on the issue. We are genuinely seeking to have barriers removed from this, but the question of restricted funding is one of those barriers and it also goes to the heart of trust funding. There is charity law and there is trust law, which is very complicated; we have a number of trusts that feed into the organisation for things such as care of the elderly in very specific locations. We cannot just call on that money to put into a scheme that compensates or makes redress to survivors. We desperately want to do that, but we cannot call on those restricted reserves; if we did so, we could also be taken to court for the way we operated in those circumstances. Therefore, it is a complex situation that demands a lot of consideration of restricted funds, trust funds and the laws that surround them.

We hammer down on those points because they are the barriers. It would be great to find a way through all this that would allow us the conditions to talk about fair and meaningful contributions and voluntary contributions and get on and do what we really want to do, which is work alongside survivors and make the redress that they deserve.

Dr Turbyne: I want to reflect on something that Dr Culley said. I reinforce the importance of finding a way over the barriers, but creating something that puts more complexity into the system is unlikely to help charities when they make their decisions. We want charities to be able to respond to the harms of the past, because it is right and it is a moral responsibility; that is what we all want and finding the right way to do that is important. I suggest that the restricted funds route is slightly problematic because of the way in which it could fundamentally undermine trust in charities and charitable giving.

Ross Greer (West Scotland) (Green): I will move on to questions about the next-of-kin payments element of the bill. We have spoken with previous panels about the hierarchy of spouses, cohabiting partners and children around who can make a next-of-kin claim. If you have any wider or more specific thoughts on the next-of-kin payments system, it would be great to hear them.

I have a specific question on the cut-off date that I would like to hear your thoughts on, particularly CrossReach and Quarriers. Survivors groups and others have raised a lot of concern that the cut-off date—applications can be made only if the survivor passed away on or after 17 November 2016—is arbitrary. For example, a person who passed away before then may clearly have put on the record that they were abused, and the cut-off date will arbitrarily block their spouse from being able to achieve redress through the scheme. What would your reaction be if the cut-off date of 17 November 2016 was removed or changed considerably?

Viv Dickenson: We have not made any submission about next of kin. We believe that the conditions should make it as easy as possible for people to have the redress that is due to them. Any change might change the potential contribution levels. That would be material to us, but finding a way through to make it as easy as possible for us to contribute voluntarily is more important to us than arbitrary dates.

Dr Culley: To echo Viv, and setting aside the wider question of affordability that we have already rehearsed, as a general principle we want to support the views of survivors as we work through the process.

I said that we have developed a strong relationship with Former Boys and Girls Abused in Quarriers Homes. If there was a way to support its views and those of other survivor organisations, we would want to do that. We must be committed to survivors through the process and to their wellbeing and that of their families.

Ross Greer: That is everything from me on that subject, convener. It does not look as though anyone on the panel has wider thoughts on next of kin, and I have no follow-up questions.

The Convener: We will move on to non-financial redress and apologies.

Daniel Johnson: When the committee spoke privately to survivors, I was struck by fact that, although financial compensation is of interest, what matters to many survivors is acknowledgment or a non-financial form of redress. What are the witnesses' thoughts on the ways in which apologies could be provided through the scheme? How could that work?

Dr Culley: That is an important question. We are inevitably drawn into a lot of detail around financial redress, but there is an important discussion to be had on this area.

There are mechanisms for apologies. Organisations such as Quarriers have made heartfelt apologies through the Scottish child abuse inquiry. That is important. We heard survivors talk about the accountability process in that regard, and that is an important mechanism that is quite separate from the scheme.

Allowing organisations to apologise, from a senior level, to survivors who have endured pain is an important feature of the scheme, and I am committed to it.

Apologies become problematic only in relation to the civil court process, where there would be legal implications if an apology were to be offered prior to the conclusion of that process. Other than that, it is important to commit to apologies for the reasons that you identified.

There are other things that we can do. Quarriers has established an aftercare team that can support survivors with information and records. That is also an important part of the healing process for many people. We are doing a lot and will continue to do so, regardless of what the scheme establishes.

Derek Yule: I will not repeat Dr Culley's comments, because I agree with everything that he said.

Local authorities are already investing considerable resources in this area. The point about the need to support families, relatives and next of kin has been well made. Demand for such work will probably increase when the bill becomes law; the work that takes place to support children

and families will need to increase. I hate to say that a lot of that will come back to resources, but we must recognise that the non-financial elements of the redress scheme will manifest themselves in additional services to support children and families.

Viv Dickenson: Apology is at the heart of the issue. I have spoken to a number of survivors who chose not to go down a civil route because they were really looking for a genuine understanding of what they went through and a genuine recognition of and apology for that. That is an important issue that must be built in for survivors. Financial compensation will be the answer for some, but for many it will not be—it will not right the hurt. We need to find a way to do that more sympathetically.

Daniel Johnson: In thinking about the potential liabilities that an apology might incur, the question occurred to me whether a general statement to acknowledge historical abuse might be a useful part of the process. Contributing organisations should give individual apologies when that is possible, but they could also make a general statement to acknowledge the harms. It is explicit that participation in the scheme does not imply liability, but could a general apology or statement be a route forward?

Viv Dickenson: Yes—it could. We have already made a general apology to anyone who was harmed in our care and we would willingly and genuinely do so again. A collective apology is not problematic to us.

Dr Culley: Viv Dickenson just stole my thunder. Organisations such as Quarriers and CrossReach have already made apologies. Like Viv Dickenson, I apologise again today for all the harm that was caused. Such an apology would not be problematic and could help the process.

The Convener: Ms Mackay will ask questions about the abuse that the bill covers. I ask colleagues to put an R in the chat box if they want to come back in.

Rona Mackay: What are the witnesses' views on the abuse that the bill covers? I am thinking of the exclusion of lawful corporal punishment and whether the bill needs to include a definition of abuse by peers.

Dr Culley: The questions are interesting and we want to be guided, to a degree, by survivors in coming to a view on them. We did not cover the issue in our submission, but we work closely with survivors and we want our policy on such themes to be informed by their views.

It is fair to say that organisations have a general duty of care, which probably extends into the territory of peer abuse, so that is a legitimate consideration. There are technical issues to unpick about things that were deemed to be lawful at the time; perhaps it would be better for legal advisers to comment on that.

10:15

Viv Dickenson: My comments on that will be very similar. The committee probably needs to take legal advice on what was appropriate and legal at the time. It is a really difficult issue for us. I sometimes look back at what was permitted and think that, by today's standards, it falls so far short; nevertheless, it was permitted at the time. It is tricky. I agree with Dr Culley that, if survivors indicate that something is important, we have a duty to listen to that and we should do our best to find a way forward.

The Convener: Mr Yule, do you want to come in on that important point?

Derek Yule: No, I am happy with the points that have been made so far. It is more a legal issue, to be honest.

The Convener: I invite questions from Mr Greene.

Jamie Greene: Thank you, convener. I have a more general question. The witnesses will be aware that we will take evidence from the Cabinet Secretary for Education and Skills, and I suspect that he has been listening intently to what has been said. Do you have one principal comment or piece of feedback for the cabinet secretary about how the bill could be altered to make it more palatable for you to participate in the scheme? What would that advice be? What is the main change to the bill that would make it easier for your organisations to participate? I get the sense that there is a willingness to do the right thing, but there are clearly some technical issues on your minds. I know that you have submitted written evidence, but, for the benefit of those watching the evidence session, can you summarise your views on that?

Dr Culley: The Deputy First Minister has taken a very helpful and conciliatory approach to all this, and he has been in correspondence with us and other organisations. We wrote to Mr Swinney, asking him to have specific regard to the question of affordability. If the bill could be changed to create a duty on Scottish ministers to have regard not just to whether a contribution is fair and meaningful but to whether it is affordable, Scottish ministers would have an obligation to at least consider the finances of organisations that wish to participate. I underline the point that you made that all of us absolutely want to do this; it is about creating the conditions that allow for that. That is the same message that we have sent to Mr Swinney: help us to contribute and to get to a

place where we can be part of the national healing, because that is absolutely what we want to happen.

Viv Dickenson: I echo a lot of that. The bill itself is not so much the problem, although it would certainly help if the notion of affordability was put into it in some way. However, some of the documents behind the bill are really problematic. The financial memorandum and the way that "fair and meaningful" has been translated into an algorithm are particularly difficult and need further scrutiny. We are completely behind the bill itself and the intent behind it.

Dr Turbyne: This is a good way to sum up what we have been talking about. We want the bill to allow charities to contribute and to give trustees the freedom to have appropriate discussions about what is in the best interests of the charities. We have a concern about section 14, which refers to charities contributing to the scheme. We have had some influence on that part of the bill, but we still have some worries about it. We have offered to support guidance on that, to help charities to think through that decision-making process. That might be good.

We are specifically interested in looking at restricted funds again, because we are worried about the way that that might undermine public trust in fundraising and, ultimately, public trust in charities.

Derek Yule: One thing that the bill is good at is streamlining the process for survivors. We should not lose sight of that in all the discussion about the financial costs. As the committee has heard today and from other witnesses, there is a real willingness to uphold survivors' rights to access redress. There has been a lot of focus on insurance today. That process can be extremely stressful and complex for survivors and can take considerable time. We should recognise the merits of the bill in that regard.

It is important to look at the issue in the round. There will be a financial impact on contributors. I think that the committee has heard that everyone is willing to contribute if we can find a way of making the scheme affordable. There has to be something about bringing insurance companies to the table to contribute. I am conscious that I and other witnesses have highlighted the difficulties of doing that, but we need, somehow, to engage with insurers on bringing some resource to the table to help with affordability for many of the organisations that are involved.

From a local government perspective, the question is less about the scheme's affordability and more about the impact on other services. Given the financial pressures that councils are under at the moment, taking a significant sum of money out of the equation to fund a redress scheme will have significant consequences for other council services, including services that support children and families. There is a difficult dilemma in that sense, and insurers have to be part of the solution.

Jamie Greene: I thank the witnesses for those responses.

I think that anyone who has watched our evidence sessions on the bill will be aware of the dichotomy that we face. There is a huge amount of strong feeling out there, and there is a lack of trust in the approach to the bill and in organisations that have been asked to participate in the process, some of which are represented on the panel today. Rebuilding trust, through the bill, is pretty much all that we can do as a committee. Is there more that your organisations can do to ensure that the survivors—and not the insurance companies, the underwriters, the politicians and the civil servants—are at the heart of all this and have the loudest possible voices? How can we put survivors at the core of our deliberations? I think that many survivors still think that they are not, unfortunately.

Dr Culley: There are two things to say in answer to that. First, and quite independently of the bill process, it is incumbent on all organisations that are having to come to terms with a history of abuse to work with survivors and survivor organisations. That has been a priority for Quarriers. We have a developing relationship—it stretches back a number of years now—with Former Boys and Girls Abused, which, in truth, has been incredibly enlightening for us. The ability of colleagues in that organisation to speak powerfully on behalf of survivors to help Quarriers to move forward on the agenda has been crucial to the organisation. I commend the approach; I know that other organisations have taken similar routes.

You asked how survivors can be put at the heart of the bill process. I agree that there is a need to ensure that the survivor voice is the most prominent one in all this. The Scottish Government has set up a group to facilitate that, but there is always more that we can do. We want to work hand in glove with survivor organisations as the bill progresses, because ultimately such legislation is all to the good if it supports a process of reconciliation. That is what we all want to keep in mind.

Dr Turbyne: Absolutely. It is essential that survivors are at the core of the bill, and it has been great to hear the views of other panel members today in that regard. However, in doing that, we must not ignore the inherent tension that charities have to take into account when they make their calculations, which is the impact on their current

vulnerable beneficiaries and their future vulnerable beneficiaries. That is not to take away from the harm and the fact that survivors should be at the core of the legislation, and we need to ensure that there is a way of absolutely demonstrating that. However, if we ignore that tension, we will come up with a bill that is not as good as it could be.

The Convener: I think that that rounds off the session well, but I have one technical question. We have had a general conversation about how appropriate the waiver is, and the use of offset or other options for that, and we understand that part of the bill process is to ensure that every help is given to a survivor to get the evidence that they need. However, the survivors are supposed to sign a waiver at the point at which they accept a redress settlement, and they have raised a concern with us about the fact that more evidence could come to light at a later date, either through further investigations or because of corroboration. Have you thought about that scenario? I do not know whether it is possible to caveat the waiver or something, but have you considered that issue and how it might be dealt with?

Dr Culley: All that I would say at this stage is that I have a great deal of sympathy with that concern. We have to create a process that is supportive of survivors in order to ensure that they are able to draw on whatever information is relevant across the process. It is incumbent on all of us to ensure that we provide maximum flexibility to ensure that there is a positive outcome in that respect.

Derek Yule: It is difficult to respond without taking a legal perspective. Support for survivors is key to the process. I know that a number of councils are starting to work together to streamline existing claims. That has to be part of the solution, so people are not passed from pillar to post. As part of that, there must be something in the system that ensures that, if new evidence comes to light, there is an opportunity for that to be looked at. We have to be supportive and sympathetic throughout the process. To me, the issue is all about the level of support that we can give to people who will not be familiar with the systems, the legal process and so on. We need to ensure that they are assisted as far as possible.

The Convener: Thank you. This has been a useful discussion, and we thank you all for your time.

We will now suspend until 10:45, when we will be joined by the cabinet secretary.

10:28

Meeting suspended.

10:45

On resuming—

The Convener: I give a warm welcome back to those who are joining us for this morning's evidence session on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. I welcome John Swinney MSP, the Cabinet Secretary for Education and Skills in the Scottish Government. I invite the cabinet secretary to make a brief opening statement.

The Deputy First Minister and Cabinet Secretary for Education and Skills (John Swinney): Good morning. I welcome the opportunity to discuss this important bill with the committee during what is a uniquely challenging time for everybody.

Scrutiny of the bill is crucial in ensuring that, together, we agree a collective national response to the widespread failures of the past that resulted in the abuse of some of our most vulnerable members of our society—our children. I want the bill to provide survivors and their families with the acknowledgment and recognition that they rightly seek and deserve. The bill will sit alongside, and positively contribute to, the wider changes that we are making in Scotland to ensure that all our children are safe, protected and loved.

We have introduced this vital bill because acknowledging the unquestionable harm that was caused by historical abuse is the right thing to do. I want to take the opportunity to repeat the apology that I made to survivors on behalf of the Scottish Government in 2018. Their terrible experiences should not have happened, and we are truly sorry that they had to experience what they did.

The bill builds on the experience of the advance payment scheme, which opened in April 2019 and has made 500 payments to elderly and terminally ill survivors of historical child abuse in care. Through the delivery of the advance scheme, we have been able to gain invaluable insight and knowledge on the principles and processes of redress, which has greatly informed the content of the bill.

We know how important it is that a redress scheme offers more than a financial payment. Survivors will have their own views on what would make a difference in relation to acknowledgement, apology and support, and the redress scheme will offer access to those non-financial elements.

As I said in my statement to Parliament in August, it has always been a priority for me that survivors' views be at the heart of designing measures that are introduced to support them. Consultation and engagement with survivors has been key in developing the bill, and survivor voices continue to be at the core of the bill as it progresses through Parliament.

I am well aware that not all survivors have the same views on every element of the redress scheme. It is crucial that we hear as many views as possible, and I am pleased that the committee has read and heard evidence from so many.

I have been listening to the wide range of evidence that has been presented to the committee, and my officials are carefully considering all the points that have been raised. As scrutiny of the bill continues, I look forward to working collectively with all interested parties, inside and outside Parliament, to build a redress scheme that meets the needs of survivors. We will continue to engage with those who provided care in the past, as we look to them to play their part in making fair and meaningful financial contributions and in delivering the redress scheme that survivors have told us that they are looking for.

It is important that we do not underestimate the complexity of the issues that are addressed by the bill and the impact that it will have on survivors, including those who have fought tirelessly for decades to get to this point. However, I am confident that, if we continue to work together constructively, we can create a world-leading redress scheme that symbolises Scotland's national collective endeavour to address the failures of the past.

I look forward to having an open discussion with the committee and to answering the questions that the committee will have.

The Convener: Thank you very much, Mr Swinney. We will move straight to questions.

Iain Gray: Good morning, cabinet secretary. You said, as you have done on many occasions, that one of the most important things about the bill is that survivors see it as a proper acknowledgement of what happened to them, and that their voice is critical in making sure that that is the case. I know that you will have been following the evidence and that you will therefore know that survivors' evidence has consistently been that they feel that the bill is undermined by the existence of the waiver part.

Earlier today, we heard evidence from some of the care providers who expressed an interest in at least exploring alternatives to the waiver in order to balance their interests, as I think they put it. What consideration are you giving, or are you able to give, to the replacement of the waiver with something else or, indeed, its removal altogether?

John Swinney: I am very happy to explore any aspect of the bill, because the issue that is most important to me is that we reach a point at which we have in place an effective redress system that enables us to address the experiences of survivors. My primary commitment is to make sure that we have an effective and workable scheme. Although I feel that the Government has brought that forward, I do not enter this morning's discussion from a perspective of saying that every aspect of the bill must be fixed.

I take the view that the waiver is an important element in providing workability at the heart of the scheme, whereby we can provide a route that attracts financial contributions from those who should make them—I am certain that Mr Gray shares that view—and a means of providing survivors with a way of securing acknowledgment and redress. I think that the waiver has a critical role to play in our scheme. We looked at various schemes around the world in which a waiver was part of how financial contributions were attracted and enlisted from those who should be making them. That is how I come to this discussion; I think that it is the best way to deliver the purposes of the scheme.

Nonetheless, having said all that, I am very happy to consider alternative propositions that would achieve the same purpose. I want to achieve the twin purpose of delivering for survivors and ensuring that we receive financial contributions from those who should make them. I am very happy to explore the means to get us to that objective.

Iain Gray: I appreciate that answer from the cabinet secretary. Based on the evidence that we have taken, it appears that one of the concerns that the waiver tries to address is the possibility of redress being paid twice for the same abuse. The alternative to the waiver that has been proposed by a number of witnesses in the evidence sessions that we have had is an offset, whereby someone who benefits from the redress scheme and then also benefits from a settlement from the civil justice system would see that offset against any award that they had got.

Some of the evidence that we received from care providers this morning was that they do not feel that insurance companies will support them in contributing to the redress fund even with the waiver in place. Given that, does the cabinet secretary think that an offset might be a viable alternative that would allow survivors to feel that their rights to civil justice had been left intact?

John Swinney: There are two distinct elements in that question. One is about ensuring that survivors have the acknowledgement of their suffering and that it is addressed. I readily acknowledge that many survivors would want to be able to ensure that that was the case through civil court action. Mr Gray will have dealt with cases and survivors who have gone through processes of that nature. We are all familiar with the fact that there is no guarantee of an outcome through civil action. We have structured and designed the bill in a way that tries to ensure that

survivors are given more certainty about achieving acknowledgement and reparation for the suffering that they endured.

I readily accept that in that analysis there is a point of judgment about whether the civil action route will be more dependable to secure the outcome that survivors are trying to achieve or whether the route that is provided for in the bill will provide such an outcome. That is a matter of judgment. I believe that, when all the issues about standards of proof in a civil action are considered and assessed versus the type of conditions and elements that are implicit in the assessment framework, which we have shared in draft with the committee, the redress bill provides a more reliable route for survivors.

However, that is conditional on whether we can attract the commitments of providers who should be making commitments to the process. In that lies a very careful judgment, which is at the heart of the offsetting model, as to whether providers believe that their requirement to contribute to address the suffering of survivors will be made through the channel of the bill and a waiver scheme that enables them to know the likely level of risk to which they will be exposed, or whether it is better to leave the issues to be dealt with in civil action.

I have tried to set out a route that I feel is more reliable and less traumatic than civil action in getting to the point of acknowledging survivors' suffering, from their point of view. However, I accept that there is a point of judgment at the heart of that. From what I have seen so far, I am not satisfied that there is a workable offsetting model that would enable us to attract the contributions of providers at the same time as enabling survivors to pursue civil actions in the fashion that Mr Gray raised.

Alex Neil: Thanks very much for your comments, cabinet secretary, as they underline the complexity of the issue that we are dealing with. However, the evidence that we have heard this morning, which is backed up by the evidence given by others in earlier evidence sessions, is that there are difficulties with the waiver scheme. Survivors believe that it is an encroachment on their right to resort to civil action, even if they were to receive an award from the redress scheme. The evidence that we heard earlier this morning highlighted that there is no guarantee that the incentive element to try to get the insurers or organisations to contribute will work. Indeed, we have heard evidence that they will not contribute before waivers are settled.

During a previous evidence session, we also heard that, in Ireland, in a similar scheme, once the redress was settled, the contributions that were promised never materialised. There are real issues there, and perhaps there is a need to decouple the issue of the award to claimants from that of incentivising and encouraging organisations to make contributions. Furthermore, this morning, we heard a clear distinction between how that could be organised in respect of local government and how contributions could be afforded by and arranged from charitable organisations. Would you like to comment on that? It emphasises the complexity of those issues.

11:00

John Swinney: Mr Neil sums up the complexity perfectly; there is no easy way of navigating our way through these judgements.

I take issue with one point in Mr Neil's question; I view the approach that we are taking as providing an alternative means for survivors to properly acknowledge and address their suffering. I do not view it as an approach that removes any rights of survivors because, with the mechanism that we are putting forward, they have a choice. Survivors have a choice between pursuing a court action and participating in the redress scheme.

The Government is trying to put in place a reliable and dependable means for survivors to have an acknowledgement of their suffering and some reparation for that. It does not take away their right to go to court. In my view, as well as reparation, it most definitely must involve an acknowledgement and acceptance of the suffering that those survivors have endured. That commitment will be part of any payment scheme that we put in place.

There is a difficult issue at the heart of Mr Neil's question about whether that is an infringement of the rights of survivors or, as I view it, an alternative means that perhaps provides more reliability in being able to secure acknowledgement and reparation for the suffering that survivors have endured.

Alex Neil: The evidence from the survivors suggests that they would ask why, in the bill as it is drafted, getting an award from the redress scheme and going to court would be mutually exclusive. If they sign the waiver, they cannot pursue civil action, and they unanimously regard that as a restriction of their rights.

We have heard other evidence. For a lot of people, the chances of being able to pursue a successful civil action are hampered by two or three things. First, in a civil case, they would have to provide proof to the court that would justify a civil action award. In a lot of cases, that will be very difficult, because of the absence of corroboration. The second point, which was made this morning, is the issue of liability. According to the representative from COSLA this morning, 200

cases of action against local authorities are already pending in the system, and the issue is pinning down which organisation is liable. He gave some examples, such as kids being hosted by one local authority but placed in another local authority—there is a legal dispute as to which local authority would be liable in any civil court action. From all the evidence that we have heard, it looks to me as though the number of people who are going to be practically able to pursue a successful civil action is limited and that it would require a lot of resources.

If the main point is to incentivise the organisations to contribute, the evidence that we have had from the organisations is, by and large, that the bill will not act as an incentive, because the main issue for them is not incentives but affordability and whether they or insurance companies will pay. We have also heard that, elsewhere, such an approach has not provided an incentive to institutions to make significant contributions.

John Swinney: The point that lies at the heart of this is the motivation behind the redress bill. The motivation, for me, is to provide acknowledgement and reparation for survivors. That is the purpose of it, and I aim to provide as dependable a route as I can to achieving that objective.

Your question highlights the uncertainty of pursuing a civil action. All the points that you make—about the required standard of proof, the evidence base and corroboration—are entirely legitimate and militate against cases being successful. The standard of proof that will be required in the bill's redress scheme will, without a doubt, be significantly lower than the standard of proof in a civil action. Indeed, if we look at the criteria that are in place for the payment scheme, we see that the scheme is readily accessible in the context of standard of proof. I have to hand the number of cases that have been dealt with, which is 500, but I cannot quite recall how many cases have been unsuccessful. However, it is a very small proportion, because we deliberately set the criteria to address the circumstances of individuals who experienced abuse a long time ago, evidence of which is not readily available. Much of that sentiment will be taken into the approach in the bill.

For me, the core of the issue is this: what is the most reliable means of securing acknowledgement and reparation for survivors? It is also critical that providers contribute to that, and survivors definitely want that to be the case. The structure of the bill is designed to make tangible, practical and dependable our securing contributions from providers.

If we left open the possibility that an individual could pursue a case through the bill and pursue civil action—that is, if the waiver did not exist—I think that we would find it quite challenging to get contributions from providers; I think that that would be very difficult. The structure of the bill is designed to achieve the two objectives of providing a dependable and reliable route for survivors and capturing the legitimate and necessary contribution of providers who are making reparations for the suffering that exists.

Having said all that, I accept that a careful judgment has to be arrived at, and I will look carefully at the committee's reflections as it wrestles with this dilemma. I hope that my response to Mr Neil will help the committee to see the dilemma that exists in providing a dependable route while managing to secure guaranteed contributions from providers.

The Convener: Do you want to ask anything else, Mr Neil?

Alex Neil: I will let other members come in. Questions have come up in evidence about the tiered—[*Inaudible.*]—and the payments scheme, which another member might want to ask. Given the number of committee members, it is only fair that I allow you to move on, convener.

The Convener: Thank you, Mr Neil. That is helpful.

John Swinney: Can I add one other point to my answer to Mr Neil? In relation to the advance payment applications that we have received, no cases have been rejected because of lack of evidence—none. That is an important point in the approach that we are taking to minimise the burden of proof on survivors and to maximise the possibility of securing acknowledgement and reparation. I hope that is helpful to the committee.

The Convener: Mr Swinney, before I move on to Mr Johnson, I will ask a question about the decisions that survivors are making at the end of the process if a waiver is in place. Decisions on what to accept from the redress scheme will be based, to a certain degree, on evidence that they have at that time, but a concern has been raised that, at a later date, significant evidence could come forward, particularly in corroboration of what survivors have said. Would that have led to a higher award under the redress scheme or would it have made it easier for them to pursue a civil court case had they had that information at the time? Have you considered that scenario, and is there any way to caveat the waiver or to look at the scheme at a later date if there is a significant change in evidence?

John Swinney: In the way that the scheme is constructed, an individual survivor's case would be assessed by redress Scotland and the panel, and

a conclusion would be arrived at. There is no means in the provisions that we already have for such a case to be reopened at a later date, but that is a question that we can explore to determine whether there are circumstances in which the evidence base could change. In the current provisions, there will be an individual judgment in individual cases.

Daniel Johnson: In the evidence session that we just had with some of the organisations that may be contributing to the scheme, they expressed concern regarding affordability. Their willingness is not in doubt, but they expressed grave concerns—waiver or not—about whether they could afford to contribute to the scheme. That begs two questions. First, to what degree is the scheme contingent on contributions coming forward? The flipside of that question is, to what degree is the Scottish Government underwriting the scheme regardless of whether contributions come forward?

Secondly, organisations' concerns about affordability were based on the algorithm that they have seen regarding how those contributions would be calculated. I do not believe that we have seen the algorithm; I do not think it is in the financial memorandum, although I am happy to be corrected. I am interested in hearing from the cabinet secretary on the high-level detail of the algorithm and what discussions with contributors are going on. Finally, can that algorithm be published?

John Swinney: I would not describe the calculation as an algorithm. I am happy to share more information with the committee on that point so that it can make a judgment, because I fear that I may end up in a conversation with Mr Johnson this morning about what the difference is between an algorithm and a calculation, and we might spend an awful lot of time debating how many angels are dancing on the head of a pin. A calculation will be made on the basis of the individual circumstances of organisations. However, if it would be helpful to provide the committee with more detail on that calculation, to enable it to judge whether it is an algorithm or a calculation, I would be very happy to write with that detail.

11:15

The point about financial contributions is an important one. Throughout my evidence, and as I have spoken about provider contributions, I have been using the word "should". I have said that contributors and providers should be making those contributions. That is a moral obligation. The state is facing up to its moral obligation through what we are doing with the scheme, and others must face up to their obligation, too, if children who were in their care have been failed or have had experiences that they should never have had.

We are in discussion with a variety of organisations to ensure that they make financial contributions to the scheme. Those organisations have an important moral question to address. I am not hiding the fact that there will be financial challenges for everybody, but the greater challenge for the country is to address the moral challenge that the issue poses for us. A consequence of facing that moral challenge will be that we will thereafter do the right practical and financial things to address the suffering that survivors have experienced.

Daniel Johnson: The scheme will progress, whether or not contributions are received. Is that the short version of your answer?

John Swinney: The scheme will progress, and it will establish an obligation on providers to make contributions beyond the £10,000 per case that the Government has committed to making. By virtue of that commitment to and participation in the scheme—which I see as both a moral and a financial requirement—those organisations will be held to the payments that they are due to make. Financial recompense to support the scheme should be secured from any organisation that was a provider of care and under whose care abuse took place.

Jamie Greene: This line of questioning has thrown up a tension. On one hand, survivors are telling us that the scheme does not go far enough, either financially or otherwise. On the other hand, the organisations that will be asked to contribute say that the financial onus that will be placed on them by the bill as it is drafted is already too great.

We heard earlier from a witness who said that he thought it was unlikely that an insurance company would be interested in participating in the scheme as it is drafted, because it is an addition to, not instead of, the liability that exists under civil litigation. There would be no commercial benefit, and the company would be unlikely to participate.

That raises a question. If organisations say that they will not or cannot participate in the scheme, will you make them do so? If you do not make them participate in the scheme, who will participate? If the Government's payment is capped at £10,000, does that mean that the number of claims is capped or that the financial pot that is available for the payment of claims is capped? Or is there an unlimited liability on the taxpayer to pick up the tab when either insurance companies or organisations have said no?

John Swinney: That question contains a number of potential scenarios, and I have recourse to the design that the Government has put forward for the scheme.

The scheme is designed to address the fundamental point that Mr Greene raised at the start of his questions: I consider the scheme to be an alternative to court action. From that point of view, it is a compelling moral and financial route for providers to support. It is a route that allows providers to face up to their moral responsibilities. As a country, we can provide a mechanism that gives survivors more certainty that they can secure an outcome, as I said to Mr Neil. They cannot be certain about securing that through a civil action process.

We have chosen an approach that has sufficient reliability and dependability, from the survivors' perspective, for securing acknowledgement and reparation. It will also give providers certainty that they can see the route that is available for resolving the issues, which they must resolve because of their moral obligation in relation to failures of the past, which the Government is facing up to and which other players must face up to.

Mr Greene is correct in highlighting the issue as the nub of the scheme. The Parliament must consider—first through the committee, with its evidence, and then as the bill is scrutinised in detail when it proceeds through Parliament—what the most reliable means is for addressing the fundamental dilemma that Mr Greene has highlighted. I think that my proposal will provide not only reliability and certainty for survivors but clarity and reliability for providers. I invite the Parliament to consider whether that approach is correct.

Jamie Greene: I respect the fact that you agree with my summary, but, with respect, that was a clever way of saying, "No comment." I asked the direct question whether you will make providers participate in the scheme, and your response was that it will be up to Parliament to decide whether to amend the bill to that effect. However, it is the committee's job not to come up with solutions but to highlight the problem.

John Swinney: I felt that I answered the question. The direct answer is that I cannot compel an organisation to take part. However, I can put in place an arrangement that provides the appropriate opportunity for survivors to seek the acknowledgement and reparation to which they are entitled and that enables providers to address that in a way that meets survivors' needs. For everybody concerned—whether it is a survivor who carries stress and trauma or a provider that carries financial and legal risks—there will be a reliable route for addressing and removing issues.

The Convener: Does Mr Greene have another question?

Jamie Greene: I have a question on the bands and amounts, but I might save it for later, because I know that other members want to speak.

The Convener: Thank you. That is helpful.

Before we move off the topic, I will ask about the involvement of insurance companies in the scheme, which was raised earlier. Some survivors are concerned that an insurance company could pick up the tab, if you like, for what has happened. They are keen for responsibility to lie with the organisations. Have you discussed with insurance companies how they might indemnify the redress system on organisations' behalf?

John Swinney: From recollection, I think that my officials have had discussions with representatives of the insurance industry, but I had better reserve my position and write to you to clarify that point. I think that that is the case, but I had better confirm it in writing.

The Convener: Thank you very much.

Ross Greer: I want to ask about the provision in the bill for payments to next of kin and the safeguarding of survivors who receive payments. Will you explain the rationale behind the November 2016 cut-off for payments for next of kin? That has caused a bit of concern in the survivors groups that have submitted evidence to the committee.

John Swinney: In essence, the rationale is to provide some order to the eligibility for the scheme. It was in 2016 that I announced that we were going to move to such an approach. It is about establishing the moments at which we make defined judgments about eligibility—I suppose that that is the best way of describing it. The rationale is of a similar character to that behind the definition of historical abuse as that which preceded December 2004, which was when the former First Minister Jack McConnell made a public apology in Parliament to survivors. It is simply about establishing reference points for eligibility for the scheme to make absolutely clear the circumstances in which individuals—or, as in the point that Mr Greer has put to me, next of kin—would be eligible.

Ross Greer: I understand the need for a line to be drawn somewhere, although I am sure that you would accept that any date that is set is arbitrary to a significant extent. The concern that has been raised is that, because it is such a recent date, a lot of people who are the next of kin of a survivor would have the evidence and would meet the other criteria for getting a payment, but their relative—or whoever it might have been—passed away before November 2016. Quite a lot of people would potentially feel—and would be—closed off by that.

Would the Government be amenable to moving that cut-off date? I am not proposing a specific date at this point, but is it set in stone, or would the Government would be open to an adjustment that might address some of those concerns? As I have just said, any date is ultimately arbitrary to some extent.

John Swinney: I am very happy to explore that point and the possibility of considering an alternative date. Mr Greer is absolutely correct: choices have to be made about those dates or points of eligibility. Nothing about that is absolutely set in stone, and I would certainly be happy to consider the issue and to hear the committee's views on that question.

Ross Greer: Thank you.

To move on to the mechanics of the next-of-kin payment, the bill specifies a six-month period for a cohabiting partner to have cohabited with the survivor before they become eligible ahead of any spouse that the survivor may have had. However, no time period is provided for them to become eligible ahead of children. In essence, as soon as a cohabiting partner moves in with a survivor, they will become eligible ahead of the survivor's children in a situation in which they become next of kin.

The Faculty of Advocates has suggested that the six-month period be extended to the question of a cohabiting partner's eligibility ahead of children, so that there is consistency in how a cohabiting partner is viewed relative to a spouse and relative to the survivor's children. Will you explain the rationale for that not being in the bill? Would the Government be open to that proposal from the faculty?

John Swinney: I am certainly prepared to look at that question again. Those are matters of judgment. One thing that we would have to look at carefully is any interrelationship between those questions and questions of family law—I say "family law", but I do not think that it is quite the right term. We need to ensure that no residual rights are in any way conflicted by any decisions that we make. Fundamentally, these are judgments about the appropriate point at which the arrangements should be put in place. As with all such questions, I am very happy to explore the detail behind the issue and see whether there is a more appropriate way in which things can be constructed.

11:30

Ross Greer: My final question is on that point about consistency with other areas of law, although not on next-of-kin payments. The bill provides redress Scotland with the power to assess the capacity of a survivor to handle the payment. That is reasonable, because payments can be significant and survivors can be particularly vulnerable individuals. However, the framework for making such decisions already exists in the Adults with Incapacity (Scotland) Act 2000. I am not sure why that is not being used as the framework. Why does the bill create a whole new legal basis for establishing capacity when we already have a framework for doing that in law?

John Swinney: I am not sure that I would quite see that as an issue. The concept of capacity is well defined in Scots law. What we are trying to do in the bill is acknowledge that some survivors will have experienced such trauma that they face significant challenges in their lives and may require some support to deal with issues that may emerge from the redress scheme and also the substantial payments that may arise. I do not think that those survivors would be classified within the terms of the Adults with Incapacity (Scotland) Act 2000, but they will be provided with some support to help them to manage their affairs.

With the support mechanisms that are put in place for survivors—through the work of Future Pathways, for example—a lot of practical support is given to people who have been traumatised and damaged by their experience. Support to assist them is put in place that is not formal legal provision such as that provided for by the 2000 act. It is about having a more pragmatic and flexible support arrangement to try to ensure that individuals are better supported to handle issues that will arise from a payment from a scheme of this type. I would not equate that role with the formal legal provision of the 2000 act. We are certainly not trying to construct any provision that is a rival to the terms of that act, for which there is a very specific, defined purpose.

The Convener: Another issue to do with timing is the five-year duration that is proposed for the scheme. We have taken evidence from schemes elsewhere that shows that that is quite a tight timescale, particularly for people affected who may be living abroad and may be unaware of the scheme. Could any consideration be given to extending the duration slightly, albeit perhaps in a scaled-down version of the redress system?

John Swinney: There is provision in the bill for ministers to extend that five-year period by regulation. Obviously, we could formally extend that timescale, and I am happy to consider that, but a mechanism is in place that would enable ministers to extend the timescale, should that be required.

The Convener: I want to go back to the issue of banding, which Mr Neil and Mr Greene have questions about.

Alex Neil: We have heard evidence about the issue of the tiering and banding of payments. How do you decide who goes into which band? How do you set the borders between one band and another? Survivors and their representative organisations have expressed doubts about whether banding was the right way to go about this.

I have two main questions. First, what is the rationale for the banding, and what other options were looked at? Secondly, does that issue need to be included in the bill? It seems to me to be something that might require adjustment anyway if the scheme lasts for five years or more, if only in order to take account of inflation, for example.

John Swinney: To be frank, I find this a difficult issue to talk about because, fundamentally, judgments will have to be made about the level of abuse that has been suffered by individuals. I cannot find a better way to respond to Mr Neil's question than with those words, and they feel like totally unsatisfactory words to use. However, essentially, the scheme is predicated on making an assessment of the degree of suffering that individuals have experienced and then attaching a level of financial reparation to that assessment.

We have shared with the committee some of the draft of the assessment framework, which we will be working on to help to inform the decision making. Again, this is a topic in relation to which it is difficult to work with survivors, because we need to be very careful about ensuring that we work properly with them. I want survivors to be reassured by the approach that is being taken but, to do that, I need to engage survivors in a discussion about material that can be extremely traumatic for them, and we have to handle that with enormous care and sensitivity. Naturally, I am keen to understand the committee's perspective on that question, because we are having to navigate our way through extraordinarily sensitive territory in order to make the right decisions in the interests of survivors.

Alex Neil: What were the criteria for deciding what the bands should be?

John Swinney: Essentially, we looked at a range of schemes in different jurisdictions and examined the feedback that we received in relation to the advance payment scheme, and then we constructed the model that is in the bill, which involves the assured payment from Government and then, based on the evidence that is able to be drawn together about the experiences of individuals, three additional individual payment levels that could be constructed, which we feel are sufficiently distinctive to be materially different from each other and to provide the opportunity to recognise the difference between the levels of abuse that individuals suffered and for which reparation is to be made.

Alex Neil: It would be useful if we could get the details of that assessment. I do not think that we have that in anything that I have read so far.

John Swinney: The draft assessment framework has been shared with the committee, but only very recently—just in the past couple of days. I stress that there has to be an assessment framework at the heart of the bill that explores the contents of each of the levels. Again, I want to have a very open discussion with the committee and survivors about the composition of that approach.

The Convener: Thank you, cabinet secretary. That information has, indeed, been shared with us recently. We have also received a paper from our adviser, Professor Kendrick, which contains a detailed comparison of schemes elsewhere. I thank him for that.

Jamie Greene: I absolutely accept the cabinet secretary's uneasiness with the notion that we are attaching a level of financial compensation to the level of abuse that took place and the hurt that was experienced. That is uncomfortable for us all. There is also, perhaps, due reason for that, given the amount of evidence that individuals will be asked to submit in relation to the levels.

There is a genuine question about what the maximum compensation should be. Many people from whom we have taken evidence think that a highest level of £80,000 is nowhere near enough. The Republic of Ireland's residential institutions redress scheme, for example, has awarded up to €300,000, and the maximum payment in a scheme in Canada is $250,000. The Scottish scheme seems to be at the low end of the scale, compared with schemes in other parts of the world. I am not saying that that is right or wrong, but I would welcome clarity on how the numbers were arrived at and whether they need to be in primary legislation.

Many survivors have suggested that it would be beneficial to have survivors on the panels that decide on awards, and they have said that provision for that could be in the bill, to ensure that there is always representation from survivors or survivor organisations. They have said that that might go some way towards rebuilding trust in the awards system. Do you have a view on that, cabinet secretary?

John Swinney: First, on the levels, our assessment is based on a range of international evidence. The committee will benefit from Professor Kendrick's input on that point, and we will look carefully at the evidence that it considers and at its report on the provisions in the bill.

Secondly, on the difficult issue of whether survivors should be on awarding panels, I am not opposed to the idea. The feedback from our dialogue with survivors was that we must consider whether being involved in decision making on cases would potentially traumatise survivors—and we came down on the side on which we came down in that regard.

Having said that, the Government wants to ensure that we constantly hear survivors' views in the process, to ensure that we understand, are aware of and take account of the survivor's perspective in every way that we can in the shaping and delivery of the scheme.

Jamie Greene: That is important during the bill process, but in the long term, over five years, applications will be dealt with on a case-by-case basis. The feedback that we have had is that, although it might be difficult for members of the awarding panel to hear some of the evidence, there are survivors out there who have the strength of character to put themselves forward to take on that role and who think that it is entirely right that a survivor be part of the process, because only a survivor really understands the consequences and effect of the abuse on an individual, which would help to determine the right level of compensation due in any individual case. We have been told that their presence should therefore be mandatory.

11:45

John Swinney: As I said, I am not opposed to that. There are sensitivities involved, but, equally, Mr Greene is correct that there are survivors with whom I interact regularly who have enormous strength of character. I am full of wonder at how they have such strength of character, but they are amazing people. They would certainly be immensely capable of doing that. Again, I am open to considering that issue.

The Convener: That is an area on which survivors had very strong views, but it reminded me of some of the discussions around the Social Security (Scotland) Bill, as it was then. There were two issues in relation to that bill that might be helpful to survivors. One is the phrase that was used in many of the documents about compassion, fairness, integrity and respect. I wonder whether you would consider including it in the bill. Also, mindful of how survivors want to be involved in some way in the redress panels, could consideration be given to an experience panel to inform decisions in the same way as happened with the social security bill?

John Swinney: I am certainly keen that we have survivor input to all aspects of the design of the scheme. We are constantly involved in that dialogue. We have taken great care through the consultation exercises and in the preparation of the bill to ensure that we hear that point. Indeed, the point that I articulated in my response to Mr Greene was a reflection from the consultation exercise that we undertook with survivors. There was some concern about whether survivors sitting on panels would run the risk of traumatising survivors further. I am not, for a moment, saying that that is a universal opinion for survivors. Mr Greene is absolutely correct that there are some survivors with astonishing strength of character who would be able to make a significant contribution, and I am determined to ensure that we have that option at all times.

On your point, convener, about some of the characteristics of the bill, you make a fair point that perhaps one element that we have not stamped all over the bill is the ethos that we expect the approach to involve. That was the approach taken in the Social Security (Scotland) Act 2018, and there is certainly the opportunity for us to ensure that the bill conveys that ethos, to ensure that it starts its work on entirely the correct footing.

The Convener: Mr Johnson, if you could ask your supplementary questions and then move on to the area of non-financial redress and apologies, that would be helpful.

Daniel Johnson: I will do that, convener. I have two questions about the tiered payments. First, colleagues have correctly outlined the real sensitivity about the new body, in essence, distinguishing between different individuals and different experiences. In some ways, Alex Neil's suggestion that keeping how that will be done completely out of the bill is one way of doing that, because it needs to be done sensitively and, indeed, flexibly, on the basis of individual experience. However, my feeling is that the bill neither specifies the approach nor leaves it to the body, because the bill says that, in essence, it is about the materiality of the abuse that took place—both its duration and the seriousness of the acts.

First, I wonder why the consequences and preventability of those tragic events will not be taken into consideration. Secondly, I wonder whether the bill should specify in more detail the principles—in terms of statements of values, not detailed decision-making processes—on which those decisions should be made. What is the cabinet secretary's response to those thoughts?

John Swinney: I hope that part of what I said in my previous answer to the convener reassured Mr Johnson about the need for the ethos, which we think is important to underpin the bill, to be very clearly understood. In the light of the discussions with the committee, I want to make sure that we

reflect on whether that needs to be made more explicit in the bill. We will consider that point.

With regard to Mr Johnson's question about whether consequences and preventability are duly taken into account, I contend that they are. If we take the concept of preventability, none of that abuse should have been happening, so there has to be an acknowledgement that failure by providers led to children having those experiences. Preventability is written through the ethos of the bill, because none of it should have been happening, but it happened and we have to face up to that as a country. That acknowledgement informs the judgments and decisions that the panel arrives at, based on the experiences of individual children and cases. In my view, all those questions should be material parts of the discussions and deliberations that are taken forward by the process in which we are involved.

Daniel Johnson: I will stay on the topic of tiers before we move on. As is set out in the draft framework, the experiences that are outlined in relation to level 3, which would receive an £80,000 award, are sexual abuse, trafficking and hospitalisation or injuries that should have incurred hospitalisation. My intuitive feeling is that £80,000 is a very low amount for those sorts of injuries and experiences. What possibility is there of revisiting that maximum award? I would like to get the cabinet secretary's reaction and thoughts about whether that maximum award could be revisited as we progress through stages 2 and 3.

John Swinney: There is no perfect, defined position. I hope that the committee is getting a sense this morning that I am keen to make sure that, as a Parliament, we agree how we are going to progress. I cannot say to Mr Johnson that there is a cast-iron reason why the maximum payment has to be that figure; it would not be appropriate for me to say that. There is every opportunity for us to look at such questions—the committee is taking evidence, the Government has looked at comparative experiences, and Professor Andrew Kendrick has informed the committee with his paper. All those pieces of evidence need to be reflected on, and I am open to considering the appropriateness of the levels, including the maximum level, in the spirit of an engaged parliamentary process.

Daniel Johnson: The survivors that we have heard from have made it clear to us that non-financial redress is a very important part of the process. I will put to the cabinet secretary the two propositions that I put to the previous panel. First, could we explore the creation of a mechanism to provide individual apologies to applicants? An apology could be provided to applicants by the individual contributors to the scheme.

Secondly, could there be a broader and more general statement that all contributors would be required to sign up to? This is a no-fault scheme. Such a statement would mean that no contributor could get away with saying that it had made its contribution and its payment but that it had done nothing wrong and that the scheme had said that it was not at fault. A broad, general apology that everyone had to sign up to would prevent that unfortunate circumstance.

What are the cabinet secretary's thoughts on those two propositions?

John Swinney: I take the view that the scheme—along with the Scottish child abuse inquiry that is hearing evidence under Lady Smith's leadership and the advance payments scheme—is part of an exercise that we, as a country, must face up to. In the past, we presided over the completely and utterly unacceptable treatment of children. That must be faced up to and addressed. The former First Minister Jack McConnell apologised on behalf of the country. I have apologised on behalf of the Government, and I will have more to say about those issues in the future. If I feel that and if Mr McConnell felt that, providers should also feel that.

Mr Johnson's point is a fair one. What I have heard from survivors is that they are very interested in an apology. They want the country and the organisations that were meant to be caring for them to face up to the past, and they are right to want that. I view it as an implicit part of our approach. We are confronting the need to make an apology and amends for what has happened in the past. I conclude my answer by going back to the beginning and my response to Iain Gray's questions. The most dependable way of doing that is to draw providers into a reliable and dependable mechanism that uses the waiver and that attracts the financial contributions of providers. That will give us a means of reliably and dependably addressing the suffering of some of our fellow citizens.

Rona Mackay: I want to ask about the types of abuse that the bill covers. First, corporal punishment, which we would now see as assault, is not covered. Why was that not included? Secondly, in my earlier question, I said that abuse by peers is not defined, but I did not put on record that the explanatory notes indicate that such abuse is covered. That relates to the distinction between a one-off fight that staff might not have known about and a pattern of behaviour that staff turned a blind eye to. Why is that aspect not in the bill? What are your views on corporal punishment?

12:00

John Swinney: Corporal punishment feels like a difficult issue as we sit here, in Scotland, in 2020. It is a matter of fact that corporal punishment was still provided for in our society until the early 1980s, if my memory serves me right. The approach that is taken in the bill reflects the circumstances of the time. However, an important caveat is that, although it might have been permissible at some time in the past for corporal punishment to be administered to young people in a school situation—heaven forfend—the use of that power was also abused through excessive or inappropriate use.

The bill does not say that corporal punishment is disregarded as a factor; it says that, although there was provision for corporal punishment in the past, if it was used zealously and inappropriately, that can be taken into account in reparations that are made. Therefore, it is not an unconditional writing-off of the concept of corporal punishment. It is, in essence, trying to apply a proportionate element.

I think that the aspect of peer abuse is adequately covered. However, if issues emerge during our dialogue and scrutiny as we go through the detailed provisions of the bill, I will, of course, be happy to reflect on the matter further.

Rona Mackay: Thank you, cabinet secretary. That is really helpful.

The Convener: I do not any member indicating that they would like to come in, but there are a couple of issues that we have not covered yet, one of which is the settings that are covered by the bill. We were very moved by all the evidence from survivors, but the issue of young people being placed in long-term hospital care came up, in particular. Do you have any thoughts on the representation that we have had regarding that issue?

John Swinney: The judgment that we have applied relates to situations in which organisations were acting on behalf of the state in replacing the role of parents—that is the definition of the parameters of the in-care scheme that we are developing. I suppose that, in certain circumstances, it comes down to how long term a long-term hospital setting was. We will, perhaps, explore the detail of that to determine the extent to which it comes within the definition of eligibility and the scope of the general presumption that the bill is trying to reach those cases in which a provider was acting on behalf of the state in circumstances in which parents would normally have provided the care.

The Convener: Jamie Greene has an additional question.

Jamie Greene: I want us to benefit from being comprehensive. We have not asked for the cabinet secretary's view on applicants with convictions, which is an issue that has come up. There are different schools of thought, and a range of views have been expressed on that sensitive issue. Does the Government have a view on the barring or exemption of any applicant based on criteria around different convictions?

John Swinney: I am against barring individuals from applying because they have had convictions, simply from the point of view that, although individuals who were the victims of abuse might have committed serious offences, none of us has an understanding of the trauma and experience that preceded the actions that led to those convictions. I feel more comfortable with—this is in the bill—those issues being subject to the review panel's judgment. There is no automatic right to acknowledgement and reparation, nor is there an automatic debarring from acknowledgement and reparation. That feels to me to be the right way in which to handle a difficult situation.

I completely understand why people would be concerned by the possibility that someone with a serious conviction might be able to secure compensation, but none of us truly understands the trauma that individuals will have experienced. Sensitive, careful, case-by-case judgment is required.

Jamie Greene: I appreciate that. I am not taking a view on the matter; each case is an individual one. However, the general public would have a view if they thought that a Government and taxpayer-funded scheme was providing compensation to people who had been convicted of serious sexual assault against children or women, for example. Given the levels of compensation in the scheme, we have a duty to justify that to the public as we go through the process.

The only other issue that I want to raise that has not come up is the interesting idea of non-financial redress. In the table of comparisons with other schemes around the world, there are helpful and interesting examples of other ways that Governments have been able to support victims without making compensation payments. For example, victims could have counselling, education and training funds, assistance with tracing their families and dental care—it ranges from country to country. Is non-financial redress part of the redress scheme, or will the Government deal with that elsewhere?

John Swinney: We have significant experience of that from the work that has been developed over a number of years with Future Pathways. That approach, and others, works directly with survivors, supporting them and identifying with

them what the best mechanisms of support would be.

We are making significant progress in improving the quality of life for survivors. I see an on-going requirement for us not only to address the issues of acknowledgment and reparation that I have talked about extensively today, but to put in place support for individuals that enables them to move on in their lives and come to terms with the trauma that they have experienced.

The Convener: The final issue, which came up in written submissions and also in evidence from our earlier witnesses, is concerns about charity law. The use of restricted funds and the issue of trust law came up today for the first time. Charities must be sure that they are not going to breach any existing provisions by agreeing to redress. Is the Government aware of the issue? What are your thoughts on it at this stage?

John Swinney: The Government is aware of the issue, and we have engaged with OSCR on those questions. It is important that the distinctions that you have properly set out are fully respected and that we fully meet the requirements of charity law and of charitable organisations. I am satisfied that the provisions of the bill are compatible with those requirements and approaches. The Government will continue to engage on those questions.

The Convener: That concludes the committee's questions. Thank you for your attendance, cabinet secretary. Your evidence has been extremely helpful.

12:09

Meeting continued in private until 13:37.

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