OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Education and Skills Committee

Wednesday 10 February 2021

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 10 February 2021

CONTENTS

EDUCATION AND SKILLS COMMITTEE
5th Meeting 2021, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Daniel Johnson (Edinburgh Southern) (Lab)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

John Swinney (Deputy First Minister and Cabinet Secretary for Education and Skills)

CLERK TO THE COMMITTEE

Gary Cocker

LOCATION

Virtual Meeting

Scottish Parliament

Education and Skills Committee

Wednesday 10 February 2021

[The Convener opened the meeting at 08:38]

Subordinate Legislation

Repayment of Student Loans (Scotland) (Amendment) Regulations 2021 (SSI 2021/8)

The Convener (Clare Adamson): Good morning. I welcome everyone to the Education and Skills Committee's fifth meeting in 2021. I ask everyone to please turn their mobile phones and other devices to silent.

Agenda item 1 is consideration of a negative instrument. Details about the instrument are in the committee's papers. I ask members who have comments to indicate that by typing R in the chat bar.

I see that no one wants to speak. Thank you.

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

08:39

The Convener: We move to item 2. This will be my first stage 2 as convener; I know that some committee members have dealt with bills at stage 2 in other committees. I will endeavour to get through the amendments as efficiently as possible.

When members wish to speak in the debate on an amendment, I ask them to indicate that by typing R in the chat bar. If members wish to intervene on a speaker, I ask them to please type I in the chat bar. I will give further information on divisions if we come to one. We move to consider amendments to the bill.

Section 1—Overview of Act

The Convener: The first group of amendments is on the waiver. Amendment 1, in the name of Iain Gray, is grouped with amendments 38, 2, 40, 3, 43 to 45, 48, 5, 84, 6 to 17, 106 and 107. I draw members' attention to the pre-emption information that is in the groupings document. If amendment 3 is agreed to, amendment 43 will be pre-empted. If amendment 17 is agreed to, amendment 100, from the group on initial determinations, will be pre-empted.

Iain Gray (East Lothian) (Lab): I will speak to amendment 1 and the other amendments in my name. It is appropriate that the group on the waiver is the first to be debated, because it goes to the heart of the bill's purpose. As we know, the redress scheme is the final stage in a very long process of recognising the appalling treatment that many children suffered when they were supposed to be in our collective care. It took years for their stories to be heard at all; years more for those stories to be believed; longer still for an apology to be made to them—initially by the then First Minister, Jack McConnell; and years more until their experience was formally investigated and recognised in an inquiry.

It has taken yet longer to produce the legislation that will provide those people with redress. The abuse that they suffered has blighted their whole lives, which have been further hurt by the struggle for justice that they have faced. We all want to get the scheme right—above all, for survivors. The bill that we pass and the scheme that it creates must be trusted by survivors, yet the bill as introduced has at its heart a measure that threatens to compromise such trust. As the committee has heard, some survivors consider that measure to be a betrayal.

Under the waiver, if a survivor benefits from the redress scheme, they are required to give up their right to pursue civil justice. The cabinet secretary argued to the committee that that is necessary to ensure that care providers in whose care survivors were abused contribute to the scheme. It is true that survivors want care providers to contribute. However, the cabinet secretary has been unable to put before the committee the evidence that the waiver is the critical element that will ensure that contributions are forthcoming.

The committee heard evidence from potential contributors that, although a waiver might help them, it is not the critical factor—that is the affordability of the required contribution and the fear of a commitment without limit, which we will deal with under other sections. The providers were at best ambivalent about the protection that the waiver purports to provide.

We must remember that contributions will be voluntary, with or without the waiver in place. There will be no compulsion. In effect, we are being asked to include in the bill a measure that threatens to undermine the scheme in survivors' eyes, and to do so in the interests of those who historically allowed the abuse to happen, without creating a compulsion on care providers to contribute.

The key amendments are amendments 6 and 7, which would remove the waiver requirement. The other amendments that are in my name are consequential to those amendments.

I acknowledge that the cabinet secretary has made significant efforts that would mitigate the effect of the waiver, but it would remain in place even if his amendments were agreed to. He has not managed to square the circle of the waiver and contributions. Given the choice, we should choose to square that circle on the side of survivors. We should protect their rights and ensure their confidence in the bill.

I move amendment 1.

08:45

The Deputy First Minister and Cabinet Secretary for Education and Skills (John Swinney): I thank Mr Gray for raising the issue of the waiver. It has been a key issue throughout the scrutiny of this bill, and it is important that we discuss it today. I also thank the committee for its careful consideration of this complex and sensitive matter. During the past weeks and months, we have all been navigating our way through a wide range of evidence and an even wider range of views on this issue.

[*Inaudible*.]—explore alternatives, and we have looked far beyond our shores at the experience of other schemes. The result of that exploration and consultation has confirmed my belief that the inclusion of a waiver represents the best possible way of delivering a collective approach to redress that secures the financial contributions that survivors want and deserve.

There can be no mistaking the commitment and desire of all of us in Parliament to do the very best we can for the survivors that our country has let down so badly.

I fully acknowledge that there are no easy options, but I continue to believe that the waiver is the best option available to us. The waiver is an important mechanism to encourage the participation of organisations. It is the only route to securing meaningful contributions at a level that can be considered fair and appropriate. The waiver helps to secure financial contributions by reducing the risk of litigation that organisations, the Scottish Government and local authorities would otherwise face in relation to abuse covered by the scheme. By reducing that risk, the waiver enables those organisations to commit to larger contributions than would be the case if there were no waiver and the risk of future litigation were not reduced.

Alex Neil (Airdrie and Shotts) (SNP): As the cabinet secretary knows, I am not enamoured with the waiver, although I recognise that in his amendments he has gone a long way to try to deal with the concerns of survivors. A major concern for some survivors is that, after they sign a waiver, additional information might become available that would have given them a good chance of success in getting substantially more compensation and redress in court. Between now and stage 3, will the Government consider the possibility of amendments to address that situation, so that if any survivor finds themselves in it, the waiver could be waived?

John Swinney: I am grateful to Mr Neil for the intervention. I listened carefully to the concerns raised by survivors and others on that point and, if new evidence emerged, the amendments that I am lodging would allow redress payments that have already been accepted to be revisited to take account of that fact.

I want to create a redress scheme that is fair to survivors. That means empowering them to make the right decision, with independent legal advice, and to choose the right path. I lodged amendments to ensure that survivors have the time that they need to make those decisions and that the scheme is open long enough to allow them to fully explore other options. They also have the option to pause their redress application at any time before a determination is made.

However, Mr Neil made an important point, and I will consider that issue again in advance of stage 3. If there is more that we can do to strengthen the safeguards for survivors, we will certainly aim to do so.

The primary purpose and intention of the waiver is to ensure that those who are seen as responsible contribute to the scheme and the national response to historical child abuse in care in Scotland in a sizeable and meaningful way.

It is important to state that it is only by participating in the scheme at an acceptable threshold, by making a fair and meaningful contribution, that any organisation could have the waiver apply to it. In the absence of that fair and meaningful contribution, survivors will be able to receive their redress payment and still retain the option to raise legal action against the organisation.

It is my judgment that removing the waiver would have a significant impact on the Government's ability to secure financial contributions for redress payments to survivors. We know that from our extensive engagement with organisations and from the written evidence that was submitted at stage 1. Survivors responded in large numbers to both the 2017 consultation and the pre-legislation consultation, and in both cases the overwhelming majority stated that they wanted those responsible to contribute financially to the scheme. Without the waiver, it is unlikely that we will be able to deliver to survivors the redress scheme that they want. That would leave pre-1964 survivors with no avenue through which to hold their provider to account by way of receiving a financial payment from it because, as we all know, court options are not available to pre-1964 survivors.

Some organisations have told us and the committee that the waiver will not make a material difference, as they cannot afford to contribute at the threshold required to be covered by the waiver. However, the scheme cannot be designed around their needs alone, and it is important to recognise that, for many others, including some of the biggest potential contributors, the waiver is essential. Many of those organisations want to do the right thing but, without the waiver, they may not be able to do so, largely because they would continue to face the financial risk of civil litigation.

I understand the concerns that have been raised, and we have sought to safeguard survivors' rights in the bill—for example, by funding independent legal advice for applicants to ensure that all decision making is fully informed. I am also proposing a broad range of changes to the bill that seek to further strengthen those protections. They include extending the time period that survivors have to make key decisions and removing initial determinations so that the waiver will come only at the very end of the process, when a fully informed decision can be taken. They also include allowing the ability to bring a second application for an individually assessed payment to redress Scotland in light of new evidence, even if an earlier payment of less than the maximum amount was already accepted and a waiver was signed to bring matters to an end.

I will come on to the mitigating measures that I am proposing, including ensuring that waivers can be revoked if an organisation reneges or defaults on its commitment to make the agreed financial contributions to the scheme. That will ensure that waivers will, as intended, stand only in situations in which an organisation made a fair and meaningful contribution to the scheme.

I appreciate that the redress scheme will not be the right path for everyone. Indeed, it is not designed as such; I do not hide from that. It is a route to financial payment in respect of historical abuse for those who currently have no route. For those who already have the choice to go to court but do not want to do so, it offers an alternative option that many, but not all, will find attractive. The right of survivors who can and want to go to court instead of receiving a redress payment is entirely unaffected.

I have carefully considered the alternatives that were discussed in the stage 1 evidence sessions, such as offsetting, but I do not consider that there is an option that is as workable or as effective as the waiver in being able to deliver up front the scale of contributions that we seek for survivors. I have listened to the concerns of those who have given evidence, and I do not in any way dismiss them, but I ask colleagues to consider carefully what we are seeking to do. I believe that, to achieve the aim of providing meaningful redress, which includes payments that contain a contribution from providers, our scheme, like other schemes around the world, must include the waiver.

For the reasons that I have set out, I invite committee members not to agree to Mr Gray's amendments, which have the intention of removing the waiver.

I have heard concerns expressed by some survivors that organisations that agree to make fair and meaningful contributions to the scheme may not ultimately do so. It is essential that survivors have confidence in the commitments that are made by organisations that choose to participate. The scheme looks to organisations to play their part and to make fair and meaningful contributions to redress payments. It is only on that basis that survivors can be asked to sign a waiver in relation to the organisation, and it is essential that the

basis on which that waiver is signed is respected and delivered.

I listened to the concern that waivers, once granted, are currently not affected if an organisation defaults on its agreed payments. The bill, as introduced, provided that unpaid contributions could be recovered as a debt owed to the Scottish ministers. I recognise and acknowledge that that simply did not go far enough for survivors, and I believe that returning the survivors' rights to them as if they had not signed the waiver against the defaulting organisations in the first place is the fairest way to proceed. The amendments will allow that.

Where it transpires that an individual survivor's redress payment did not include a contribution from a particular organisation because it failed to pay what is promised, that individual survivor's waiver will not continue to apply against that organisation. The intention is that survivors sign a waiver on the understanding that they receive redress that includes a fair and meaningful contribution from their provider. If that contribution is not delivered, the survivor should have returned to them the right to pursue that provider in the civil court, through the retrospective removal of the organisation from the contributor list.

I understand that an applicant may choose redress precisely because the scheme has received provider contributions. For some, that will be a preferable way to hold providers to account and to receive financial payments from them. For such survivors, it would be unjust if, in good faith, they signed the waiver but the organisations defaulted and failed to pay. I hope and am confident that all contributions that are agreed in our scheme will be delivered. I have taken significant steps to facilitate participation and to address affordability concerns. Organisations that are seeking to fairly play their part in the scheme are looking to face up to the past with integrity. We will work with them to ensure that their agreed contributions are made. However, in relation to the prospect of default where agreed payments are not delivered, my amendments on the subject will strengthen the rights of survivors. If the contribution is not delivered in full, the settlement cannot be considered to be final.

My amendments will make it possible for the Scottish ministers to retrospectively remove organisations from the contributor list where they default on their agreed fair and meaningful contributions. The amendments put the needs and the confidence of the survivors at the forefront of the process. I therefore ask that the committee supports those amendments.

The committee recognised the Delegated Powers and Law Reform Committee's concern that the negative procedure would not provide an adequate opportunity for scrutiny of the form and content of the waiver, given its significance in the context of the redress scheme and the potential implications for applicants. In response to the stage 1 report, I committed to lodge an amendment at stage 2 to make the regulation subject to the affirmative procedure. My amendments 106 and 107 will do that. Effective and thorough scrutiny of the waiver is important to ensure that applicants and organisations have confidence in relation to its functioning and that of the scheme as a whole. I hope that that amendment to the procedure for the regulations on the matter will go some way to ensuring that that is the case.

Daniel Johnson (Edinburgh Southern) (Lab): I thank the cabinet secretary for his contribution and for the manner in which the Government has conducted its engagement with the committee. I also thank fellow committee members. I think that we all understand the seriousness and importance of the bill.

I understand the purpose and intent of the waiver. The bill is about a series of balances between the rights and requirements of survivors and the limitations and restrictions that there might be on providers, and it is important that both of those groups participate. However, despite the significant number of changes that the Government has introduced, which I welcome, there continue to be issues with the waiver.

The first is whether the waiver adequately secures the participation of providers. As Mr Gray alluded, it is far from clear that it will do that. That is simply about the incentives that the waiver will create. Although it would prevent participating organisations from being taken to court, at the moment, it is not clear that that provides those organisations with an incentive, given the arrangements that they might or might not have in place with insurers. In short, if providers are uninsured or their insurance does not cover them whereas it would cover them if they were taken to court, by participating in the scheme, they would be exposed to additional financial liabilities to which they would not be exposed if they simply sat it out and, in essence, allowed people to pursue their claims through the courts. That remains a significant issue.

09:00

The other critical issue concerns survivors' rights. We are essentially asking survivors to set aside their rights in order to take part in the scheme. I understand and appreciate that, for a great number of survivors, it might not be possible—or they might not be willing—to go through the courts. Nonetheless, there are questions around whether the scheme as it is

currently constituted would adequately ensure that they were informed in making that decision. There is also the question of scope, given that the scheme does not cover damages in all respects, particularly loss of earnings. Finally, there is the question of whether it is legitimate to ask people to set aside their rights. It is not always acceptable to enable people, regardless of how informed they might be, to set aside their rights voluntarily.

For those reasons, I still question the waiver, particularly as it would apply in situations in which new information came to light, as Mr Neil highlighted. In addition, there is the question of whether it would be legitimate in situations in which the cost lies outside the scope of the scheme. In such cases, individuals must surely retain the right to pursue their claims through the courts.

I ask Mr Swinney, in summing up, to say whether he would consider other compromises and additional situations in which the waiver might be set aside, either by redress Scotland itself or through application to ministers or some other mechanism. For example, if significant new evidence came to light, an individual might ask ministers or redress Scotland for the waiver to be set aside—

The Convener: I am sorry to interrupt, Mr Johnson, but I will pause you there. The cabinet secretary said that he will not move the amendment, so he will not have an opportunity to sum up the debate on it. However, Mr Swinney is in a position to intervene in response to your comment if he wishes to do so and if you wish to take the intervention. I will pause for a moment to see whether that happens, and then we can move on.

John Swinney: I am happy to make some comments in response to Mr Johnson's very fair observations on the situation. Through the amendments that I have lodged, I am trying to take a number of steps to ensure that, while there is no erosion of survivors' rights, they have available to them the maximum choice as to what course of action they wish to take.

I have made it clear enough—and I put it on the record again—that the scheme was designed to give survivors a choice in the route that they decide to follow. They are not obliged to use the redress scheme, but it is designed to be an alternative to court action should they consider that to be viable.

As I said to Mr Neil, I certainly commit to identifying, during the remaining period available to me between stage 2 consideration of amendments and stage 3, whether there are other steps that we could take that would go beyond the amendments that we have already crafted to address the issues that Mr Johnson, Mr Neil and Mr Gray have raised in committee this morning.

Daniel Johnson: I appreciate that commitment, and I would seek to work with colleagues and the Government to explore whether there are possibilities in that regard.

I will highlight one other situation in which an application would clearly not be in the interests of the applicant, given the nature and the quantum of the compensation that is available. There might well be situations in which it is apparent that a claim, if taken through the courts, could result in an award that is much more generous than what is available under the scheme, or in which the amount of damages might be such as to cover the loss of earnings, as I mentioned. It might be clear to redress Scotland that it could not make an award to the same degree or extent as might be available through the courts.

I wonder whether, in that situation, we should make it possible for redress Scotland to make an exemption to the waiver at the point of the award or, indeed, to explicitly point that out to the individual. Ultimately, I am asking whether redress Scotland should have an overarching duty to act in the best interests of the applicants, because this is not a judicial process—it is not a process that finds fault, and it is not an adversarial process. Indeed, in many ways, we could regard it as an investigative process that seeks to establish facts. Therefore, I think that it would be perfectly legitimate for it to do that, and that would be one other possibility.

Finally, I understand Mr Swinney's point that it is about making sure that the scheme works—that it secures contributions from providers. In essence, he has alleged that, without those contributions, the scheme simply would not work at all. My simple point to him is this: we are dealing with people who were placed into care at the behest of the state, and it is ultimately a state responsibility that we are seeking to set up a compensation scheme for. Although providers might have provided that care and might be culpable or responsible for what happened thereafter, it is ultimately a state responsibility and that is explicitly part of the bill. I absolutely understand that it would be preferable for the providers to take part and make financial contributions to the scheme. However, that being the case, ultimately, the state should be underwriting the scheme and should be making sure that, if applicants come forward, they receive compensation regardless of whether we secure the participation of providers. That is the bottom line.

I accept that the participation of providers would be preferable. However, ultimately, I do not think that it is necessary for the scheme—albeit that, if

they did not take part, the scheme would come with a higher price tag for the Government.

Ross Greer (West Scotland) (Green): Like Mr Johnson, I thank the Government for the extent of its engagement in the process and its very sincere attempts to find a resolution to some really tricky issues.

That being said, with the waiver included, the scheme simply will not achieve its objectives. The waiver directly infringes the rights of survivors, and many survivors have made it clear to us that they will not engage with redress Scotland if the waiver is retained.

Last month, we heard that the main organisation for survivors of Quarriers homes has told the organisations not to bother contributing if the waiver is there. That calls into question the viability of the whole scheme and of the bill. Organisations that have engaged with the committee, including Quarriers, have made it clear to us that a waiver is not a condition of their participation. Those organisations that spoke to me were far more concerned about the imposition of a cap on contributions and the formula that will be used to calculate contributions. To the Scottish Government's credit, those concerns seem largely to have been addressed.

Insurers have submitted evidence explaining that the inclusion of the waiver does not change the likelihood of their paying out. If there are organisations whose participation is dependent on the waiver, they have chosen not to engage with the committee or with the Parliament, and we can proceed only on the basis of the evidence that is in front of us.

One other issue at play in the waiver debate, which Mr Johnson just touched on, is the extent to which the Government will end up paying the costs. I understand entirely the Scottish Government's reluctance to confirm that it will end up covering a significant amount of the costs if doing so might give some organisations less incentive to contribute. However, that is the reality.

Survivors have clearly told us that it is not important to them that the organisation that was responsible for their abuse should make the majority contribution towards their payment. In some cases, they explicitly do not want that organisation to contribute, because they believe strongly that, as the state carried ultimate responsibility for their welfare, the state should recognise that by making financial redress itself.

The evidence that was submitted to the committee at stage 1 was overwhelmingly clear, and our recommendation was unanimous: the waiver must be removed. No evidence has since been submitted to change that, and, throughout the process, survivors have made it clear how devastating the waiver's inclusion would be to them. If we cannot respond to the clearest message that survivors have given us, we, as a political class, risk failing them once again. I cannot countenance that, so I will vote for the amendments in Iain Gray's name.

Jamie Greene (West Scotland) (Con): Good morning to colleagues and to the cabinet secretary. Where do we start with this? The issue has been a conundrum for the committee. Reflecting on the words of Daniel Johnson, I think it is about striking a balance. The whole bill is about striking a balance between the technicality and the morality of it, which is what we have struggled with.

As others have said, this is a state-operated scheme. The Government of the day made a political and policy decision to set up the scheme, which I think we all endorse. The scheme will go ahead irrespective of the inclusion—or otherwise—of the waiver and contributions from providers. The question on our minds is how we can ensure that the scheme balances the rights of survivors—which have been discussed in great detail—with being workable and maximising contributions from the providers under which much of the abuse occurred. I do not agree with the point that, if no providers contribute to the scheme, it will still meet its purpose. I will comment mostly on that, because it is imperative that providers financially contribute to the scheme in order for it to close—[*Inaudible.*]—its intention.

Although I know that it is an emotive subjective, the waiver is a technical issue. As the Government has argued throughout—although not always particularly well—the premise of the waiver is that it will secure contributions from providers. However, as others have said, very few of those providers have been forthcoming, privately or publicly, to state that link in the great terms in which the Government has stated it. That has created an issue for the committee. Nonetheless, it remains the case that, if the waiver is removed, there will be significant challenges for the Government in securing contributions from organisations.

I do not think that the scheme is designed to replace court action for many people. Indeed, I think that many of the people who will best take advantage of the redress scheme would rarely seek benefit from court action. However, there may be those in the higher echelons of the payment scales—whatever we agree those are at the end of this process—who may well benefit from court action. Therefore, I fully expect the scheme to signpost and direct people to all the options available to them.

We have come a long way since we started this process. Some of the amendments that the

Government has lodged move us in the right direction in relation to the legal advice that will be on offer and its associated costs, the length of time that people will have in which to consider the options available to them, and, as we have discussed, some of the issues around what would happen if contributors refused to participate in the scheme.

I have lodged other amendments that will put on the record the levels of contribution that we expect contributors to make in order to improve transparency. If survivors feel that those organisations have withdrawn from the scheme, I would welcome there being further flexibility on the issue of the waiver. As we have heard, the waiver has many drawbacks, not all of which are moral—some of them are technical. However, we must be clear that no credible alternative has been offered, and it is not the job of the committee to come up with alternatives; that is the job of the Government. It has been fairly forthcoming on all options throughout this process, and I am not convinced that a credible alternative proposal has been offered at this stage. I am also acutely aware that the Parliament will dissolve in a few short weeks, and I would like to see the bill come to fruition. Indeed, there is an obligation on us to ensure that we get the scheme under way and do not push it into the long grass of the next Parliament.

I was never convinced that the Government had not explored all the options; I do not think that the waiver is in there for the fun of it. I have never believed that the cabinet secretary or his legislative team have it in there for no reason, because of all the difficulties that it comes with.

The view of the survivor community has been extremely forthcoming on the matter, but we have to separate the morality of the issue from the technicality of what we are working with. I want a scheme that contributors pay into—it is quite simple. If the bill provides the way to achieve that, it will offer a scheme that is fair and just. I will talk about "fair and meaningful" and "just" in more detail later.

09:15

Rona Mackay (Strathkelvin and Bearsden) (SNP): I largely agree with what Jamie Greene has been saying. What he just said is crucial: I, too, want a scheme that contributors pay into. The proposed scheme has pros and cons, and the issue is a difficult one—it is a balancing act. On balance, we should consider the positives and the fact that the scheme provides an avenue for the pre-1964 survivors. The waiver is not perfect, but, on balance, it has to stay.

The bill is crucial—it has to be enacted—and the amendments that the Government has lodged to mitigate some of the concerns, including the point that Alex Neil made about further evidence that may be forthcoming, will go a long to reassuring survivors that the proposals represent the best way forward. For those reasons, I do not support Iain Gray's amendments.

The Convener: The hybrid system makes it a bit difficult to have a debate, but I am conscious that there were some direct questions for the cabinet secretary in members' contributions. Does Mr Swinney wish to address any of those questions before we go back to Mr Gray to wind up on the group?

John Swinney: Thank you, convener. I am grateful to you for giving me the opportunity to contribute again. I will make two observations on the comments that colleagues have made, in addition to my earlier remarks.

First, Mr Johnson made some further remarks about what could be the perspective of redress Scotland or the obligation put on it. We need to explore further the question as to whether there are further duties or obligations. I am mindful of the grouping of amendments in your name, convener, that we will come to later, which set out the ethos of the scheme, if I may describe it in that fashion. We perhaps need to address some similar issues regarding redress Scotland that are not addressed in today's Government amendments, and we could consider those at stage 3. I am certainly happy to engage with Mr Johnson and other colleagues on that.

Turning to my second observation, I appreciate that the committee has received a range of evidence, both oral and in writing, on the question of the waiver. Evidence has been put to the committee on the necessity of having the waiver to establish the case for provider contributions. Such evidence was submitted by CrossReach, to name but one organisation that provided written evidence that the committee has considered. The committee has also heard from the Convention of Scottish Local Authorities on the matter.

Although I acknowledge that some survivors are strongly opposed to the concept of the waiver—and I understand their concerns—there are also survivors who believe that the waiver is a necessity for ensuring one of the fundamental objectives of survivors: that the providers that failed them—as the state failed them—make a contribution. That is enabled by the presence of the waiver. The state will, of course, make contributions to the scheme—that is an absolute given—but Mr Greene pointed out the importance of ensuring that providers, too, make contributions. In my view, the waiver is an essential ingredient in making that possible.

I am grateful for the opportunity to reflect on some of the points that committee colleagues have made.

The Convener: I invite Iain Gray to wind up and to press or withdraw his amendment.

Iain Gray: I will address some of the issues that have been raised—in particular, some of the cabinet secretary's points. He spoke about the consultation that happened during preparation of the bill and pointed out that the survivors who responded to that want the organisations that were responsible for the abuse to contribute. That is absolutely true. However, survivors also made it clear that they did not want to give up any right to take civil action.

In the evidence that the committee took, organisations that work with survivors made it clear on several occasions that the consultation made no link between the waiver and contributions. Therefore, I do not think that survivors made the choice that the cabinet secretary is suggesting they did. He said that the idea of the bill is to give survivors a choice between the less onerous redress system and the potentially far more onerous civil justice system, which is correct. He also said that it is not about giving up rights but about giving a choice, but the choice that we are asking survivors to make is to give up their rights. That is the fundamental point.

With regard to securing financial contributions, the cabinet secretary said that major contributors have said that they must have the waiver in order to be able to contribute. Nevertheless, there are potential major contributors who did not say that when they gave written or oral evidence on the record. For example, the cabinet secretary referred to CrossReach, which said in its early written evidence that it was in favour of the waiver. However, in oral evidence it made it clear that that was not a red line. That was not the critical issue that would decide whether it was able to contribute.

One major contributor that has been consistent in its support of the waiver is the Convention of Scottish Local Authorities. It communicated with the committee late last night and reiterated that position. However, an examination of its case shows that its desire for the waiver is driven by a desire to reduce the costs to local government of providing redress, and that is not the strongest of arguments in terms of the moral obligation that we have to respond to survivors.

As the cabinet secretary and others have said, significant concessions have already been made on the waiver and further significant concessions are likely to be made if the amendments that are before us, concerning the contributions, are agreed to—a cap on contributions, for example. Significant concessions are being made by the cabinet secretary to the contributors; my argument is that we need to make a concession to the survivors as well, which would be to remove the waiver.

I acknowledge that significant changes have been made and that the cabinet secretary says that he will make further changes before stage 3. I will look closely at those. However, for me, the basic circle that requires to be squared has not yet been squared. For that reason, I will press amendment 1.

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division. In the chat box, please type Y or "Yes" to vote for the amendment, N or "No" to vote against the amendment, or A to abstain.

May I prompt Mr Gibson to cast his vote? It does not seem to be recorded in the comments.

Kenneth Gibson (Cunninghame North) (SNP): I cast my vote earlier, convener. I am happy to have it counted twice, if that helps.

The Convener: I am afraid that it did not come through, Mr Gibson—it is easy for that to happen—but it has been recorded now.

For

Gray, Iain (East Lothian) (Lab)
Greer, Ross (West Scotland) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)
Wishart, Beatrice (Shetland Islands) (LD)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Greene, Jamie (West Scotland) (Con)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Mundell, Oliver (Dumfriesshire) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)

The Convener: The result of the division is: For 4, Against 7, Abstentions 0.

Amendment 1 disagreed to.

Section 1 agreed to.

Sections 2 to 5 agreed to.

Schedule 1—Redress Scotland

The Convener: The second group of amendments is on redress Scotland's chief executive. Amendment 34, in the name of the cabinet secretary, is grouped with amendments 35 and 36.

John Swinney: The establishment of redress Scotland—a new non-departmental public body—will deliver the independent decision making that is

essential for survivors and others to have confidence in the redress scheme. I recognise that building that confidence involves ensuring the good governance of redress Scotland in a transparent way.

Redress Scotland will be subject to a number of statutory duties and other obligations that will ensure its good governance without compromising its independence. Although the bill allows redress Scotland to appoint staff, it does not require the appointment of a chief executive. It was initially considered that that would not be required, because of the organisation's relatively small size. However, having considered the matter further in the light of the committee's stage 1 report, and as I outlined in my response to that, I am of the view that requiring the appointment of a chief executive will help to provide further assurance on the good governance of redress Scotland. Amendment 34 provides for that, and amendments 35 and 36 are consequential amendments.

I move amendment 34.

09:30

Daniel Johnson: I welcome the amendments. The separation of the chief executive and the chair is important. Although redress Scotland will be a relatively small organisation, its sensitivity—and, more important, its complete independence from the Government—means that we need the best levels of oversight and of scrutiny and good governance. It is a well understood point of principle that the separation of the chief executive and the chair is an important way of ensuring that, so I welcome the amendments and thank the Government for lodging them.

John Swinney: I take the opportunity to reflect slightly more on what Mr Johnson said in the debate on the first group and to welcome the comments that he has just made. I absolutely accept the critical importance of redress Scotland's independence and the clear separation of the exercise of its functions from those of the Government.

I will remain open to the fact that it is important for us, between stages 2 and 3, to consider further whether the character of redress Scotland is absolutely correctly set out in statute. In the earlier discussion, Mr Johnson raised a number of points that have merit, and, if the committee believes that we should consider other issues, I will be open to doing so as part of preparation for stage 3. I conclude my summation with those comments.

Amendment 34 agreed to.

Amendments 35 and 36 moved—[John Swinney]—and agreed to.

Schedule 1, as amended, agreed to.

Sections 6 to 11 agreed to.

After section 11

The Convener: I hand over the convening to the deputy convener, Daniel Johnson.

The Deputy Convener (Daniel Johnson): Thank you. I ask for the committee's co-operation, and I hope that I do not make the convener regret handing over the chair.

Amendment 20, in the name of Clare Adamson, is in a group on its own.

Clare Adamson (Motherwell and Wishaw) (SNP): From the comments that members have made today, there is no doubt that we feel the responsibility on our shoulders to do the very best that we can to ensure that victims and survivors have confidence in the redress Scotland bill. In its stage 1 report, the committee recommended that

"the Scottish Government considers including a statement on the face of the Bill recognising these qualities and the need for them to be applied across each element of the redress scheme."

In response, the Scottish Government agreed with

"the Committee's acknowledgement of the importance of these values"

and committed to considering further how the aim could be achieved.

The redress scheme has been designed with victim and survivor needs and expectations at its forefront, and it aims to ensure that applicants are treated with dignity, respect and compassion throughout the process. Incorporating a statement in the bill will demonstrate the importance of that and the commitment to victims and survivors in following a trauma-informed approach. The amendment places the duty not only on the Scottish ministers and redress Scotland but on scheme contributors and others that perform functions under the duties that are in the bill. I trust that it will give victims and survivors confidence in the legislation.

I move amendment 20.

John Swinney: I thank the convener for lodging this important amendment, following her interest in this potential addition to the bill during the stage 1 evidence sessions. I share the convener's view, which the committee supported, that all who are connected with the redress scheme should be fully committed to treating survivors with dignity, respect and compassion.

I fully support amendment 20, which will express that commitment in the bill as a clear demonstration of the scheme's survivor focus and trauma-informed approach. It will ensure that

everyone who is involved in the provision of the scheme, including those that contribute to it financially, is committed to its values when carrying out functions under the act. The amendment also provides us with the opportunity to reflect further on some of the issues that you have raised, deputy convener, and the Government will engage constructively in that respect.

Amendment 20 agreed to.

The Deputy Convener: I hand back the chair to the convener.

Section 12—Scheme contributors

The Convener: The next group is entitled "Scheme contributors: acknowledgement of harm". Amendment 21, in the name of Daniel Johnson, is the only amendment in the group.

Daniel Johnson: In many ways, this amendment follows on from amendment 20, as it is concerned with establishing the clear intent and principles that lie behind redress Scotland.

From the beginning of our examination of the bill, I have wrestled with the fact that we are not talking about a judicial process and that, explicitly, redress Scotland will not find liability or specific fault. That raises a practical point and a point of principle, which I feel require remedy in the bill.

The point of principle is that, by taking part and making compensation settlements, the providers have to acknowledge their responsibilities in terms of the harm that has been caused to the individuals who are receiving compensation. That is an important point of principle, and, although I understand the reasons why redress Scotland will not find formal liability, I think that it is important to accept liability.

The practical point concerns the fact that the way in which the scheme is currently configured means that it would be possible for providers to participate in the scheme and pay into it to make compensation settlements to individuals and yet be able to claim that they did nothing wrong. It is important that that is made absolutely impossible. Participation in the scheme must require an acknowledgement of the harm that was done and the wrongfulness of that, and an admission of responsibility. That is what the amendment intends to achieve.

I will listen to the contributions that are made in the debate, as I understand that there are complexities around the form of words that the amendment uses in relation to the broad acknowledgement of wrongfulness.

I might choose to withdraw the amendment at the close of the debate if the Government is willing to work with me to find a more suitable form of words, but I will press it if the Government feels that the wording is adequate. I will be mindful of that as I listen to members' contributions.

I move amendment 21.

The Convener: No members wish to contribute to the debate. I call the cabinet secretary.

John Swinney: I thank Mr Johnson for lodging amendment 21. I absolutely agree with him on the sentiment behind it and share his determination that the scheme provide tangible acknowledgement of the harms of the past and the failings that led to those harms. Although I envisage some difficulties with the detail of his amendment, I hope that he will agree to work with me in lodging amendments at stage 3 to address the issue to the same effect.

The acknowledgement of the role of providers in looking after children at the time they were abused underpins the concept of provider contributions to the scheme. The organisations that participate in the redress scheme must do so with integrity and the understanding that a fair and meaningful contribution is one that acknowledges the harm that arises from historical child abuse in the care settings.

Participation in the redress scheme is more than a financial transaction. That sense of acknowledgement—of facing up to the past with honesty and candour—and a willingness to apologise are essential to the commitment to the national collective endeavour that the scheme represents. It is those fundamental principles of participation that, I believe, Mr Johnson has sought to reflect through amendment 21. I share that objective.

The redress scheme deliberately does not seek to establish liability. The approach that we have followed allows providers to participate in the scheme by making fair and meaningful contributions without legal consequences beyond the redress scheme itself. It allows them to participate in a process that follows different rules from those that are followed in court, where providers would have the opportunity to examine and challenge the evidence against them, because the consequences of redress determinations are different from determinations made by a court. For applicants, that approach allows a faster, more survivor-focused and trauma-informed path to redress than is found in the civil courts.

The risk with amendment 21 is that the making of a contribution could be interpreted as meaning that organisations accepted legal liability, which would have consequences beyond the scheme itself and leave those organisations with greater exposure to litigation. Ironically, the amendment might mean that the organisations that are the

most interested in contributing would find themselves at the most risk of litigation costs, which would, in turn, reduce their ability to contribute.

I ask Mr Johnson not to press his amendment at this stage, on the basis that he and I will work together in the coming weeks to further explore what can be done to meet an objective that is common not only to us both but, I think, to all members of the committee. I want to ensure that contributions are given and received in the right spirit for the benefit of survivors, and I am certain that we can find a suitable way to address this critical issue in advance of stage 3. I commit myself to doing so in the weeks to come.

Daniel Johnson: I thank the cabinet secretary for his constructive remarks. I agree with his broad points, and I understand his specific points on the issues with the amendment as drafted. I look forward to drafting an amendment that adequately addresses those points in the coming weeks.

Amendment 21, by agreement, withdrawn.

09:45

The Convener: The next group is on "Scheme contributors: amount of contribution (publication, affordability, and use of charitable funds)". Amendment 37, in the name of Jamie Greene, is grouped with amendments 39, 41, 42, 46, 47, 4, 49, 50 and 105.

Jamie Greene: The amendments in this group largely fall into two categories. The first deals with the publication of financial amounts, and the second deals with affordability. I will start with the first.

It is important that the scheme that the bill establishes is as transparent as it can be. The list of contributors and a statement of principles underpinning the scheme are essential aspects, but the bill should go further and offer clarity about the nature of the contributions that are made to the scheme.

Survivors must be given all the information necessary for them to be able to make an informed decision about whether to apply to the scheme and, if they do, whether to accept a proposed payment. There is merit in including in the bill an explicit requirement to publish contribution amounts, which would give providers a greater understanding of how the organisations that are relevant to them have committed to contribute to the scheme, or, indeed, confirm that those organisations have not committed to contribute to the scheme. That is an important point, as such information might be more necessary than ever if it affects issues around the waiver, which we have discussed.

The publication of contribution amounts will demonstrate an organisation's commitment to work in the spirit of the scheme.

Amendments 37, 39, 41 and 42 aim to enhance confidence in the scheme among survivors and organisations that are looking to play their part. Different organisations will contribute different amounts, depending on the nature of the organisation and its historical legacy. I am reassured that the Government will look to ensure that organisations make contributions that address their legacy with fairness and proportionality. Publishing the amounts that are committed to the scheme will demonstrate our commitment to ensuring that the scheme is as open and transparent as it can be.

The second category relates to the scheme's affordability, which is an important issue. The committee took evidence on the affordability of contributions, which was a key concern for many provider organisations and will be one of the deciding factors in whether they choose to participate in the scheme. We have to bear in mind that the scheme is not compulsory and the Government cannot mandate any providers or organisations to contribute, so the scheme must be workable in order to maximise contributions.

The committee reflected those concerns in our stage 1 report, in which we suggested that the Government should consider the issue further. I thank the Government and its team for working with me to develop wording that reflects the concept of contributions that are fair, meaningful and affordable.

As we have discussed, this is a crucial issue. The scheme will operate irrespective of contributions from organisations. Organisations had difficulty with the proposed levels of contributions being asked of them—we do not know what the numbers were, but we have to take at face value the fact that organisations were uncomfortable. Therefore, my amendments seek to ensure that ministers consider the affordability of payments when negotiating contribution amounts.

That is important because the history of care in Scotland is very wide ranging and complex. Indeed, the nature of the organisations is also varied and complex. Some are religious organisations, some are public sector bodies and some are small charitable trusts. Some do not exist any more. What those that are still in operation have in common is that they face significant financial challenges—challenges that have been made worse by the pandemic over the past year. I want to ensure that providers participate in a way that does not threaten their viability as going concerns, but which still results in payments that are fair and meaningful for

survivors. It comes back to balancing fairness for both sides.

The matter of affordability should never diminish the commitment of organisations to the redress scheme, but nor should we make survivors feel responsible for the financial circumstances of the organisations that previously caused them such harm.

Organisations have a moral obligation to face up to the harms of the past. Equally, as many survivors have told us, participating in the scheme and facing up to that moral obligation should not be to the detriment of anyone who uses the services of that organisation. Getting that balance has not been easy. The Office of the Scottish Charity Regulator flagged concerns to us that significant contributions that came from reserves or restricted funds would put charities in an extremely difficult position.

I look forward to hearing members' contributions. I ask them to consider supporting my amendments so that affordability is considered as a factor when the Government negotiates the amounts that providers will contribute.

I move amendment 37.

Iain Gray: In evidence, we heard a great deal about contributions and the concerns of charities that wish to contribute. They recognise their moral obligation to contribute but fear that they would not be able to do so given the size of contribution required of them, because it is not clear what "fair and meaningful" means.

Other amendments deal with various aspects of that issue, including Jamie Greene's amendments, which I will support. However, amendment 4, in my name, makes it absolutely clear that one of the criteria should be the sustainability of the charity, particularly where it continues to provide valuable care or other services today.

Simply put, in seeking to right the wrongs of the care system of the past, we should not destroy the care system of the present. The combination of amendment 4 with other changes to the bill, such as a cap on contributions and the maintenance of reserved or restricted funds, should make it much more likely that the trustees of a charity will be able to recommend participation in the scheme, while not jeopardising their legal duty to protect the charity's interests.

The amendments in this group go a long way towards making participation in the scheme more likely on the part of many charities.

John Swinney: I am grateful to Mr Greene for lodging amendments 37, 39, 41 and 42. I share his call for contribution amounts to be understood in context, which is, after all, an important part of our redress work. How can we understand what a fair contribution should be if we do not understand an organisation's past and present? No figure should be thought of as too high or too low without that understanding. I would like to work with organisations to provide the best possible information on why a contribution is "fair and meaningful" for survivors.

Our work on redress shows us that abuse has taken place in care settings that were run by a wide variety of organisations. Some were small and some were large. Some are still providing services for children and others today, and some have completely different roles. The redress scheme will provide each organisation with the opportunity to play its part in redress in a way that is right for it and, importantly, for survivors.

The approach to "fair and meaningful" contributions must be consistent and principled. Survivors have been clear on the importance of openness and transparency throughout the process. I therefore support Jamie Greene's amendments.

Turning to amendments 46 and 47, I share Mr Greene's focus on encouraging organisations' participation in redress for survivors in ways that do not risk the important functions that many of them undertake today. It has always been the intention that fair contributions would be affordable and manageable for the organisations involved. Amendment 46 provides clarity that that will be the case.

Many charitable organisations find themselves in challenging financial circumstances, particularly in relation to the pandemic and its impact on charitable giving. Many of our discussions with organisations are focused on how contributions can be made meaningful while being manageable in organisations' operating context and while reflecting the needs of their service users. Amendment 46 will assist in creating the conditions for organisations to participate in the redress scheme through making fair and meaningful contributions that are manageable and affordable over time.

We also recognise that the issue of responding to historical child abuse in care through financial redress is characterised by uncertainty, as the time periods involved and the sensitive subject matter make application rates difficult to predict. It is therefore important to consider how that uncertainty can be addressed. Following stage 1, I proposed changes to our approach to contributions. I have made a number of significant changes that I believe will give organisations greater clarity and certainty when considering whether to contribute to the scheme.

I will introduce a cap for contributions based on the best available evidence on potential

applications, which will give organisations some certainty in their financial planning. I will also increase the Government's proportion of the contribution for each individually assessed redress payment to one third of the total payment or £10,000—whichever is the higher amount. I believe that those changes make fair and meaningful contributions more manageable for organisations, and provide the certainty to enable financial planning in these very uncertain times. Crucially, the changes will do so while ensuring that contributions remain at a level that is meaningful in redress payments for survivors.

Organisations have told us that they wish to support the redress scheme but might struggle to do so. Amendment 46, alongside other measures that are being pursued alongside the bill, will go a long way towards addressing that concern. It is in everyone's interest to facilitate contributions so that providers can face up to their moral responsibilities; so that, for the taxpayer, the state alone does not shoulder the cost of redressing harms; and, most important, so that survivors receive meaningful payments in tangible recognition of the abuse that happened.

I thank Mr Gray for focusing on affordability for potential contributors to the scheme that are charities. Creating the conditions to facilitate a collective approach to redress is an important aspect of the work. As I have already described, I have been carefully reviewing the approach to contributions in the light of the committee's stage 1 report and representations that were made by potential contributors that are charities.

Addressing the issue of affordability must take into account the circumstances of the organisation and should not risk its current services. I believe that we are all in agreement on that point. However, addressing affordability should not be to the detriment of survivors who apply for redress. Survivors of historical abuse are not responsible for the financial functioning now of the organisations that caused them harm, and they should never be made to feel that way.

We have put together a package of measures that maximises opportunities for organisations to participate, while not compromising the ethos of the redress scheme that we want to establish. The amended approach to contributions is complemented by amendments 46 and 47, which have been lodged by Mr Greene. They seek to ensure that affordability is given appropriate consideration and that organisations are supported to contribute in manageable but meaningful ways. Mr Greene's amendments will secure that necessary consideration in the context of the scheme that we are seeking to create.

In contrast, I have reservations about amendment 4, which has been lodged by Mr Gray. It would apply only to charities and not to the full range of organisations with which we are seeking to engage. Section 14 is designed to enable charities that want to make a contribution to do so. My concern with Mr Gray's amendment is that it would introduce an unnecessary limitation and, potentially, a further barrier to contributions, which will, in any event, be sought on a voluntary basis. The amendment risks being perceived by charities as an extra barrier in law and an extra risk to their making a contribution. Mr Gray's amendment would place decisions in relation to affordability on charities themselves, but I argue that existing charity law is sufficient to ensure that charities take all relevant considerations into account in making a decision on whether to contribute.

From the outset, I have spoken about the need for collective national endeavour. In no area is it more crucial that we take a collective approach than the making of contributions. We must seek to create conditions that allow organisations to join in order to demonstrate their integrity and commitment to survivors. We must not create excuses, dilute the response or make it easy to withdraw from moral obligations.

I acknowledge colleagues' responses to the important matter of affordability and I am encouraged that we all share the view that contributions should be both affordable for those who make them and sustainable, so that important services can continue. Having considered—

The Convener: I am sorry to interrupt, cabinet secretary, but Mr Gray has indicated that he would like to intervene on the point that you have just covered. Are you willing to take that intervention?

John Swinney: Of course.

10:00

Iain Gray: On the point about the relationship between affordability and the ability to continue to provide services, I hear what the cabinet secretary says and I realise that affordability of contributions is covered in other amendments, but the very specific point about the capacity to continue to deliver services being an element of affordability is important. I am willing not to move amendment 4, but I would be grateful if the cabinet secretary would consider whether there is any way that the matter might be made explicit at stage 3.

John Swinney: I am happy to explore further the possibilities in that respect. As I said, Mr Greene's amendments substantially address the matter, but I will, once we see what alterations are made at stage 2, be happy to engage in further dialogue with Mr Gray and other colleagues to determine whether more needs to be done. I encourage the committee to support the amendments that Mr Greene has lodged. Mr Gray

has said that he might not move amendment 4, on the basis of willingness to engage further. I happily commit on the record to that engagement before stage 3.

I turn to amendments 49, 50 and 105, which are in my name. I have listened to concerns about what the bill says about use of charities' restricted funds. Although section 15 was intended to empower organisations and remove barriers to their contributing, in the stage 1 debate I accepted that it has not been welcomed by organisations and committed to lodging an amendment to remove that provision from the bill. Amendment 50 will do so, and amendments 49 and 105 are consequential to that.

Removal of section 15 will mean that there will no longer be a mechanism in the bill whereby charities would be permitted to use restricted funds to make a contribution to the redress scheme. I hope that, with amendment 50, the provisions in respect of contributions to the redress scheme from charitable organisations are such that those who look to play their part for survivors can do so.

Daniel Johnson: I will briefly elaborate on the point that Mr Gray made in his intervention. Although I acknowledge that Jamie Greene's amendments are a substantial step forward, there is a clear distinction between affordability and sustainability—in particular, sustainability of services. They are related but different concepts. If we take a broader understanding of charities' financial requirements in managing their profit and loss accounts and balance sheets, we can see a number of circumstances in which contributions might seem to be affordable but would make it difficult to maintain their current level of services, either in whole or in part.

I acknowledge that the detail of the interpretation of affordability might allow such considerations to be taken into account in assessing fair and meaningful contributions from providers, but it is important that sustainability of services is made explicit in the bill, so that we ensure that such considerations are taken into account.

I am encouraged by the cabinet secretary's having said that he will work with Mr Gray before stage 3. Sustainability is an important concept that should be in the bill.

The Convener: I invite Jamie Greene to wind up and to press or seek to withdraw amendment 37.

Jamie Greene: I thank members and the cabinet secretary for their contributions. I will keep my comments brief.

The main point that I have taken from our discussion is that although my amendments 46 and 47 go some way towards improving the provisions on affordability, they perhaps do not go the whole hog, which I accept. I appreciate the cabinet secretary's willingness to work with members. Contributions should be not only affordable—a concept that relates to a point in time—but sustainable in relation to the future activities of organisations, whether they be charities or otherwise.

Therefore, I, too, would like to work on augmenting my amendments ahead of stage 3, either through the Government working with me and other members, or doing so itself, to ensure that we take cognisance of the sustainability of organisations that want to do the right thing.

I will add a brief closing point on this important area. It is entirely right that organisations face up to their past and that they do so not only with honesty but with confidence in the scheme. Equally, however, it is right that survivors know which organisations are contributing and to what extent. It should be a point of pride that organisations are facing up to a very difficult past and will play their part by participating in the scheme, which should recognise those that want to do the right thing. However, there should also be no reputational risk from participation. I would go as far as to say that perhaps questions should be asked of those that choose not to participate.

I will press amendment 37.

Amendment 37 agreed to.

Amendment 38 moved—[John Swinney]—and agreed to.

Amendment 39 moved—[Jamie Greene]—and agreed to.

Amendment 2 not moved.

Amendment 40 moved—[John Swinney]—and agreed to.

Amendments 41 and 42 moved—[Jamie Greene]—and agreed to.

Amendment 3 not moved.

Amendments 43 and 44 moved—[John Swinney]—and agreed to.

Section 12, as amended, agreed to.

Section 13—Statement of principles in relation to contributor list

Amendment 45 moved—[John Swinney]—and agreed to.

Amendments 46 and 47 moved—[Jamie Greene]—and agreed to.

Section 13, as amended, agreed to.

After section 13

Amendment 48 moved—[John Swinney]—and agreed to.

Section 14—Financial contributions by charities

Amendment 4 not moved.

Amendment 49 moved—[John Swinney]—and agreed to.

Section 14, as amended, agreed to.

Section 15—Financial contributions by charities: restricted funds

Amendment 50 moved—[John Swinney]—and agreed to.

Section 16 agreed to.

Section 17—Meaning of "abuse"

The Convener: The next group is on "Eligibility: abuse". Amendment 51, in the name of the cabinet secretary, is grouped with amendments 22, 52, and 53.

John Swinney: During stage 1, evidence was heard about the fact that the definition of "abuse" in the bill is different from the inclusive definition in the Limitation (Childhood Abuse) (Scotland) Act 2017, the legislation that removed the three-year limitation period for court action for damages for personal injury arising from childhood abuse.

10:15

The current definition in the bill provides that "abuse" means

"sexual abuse ... physical abuse ... emotional abuse"

and

"abuse which takes the form of neglect"

rather than that it includes those things, as in the definition in the 2017 act.

We always intended our definition of "abuse" to cover all the forms of abuse that survivors might have suffered, and our view was that the very broad categories set out in the bill achieved that. However, during stage 1, concerns were expressed that it was possible that some types of abuse might be excluded by the bill and would therefore not be eligible for redress. I have listened to those concerns and am persuaded that, for the sake of clarity, consistency and reassurance for survivors, there is merit in aligning the definition in the bill with that in the 2017 act. Amendment 51 therefore substitutes "includes" for "means" in section 17(1).

Ms Mackay's amendment 22, which is on corporal punishment, also relates to the definition of "abuse". I am happy to support the amendment and I welcome the additional clarification that it brings. Potential applicants to the scheme should be in no doubt that abuse was abuse, whether or not it was disguised as corporal punishment, and all survivors of abuse in care must know that the scheme is there for them. The committee recommended that

"the Scottish Government should consider how best to instil confidence in ... survivors that the excessive use of corporal punishment will be covered by the scheme."

I believe that Ms Mackay's amendment appropriately and directly addresses those concerns.

My amendment 52 provides additional reassurance that the regulation-making power in section 18(4), which allows us to modify the definition of "residential institution", will be used only to widen eligibility for the scheme. Some of those who gave evidence at stage 1 said that they were concerned that the power could be used to narrow eligibility, with the effect that eligibility requirements as to the care settings covered by the bill could change over the lifetime of the scheme and that a person who anticipated being able to apply now may no longer be able to do so in the future. I reassure survivors and the committee that that is not the intention. The power in section 18(4) is already intended to be used to widen eligibility, not narrow it. That power is separate from the power of ministers under section 21 to create exceptions to eligibility where that is necessary, and it is consistent with the underlying purposes of the scheme. Similarly, that power could not be used to narrow the settings that come under the scheme. However, it may be used to exclude specific circumstances or arrangements that led to the child being cared for in the setting—for example, short-term respite care may be excluded.

We have the power in section 18 in order to ensure that the definition of "residential institution" can be adjusted in due course should that prove necessary in the light of experience gained during the lifetime of the scheme. We must remember the complexity of the care setting landscape over the period in question. It is important that we keep a level of flexibility available for any necessary amendment, even though we may anticipate that the power would rarely be used. The future exercise of the power in section 18(4) will already, quite properly, be subject to the Parliament's approval under the affirmative procedure. However, we have considered whether the power could be amended to reinforce the intention that its exercise should result in no detriment to survivors. Amendment 52 provides reassurance on that.

Amendment 53 is a technical amendment to make it clear that abuse that occurred on trips outside Scotland will be covered by the scheme. Section 20 already provides that

"A reference to being resident in a relevant care setting includes a reference to being absent from the care setting while under the care of"

that setting or a person authorised by it. The effect of the amendment is to clarify that it does not matter whether the child was within or outwith Scotland during such a period of temporary absence from the care setting. That means that potential applicants who experienced abuse outwith Scotland in those circumstances should not be deterred from applying because of doubt on that point.

I move amendment 51.

Rona Mackay: At stage 1, many of those who gave evidence expressed concern about the bill's current treatment of corporal punishment. The bill states that, where corporal punishment was permitted by law in force at the time that it was administered, it will not constitute abuse eligible for redress.

In their evidence, a number of stakeholders argued that, although corporal punishment was legal in the past, its application could have been, and often was, highly abusive. The scheme must encourage those who were abused to come forward. The committee heard that excluding corporal punishment, when it was lawful, from the definition of "abuse" could deter victim survivors from applying, either because it is difficult to know what was lawful at the time or because they might feel that the Government had somehow sanctioned assault. I appreciate that abusive corporal punishment is not excluded under the bill as it stands, but there would be a benefit in setting out in more positive terms for survivors that such behaviour is excluded. I am therefore pleased to have lodged amendment 22, which would reverse the emphasis in section 17(2).

Amendment 22 sets out more clearly the circumstances in which corporal punishment would not have been lawful and, therefore, when it constitutes abuse for the purposes of the scheme. In accordance with the wording of the amendment, corporal punishment that was "excessive, arbitrary or cruel", "administered for an improper" use or not "permitted" by the law for any other reason will constitute physical abuse and therefore satisfy the abuse aspect of the eligibility criteria under the scheme.

I urge members to support my amendment 22.

John Swinney: I am grateful to Rona Mackay for lodging amendment 22, which relates to corporal punishment. I hope that it and my amendments on the definition of "abuse" and the use of regulations in the future will provide reassurance on the approach that is to be taken through the redress scheme. Today's discussion shows the care that all members have taken to improve this important aspect of the bill where necessary.

I invite members to support the amendments in the group, which will strengthen the bill by providing further clarity on corporal punishment and other aspects of abuse.

The Convener: I will pause before putting the question on amendment 51. One of our members has left the meeting temporarily, so we will give him time to come back.

We seem to be having some difficulties, so I suspend the meeting—a little earlier than I normally would—for a comfort break. We will resume at 10:30.

10:23

Meeting suspended.

10:30

On resuming—

The Convener: I welcome everyone back to the committee. We have completed the debate on amendment 51, so I will put the question on it.

Amendment 51 agreed to.

Amendment 22 moved—[Rona Mackay]—and agreed to.

Section 17, as amended, agreed to.

Section 18—Meaning of "relevant care setting"

Amendment 52 moved—[John Swinney]—and agreed to.

Section 18, as amended, agreed to.

Section 19 agreed to.

Section 20—Meaning of "resident"

Amendment 53 moved—[John Swinney]—and agreed to.

Section 20, as amended, agreed to.

Section 21 agreed to.

Section 22—Eligibility to apply for a next of kin payment

The Convener: The next group is on eligibility: next-of-kin payments. Amendment 54, in the name of the cabinet secretary, is grouped with amendments 58, 23 and 24.

John Swinney: An important part of our collective response to the harms of the past is recognising those survivors who did not live long enough to be able to apply for financial redress. At stage 1, the committee heard powerful and moving evidence about the importance of recognising the experience of survivors who are no longer with us. Iain Gray, in his earlier remarks, made the point that it has taken a formidable amount of time for the Parliament to be able to legislate to address issues such as redress and for the inquiry to take its course.

Provision for next-of-kin payments is, therefore, an important part of the redress scheme and is aimed at acknowledging the experience of survivors who are no longer with us. In particular, it seeks to recognise that some of those survivors may have formed a reasonable expectation that a redress scheme was to be established and that they would meet the eligibility criteria but that, sadly, they died before the scheme opened, before their application could be fully considered.

The bill as introduced provided an eligibility date for next-of-kin payments of 17 November 2016, which was the date on which I announced to Parliament a commitment to formal consultation on redress. However, I have reflected on the recommendation that was made by the committee and the evidence that was given during stage 1 that that date would unreasonably restrict access to the redress scheme for next of kin. Indeed, I have heard how that would exclude the next of kin of some survivors who themselves had fought and advocated tirelessly for a redress scheme.

Amendment 54 delivers on the commitment that I made during the stage 1 debate and proposes a change to the cut-off date to ensure that families of eligible survivors who passed away on or after 1 December 2004 can access redress. That aligns with the date that is used for survivors who apply for redress, whereby abuse must have occurred on or before 1 December 2004. As the committee notes, that is the date of the then First Minister Jack McConnell's apology. I consider that it represents an appropriate date for the forming of a reasonable expectation of eligibility for any future national scheme aimed at providing recognition and redress to survivors of historical child abuse in care in Scotland. It is right and necessary that we remember the experience of those who are no longer with us and their perseverance in ensuring that we reach this point.

My other amendment in the group is a technical amendment concerning the next-of-kin provisions. Amendment 58 clarifies the rule about prioritisation of applications when there is or was both a spouse or a civil partner and a cohabitant. The decision about which of those is to be treated as the partner for next-of-kin purposes is intended to be a final one. After that, if the partner dies without making a claim, the right passes to the survivor's children. The amendment clarifies that the subsequent death of the partner after the death of the survivor does not change matters in the determination of which partner is the specified next of kin.

I am grateful to Ross Greer for identifying the provisions around eligible cohabitants that would benefit from further consideration and for lodging amendments 23 and 24, which the committee will deal with today. I support Mr Greer's amendments, which will provide a clear and consistent approach across next-of-kin applications, as well as being in line with other legislation, when it is considered appropriate to require a minimum period of cohabitation.

I move amendment 54.

The Convener: I invite Mr Greer to speak to amendments 23 and 24 and to the other amendments in the group.

Ross Greer: I will not repeat the cabinet secretary's remarks about the value of including next-of-kin payments, but I certainly associate myself with them. They are very much reflective of the committee's conclusions in our stage 1 report. Next-of-kin payments are a powerful example of how we have committed to listen to survivors throughout what has been a long process.

As the cabinet secretary said, the purpose of my amendments is to ensure consistency. At the moment, the bill has two hierarchies for eligibility when it comes to receiving a next-of-kin payment: one between a spouse or civil partner and a cohabitant, and another between the children of the survivor and a cohabitant.

When there is both a spouse or civil partner and a cohabitant, the cohabitant must have been living with the survivor for at least six months prior to the survivor's passing for them to be eligible ahead of said spouse or civil partner. That is a demonstration of the fact that they were the survivor's partner at the time of their death. There is no six-month requirement in the bill as it currently stands for the cohabitant to be eligible ahead of a survivor's children. Essentially, the moment that someone moves in with a survivor and cohabits with them, they immediately become eligible ahead of that survivor's children. There is no clear rationale for that inconsistency, and I think that we can all see the potential for conflict to arise there. The purpose of my amendment is to require that any cohabitant must demonstrate six months' cohabitation with a survivor immediately prior to their passing in order for them to be eligible to apply to the scheme. So, the term "cohabitant" would, if the amendments were agreed, be defined as a cohabitant of at least six

months' duration. That means that, if a period of cohabitation was less than six months, the children of the survivor, if there were any, would be eligible to apply, not the cohabitant. That would ensure a clear and consistent approach to the operation of section 26, and it would be a means of evidencing the stability of the relationship by reference to its duration.

I thank the Government for its support for the amendments, and I support the amendments in the cabinet secretary's name.

John Swinney: I thank Mr Greer for his engagement on this important subject. I encourage the committee to support his amendments and those in my name.

Amendment 54 agreed to.

The Convener: The next group is on previous payments. Amendment 55, in the name of the cabinet secretary, is grouped with amendments 56, 102 and 103.

John Swinney: Amendments 55 and 56 are technical amendments that ensure consistency in the terminology that is used in the bill when it refers to redress payments that have previously been paid to a survivor. They adjust the provisions that provide that eligibility for a next-of-kin payment does not arise when the deceased survivor had already received a redress payment before they died.

Amendments 102 and 103 are also technical in nature. They provide that, in the interpretation of provisions of the bill that involve considering whether a person has previously received a redress payment, account is taken of any redress payments being paid "in instalments or otherwise" that are still in the process of being paid. The amendments do not affect a person's right to receive any payments that are due to them; they simply provide that, when it is necessary, the entitlement to the whole redress payment is recognised even if the payment has not yet been made in full.

I move amendment 55.

Amendment 55 agreed to.

Section 22, as amended, agreed to.

Section 23—Eligibility to apply for a next of kin payment: exceptional circumstances

Amendment 56 moved—[John Swinney]—and agreed to.

Section 23, as amended, agreed to.

Section 24—Review of determination made under section 23

The Convener: The next group is on extending time periods. Amendment 57, in the name of the cabinet secretary, is grouped with amendments 85 to 91, 93, 96 and 98.

John Swinney: The committee's stage 1 report highlighted the significance of the decisions that applicants are asked to make within the redress scheme, the complexity of those decisions and the range of factors that have to be considered before, during and after applying to the scheme. The report raised concerns that the time periods that are provided in the bill for applicants—in particular, survivors—to make those decisions are too restrictive, given that legal advice and other support might be needed to reach an informed decision.

In response, I committed to lodging amendments to increase the periods of time that applicants have in which to make key decisions under the scheme. My amendments in this group propose to extend the 12-week period that applicants have in which to accept an offer of a redress payment to six months and the four-week period in which they may request a review of any matter to eight weeks. The period that is given to nominated beneficiaries to allow them to take over an application or that is given to people who want to make representations about reconsiderations is also extended, from four to eight weeks.

10:45

I fully appreciate the significance of the decisions that applicants—survivors, in particular—will make in connection with their redress application, and I do not wish them to be under any pressure when making those decisions. Accepting a redress payment has emotional significance and a symbolic meaning. Survivors must not feel rushed. They must have the time that they need to obtain independent legal advice and access any other support that they require in order to carefully consider the options that are available to them.

As I have said, for some survivors, redress provides a route to financial payment that they might not otherwise be able to access. However, for others, there will be a choice to make between pursuing their case in court and accepting redress under the scheme. The scheme has been designed to support and empower survivors to make the right choice for them, based on the right level of information and advice. These amendments will strengthen that approach and ensure that applicants are given the time that they need.

I move amendment 57.

Amendment 57 agreed to.

Section 24, as amended, agreed to.

Section 25—Outcome of a section 24 review

Section 25 agreed.

Section 26—Meaning of "specified next of kin"

Amendment 58 moved—[John Swinney]—and agreed to.

Amendments 23 and 24 moved—[Ross Greer]—and agreed to.

Section 26, as amended, agreed to.

The Convener: That ends the first day of stage 2 consideration of the bill. The committee will resume its stage 2 consideration on Wednesday 17 February. Any further amendments to the remaining provisions of the bill should be lodged by 12 noon tomorrow, which is Thursday 11 February.

I thank the cabinet secretary and committee members for attending this morning.

Meeting closed at 10:47.

Official Report
Room T2.20
Scottish Parliament
Edinburgh
EH99 1SP

Email: official.report@parliament.scot
Telephone: 0131 348 5447
Fax: 0131 348 5423

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba