OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Justice Committee

Tuesday 28 February 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 28 February 2017

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JUSTICE COMMITTEE
7th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Oliver Mundell (Dumfriesshire) (Con)
*Douglas Ross (Highlands and Islands) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bruce Adamson (Scottish Human Rights Commission)
Detective Chief Superintendent Lesley Boal QPM (Police Scotland)
Lauren Bruce (Convention of Scottish Local Authorities)
Laura Dunlop QC (Faculty of Advocates)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
Alistair Gaw (Social Work Scotland)
Kim Leslie (Law Society of Scotland)
Vladimir Valiente (Society of Local Authority Lawyers and Administrators in Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 28 February 2017

[The Convener opened the meeting at 10:02]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning, and welcome to the seventh meeting of the Justice Committee in 2017. We have received apologies from Fulton MacGregor. Agenda item 1 is a decision on whether to take in private item 5, which is discussion of our work programme. Are we all agreed?

Members *indicated agreement.*

Subordinate Legislation

Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017 [Draft]

10:02

The Convener: Agenda item 2 is consideration of an instrument that is subject to affirmative procedure—the draft Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017. I welcome Annabelle Ewing, the Minister for Community Safety and Legal Affairs, who will speak to the instrument. She is accompanied by her Scottish Government officials; Catherine Hodgson is from the judicial sponsorship and appointments branch, and Sadif Ashraf is from the directorate for legal services. I refer members to paper 1, which is a note by the clerk, and I invite the minister to make a short opening statement.

Annabelle Ewing (Minister for Community Safety and Legal Affairs): Thank you, convener.

The purpose of the draft Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017 is to transfer the Scottish Land Court to the Scottish Courts and Tribunals Service. The SCTS will then have responsibility for the staff, information technology and services of the Scottish Land Court. The opportunity is also being taken to bring the offices of members of the Scottish Land Court, including the deputy chairman, under the remit of the Lord President. The office of chairman of the Scottish Land Court is already under the remit of the Lord President.

The Scottish Land Court deals with cases involving agriculture—primarily, with disputes relating to agricultural tenancies and crofts. As part of the on-going process of court reform, the policy intention has been to transfer the Scottish Land Court to the SCTS at an appropriate time. Following the passage of the Judiciary and Courts (Scotland) Act 2008 and the Courts Reform (Scotland) Act 2014, the SCTS now provides administrative support for Scottish courts and tribunals.

The Lord President is currently head of all the courts other than the Scottish Land Court and the Scottish tribunals. Although the main Scottish courts were administered by the Scottish Courts Administration even before the 2008 act put them under judicial control, the Scottish Land Court had always been administered separately.

The Government has consulted the Lord President and Lord Minginish, who is the chairman of the Scottish Land Court. They agree that the transfer should now take place. The SCTS has been working with the four members of staff of the Scottish Land Court who are due to transfer to the

SCTS on the terms and conditions that are being offered. The Public and Commercial Services Union has also been consulted and has no concerns about the proposals. I consider that this is an appropriate time to use the order-making power in the Judiciary and Courts (Scotland) Act 2008 to transfer the Scottish Land Court to the Scottish Courts and Tribunals Service.

I hope to be able to answer members' questions.

The Convener: Thank you, minister. I invite questions.

Liam McArthur (Orkney Islands) (LD): The minister has set out very well the background to the draft order. A potential concern of people on the outside looking in is that the Scottish Land Court has had a specific role and is—this is certainly the feedback that I get locally—a very accessible court, which functions in such a way as to be regarded as being very sympathetic to the lay person. Can you offer assurance that how the court functions and its accessibility will remain constant throughout the process and after the transition?

Annabelle Ewing: Bringing the Scottish Land Court within the remit of the Lord President and the Scottish Courts and Tribunals Service is part of the on-going process of court reform to which I referred; it is not intended to change the day-to-day operations of the court. For example, after the move, the judicial officers of the Land Court will for the most part be part of the SCTS system of on-going education and training, welfare issues and disciplinary issues. The Land Court will sit in that overarching administrative structure.

As I said, the Lord President and Lord Minginish are content with the proposal. We also consulted interested parties, including solicitor firms that have appeared before the Land Court. We got three acknowledgements of our consultation—two from solicitor firms and one from the Faculty of Advocates—and none had substantive comments to make. I hope that that gives some reassurance.

Liam McArthur: Thank you.

The Convener: If there are no further questions and the minister does not want to make closing remarks, we will move on to item 3, which is formal consideration of the motion on the affirmative instrument. The Delegated Powers and Law Reform Committee considered and reported on the draft order and had no comment to make on it. I ask the minister to move motion S5M-03909.

Motion moved,

That the Justice Committee recommends that the Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017 [draft] be approved.—[*Annabelle Ewing*]

Motion agreed to.

The Convener: That concludes consideration of the draft order. The committee's report will note and confirm the outcome of the debate. May I have the committee's agreement to delegate to me the authority to clear the final draft of the report?

Members *indicated agreement.*

The Convener: Thank you. I thank the minister and her officials for appearing before us today.

10:08

Meeting suspended.

10:10

On resuming—

Limitation (Childhood Abuse) (Scotland) Bill: Stage 1

The Convener: Agenda item 4 is our second evidence-taking session on the Limitation (Childhood Abuse) (Scotland) Bill. I refer members to paper 2, which is a note by the clerk, and paper 3, which is a Scottish Parliament information centre paper.

Our first panel of witnesses comprises Laura Dunlop QC, who is the convener of the law reform committee of the Faculty of Advocates; Kim Leslie, who is the convener of the civil justice committee of the Law Society of Scotland; and Bruce Adamson, who is a legal officer with Scottish Human Rights Commission. You are all very welcome. I thank you all for your written submissions, which have been very helpful.

It will be good to get some things on the record, so I will start with a general question. It is stating the obvious to say that the bill will remove the three-year limitation period for a court action about childhood abuse. Do you support that change? What are your reasons for your views?

Kim Leslie (Law Society of Scotland): I am grateful for the opportunity to give evidence this morning. I am a representative of the Law Society of Scotland, so I must underline at the outset that the Law Society of Scotland is a broad church. It represents practitioners who, in turn, represent claimants who have been victims of childhood abuse. It also represents practitioners who represent the insurance industry and local authorities, so I must stress that although in its response the Law Society welcomes the bill, that welcome is from claimants' perspective: there is no consensus.

Today I will speak principally from the position of claimants, from which view I can say that we broadly welcome the bill—although we have some comments to make, which will, no doubt, be fleshed out today. The reason why we have welcomed the bill from claimants' perspective is that the existing legislation is simply not giving access to justice to this category of claimants.

The Convener: We appreciate that claimants have a view, but other people will be affected by the bill, so it is the committee's duty to scrutinise all aspects in order to ensure that we get the legislation right.

Would anyone like to add to that?

Laura Dunlop QC (Faculty of Advocates): I will speak on behalf of the Faculty of Advocates. Before I do, I put on the record that I have another hat, which I am not wearing today: I hold office as procurator to the General Assembly of the Church of Scotland. I thought that it would be just as well to put on the record that I have never given any advice to the church in connection to any claims in relation to historical abuse.

The Convener: That is duly noted.

Laura Dunlop: Thank you. In the capacity in which I am here today, I have remarks to make that are similar to what Kim Leslie said. The faculty is also a broad church; it is a smaller church than the Law Society, but we have about 450 practising members, and views on the matter are probably spread across the range of opinions.

10:15

The mechanics of the faculty in preparing its initial response to the consultation were that the reparation sub-committee of its law reform committee prepared the written response, and a line was taken by that sub-committee. Advocates who serve on the reparation sub-committee operate across the spectrum, and so represent both insurers and pursuers in actions such as those to which the bill applies. The sub-committee took a particular line that was not revised, but was submitted because it had been prepared by a group of practitioners in the area. The position that the faculty takes now is as set out in its most recent written response. That position is that we have obviously moved on. Everybody has moved on. The bill is here and the faculty's position is that it will offer whatever comments it can in an attempt to make the bill as good as it can be.

Although I am conscious that the faculty has in it, as the Law Society of Scotland has, practitioners who operate across a spectrum, I say from a law reform point of view that the bill is welcome. Because the bill is quite short and clarificatory, the position is—perhaps subject to one or two points of detail—clearer than it has been until now.

Bruce Adamson (Scottish Human Rights Commission): The Scottish Human Rights Commission is a very small church of just four members, but it has a very broad remit covering all human rights for everyone in Scotland.

The survivors who gave evidence last week set out the arguments more powerfully and eloquently than I will be able to do today. We all share a common purpose, which is that the most important function of the state is to keep children safe from abuse. When we fail to do that, we need to ensure that practical, effective and accessible remedies are available. We need to adapt for the special vulnerabilities of certain categories of people to ensure that they have access to justice.

The bill is not the whole solution for survivors, but it is an important part of it. For a large number of survivors, an action for personal injury damages will not be the best route for justice. However, for some, the current law represents a real barrier to their accessing justice. That has been consistently cited as one of the serious concerns, right from the beginning of the work on the issue. David Whelan and Harry Aitken, who gave evidence to the committee last week, have been at the forefront of campaigning and supporting other survivors to campaign, and that issue constantly comes up.

The commission worked with the Scottish Government and care providers to develop the 2013 "Action Plan on Justice for Victims of Historic Abuse of Children in Care". That set out two broad outcomes: one was acknowledgment and the other was accountability. The Apologies (Scotland) Act 2016, which the committee considered in the previous session of Parliament—I recognise the convener's leadership in that—was very important as regards putting in place a facility for meaningful apology without incurring civil liability. When the commission gave evidence to the previous Justice Committee on that point, we said that it was very important, but that it was not all of the solution.

The same goes for the bill: it adds something. As far as moving accountability forward is concerned, a national inquiry is starting its work, and we have further work being done on redress, which will provide another aspect of access to justice for survivors. However, the bill will address a particular barrier. Removal of that barrier in pursuit of the very legitimate aim that I think everyone agrees with, will affect the rights of others.

At the previous committee meeting, there was some useful discussion—as I am sure there will be today—of how we can ensure that interference with rights, particularly with the right to peaceful enjoyment of possessions under article 1 of protocol 1 of the European convention on human rights, occurs only to a level that is necessary and proportionate to the legitimate aim that is being pursued, and that a fair hearing is available to both sides in a civil case.

The commission fully supports the general principles of the bill. The last thing that I will say in opening is that the bill needs to be seen as part of the wider work that is being done. Survivors need to be supported in understanding the broad range of options that are opening up to them and in making the choice about whether the approach will be right for them. In many cases, it might not be.

The Convener: That is useful. We will touch on that, because there has been quite a lot of dialogue, concern and coverage about the numbers that may present. You make a good point that it is not necessarily a solution for everyone and that different things will give different people closure.

John Finnie (Highlands and Islands) (Green): Opponents of the bill, such as the Association of British Insurers, have suggested, as an alternative approach, that guidance—whether statutory or in some other form—be provided to judges on how they could exercise their discretion under the Prescription and Limitation (Scotland) Act 1973. Could you comment on that proposal?

Kim Leslie: As part of the consultation process, consideration was given to effectively adding in some statutory factors, but it was considered that that would simply not go far enough and that the burden would still remain with the claimant—the survivor, in this case—to explain why they had failed to raise the matter, and too much focus would be put on the delay in raising proceedings. That would naturally be an appropriate alternative, but it was decided that, on balance, it was unlikely to go far enough to remove that barrier for that category of claimant.

Bruce Adamson: The commission agrees with that. We are looking for a remedy that is effective, accessible and practical, and we would have concerns that keeping the onus on the survivor to explain why the delay took place is unduly restrictive. One of the things that came out in the consultation was the feeling from survivors that they are in some way being blamed for not being able to bring their case forward, so the commission strongly feels that, in terms of providing access to justice, the right thing to do is to create a particular category of survivors—those who were abused as children—who are exempt from having to face that limitation barrier.

Laura Dunlop: If you are talking about guidance in a non-statutory form, there is an element of contradiction of terms, in that judges are not given guidance as to how to exercise statutory discretion. I would not favour that approach, because it would go down a wholly different route. If you are talking about a list of factors that have to be taken into account—Kim Leslie mentioned that—my view is that that would always be a more complicated exercise by its very nature, because it raises a whole new batch of questions. Is the list comprehensive, or is there to be some sort of catch-all—such as "any other relevant factor"—to cater for the multiple different circumstances of the people affected? What weight is to be given to each factor, or are they all of the same weight? If you took that approach, you would perpetuate greater uncertainty.

Douglas Ross (Highlands and Islands) (Con): My question is not about guidance as a possible alternative. Rather, I want to look at how we got to this situation. Why do you believe that judges are not using the discretion that they have? As Kim

Leslie said, existing legislation is not giving people access to justice, although there is an opportunity for judges to use their discretion at the moment. Why are they not using it?

Kim Leslie: That is a very good point to raise at this juncture. The current legislation says:

"Where a person would be entitled, but for any of the provisions of section 17 of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

That entitlement exists at present, but evidence suggests that, despite efforts that have been made, people in this category of claimant have not been able to access justice. You asked for a reason. It may just be the natural conservatism of the Scottish judiciary not to allow such cases to proceed after what is often a significant length of time. That is certainly an argument that would be advanced at a preliminary stage.

What does not square with me is that there is no such time limit for a criminal prosecution. The situation is either that we cannot prosecute after a lengthy passage of time, or that there is no reason why we should not be able to bring a civil suit for the category of individual concerned. One can speculate, but the provision is there at present and we can confidently say that there has simply not been expansive use of it to allow the category of claimant concerned to proceed.

Laura Dunlop: I agree with what Kim Leslie has said and would add only two points. First, one could perfectly reasonably hold the opinion that the discretion has been very sparingly exercised in the class of case concerned—there is no question about that. In fact, I found only one case where the discretion had been used, and it did not involve an organisation or an institution. Secondly, the only material distinction between civil and criminal in this regard is that most civil claims are against an organisation or institution rather than an individual. Arguably, it is more difficult for an organisation or an institution to answer a civil claim where, by definition, it does not have the sort of knowledge of what it did or did not do that an individual who is being proceeded against will have.

Bruce Adamson: I agree with all of that. We are not speculating as to the reasons why individual judges took the decisions that they took. One of the reasons why the bill is before Parliament is because the legislature needs to give clear direction on where the balance should be struck.

Douglas Ross: Can that not be made clear through a clear instruction in relation to discretion?

Bruce Adamson: The discretion is limited—it has been interpreted as quite a high test. There is an opportunity before the Parliament at the moment to give the courts a clear indication that this is a category of case that should go forward. I am sure that we will discuss the exception that might be built into that. However, reflecting on what is perhaps the conservatism of the Scottish judiciary, to which other witnesses have referred, I think that not widening the exception might also be, in part, a deference to Parliament, as there is an option for Parliament to implement change, as is clear from the bill that is before the committee, and to set out that this is a category that should go forward.

Douglas Ross: With your permission, convener, can I jump ahead to an issue that I think we will discuss later on? There is provision in the bill for a case not proceeding in certain circumstances. Do the panellists think that some of the conservatism, to which two panel members have now referred, in response to using—

The Convener: With respect, I had you down to ask a supplementary question. There will be an opportunity later to look further at the issue that you have just raised.

Douglas Ross: Sorry, convener, but you made the point in the pre-meeting that we would not stick rigidly to the numbered questions. If we are going to do that—

The Convener: Yes, but another member is waiting to ask a supplementary question on the point that you have raised.

Liam McArthur: Kim Leslie referred to the inherent conservatism of the judiciary. It was put to us by a panellist at last week's meeting that there would be a risk from there being two circumstances in which a case could be dismissed under the bill's provisions, which could lead to the same interpretation, and therefore to the time bar, in effect, being applied, albeit through a different means. I think that the Faculty of Advocates referred to that in its written submission. I am interested to know what greater certainty there will be for those proceeding with a case that they will have access to justice under the bill and will not find that the courts interpret new section 17D in the same way as they have interpreted the discretion that they have at the moment.

Kim Leslie: It is valid to raise that risk. However, I highlight that there will be a reversal of the burden of proof. At present, the burden lies with the individual bringing the action. Under the bill, that burden will be reversed to lie with the defender to establish that they would not have a fair hearing or would be substantially prejudiced by the retrospective application of the bill's provisions.

10:30

Liam McArthur: Given what Laura Dunlop said about the difference between criminal and civil in relation to a defender who is an individual as opposed to an organisation, is it conceivable that, because of either the prejudice element or the retrospective nature of the bill, the courts will continue to interpret either or both of those two areas of discretion in the same way as they have exercised the discretion that they have at the moment to apply a time bar?

Kim Leslie: There is undoubtedly a risk, but the burden reversal will assist in terms of the expectation that a claimant will be able to bring suit. It is then for the defender to do the heavy lifting in persuading the court that it simply cannot allow the case to proceed.

One of the issues that has been raised in the explanatory note is that passage of time need not and ought not be an automatic bar to proceedings being allowed to continue. It is a balance, and I think that there would have to be something on defenders' convention rights—my fellow witnesses might have something to say about that.

If I may, at this juncture I will highlight something for clarification. If we are looking at previously litigated childhood abuse actions—again, this is an area where there is mention of substantial prejudice—we have to make it clear that there might be a category of case that has settled without ever being litigated. In my respectful opinion, that type of action is not mentioned in the bill.

Liam McArthur: We will probably come to that in a minute.

The Convener: We are straying quite far into the area that I have just stopped Douglas Ross going into. Since we have started, we might as well continue. If Douglas Ross wants to come in later, he can.

Liam McArthur: In their written evidence, the Law Society and the Faculty of Advocates express support for proposed new section 17D of the 1993 act, but the Scottish Human Rights Commission took a slightly different view. Is that because the fear is that the bill will be interpreted in a way that could lead to similar barriers to access to justice being put in place?

Bruce Adamson: The short answer is yes. The longer answer is that we would like to see some more clarity because, given their experience to date, survivors are certainly concerned that switching the onus around might still lead to the same barrier being put in place. It also focuses attention on the reasons for the delay in taking the case and, even though the onus will be switched around and it will be for the defender to bring that forward, we are concerned that there might be an additional barrier. The purpose of the legislation is to open up access to justice to a particular class of person so, if another procedural barrier was put in place, we would need to make sure that it did not have unintended consequences. As Kim Leslie has said, however, we also need to be aware of defenders' rights by ensuring that they get a fair hearing. "Substantial prejudice" might need further clarification in terms of the factors that will be taken into account.

Liam McArthur: Is that feasible? The implication appears to be that future case law will set out the parameters of discretion, but could the bill do more to give greater clarity and certainty about how it might be applied?

Bruce Adamson: There certainly needs to be more clarity, particularly around substantial prejudice. We generally agree with the fair hearing point; that is already an obligation on the court and we could foresee instances where the pursuer might not get a fair hearing if they went forward with the case.

There is certainly a need for more clarity but, before we get to that stage, the case needs to be made that the provision is necessary. The argument is that it goes some way towards protecting defenders' rights, particularly around all of the things that we are aware of in relation to the decay of evidence. It would allow a procedural mechanism to stop cases going forward, given the cost to the system and the stresses that are put on everyone of going through a hearing where the pursuer has no chance of success.

We would like to see a clearer explanation of the necessity of including that provision, in order to address survivors' concerns that it might be another way in which they would be restricted from being able to take their case forward and having it heard.

Laura Dunlop: I note, as Kim Leslie did, that the reversing of the onus is a significant factor, and I would expect it to make a difference. The defender will have to demonstrate substantial prejudice, and I would be very surprised if general assertions were enough. The defender will have to put forward something specific—some reason or reasons why substantial prejudice is being generated—and that seems to me to be a move away from the tenor of the case law to date, which has very much put the pursuer on the spot by asking why they did not raise proceedings earlier.

The spotlight will move on to the defender; there is no reference to the need for an adequate explanation from the pursuer. Both that change and the reversal of the onus are almost bound to have an effect.

My final point is that the system—the common-law or judicial system—does from time to time, particularly in the area of personal injury, undertake a reboot. It is obvious from the context of the passing of this legislation that a reboot is what is intended. I would be surprised if, in five or 10 years' time, it is business as usual.

Liam McArthur: In summary, you do not believe that additional clarification is required beyond what will happen through the rebooting of the system and the case law that will follow.

Laura Dunlop: I suppose that we should never say never. If somebody comes up with a neat additional piece of clarification, by all means include it, but such clarification would have to select specific factors that are never to be taken into account, or which have always to be taken into account—something like that. There is a certain benefit in simplicity—I would probably be an agnostic until I had seen what was being proposed as an additional provision.

The Convener: Now that we have touched on that subject, does Douglas Ross have anything further to ask?

Douglas Ross: My points have been covered.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Good morning, panel. I refer members to my voluntary entry in the register of members' interests as a non-practising member of the Law Society of Scotland.

If the bill is passed, the new limitation regime would sit alongside prescription, the related area of law, which—as I am sure you are aware—the Scottish Government has decided not to reform, because it believes that it is unable to do so without breaching the European convention on human rights. The effect of that decision is that if the abuse occurred prior to September 1964 it will not usually be possible to raise a court action under the new regime. What are the panel's thoughts on whether the Scottish Government's approach is appropriate?

Kim Leslie: I imagine that there will be a certain category of individual who will argue against that, but the balance has to be struck somewhere and the Law Society feels that the Scottish Government has struck the right balance. In any event, cases that predated September 1964 would, or could, fall within the exceptions discussed in relation to fair hearing and, potentially, substantial prejudice.

Survivors gave powerful evidence to the committee last week, and there will never be a perfect, neat solution that will please everybody. However, if a line has to be drawn, we are supportive of where it has been drawn.

Laura Dunlop: I agree. I can see a potential challenge if the law of prescription were to be amended to seek to resurrect claims that have been extinguished.

Bruce Adamson: It is important to note that the duty on the state to provide an effective remedy, including reparation, is not extinguished by prescription. We need to do other things, particularly for the survivors who fall into the category of people with pre-1964 cases. As was touched on in last week's evidence, they will generally be older survivors, who are in most need of access to justice and who have been waiting the longest for it.

The challenge is that, when the law was amended back in 1984, the United Kingdom Parliament took the decision not to reinstate the rights of those whose cases were previously prescribed. To go back on that now would be incredibly problematic in terms of article 1 of protocol 1 of the ECHR and the proportionality that it provides.

It would be an incredibly challenging route to reopen. To add that change into the bill would take us down a path that might frustrate its purpose. That is not to say that the rights of those survivors who were abused before 1964 do not need to be taken seriously and addressed, but there are other ways that we should look to do that.

Equally, although the bill is focused on children who were abused in that period, that should not take away from the right to justice of those who were not children when they were abused or the other categories of people who deserve access to justice. However, for the purposes of the bill and its particular remit, the balance is about right.

Ben Macpherson: Thank you for that useful comment and analysis.

Mairi Evans (Angus North and Mearns) (SNP): The bill includes definitions of the terms "child" and "abuse". The definition of "child" has generally been accepted and deemed to be okay, so I will focus on the term "abuse". When we took evidence last week, it was suggested that "abuse" should include spiritual abuse. What is your opinion on that? Should there be a definitive, exhaustive list in the bill to describe what abuse is, or do you agree with the broader definition that is given?

Kim Leslie: If you spoke to a practitioner who represented the claimant, they would call for a definition that says "abuse includes". However, a practitioner who represented the defender would call for a definition that says "abuse comprises" or "abuse is". I am afraid that you will not be able to get consensus on the definition.

I would be happy to be educated on the meaning of "spiritual abuse"; it seems highly likely that types of abuse will co-occur. I would have to see the definition—if spiritual abuse can be defined clearly—before I could comment fully. I simply put it to the committee that such abuse might be properly included in the term "emotional abuse".

Laura Dunlop: I cannot really add to that—I agree with Kim Leslie. So much of this deceptively short bill is about striking balances. There is even a balance in the selection of the word "includes". It is open to the courts to develop the concept of abuse—in particular, emotional abuse—to include some of the types of harm that were described to the committee last week.

Bruce Adamson: We agree that there is room to improve the definition.

I will comment briefly on the age categorisation. As Mairi Evans said, there is general agreement that 18 is the correct age, but I reiterate that that does not mean that those who suffered abuse over the age of 18 do not need to have more work done on their rights to redress and to access to remedy. However, because of the special category of being a child—and the international standard that sets the threshold at 18—we think that the bill is correct in that regard.

10:45

On the definition, the one thing that I would add to what has been said is the commission's view of the fact that the bill does not include neglect. The bill focuses on a categorisation of things that occurred to someone, including

"sexual abuse, physical abuse and emotional abuse",

which will need to be considered and expanded on, and which involve a number of human rights concerns. The European Court of Human Rights has found that neglect can meet the standard in article 3 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and article 9 of the United Nations Convention on the Rights of the Child clearly sets neglect alongside the things that are listed in the bill as something that needs to be protected against and for which a remedy should be provided.

In our written submission, we cited the World Health Organization definition, which also puts neglect alongside the categories that are included in the bill. We also cited Sir Nigel Rodley—a great hero of mine who sadly died just a few weeks ago—who was the UN special rapporteur on torture; he said that neglect could certainly be cruel and inhuman treatment under the UN standards, particularly in relation to younger children.

The commission therefore has concerns about the absence of neglect from the list, which should be as broad as possible. Bearing in mind that the provision will be the test for whether a category of people can get past the procedural bar, those people will still need an actionable case and will have to go through the difficult evidential process if they are actually to win their case. When we define the category of people who will get past the procedural bar, we think that neglect could be usefully included.

Mairi Evans: I was going to ask about neglect, and I would like to hear other witnesses' opinions on the matter. As the bill stands, with neglect not included, will neglect not be considered a form of abuse? Is there case law in that regard, or are there other examples that people can think of?

Kim Leslie: As you know, the Law Society of Scotland, on behalf of the claimant practitioners, wants neglect to be included in the bill. I cannot say definitively that there would not be a category of abuse that was neglect but that would not be covered by the term "emotional abuse". That perhaps justifies the word "includes" in the bill to provide for discretion, so that when something is presented that is clearly abuse, it can be included.

The Convener: Would the definition of neglect be strong enough? Would there be concerns that its inclusion might mean that the bill would capture cases that might be regarded as—what can I say? Let me give a frivolous example. Someone might say, "Everyone else's child has designer trainers and my child doesn't. Am I a bad parent because of that? Am I neglecting my child?"

Bruce Adamson: I appreciate that that was an intention to trivialise, convener. There is a very good understanding of what "neglect" means in international human rights law—the term has been well defined. In addition, the European Court case law maps out the level of neglect that is required to meet the minimum standard of severity under article 3 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. We are not talking about trivial matters.

For the purposes of the bill, and bearing in mind that we are talking about allowing a category of survivors or pursuers to get past the procedural barrier, the type of trivial case that you are talking about would not get anywhere in terms of personal injury action, and I cannot foresee a situation in which someone would see any utility in taking a case forward on such a basis—I do not think that that has been tried before.

We are concerned that any limitation on the definition of "abuse" might exclude people. As

others have said, neglect could perhaps be covered by the expansion of the definition of "emotional abuse". However, the international standards very clearly list those as separate categories, and we think that there is a great deal of international evidence that would make not including neglect in the bill when it clearly could be included seem a little strange. There does not seem to be a real risk of trivial cases going forward, given that, even for very strong cases, people would not undertake the process lightly. The process is very challenging, and it is able to deliver only monetary compensation for the abuse. I cannot see a situation in which the floodgates would be opened to trivial cases by including neglect in the bill.

The Convener: That is interesting—it is good to tease that out.

Ben Macpherson: Laura Dunlop said that the notion of emotional abuse would be developed through the courts and the casework system, particularly in reference to international law, human rights law or, indeed, Scots law. Last week, we heard concerns from a panel about the inclusion of the term "emotional abuse" in the bill. For clarity or expansion, will you give your thoughts on the inclusion of "emotional abuse" and on whether that will help to make the definition of "abuse" effective or create confusion or dubiety?

Laura Dunlop: From listening in particular to the discussion that we have just heard about whether to include neglect in the bill, I see the matter as primarily a drafting one. We know where we are trying to get to, and I suspect that you want to avoid overdefinition. I would be dismayed if a case that involved neglecting to provide food to a child was not characterised as physical abuse or if failing to offer love and affection to a child was not characterised as emotional abuse.

As members have probably gathered from my earlier answer, I tend to favour simplicity. Currently, there is a matching set of three concepts. If you want to add to that to try to capture sins of omission as well as sins of commission, I foresee some drafting problems. I would be interested to hear the views of those who drafted the bill and their thinking on whether the list is robust enough. I suppose that an alternative would be to go with that and, if it produced results in the courts in which the terms seemed to not apply to cases in which there was consensus that they should apply, amendment would be possible.

Ben Macpherson: Thank you—that is very helpful.

The Convener: I want to press you a little more on spiritual abuse, which has sometimes been called religious abuse. I think that it was said last week that that covers the indoctrination—almost brainwashing—of a child by people in a particular position of power. The effect of that kind of abuse seems to be recognised in some quarters as much greater. Someone said that it is almost a fundamental messing with the soul. Not everyone will recognise that concept, but some people will. Will you give your views on that?

Bruce Adamson: I am very aware of the answer that Harry Aitken gave when the committee asked whether spiritual abuse would be covered by the term "emotional abuse". I respect his view that there is a difference, but I am not really in a position to say that there is. I think that the treatment of emotional abuse by the courts has included the type of abuse that Harry Aitken talked about.

We should do anything that will ensure clarity for survivors; that goes back to the point that we discussed. The drafting is important not only to provide certainty for the courts, but for survivors who wish to take action, as they need to be very clear about what is included. However, I am not overly familiar with spiritual abuse as a distinct category that needs to be listed.

Laura Dunlop: I will mention something that struck me when I was preparing for coming here today, and I am interested to hear what the other panellists think about it. Arguably, the term that is missing from the bill is "psychological abuse". I am not well enough qualified to develop that point, but it struck me that there may be a difference between emotional abuse and psychological abuse.

The Convener: That would seem to expand the definition a little bit and cover, to an extent, what has been discussed. What does Kim Leslie think?

Kim Leslie: I would need to have time to digest it. It may be that this is a drafting issue and that further consultation is required. Certainly, one turns to causation and the question of what injury has been caused by the abuse. When asked what injury has been caused, one would naturally say, "Psychological harm". If the term "psychological abuse" could be expanded on, if more time could be spent on drafting and if further consultation could take place, to see where the delineation between "emotional" and "psychological" lies, I would welcome that.

The Convener: Would that be Bruce Adamson's position too?

Bruce Adamson: Yes, it would—the more clarity we can give, the better. Earlier, I cited article 19 of the UN Convention on the Rights of the Child, which uses the phrase:

"protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment".

We can phrase that in different ways, but we need to ensure that there is clarity of understanding for survivors in particular. We are talking about a category of people who will not have to go through the limitation process, but they would still need an actionable claim and the evidence to support that. The definition allows people to get over a procedural hurdle; it does not change the nature of the law under which they are seeking a remedy.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to look at the retrospection that comes with the insertion of proposed new section 17C of the 1973 act. It is an area that we always need to tackle with great care. I want to make sure that we have a shared understanding of what section 17C means, so I ask for short answers, please, before I ask about a matter of substance.

I am looking at what excludes cases that have been previously disposed of by the court. I am not sure that the cases need to have been litigated; section 17C says "disposed of". The first barrier is subsection (5), which I understand to mean that if any of the money that the pursuer received was other than for their direct expenses, that case cannot be reopened. Is that layman's understanding of what the drafters sought to put in the bill correct?

Laura Dunlop: Yes.

Stewart Stevenson: Thank you—that is what I want. Drafting is a particular art, and it can make it difficult for us laypeople sometimes.

Moving on to section 17C(4)(B)(iii)—moving from the bottom upwards—we see that a case will be excluded if the sum of money that was paid to the pursuer exceeded

"the pursuer's expenses in connection with bringing and settling the initial action."

What does "the pursuer's expenses" mean in that instance? Is that a legally prescribed thing or is it something that could be open to legal debate, with regard to what the expenses are or were at the time? At the time, it may not have mattered to the extent that it might now matter.

Kim Leslie: For clarification, previously disposed of rights of action would include cases that never saw a court door.

Stewart Stevenson: That is my understanding; I would be happy to hear that it is yours, as well.

Kim Leslie: It should as a point of principle. There may, of course, be cases that are settled—disposed of—pre-litigation without an action being raised.

Stewart Stevenson: My understanding is that, in policy terms, that is the intention.

Kim Leslie: That is the principle.

Stewart Stevenson: Our duty is to make sure that the words deliver that.

11:00

Kim Leslie: As a lawyer who uses that parlance, I understand expenses to be my fees and any outlays that are incurred in the course of the case.

Stewart Stevenson: As a hypothetical example, if the pursuer was resident in Australia and had to travel on several occasions to Scotland to pursue the previous case, would those be legitimate expenses? In other words, are the pursuer's expenses included?

Kim Leslie: They can be. It may be a matter for the auditor.

Stewart Stevenson: The bottom line is that section 17C(4)(b)(iii) does not exclude that example.

Kim Leslie: Yes.

Stewart Stevenson: If the records are no longer available for a case that might be as far back as 1965, for the sake of argument, where does how the bill is drafted leave us?

Kim Leslie: With very great difficulty in advising a client on their prospects for success.

Stewart Stevenson: My question meant where the bill leaves us purely in relation to the settlement. In other words, we can establish the fact of a settlement, because the bank may be able to provide bank records showing transfer of funds. However, we might not have the evidence of the detail of the settlement that would enable us to satisfy the requirement that the money be paid only to cover expenses. Where does the way in which the bill is drafted leave us? That may be only an opinion.

Kim Leslie: I think that it would lie with the defender—they would be the party who would seek to establish that a relevant settlement was made such that the claimant would be barred from raising fresh proceedings. That might be at a preliminary stage—a bit like a debate. A person may raise an action and the client may not be clear on whether he or she has had financial benefit.

I had understood that the principle that the section is seeking to establish is that those who have been financially compensated in any way—the compensation may have been £1—will be barred. I ask the committee whether offsetting could be an alternative solution. The principle behind the section is clearly that those claimants whose claims have been compromised because of

the existing legislation—those who have tried and failed—are in a worse position than those who have never tried at all. I find it illogical that a person who may have had no wherewithal at the time and to whom a solicitor may have given £50, saying, "That is for yourself; I have taken an abatement on my expenses," may then be prevented from re-raising an action at this time in Scotland.

Whichever party we represent, we can be certain that we want the act to be clear once it is brought into force. That current section in its drafting could and ought to be looked at carefully, if the principle is that, for those people who have compromised their previous claims because of limitation, there may well be an alternative, which would be offsetting. If, for example, a person has received £50 and their claim is worth £10,000, and evidence can be adduced, that amount could be offset; I do not believe that they should be prevented from reraising.

Stewart Stevenson: You are, of course, making a policy point, and I am perfectly content to accept that we will need to pursue that with the policy makers rather than with you.

I want to pursue a final small legal point to make sure that I understand the meaning of section 17C(4)(b)(ii), which provides that the pursuer entered into the settlement

"under the reasonable belief that the initial action was likely to be disposed of by the court by reason of section 17".

Do you think that, with the passage of time, there is any sensible way in which the pursuer could demonstrate that they had a reasonable belief in 1965 that the action was likely to be disposed of under section 17? In legal terms, how would they demonstrate to the court that they had that reasonable belief, which is a necessary condition for the use of new section 17C?

Laura Dunlop: It is a bit of a statement of the obvious, but section 17 did not arrive on the scene until 1973.

Stewart Stevenson: Well, let us make 1974 the year in my example.

Laura Dunlop: I think that you make a valid point, because we would have to read that reference as meaning section 17 or its predecessor sections. I cannot see any alternative to the pursuer having to be in a position to give evidence on that matter.

Stewart Stevenson: So, to meet the test that would enable them to invoke the section at all, the pursuer would need to demonstrate that, at some point 40 years previously, they had a reasonable belief that the action would be disposed of under section 17, and to have alternatively come to a settlement without the court coming to a view.

Laura Dunlop: I suppose that they would have to be able to say something along the lines of, "I settled my case because I thought that it was too late and I was going to lose," or, "I thought that I was going to lose because I was too late." They would have to be able to make a statement about missing the deadline that related to their basic understanding of lateness.

Stewart Stevenson: I am sure that, in today's circumstances, the pursuer's lawyers would proffer correct advice on that matter.

I think that I have probably covered all the issues that I wanted to cover.

John Finnie: Although there are some lawyers in our midst, we are laypeople who hope to ensure that any law that is made is good law.

I want to ask a question in the context of some of the issues that Stewart Stevenson has raised. It is about standards of acceptable practice in relation to what could or could not be done to a child. I am thinking about chastisement. Would an individual be able to make a retrospective claim on the basis of something that is now unacceptable but which was acceptable at the time? I am thinking of corporal punishment, for instance, on which we still have a way to go with our present legislation.

The Convener: Who would like to tackle that one?

Laura Dunlop: It is often remarked that the European convention on human rights is a living instrument. In relation to things such as slopping out, it has been possible to say that society has moved on and that conditions that might have been tolerable or acceptable decades ago no longer are.

Again, I am stating the obvious, but your question concerns an extra step, because the right to damages, if it exists, would be for an injury that was suffered in the past at a time when, according to the standards of that time, what was being done was not wrong. I anticipate that there will be debates about that. Bruce Adamson has a far better command of what Strasbourg has said than I do, so he might have some specific examples of how Strasbourg has approached that problem.

Bruce Adamson: The question is well raised. It is necessary to look at the behaviour at the time against the standards of the time but, in looking at what category of person would be covered by the bill, we would need to look at the definitions that are included in it.

The procedural element of the time bar is the retrospective bit, so there will be a retrospective change relating to the ability to get past the time bar. However, the case itself would need to be judged on the law as it was when the abuse

ceased. The court would consider the procedural barrier according to what the law is now.

In terms of the Strasbourg jurisprudence on how our understanding of human rights principles develops over time, your example of protection from assault for children is a good one; there has been a clear and progressive development of our understanding of what is appropriate. However, for the cases that we are talking about here, the ones that would lead to damages for personal injury would generally relate to standards that have not changed, particularly the abuse that has always been covered, in particular under article 3 of the ECHR.

What has changed in relation to article 3—protection against torture or inhuman and degrading treatment—is our understanding of the minimum level of severity that is required to trigger it, not the core concept that there is an absolute prohibition on those things. What has changed in the Strasbourg jurisprudence over the course of the possible cases that will be considered under the bill is that minimum level of severity. In article 3 terms—in terms of personal injury and whether someone is able to show that there is a case and show the damage—we are generally talking about cases that would probably always have been covered.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. I will move on to the estimated number of cases. The financial memorandum to the bill suggests that, initially, there will be 2,200 childhood abuse cases as a result of the bill. Police Scotland refers to a possible figure of 5,000, dating back to 1964. Can you comment on what you think is realistic and on the difference between the two figures? What impact will the number of cases have on our court system?

Kim Leslie: It is very difficult to predict how many cases will be taken forward. It is important to state that the bill will not be a salve for every claimant; it will remove one hurdle, but any victim would have to overcome a number of other hurdles in order to have a successful claim.

Rona Mackay: Sorry—could you expand on that?

Kim Leslie: Of course. In effect, if limitation is removed, that does not mean an automatic right to compensation if someone falls within that definition. The burden of proof will remain with the survivor, so evidence will have to be established. There is also the issue of recoverability of assets. If no institution was involved, is the perpetrator—he or she—a man of straw? There are other factors that perhaps were not considered when the modelling was done.

I think that it would be imprudent to even try to predict the likely number of cases at this stage. I can say that not all the cases that come forward will necessarily end up in court. There may be an opportunity for pre-litigation settlement. The bill takes away a procedural hurdle that would almost inevitably be run by the defender, which is, "You're out of time—we're going to try to block you." That court time will no longer need to be taken. However, the number of cases is very difficult to predict.

11:15

Bruce Adamson: I whole-heartedly agree with that. Although we certainly appreciate the committee's obligation to consider the financial implications of this legal change and the need for the budget to be provided accordingly for legal aid and the court service, in human rights terms, the change does not factor in the decision making that is involved in providing access to justice for survivors who are entitled to justice.

I very much echo what Kim Leslie has said, in that bringing a court claim is not going to be the best approach for a great number of survivors. Even taking the upper limits of the numbers that are being used, that approach is going to be appropriate for only a percentage of those people. It is important that support and advice are given to survivors to ensure that they do not see it as being the best option for all of them and that they are made aware of the other opportunities to seek justice, including possibilities for other redress.

The Scottish Human Rights Commission certainly would not expect to see this as opening the floodgates but, even if it did, we would still need to consider how to ensure that access to justice for survivors is provided. That would be the key point.

Rona Mackay: I am getting the sense that we do not know at the moment, and that it is hard to say.

Bruce Adamson: Yes. Another thing that came out strongly through the interaction process and the incredible work that very brave and courageous survivors have done is that there has been underreporting, and that anything that we can do to empower survivors who have not yet been identified to come forward and seek justice, help and support is a good thing. We should not be afraid of the numbers, or of the numbers going up. It is a good thing that more people are engaged in this process. However, support needs to be provided for people to see what the best route forward is.

Bringing a court claim is a very specific and limited approach, in that it is seeking financial redress through quite a challenging process.

Removing the time limitation barrier does not change the substantive law in terms of what you have to prove.

Rona Mackay: Thank you. That is helpful.

Douglas Ross: Mr Adamson, you have rightly suggested that people will need support through this process. Where will that support come from? A lot of people will just look at the headline, see that the limitation has been removed and therefore believe that they have a right to bring a claim. How do we deal with the people who do not get where they want to get to? A lot of the people to whom they will turn for support will understandably try, as far as possible, to encourage them to go down the claims route, because they will not have had the opportunity to do so previously. Is enough support in place for the people who might ultimately be disappointed at the end of the process?

Bruce Adamson: I might let Kim Leslie comment on the specific point about the motivations of lawyers and whether they will always give good advice. I am not entirely convinced that spurious cases would necessarily come forward, but that might be a matter for the Law Society.

There is the survivor support fund, which some of the survivors who gave evidence last week talked about, and a number of agencies support survivors to understand the different options that are available to them. That is absolutely key. We have to ensure that the legal profession is given information about the alternatives and about the fact that there are other ways forward and litigating might not be the best option. I hope that lawyers would pass on that good advice, but they might need additional support to be aware of the wider options in the action plan.

What the commission would like to see, and has been in discussion with Government about, is more support for survivors—those who are identified and those who are not yet identified—so that they understand the totality of the process, including all the different options under the action plan, and are supported to make their decision. At the moment there is a gap in understanding about, for example, using the apology law, accessing the public inquiry and accessing the redress system in other ways. I understand that that is being consulted on, which I hope eventuates in survivors understanding what their options are.

More work needs to be done on ensuring that support is in place, and it needs to be done now. You are entirely right that the publicity that will surround the legislation when it is passed might lead to survivors having raised expectations. Although the SHRC strongly supports the bill and knows that it would help some survivors, it will not be the right answer for a great majority of survivors. As the committee is aware, the process of taking a civil action for personal injury is onerous and the evidential burden on these historical cases will be incredibly challenging. For a great many survivors, the bill might not be the right way forward. If they are after an apology, or if they can get the support that they need from the survivor support fund, or if redress is available in another way, they will probably not choose to use the legislation. However, we need to make sure that they have the support to make an informed decision.

Kim Leslie: I echo that. Support will be necessary, partly to manage expectations. That is important. I would hate for somebody to come to my office, jubilant with expectation, only for me to dash them with the cold light of the burden still resting with them. The reality is that although some individuals will have been able to get past that and will meet us fully prepared with detailed notes, the majority will not.

When someone meets a lawyer, it can be quite intimidating to come into a formal situation to tell their story. It cannot be stressed enough how important it is that the process is carried out by practitioners who understand their obligations and the forum in which the person might have to advance any claim, as well as their options in relation to anonymity and media reporting restrictions.

We will still have to tell the survivor that they will have to give us the building blocks, that they will have to be organised and turn up to meetings, and that they will have to come to me with witnesses' details, such as telephone numbers and addresses, and the chronological order in which things happened. For some survivors, that—just that—might prove to be problematic. That is where some support might be necessary so that the survivors can access the justice that we are hoping that the removal of this particular hurdle will advance.

Laura Dunlop: Any lawyer who has practised in reparation for any length of time can think of examples of people whose experience of getting damages for some injury that they have suffered has not been successful. Unfortunately, that happens across all reparation law. Sometimes practitioners end up thinking that the process has done the person more harm than good. I agree with what Bruce Adamson said about litigation not being the right solution for everybody.

There are really two discrete areas where support is necessary. One is in making the initial selection about which form of remedy from what I hope is a menu is suited to the particular individual. If the survivor chooses litigation, the second area is making sure that there is support for them as they undergo that experience.

Mary Fee (West Scotland) (Lab): In its written submission, the Convention of Scottish Local Authorities suggested that there could be benefits to hearing childhood abuse cases in a specialist hub of the personal injury court, which was established in Edinburgh. In recent years, there has been a drive across the judiciary to specialise. Do the witnesses share COSLA's view and, if they do, what benefits would they see coming from a specialist court that dealt only with childhood abuse cases?

Kim Leslie: Specialisation is apparent in the legal profession and it is developing in the judiciary. I would have to have more information to be able to comment more fully in response to the question. Of course, a specialist court would have to be properly resourced. However, there might at present be a need for not a specialist forum but a specialist adjudicator who could assist. There clearly has to be great sensitivity around any litigation involving childhood abuse.

Laura Dunlop: I think that there are benefits from specialisation. My view is that we need more than just one judge or sheriff dealing with the cases involved. It would be good to have a critical mass of three or more, depending on the volume of cases, so that there would be a pool of people who dealt regularly with a particular type of case and could build up familiarity with the terminology and the landscape. That would undoubtedly bring benefits. Judicial figures working in the area regularly would be able to think of improvements to processes and procedures that we hope would benefit all concerned.

Bruce Adamson: I absolutely agree with that. I began my career in a specialist family court in New Zealand, and such specialism certainly has benefits in terms of building expertise. If we do not have specialisms, we hope that all members of the judiciary would pick up the required abilities. MSPs are generalists who build up specialist expertise over time from sitting on committees, and the judiciary develops similarly in its context.

Stepping slightly aside from the bill, one of the key points in the action plan on justice for survivors of historical abuse is that survivors must be central to the design and implementation of systems around the issue. We have had comment, particularly in relation to the inquiry, that perhaps more could be done to support survivor involvement in how the system runs. The same can be said in relation to civil litigation, because there would be a benefit in ensuring that the experience of survivors informs the way in which the process works.

Mary Fee: Do you think that it would increase survivors' confidence in the court system if they could see a specialist hub that dealt only with childhood abuse cases? Would that not give people more confidence that the system would deal with them sensitively and carefully? Perhaps it would not make it more likely that they would go to court, but would it make them feel better about the court process?

Bruce Adamson: We have seen in other parts of the action plan the strong desire for survivors to be part of designing the specialisation, because that will build confidence; without that involvement in the system, their confidence in it could be quickly destroyed. There are challenges because of the specific nature of personal injury law. We would have to explore a few steps in order to pursue the idea of having a specialist hub. In terms of human rights and ensuring that there is a right to an effective and accessible remedy, one of the key principles is that those who are affected need to be involved in the design of the system and building an understanding of it, otherwise confidence in the system will quickly be undermined.

Mary Fee: Kim Leslie mentioned resourcing. Is resourcing, or the lack of it, the only drawback that you see for the idea of having specialist hubs?

Kim Leslie: As I said, I would have to have more clarity as to what a specialist court would comprise before I could properly commit to an answer on resourcing. What I can say is that anything that promotes confidence in the process and elicits feedback from the judiciary on how procedure could be changed to ensure that unnecessary barriers are removed can only be a good thing. However, as with anything, it comes down to the resources that are made available. It is a matter for those making the policy whether it is better to have a separate specialist forum rather than the general forums that we have at present.

11:30

Mary Fee: Okay. Do other panel members have any thoughts on potential drawbacks?

Bruce Adamson: For defenders, I cannot see that a specialist court would raise additional human rights issues in terms of a fair hearing. I do not see that a specialist hub would in any way prejudice the rights of defenders. To be clear, I do not think that there is an issue in relation to a fair hearing.

Laura Dunlop: I would not necessarily categorise this as a drawback, but one phenomenon that we sometimes get in courts where a judge does a lot of a particular kind of work is the emergence of an idée fixe, as in "This is how it is done". That is why I was trying to make the point about not having just one individual. It can be good to have a fresh person come in, who might spot an area where the person who has

been doing the work all the time has become a little rigid.

Mary Fee: Okay. Thank you.

The Convener: That concludes our line of questioning. I thank witnesses for what has been very worthwhile evidence in helping us to look at some of the more challenging parts of the bill. I suspend the meeting to allow a change of panels.

11:31

Meeting suspended.

11:38

On resuming—

The Convener: I now welcome our second panel of witnesses: Lauren Bruce is policy manager with COSLA; Lesley Boal QPM is detective chief superintendent for public protection in the specialist crime division of Police Scotland; Alistair Gaw is acting executive director for communities and families for the City of Edinburgh Council, representing Social Work Scotland; and—last but not least—Vladimir Valiente is principal solicitor for Midlothian Council, representing the Society of Local Authority Lawyers and Administrators in Scotland.

The committee is very grateful to everyone for their written submissions. I understand that although SOLAR has not provided a separate written submission, it endorses the submission that has been provided by COSLA. Is that right?

Vladimir Valiente (Society of Local Authority Lawyers and Administrators in Scotland): That is correct.

The Convener: We will start with some general opening questions. What impact do you think the bill will have on victims of childhood abuse? Do you think that additional steps should be taken to safeguard the health and wellbeing of victims who are affected by the legislation?

Detective Chief Superintendent Lesley Boal QPM (Police Scotland): Police Scotland supports the broad policy intention of the Limitation (Childhood Abuse) (Scotland) Bill. Abuse, including sexual exploitation and serious physical or emotional abuse, and neglect are breaches of human rights. Anyone who has been subjected to such abuse or neglect has human rights in terms of access to justice and to effective remedy. Having worked in public protection and child protection for a number of years, I am—like my colleagues in Police Scotland, local authorities, health services and a range of support and advocacy services—acutely aware of the horrific child abuse and neglect that have taken place in the past and which, sadly, still take place in Scotland today.

Survivors of childhood abuse absolutely deserve access to a range of justice and reparation measures. Each survivor has, or should have, the ability to choose which element or elements they wish to access or progress, and the ability to seek compensation must be one of those elements. We have heard, last week and today, clear indications that many survivors of non-recent abuse in Scotland have not been given that choice, either because of a lack of legal aid or because of the discretionary powers in section 19A of the 1973 act not being applied. It is disappointing to hear that, in other parts of the United Kingdom, there has been greater exercise of similar discretion in relation to cases of non-recent child abuse.

I have a concern about the potential financial and resource impacts of the proposal on certain organisations. The committee heard last week that public liability insurance is not compulsory. Many organisations have been uninsured, self-insured or unable to trace insurance that no longer exists, and my main concern is for the many third sector organisations that operate in a way that is diametrically opposed to how they operated 15, 20 or 30 years ago, and which may be required to fund compensation claims from their own reserves. At this moment in time, many third sector organisations carry out an enormous range of activities to improve the wellbeing of children and children's lives, often complementary to and in partnership with the public sector. It seems illogical that the vital support and therapeutic services that are provided by third sector organisations to children who have recently been abused or neglected, or who are at risk of abuse and neglect now, might somehow be adversely affected because of abuse that happened many years ago. That is my own concern, but Police Scotland supports the broad principles of the bill.

Lauren Bruce (Convention of Scottish Local Authorities): Thank you for the invitation to give evidence today. Removal of barriers to justice for survivors of historical abuse is something that our members consider to be a positive move, and COSLA strongly supports the intent of the legislation. Although it is impossible to quantify the potential volume of claims, the overall impact of legislation on local authorities is likely to be extensive, complex and not limited to successful claims. There is likely to be a higher percentage of claims against local authorities because of the plethora of children's services that they have provided over the past 50 years, and the impact is also likely to include support services that are either offered directly by local authorities or are commissioned through third sector organisations such as Rape Crisis Scotland and other abuse organisations. As claims come forward, victims will

need to be supported and that support is often offered by local authorities or the services that they commission.

11:45

The method of implementation will have a significant impact on achieving the aims of the legislation, as we heard earlier. It will also have an impact on responding organisations and the processes and procedures that they need to develop to be able to respond. I am sure that we will discuss that more fully later. We encourage the committee to think about access to justice more broadly than just through the courts, and to consider other options that could be developed to support victims and witnesses while having a more proportionate impact on organisations.

Alistair Gaw (Social Work Scotland): I thank the committee for the opportunity to give evidence. Social Work Scotland supports the comments that you have already heard from Lesley Boal and Lauren Bruce. The specific nature of child abuse is in itself a reason for the legislation to be introduced. The support for potential victims that will be required will be both substantial and individually tailored. For example, some victims will require a great deal of help not just as they go through the process of reliving events from their past but as they manage their lives in the future, because of the damage that has been caused by those past events. Equally, victims who face great challenges in their lives might need help to manage any compensation that is awarded to them.

There is no doubt that access to justice is overdue. As someone who is responsible for a range of services and is constantly trying to prioritise, my caveat will build on Lesley Boal and Lauren Bruce's comments: there needs to be some sense of what the outcome might be in terms of demand on resources.

I have been looking in recent days at the Jersey experience, in preparation for this morning. The isle of Jersey chose to go down a route that did not involve the courts, but was an efficient and effective way to provide compensation. I am sure that we will come on to that at some point in our discussion. To scale up what happened in Jersey to the Scottish scene using an average cost per victim of about £40,000, if the number of victims in Scotland was about 5,000, that would amount to about £200 million. Even at its lowest level, the potential scale is highly significant. We have to take into account the potential impact on the voluntary organisations that are currently providing the services that we need, and on local authority funds, particularly in relation to issues of insurance. My colleague Vlad Valiente will discuss that further.

Wearing my Social Work Scotland hat, I say that it is essential that we right some of those historical wrongs and so we strongly support the measure. However, serious consideration needs to be given to the best way of implementing support, including the potential impact on essential services that we run now and will have to run in the future.

The Convener: You mentioned how things were handled in Jersey, which did not involve the courts but did involve solicitors. There is quite a difference between that approach and the one in the bill. Are they really comparable?

Alistair Gaw: The approach that was taken in Jersey could be taken in Scotland to complement what is in the bill—it is not a case of either/or. We might want to have that discussion.

In essence, the approach in Jersey had the default position that, if somebody was not satisfied with the outcome of the process, they could then go to court. I am no expert on the issue but, off the top of my head, I think that about 80 to 90 per cent of the victims in Jersey accepted the findings of the tribunal and the offer that was made. It is an efficient approach that has satisfied the vast majority of people who were affected and, as I understand it, the victims groups are generally in favour of the approach. That might be a proportionate approach that gives people recompense and recognition but which does not necessarily involve the stress and the potentially much higher costs of civil court action.

The Convener: Would an element of formal recognition be lacking in that approach? With a court hearing, the issue is out there and it is acknowledged, which I am sure is a huge point for people who have been abused.

Alistair Gaw: I am sure that there would be varied views on that. Ultimately, it is for victims to determine that. It would be important to get their views and really test how satisfactory a resolution that might be for victims. On the plus side, the approach taken in Jersey is quick and effective and provides recompense in a much less contested environment. I am sure that some victims want to be in an adversarial court situation and have their day in court, but my impression is that that is not the majority of them.

Lauren Bruce: Again, we will probably go into this in more detail later but, in listening to some of the evidence from victims last week, it came across strongly that, in some cases, the victim wants an apology, an acknowledgement of what happened and an assurance that it will not happen again. We have to question whether the civil court process can deliver that. That process is designed to look at issues of civil law and not the issues on the fringes of that to do with apology and an assurance that something will not happen again.

That is a strong thing that a model that is not the court system could offer to people. The court system just cannot deliver that, because of its design.

The Convener: Vladimir Valiente is next.

Vladimir Valiente: First, convener, if it is easier, I am usually referred to as Vlad. Obviously, we have the full names today.

I thank the committee for inviting the Society of Local Authority Lawyers and Administrators to provide evidence to the committee. SOLAR absolutely agrees that justice needs to be done for the victims and survivors—there is no question about that. Our question is more about what is the best method to achieve that outcome, whether that is compensation or something else. We are thinking outside the box and about the Jersey model, which my colleagues mentioned. This might seem strange coming from a litigation lawyer, but the reason for that is that the adversarial system might not be the best place. I watched the previous committee meeting, in which survivors commented on the tactics and antics of the lawyers who are involved—the discrediting of victims and the undermining of their testimonies. Earlier, Bruce Adamson mentioned the "challenging" process of court.

The adversarial system, which is about gathering the evidence and challenging it, brings difficulties. I am not certain that an adversarial system is the best outcome for all concerned, although it might well be for some. As was alluded to earlier, the Jersey system would allow for a process to be gone through in relation to compensation. If the survivor or victim was unhappy with the outcome, they could still have their day in court. To me, that provides more choice, and at the previous meeting you heard that victims want more choice, because one size does not fit all. That, alongside the Apologies (Scotland) Act 2016 and so on, would provide a more comprehensive system. From a local authority perspective, it would also provide better outcomes in terms of the public purse, because it would potentially lower some of the legal costs.

I am not an expert on the Jersey system, but I understand that it allowed for legal expenses for the formulation of applications. If I am not misquoting, about £1 million was spent on legal expenses alone to help the survivors and victims to put their cases forward. As I said, with such an approach, the survivors would have the final choice as to where the process ended up. If it ended up in court, that would be their choice. That would certainly assist with some of the concerns that have been raised about the adversarial process, which is exactly what we will have if we do not put in place anything outside of that.

The Convener: So it is another approach to add to the choices. You are not advocating that it should be the first step, before we look at the provisions of the bill.

Vladimir Valiente: It will be a policy decision as to whether people must go via that route first, as in the Jersey scheme, or whether it is simply another choice that will assist survivors and victims. SOLAR has not taken a position on that, so I cannot comment because I have not canvassed members on the matter. However, I suggest that it is well worth exploring the Jersey experience in relation to the final outcome and what the survivors and victims want from the various processes.

John Finnie: Good morning, panel, and thank you for your evidence. My questions are for Lauren Bruce and Lesley Boal. You will understand that we are obliged to consider the impact of the bill, and one aspect is the number of likely cases. The financial memorandum suggests a figure of 2,200, and I know that both COSLA and Police Scotland mention the figures in their written evidence. Will you comment on that, please? The figures have been disputed by the Association of British Insurers—indeed, it disputed them last week. How accurate is the figure in the financial memorandum?

Detective Chief Superintendent Boal: Police Scotland mentioned figures in its written response, and I think that that has been misinterpreted by some. If it has been confusing, I apologise to the committee.

We have said that we think that the 2,200 figure might be conservative. The memorandum figure was estimated using as a proxy data on the number of police reports of sexual crimes against children between 1971 and 2015. I am conscious of the time, but I have a bit of information that I want to share with the committee. Unfortunately, I am not going to come up with an answer on what we think the number is, but it is important that we give you a bit of information that we recently pulled together at Police Scotland.

Outwith Police Scotland, the crime survey for England and Wales for 2015 and 2016 asked adult respondents aged between 16 and 59 whether they had experienced a range of abuse when they were a child. I do not think that such questions are asked in any of the Scottish surveys. The survey showed that 9 per cent of adults had experienced psychological abuse—that was the term used, as opposed to "emotional abuse"—that 7 per cent had experienced physical abuse and that 7 per cent had experienced sexual abuse. In addition, in the information that was collected from adults who had survived sexual assaults by rape or penetration during childhood, three out of four persons reported that they had not told anybody

about that fact or reported it to the police. That might interest the committee.

12:00

You will be aware that Police Scotland has seen a rise in reports of non-recent rape over the past number of years, since Police Scotland was created, and I will describe a bit of work that we have been doing in the past year or so. In 2014, operation hydrant was established in the UK as a result of the Savile issues. It is a co-ordinating hub. All forces across the UK committed to report to operation hydrant when we were investigating non-recent sexual abuse involving persons of public prominence or where the abuse was in an institution—it is quite a narrow category—so that if the individual was under investigation by another police force in the UK, we could join the dots. That is operation hydrant. It is referred to in the written response but maybe it was not clear what that was about.

We have been doing that and, since the Scottish Government published its intentions for the national child abuse inquiry and then, in May 2015, announced the terms of reference, Police Scotland has tried to be prepared for that. We have had dedicated resources for the past year and we anticipate that it will take another year or so to search for and locate what we call public protection files—they used to be called family protection files—mainly in relation to sexual crime and child protection, and identify the files that fit the terms of reference for the Scottish child abuse inquiry. We are doing that in anticipation that we will be asked for information, so that we can discharge the chief constable's statutory function.

We have focused on the legacy Strathclyde area and we recently finished looking at that area. It has taken us a year to search for, locate and find our old family protection files. We have found 115,000 files. They are not all about child protection; they include sexual crime. However, out of the files that were investigated from the public protection, family protection, and woman and child-type units that there have been through the years, the vast majority of the files that we have found just go back to 2000. Very few pre-date 2000, which probably fits in with our retention and policy rules.

Although the majority of the files are from reports made in 2000 and later, the earliest abuse that we found is from 1936, so somebody had reported historical abuse. We are under a bit of pressure with the child abuse inquiry, so we have identified the files that fall within the terms of reference for that inquiry, namely abuse in care. We have also catalogued the files that, if there were investigations now, would fall within operation hydrant. There is a bit of crossover in terms of care in institutions, but we have catalogued the persons of public prominence cases and, because we have been doing some deconfliction work in Police Scotland for a wee while, we have also catalogued clerical abuse.

Although that seems quite broad, it takes into account only a small proportion of abuse, because we are quite well aware that, in terms of reports, the vast majority of abuse is in the household and by people who have some other form of relationship with the victim.

Having done the Strathclyde area, which is probably half of Scotland in terms of population and so on, we have catalogued just under 2,300 files for those specific types of terms of reference. That said, we have 4,400 victims. For example, when we counted up the victims in three different files, all relating to the same institution, there were 57 individuals reporting child abuse in a care setting.

That is where we are at the moment with that bit of work. The reference to possibly finding about 5,000 files when we do that narrow bit of work is the number that we anticipate finding once we get round the other seven legacy forces in Police Scotland. That is not the number of victims; it is the number of files. There might be one person or there might be a number of people reporting in a file, depending on the type of investigation that was done. Is that helpful?

John Finnie: It is very comprehensive. I have a series of questions, but I do not think that I will get away with asking them all, in the time. I will ask one, though, about retention policy. Is that being looked at, and does technology help with that and make it easier? Some of us know from constituency work about the challenges of historical things, particularly with the previous local authorities.

Detective Chief Superintendent Boal: I suppose that once we do that search, locate and catalogue exercise, and review the situation across Scotland, we will be in a better position to understand retention in relation to what we have—for example, what the retention policies were previously and what they are now. We are clearly not now disposing of anything that might fall within the terms of reference of the Scottish child abuse inquiry and the England and Wales inquiry. However, looking back, and with paper records, it is difficult. There is an image of us being like Ikea or something—we can just type in a name and all of a sudden we will be able to find something. Unfortunately, that is not the reality.

John Finnie: Is the informed guesstimate not too far off the 2,200 figure? I appreciate that it could change.

Detective Chief Superintendent Boal: To be honest, on the 2,200 figure, what we have at the moment is very narrow. If the bill is not just going to take into account children in a care or institutional setting but is broader, we might be talking about a larger number. We have 4,400 victims from those terms of reference from the Strathclyde area. We could say that we should double that for the whole of Scotland, but we know that that is a small proportion of the children who have been abused and neglected in Scotland across the years.

I suppose that that is probably as far as we can go. In the recent football abuse investigations, which are on-going, there were 140 referrals to Police Scotland, 36 investigations raised, and well over 100 victims. Even in relation to that small period of time, the vast majority have never been reported to the police before. It is really difficult to estimate the potential number of victims. I absolutely get that there should be a range of options for survivors of child abuse and that litigation might not be one, or might be only for a small proportion of cases, but it is difficult to say what the cost will be for the purposes of the financial memorandum.

John Finnie: Thank you. We appreciate the complexity.

Lauren Bruce: In our submission we said that, based on discussions with Police Scotland, the estimate was conservative, particularly given the large scale of what the bill covers. We are keen to emphasise that, regardless of the number of claims that go forward, the impact on local authorities will be bigger because of the number of information requests—subject data access requests and freedom of information requests that come in to try to establish who the defender is in each situation.

It could well be the case, for example, that a child had swimming lessons at the weekend in a pool housed within a high school, but the person providing the swimming lesson was an outside contractor—there was no relationship with the local authority. However, if the childhood memory is that they went to the high school for the swimming lessons, the information request that is submitted to try to figure out who is the defender in the action is likely to come to the local authority.

Overall, it is very difficult to predict how many cases will go forward, but it is also very difficult to predict what the impact will be. What we know of ombudsman inquiries might give a slight insight into that. It tends to be that only 25 per cent of ombudsman inquiries make it to the final complaint stage. There will be huge variance in that, but if we take that figure and apply it to the number of cases that go forward, the impact in terms of information and figuring out who the defender in a situation is could be massive for local authorities.

Mary Fee: The previous question and answers lead nicely to my question on capacity and impact. COSLA has highlighted that the administrative burdens could be quite large if the bill were to be passed. Let us set aside the financial impact, particularly on local authorities, given that we all accept that the financial burden for local authorities is potentially larger than for any other organisations.

Lesley Boal and Lauren Bruce have spoken in detail about the difficulties of investigating and the length of time that it could take to investigate given how far back some of the claims could go. What impact will the bill have on the capacity of the police, local authorities or social work to fulfil other obligations? Is there the capacity to deal with the issues without there being an impact on other services?

Alistair Gaw: A lot of adult survivors are still receiving services, either directly from local authorities, through voluntary organisations that we fund or who have a particular commission or through the national health service, which also provides services to some people. Therefore, many people may well be in the system already. For some people, the process of getting some recompense through a tribunal or judicial process might provide a degree of closure or support that will allow them to be in a better place by the end. It is difficult to quantify.

In my experience over the years, in different areas of the country where we have had reasons to look at historic files and cases, I have found—as have the police—that getting hold of information is extremely difficult, particularly when one goes back to the time before there were electronic records. Much of the work is done on hands and knees—it is literally done by people in warehouses digging out boxes of files and looking through papers for what they are trying to find.

The big unknown is the volume of requests that will come in, not so much under legal or judicial processes—however those might unfold—but from individuals making FOI requests or subject access requests under the Data Protection Act 1998 for information that will then have to be processed, redacted and shared by the local authority, which is very time consuming. The administrative burden as a result of that will depend entirely on the volume of requests, which is difficult to estimate at the moment.

The other area in which there is likely to be a big impact is in having to support former staff, current staff and others who are affected through hearings processes. The impact of that will depend on the number of people involved.

The repercussions are much greater than just the cost of any recompense that might be the ultimate outcome. To go back briefly to the Jersey model, there around half of the costs of the entire process were paid out in recompense; the other half related to administration and management of the process.

Mary Fee: Thank you, that is very helpful.

Lauren Bruce: I agree with what Alistair Gaw has said. However, I would add that the impact is unlikely to be identical across the country. There have been several iterations of local government across the period covered by the bill, which means that there will be differences in the files that have been kept, for example in moves between buildings. More than one method will have to be developed to deal with that—different methods depending on the files that exist, where they are kept and the resourcing capacity within the local authority at the time. Even the response to the bill will not be one size fits all.

12:15

Vladimir Valiente: I echo what has been said already about subject access requests and FOI requests. There will be a significant impact on local authorities.

I can probably provide a bit more input on the legal process. There will be an impact on legal services across all local authorities from assisting our client departments through the subject access request process and from mapping out potential claims that might be forthcoming as well as assessing any claims that might come in.

Once we go through that assessment process, we enter into the realms of litigation. Local authorities are a broad church—that term was used earlier, I think—and not all of them will be geared up with legal teams to enable them to cope with the level of claims that might be forthcoming. Some of those claims will be processed through to the court system and some will be settled outwith court, but either way a significant amount of work—dealing with those claims from the beginning through to litigation—will fall on the legal departments in the 32 local authorities.

I suspect that a lot of local authorities will have to make provision either to hire external services, if they do not already have such teams, or to recruit more people to deal with the volume of cases that might come in. I acknowledge that the volume of claims is unknown at the moment; we touched on that earlier. However, at the previous meeting of the Justice Committee, it was mentioned that one firm in particular has about 1,000 claims on the books at present. That gives us an indication of what might be forthcoming.

Mary Fee: Does Lesley Boal have anything to add?

Detective Chief Superintendent Boal: I suppose my response is exactly the same as the comments from Lauren Bruce and Vladimir Valiente. A request will be made to Police Scotland whenever an individual who is considering raising an action has made any form of report to Police Scotland in any way, whether that has resulted in a charge, a report to the procurator fiscal, a conviction or otherwise. Although I am hopeful that, in the next year, we will be in a far better position in respect of search and recovery, because we have done quite a lot of work in anticipation of the public inquiry, there are still resource implications in locating, removing, redacting and reviewing information, and for legal services. Without a doubt, there will be resource implications for the information management department in Police Scotland.

The Convener: I want you to make your position clear. We do not know what the exact impact will be, but we know that it is likely to be significant. Is your position that the bill should be adequately resourced, as we know in advance that there is likely to be an impact, or that the proposals should not be implemented at all because the resource implication is so significant?

Vladimir Valiente: For SOLAR, it would be the former—the proposals should be implemented, but they should be adequately resourced. We had input to the COSLA submissions from the beginning of the bill process, and I believe that some of the responses to the initial consultation that the committee has received from local authorities alluded to the need for adequate resourcing given the implications for them.

Alistair Gaw: Social Work Scotland thinks that the bill should go ahead and the proposals should be implemented. I reiterate, however, that one or two options should be added so that not every case would necessarily go down the route of civil litigation. It would be advisable for the committee to look at some of the options that have been adopted elsewhere—in particular in Jersey, which has implemented practical solutions that have satisfied the majority of people.

The Convener: I think that we already know, from the evidence, that not everyone will go to litigation; we are probably looking at the worst-case scenario. However, I take your point. What would be required would potentially go way beyond your current resources.

Lauren Bruce: COSLA fully supports the intent of the bill to widen access to justice, but I echo the point about the significant financial implications. If we are to achieve the bill's aims, thought will have to be given to how the financial burdens can be

met and managed. Even the Jersey model or an alternative model would not stop the impact of, for example, data subject access requests and freedom of information requests.

The Convener: I understand that. The points about the cost of redacting and so on have been well made by COSLA. You said that you support the "intent" of the bill; would you go further than that? Are you saying that what is proposed is unmanageable and the resource issue is such that the bill should not proceed, or are you saying that we absolutely should go ahead with the bill but resources must be put in to deal with its effects?

Lauren Bruce: There absolutely should be a move to widen access to justice. Given all the unknowns around the bill, it is difficult to put a figure on the impact—

The Convener: The bill goes down a certain line—we understand that there are others, such as the Jersey model, which has been mentioned. Is it your position that you support the intent, or are you saying that you support the bill, as a measure, in the full knowledge that you do not have the resources to deal with it and resources would have to be made available to ensure that you could do so?

Lauren Bruce: I do not know whether the question has gone to our membership in quite that form. As with any financial burden, we welcome discussions with the Scottish Government on how costs can be managed, so that we can continue to provide the services that we do—in the knowledge that the burden could be significant in this context.

The Convener: Is that something on which you want to get back to the committee?

Lauren Bruce: Yes.

Oliver Mundell (Dumfriesshire) (Con): Would the additional costs include the awards that might be made? I understand that, given that things have changed over time, some local authorities do not have insurance provision for what happened in the past and would end up picking up the bill from their on-going financial pot.

Vladimir Valiente: I agree that the insurance position is unclear. Every local authority must do a mapping exercise to ascertain what, if any, insurance was available at the time and what the terms of the contract were and whether it included excesses and limitations. It might well be that some insurance companies are no longer in existence, so the local authority would have to cover the costs. The insurance element will bring about extra work, conducting that mapping exercise. Thereafter, we might even enter into disputes with insurance companies about the terms of contracts at the time. There might be double litigation: the claim itself; and litigation against relevant insurers, if we do not agree.

Oliver Mundell: Would you seek additional financial support from the Scottish Government if, in a worst-case scenario, a council had to find millions of pounds from its current budget?

Vladimir Valiente: As I mentioned, SOLAR's position is that the policy should be adequately resourced. If local authorities cannot meet that, extra funds should be made available to cover it. There might well be circumstances in which a local authority did not have insurance and a significant number of claims come in, which would have a serious and significant impact on the local authority.

Stewart Stevenson: There is a point to consider about indexing information so that you can dismiss or progress things right from the outset. If you are able to take things out at the beginning of the process, you will reduce your long-run costs. Have you made any attempt to estimate how much getting a decent index would cost?

Given my lifelong interest in genealogy, I highlight as a recent example the 1939 census, which has now been made available publicly in England and Wales and includes about 30 million names, addresses, professions and ages, cross-checked against the death index so that information on those who are still living is shown redacted. It appears that the commercial provider was able to do that for less than £1 million, which is much less than one might expect, and there are many other more complex and more comparable things that are routinely done by archivists.

Do you have any sense of how much it might cost to get to a position where, out of all those warehouses of paperwork, we know what there is, where it is physically and what names are in it? There is a lot of work being done in other domains that does all that, so it is not a new problem.

Alistair Gaw: Local authorities have warehouses of secure storage where such files are kept, so one could roughly estimate the quantity. The trouble is that one box could contain 100 files and another box could contain only one file, depending on the history of the individual. These things would cost significant amounts of money depending on the nature and quality of the evidence that is available. Anything before the mid-1990s will be entirely based on paper records, which have a scattered history going through three iterations of different local authorities, which will create difficulties. It might be worth discussing, either with COSLA or Social Work Scotland, whether a collective approach could be taken across local authorities to help to reduce some of those difficulties, and I would be happy to take that

back to my organisation to see whether there is any scope for that.

Douglas Ross: We have spoken a lot about finance and how much it would cost to do that, but Vladimir Valiente will remember from his time at Moray Council that councils often look to make savings in staff costs, because people are often their biggest cost, and sometimes the legal services department is one where they look for staff reductions. Without considering how much it would cost, what capacity, in terms of the number of lawyers, would need to be employed in local authorities to deal with the potential increase in work?

Vladimir Valiente: I must emphasise the broad-church nature of the 32 local authorities. Some local authorities do most of their personal injury work in-house and might have in place mechanisms to deal with claims, but a small local authority such as Midlothian Council would not be able to cope. We have already done that exercise; at the moment we would not be able to cope with the claims. All that we can do is assist our internal clients in the lead-up to the claim and in the assessing process. Thereafter, actual representation would probably need to be by external solicitors, which would have a significant impact on the council's legal costs. There will be a broad variety of teams across all the local authorities. Some authorities might be more capable and have the resources to deal with personal injury, but I suspect, workload being what it is, that others will require extra legal bodies to deal with claims. The larger authorities will be impacted more, because they cover wider areas and have more potential for claims.

12:30

Douglas Ross: Does COSLA have a view?

Lauren Bruce: It is more Vladimir Valiente's place, as a lawyer, to present a view, than it is COSLA's, in this instance.

Douglas Ross: It is councillors who will be faced with their legal staff telling them, "You want me to do this committee report but I have to do work for an investigation." Where will priorities lie for COSLA? Is the picture across the country that there has been a reduction in the number of legal staff employed by local authorities?

Alistair Gaw: The approach varies across the country. Some local authorities outsource and buy their legal services more than others do. I work for the City of Edinburgh Council; we buy in a lot of the legal support that we need, from time to time, which gives us a great deal of flexibility.

My take on what Douglas Ross asked about is that, as the situation starts to build, local authorities may increase the size of their in-house teams, but are more likely to commission work from external providers. The question will be how much of that expertise is available across the country; the laws of supply and demand will probably generate higher costs as things move forward. That is something else that has to be factored in.

Rona Mackay: I would like Vladimir Valiente to clarify something that he said earlier. I may not have understood it properly. Did you say that some local authorities are insured and some are not?

Vladimir Valiente: No. I am sorry; I suspect that currently all local authorities are insured. What I said was about looking back in time to see what insurance was in place, whether companies still exist, and whether councils were insured for the type of claim that we are talking about. It all depends on the terms of the contracts with insurance companies at the time. We need to do quite a significant mapping exercise in digging up our records about insurance.

Rona Mackay: I see. Thank you. That clarifies it.

Ben Macpherson: I will ask this panel the same question as I asked the previous panel. If the bill is passed, the new limitation regime will sit alongside the related area of law of prescription, which the Scottish Government has decided not to reform because it maintains that it is unable to do so without breaching the European convention on human rights. For clarity, I say that the effect of that decision is that, if the abuse occurred prior to September 1964, it will usually not be possible to raise a court action under the new regime. Have the witnesses any brief comments on whether the Scottish Government's decision is correct?

Vladimir Valiente: I have not canvassed our members on that issue. My view is that the decision is correct, bearing in mind particularly the earlier evidence that the committee heard from the SHRC on article 6 of the ECHR and article 1 of protocol 1. That approach will be just and fair, moving forward. I do not know whether that is SOLAR's view—I have not been able to discuss that with it.

Alistair Gaw: My view accords with that. The decision is pragmatic; the section 17D elements would kick in substantially in cases from before that time.

Lauren Bruce: As Vladimir Valiente said about SOLAR, COSLA has not canvassed members about that issue, but I agree with the view that the decision is correct.

Detective Chief Superintendent Boal: To be honest, I have not looked at the matter in great

detail because my understanding, and my reading of all the previous documents, was that to go prior to that date was going to be really difficult in terms of the ECHR. The Scottish Government has taken the pragmatic position.

Mairi Evans: I will ask a similar question to the one that I asked the previous witnesses, and the witnesses that we had last week, about the definitions of "child" and "abuse" in the bill. There has been general agreement on the definition of "child", so my question is really about how "abuse" is defined. We have had various suggestions about that. Some witnesses suggested that spiritual abuse should be included and that the list should be more definitive, but we have heard other opinions that the bill's descriptions should remain fairly broad. What are your opinions on that?

Detective Chief Superintendent Boal: I absolutely understand that survivors want the broadest definition possible, but I also understand from quite a lot of written submissions that that might be unhelpful to some.

The definitions in the Scottish Government's "National Guidance for Child Protection in Scotland 2014" are helpful. On sexual abuse, it says:

"Sexual abuse is any act that involves the child in any activity for the sexual gratification of another person, whether or not it is claimed that the child either consented or assented."

On physical abuse, it says:

"Physical abuse is the causing of physical harm to a child or young person … Physical harm may also be caused when a parent or carer feigns the symptoms of, or deliberately causes, ill health to a child they are looking after."

That is a "Fabricated or induced illness". On the convener's earlier example of a child not having designer shoes being emotional abuse, the guidance is clear. It states:

"Emotional abuse is persistent emotional neglect or ill treatment that has severe and persistent adverse effects on a child's emotional development … Some level of emotional abuse is present in all types of ill treatment of a child"

but

"it can also occur independently of other forms of abuse."

The issue that I would like to raise is neglect, which is clearly covered in current Scottish child abuse policy and procedures, which say:

"Neglect is the persistent failure to meet a child's basic physical and/or psychological needs, likely to result in the serious impairment of the child's health or development."

I think that we mentioned in our written submission that the law is clear even going back as far as the Children and Young Persons (Scotland) Act 1937, section 12 of which—although we would probably argue that it is a bit out of date now—covers:

"any person … who has parental responsibilities … or has charge or care of a child"

and

"wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed".

Neglect is seen as something different. As Bruce Adamson said, the Scottish Human Rights Commission's written submission states:

"The Commission … considers that neglect should be explicitly included in the definition of abuse to bring it into line with international human rights law",

which says that

"child abuse includes physical, emotional, or sexual mistreatment of a child or the neglect of a child".

There, again, neglect is considered separately.

I know that we are looking at non-recent cases, but as we mentioned in our written submission,

"In 2011 neglect remained the most common reason for registration or initial category of those made subject to a child protection plan".

We also know that

"By 2016 the two most common concerns identified at Child Protection Case Conferences for children who were subsequently placed on the Child Protection Register were emotional abuse (39%) and neglect (37%)."

Neglect was an issue previously and still is. Our understanding of it is far better because of all the work that has been done, predominantly at the University of Stirling by Professor Brigid Daniel. The Scottish Government child protection improvement programme, which is on-going at the moment, has a work stream that is considering neglect specifically. I think that it is focusing on three areas: online abuse, child sexual exploitation and neglect.

One of the representatives of Former Boys and Girls Abused in Quarriers Homes last week suggested that the bill would widen awareness. If we do not mention neglect in it, it might not be in the spotlight.

Mairi Evans: You are suggesting that neglect be referenced in the bill.

Detective Chief Superintendent Boal: Indeed, I am. In addition, although I know that it is not the point of the bill, it is suggested that all legislation that imposes some form of sanction is a means of deterring behaviour. I am not suggesting that the bill alone will deter individuals who want to abuse and neglect children, but if it does, that will be great. That is my submission on the point about neglect.

Lauren Bruce: On the points about certainty that were made at last week's meeting, I think that a policy question must be asked. If the approach goes forward into the court system, will neglect be included in the interpretation of the forms of abuse that are listed, and should it, if that is the case, be included in the bill up front, before it becomes an act, rather than becoming included through the court process, which can be long and would add to the uncertainty for victims?

Alistair Gaw: It is really important to include neglect as a category of abuse. Neglect is not just a sin of omission, and it can be fatal. The Declan Hainey case is a good example of that.

For me, the concept of spiritual or psychological abuse probably falls into the category of "emotional abuse". If the bill were to refer to "sexual abuse, physical abuse, emotional abuse and neglect", I think that that would cover it.

Vladimir Valiente: I do not think that SOLAR discussed the point about neglect. However, as someone who deals with child protection, I think that "neglect" would fit nicely in the bill, because the Children's Hearings (Scotland) Act 2011 mentions neglect as one of the significant harms that are relevant when we apply for a child protection order. Including the word would make sense from that perspective but, as I said, there is no SOLAR position on the matter.

Mairi Evans: Thank you.

The Convener: That has been helpful. I am conscious of the clock, so I must ask for questions and answers to be as succinct as possible, to ensure that we cover everything that we want to cover.

Liam McArthur: This is an issue that I have followed up with the other panels. I think that all the witnesses were silent on proposed new section 17D, which is provided for in section 1, on the discretion of the courts. Unless witnesses tell me otherwise, I will assume that you are generally comfortable with the provisions.

Police Scotland suggested in its submission that, as we scrutinise the bill, the committee should consider situations in which a civil claim is raised while a criminal investigation or prosecution is on-going. It is not clear what your point is and what the committee should be aware of or concerned about in such circumstances.

Detective Chief Superintendent Boal: We were highlighting what happens when a criminal investigation or live proceedings go on in parallel with a civil process. I suppose that the civil aspect might be better put to the Crown Office and Procurator Fiscal Service than to the police, but I can say that there are issues about what would take precedence, and there is, to a certain extent, the difficulty of contamination of evidence.

I gave the example of significant case reviews in child protection or multi-agency public protection arrangements. The COPFS is of the opinion that an SCR could not take place until a criminal case has concluded, but there is now a bit more leeway. However, there is a difficulty when two processes are running in parallel. Which one takes precedence? There has been a conversation between the COPFS and the Scottish child abuse inquiry about what would happen in that regard.

Our point is that the bill is silent on that and we are a wee bit concerned about what would happen if we were dealing with a live investigation or there was a live prosecution while a civil process was going on. For example, if witnesses were re-interviewed, would that be disclosable? It is about all the issues that arise from parallel proceedings.

12:45

Vladimir Valiente: That is something that crops up from time to time in local authority work in which there is a criminal prosecution and a civil case. Generally, because of sub judice considerations, the criminal prosecution has to take shape and reach an outcome first, before the civil court proceedings can take place because, as was mentioned earlier, there might be contamination of witnesses, or running of evidence that the procurator fiscal might not want to be heard in court until there is an opportunity to question a particular witness. I guess that it would be for the courts to decide whether to run both in parallel, but I suggest that the criminal element will always be heard first, then the civil element, simply to ensure that the right conviction is reached. The civil process may actually be helped if there has been a conviction.

The Convener: Our last question is from Mary Fee, on the specialist hub.

Mary Fee: I had forgotten about that. I apologise; I had moved on. COSLA's written submission suggested that there would be benefits in childhood abuse cases being heard by a specialist hub of the personal injury court. Do witnesses see any benefits or drawbacks?

Lauren Bruce: Part of the difficulty—which we have explored already—is about responding organisations such as local authorities knowing what is required of them in relation to a civil case. Vlad will be able to go into the issues in more detail, but some of the time limits will be unprecedented, witnesses may be untraceable and the institutions that existed at the time may not exist anymore, so it would help to develop a degree of specialism in the system around such cases.

A benefit for victims in the model could be that sheriffs in those courts would be specially trained, as they are in the domestic abuse courts. There could be benefits all round in quickly and flexibly developing a process around such cases, which will be a unique type of personal injury action—if they go into the personal injury court setting.

We would definitely encourage that not being the only model that is considered: we are keen to see systems such as the Jersey model—it has been mentioned—which has commonalities with the Criminal Injuries Compensation Authority, also being explored.

Mary Fee: Would a specialist court to deal with such cases increase victims' confidence about going to court and going through the court process?

Lauren Bruce: I do not know that that is for COSLA to answer, but my personal perspective from work that I have done in the past on access to justice is that a specialist court would increase victims' confidence. It could make quite a big difference for victims to know that they are going into a setting in which the sheriffs have an understanding not just of the case that is in front of them, but of other issues and elements that might have impacted on the victim's life. That is a personal opinion—it is not one from COSLA.

Mary Fee: Just before I bring in Vlad, I will pose another question to which he might have an answer.

The previous panel did not raise this as a concern, but they pointed out that we would need more than one specialist hub. If there were to be only one unit, there would be the danger of things being done by rote. Allowing for variability by having more than one hub and sharing expertise across three different units could perhaps be of benefit.

Vladimir Valiente: Yes—you pre-empted my answer. Laura Dunlop mentioned that there are advantages and disadvantages to having a specialist system. The advantage is uniformity in dealing with applications. Among the disadvantages is the potential for becoming set in your ways so that way you do things becomes the only way. Laura Dunlop developed that point well. Having more than one specialist hub might assist in that process, if we could ensure that all the hubs were co-ordinated and able to talk to one another.

Lauren Bruce: To clarify, I say that it is my understanding that, because the cases would typically be above the value of what is now simple procedure but below the value of a case in the Court of Session, they would go to the personal injury court, which would be based in Edinburgh, so they would not be raised in different sheriffdoms throughout the country. Having one hub but with several sheriffs participating might be a solution.

The Convener: Stewart Stevenson has a further question that he will not now ask because we have run out of time. The clerks will write to you with it, so we would be grateful for your responses. I thank all the witnesses for their evidence, which has helped us tremendously in looking not only at what must be in the bill, but at what else must be catered for and thought about in order to ensure that the bill works, if and when it is passed.

The next meeting of the Justice Committee will be on 7 March, when our main item of business will be our first evidence session on the Railway Policing (Scotland) Bill.

12:52

Meeting continued in private until 13:02.

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