

# Scottish Child Abuse Inquiry

## **Case Study no. 6**

The response of the **Scottish Government** between August 2002 and December 2014 to Petition PE535, and other key issues raised by adult survivors of childhood abuse experienced in care in Scotland arising after the petition was presented to the Scottish Parliament.

Evidential Hearings: 17 November 2020 to 4 December 2020



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## List of Abbreviations

AAF	Acknowledgement and accountability forum
CELCIS	Centre for Excellence for Looked After Children in Scotland
CICA	Criminal Injuries Compensation Authority
FBGA	Former Boys and Girls Abused at Quarriers
INCAS	In Care Abuse Survivors
NCF	National Confidential Forum
NRG	National Reference Group
OSSE	Office of the Solicitor to the Scottish Executive
PPC	Public Petitions Committee
SCAI	Scottish Child Abuse Inquiry
SG	Scottish Executive/Government
SHRC	Scottish Human Rights Commission
SLC	Scottish Law Commission
TTBH	Time to Be Heard
TFATBH	Time for all to be heard
ToR	Terms of Reference
UKHL	United Kingdom House of Lords

## Ministers, civil servants, and other key individuals

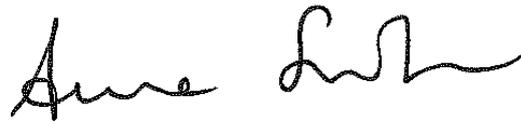
Jack McConnell	First Minister, 2001-07 Created a life peer in 2010 as Baron McConnell of Glenscorrodale (Lord McConnell)
Cathy Jamieson	Minister for Education and Young People, 2001-03 Minister for Justice, 2003-07
Peter Peacock	Minister for Education and Young People, 2003-06
Adam Ingram	Minister for Children and Early Years, 2007-11
Fergus Ewing	Minister for Community Safety, 2007-11
Shona Robison	Minister for Public Health, 2007-09 Minister for Public Health and Sport, 2009-11
John Swinney	Cabinet Secretary for Finance and Sustainable Growth, 2007-14 Cabinet Secretary for Finance, Constitution and the Economy, 2014-16 Cabinet Secretary for Education and Skills, 2016-21 Deputy First Minister for Scotland, 2014-present
Michael Russell	Cabinet Secretary for Education and Lifelong Learning, 2009-14
Michael McMahon	Convener of the Scottish Parliament's Public Petitions Committee, 2003-07
Frank McAveety	Convener of the Scottish Parliament's Public Petitions Committee, 2007-10
Jeane Freeman	Special adviser to the First Minister, 2001-05
Colin MacLean	Senior civil servant in Department of Education
Gerald Byrne	Civil servant in Department of Education
Jean MacLellan	Senior civil servant in Department of Health
Duncan Wilson	Scottish Human Rights Commission, Head of Strategy and Legal, 2008-14

## Foreword



These are the sixth of my published case study findings and they relate to the Scottish Government's response to Petition PE535 between August 2002 and December 2014, and other significant issues raised by other adult survivors of abuse experienced as children in care in Scotland after the petition was presented to the Scottish Parliament in August 2002.

In reaching the stage of publication of these findings—from detailed analysis to the final document—I have again been supported and assisted by some quite exceptional teamwork. I would like to record my gratitude to the Inquiry counsel who led in this case study and the members of staff involved at each stage for their diligence and remarkable commitment.



Lady Smith

## Preface

### The Scottish Child Abuse Inquiry (“SCAI”)

SCAI’s Terms of Reference (ToR) explain that the overall aim and purpose of this Inquiry is “to raise public awareness of the abuse of children in care, particularly during the period covered” and to “provide an opportunity for public acknowledgement of the suffering of those children and a forum for validation of their experience and testimony”.

This public inquiry has been raising that awareness and providing such a forum over the last five years and more. It will continue to do so. However, it’s likely that would never have happened had it not been for the clear vision and determination of adult survivors of such abuse. Despite several setbacks, they persisted for many years in pressing for what they believed was required if the best interests of yesterday’s children, of today’s children and of tomorrow’s children were to be properly served.

The delay of over 13 years between the presentation, by a survivor (Chris Daly) to the Public Petitions Committee (PPC) of the Scottish Parliament of a carefully drafted, articulate petition (the Daly petition) calling for the Scottish Executive (SG) to commence an inquiry into past institutional child abuse and the establishment of this Inquiry cries out for an explanation.<sup>1</sup> As does the considerable governmental delay in addressing other associated key issues.

Hence this case study.

A copy of the full terms of SCAI’s ToR is at [Appendix A](#).

### Public hearings

In common with other public inquiries, the work of SCAI includes public hearings. They take place after detailed investigations, research, analysis and preparation have been completed by SCAI counsel and SCAI staff. That stage can take a long time.

Although this case study was not concerned with investigating a particular institution or the detail of applicants’ experiences when in care as children, the process was, in essence, no different.<sup>2</sup>

Public hearings took place between 17 November and 4 December 2020, during the Covid-19 pandemic. Covid public health restrictions were adhered to and public health guidance was followed.

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1 The Scotland Act 1998, section 44 provided for the term Scottish Executive to denote the devolved administration. When the SNP came to power in 2007, they rebranded the administration and began using the term Scottish Government to refer to the Scottish Executive. The Scotland Act 2012, section 12 provided for the Scottish Executive to be renamed the Scottish Government. For clarity the abbreviation “SG” will be used throughout the text to refer to the Scottish Executive/Scottish Government.

2 An applicant is the term SCAI uses for a person who tells SCAI that he or she was abused in circumstances that fall within the ToR.

## **This case study**

The scope and purpose of this case study was to consider evidence about:

- SG's response to the Daly petition between December 2002 and December 2014;
- SG's response to other significant issues raised by adult survivors of abuse experienced as children in care in Scotland following the lodging of the petition with the Scottish Parliament in August 2002.

## **Leave to appear**

Leave to appear was granted to the following in relation to this case study:

- In Care Abuse Survivors (INCAS)
- Former Boys and Girls Abused at Quarriers (FBGA)
- The Scottish Ministers (SG)
- Lord McConnell of Glenscorrodale (Jack McConnell)

## Some significant dates

Some significant dates during the 13 year period between survivors calling for a public inquiry in 2002 and the start of this Inquiry in 2015; a more detailed list of key events can be found in Chapter 2 of these Findings:

20 August 2002: Daly petition (PE535) submitted to PPC calling for a public inquiry

25 September 2003: SG ministers unanimously decide against a public inquiry into historical abuse of children in institutional care

30 June 2004: ministerial decision not to establish an inquiry is made public in a letter from SG to PPC

29 September 2004: PPC decide to seek a debate in the Scottish Parliament on matters raised by the Daly petition

1 December 2004: First Minister's apology in the Scottish Parliament on behalf of the people of Scotland for past abuse of children in institutional care. During the debate which followed, the intention to appoint an independent expert to carry out a historical systemic review is announced

November 2007: Historical Abuse Systemic Review [Shaw Review] is published

November 2008: SG launches In Care Survivors Service Scotland

March 2009: SHRC is commissioned by SG to produce a Human Rights Framework to inform design of a proposed acknowledgement and accountability forum

30 September 2009: SG ministers, without waiting for the SHRC's report, decide to pilot a confidential forum with no element of accountability

February 2010: SHRC publishes its *Human Rights Framework* but SG does not commit to implementation

February 2011: TTBH pilot forum's report is published

December 2011: SG eventually—at the suggestion of SHRC—agree to participate in an *InterAction* process

17 June 2014: Following consultation on a draft action plan, the *InterAction Action Plan* is published

17 December 2014: SG announces a national public inquiry into historical abuse of children in residential care

October 2015: SCAI begins its work

## Summary

Children were abused when in care in Scotland, in institutions in relation to which state bodies had regulatory and/or supervisory functions, for many decades prior to December 2014.

- Those children were sexually abused, physically abused, and emotionally abused.
- In August 2002, Chris Daly, a survivor of childhood abuse in care, presented a clear, carefully drafted, and articulate petition to the Public Petitions Committee of the Scottish Parliament.
- The Daly petition had these key aims:
  - the Scottish Government should establish an inquiry into past institutional child abuse,
  - an unreserved apology should be made on behalf of the state, and
  - the religious orders that had run institutions should be urged to also apologise unconditionally.
- The import of the Daly petition was that there was a serious and important need for justice to be afforded to survivors.
- It was clear throughout that the justice survivors were calling for, and was of paramount importance to them, was the need for public acknowledgement of their experiences of being abused as children in institutional care, and the need to hold to account those who did not listen to them when they were children, those responsible for the abuse, and those who failed to prevent the abuse from happening.
- Survivors' demand for justice was well justified.
- Since 2002 a significant number of survivors of childhood abuse in care in Scotland have died.
- Between 2002 and 2014, there was no appetite within the Scottish Government, at official or ministerial level, for setting up a public inquiry:
  - The Scottish Government decided against an inquiry as early as 25 September 2003, without engagement with survivors.
  - That decision was only made public 9 months later, on 30 June 2004.
  - Nearly 10 years later—during an *InterAction* process—the Scottish Government's position was that there would be no value in having a national inquiry.
  - It was not until December 2014 that the Scottish Government announced it was going to set up a public inquiry into past institutional child abuse.

- Officials and legal advisers wielded significant power and influence. Ministers relied heavily on their advice and generally followed their recommendations. Ministers felt constrained by such advice. By following advice and by not questioning it when they should have done, key aims of the Daly petition were resisted by ministers for far too long.
- The needs of survivors were not fully met. For far too long, their voices were not listened to, nor heard; they were treated as if their views did not matter and as if they were not worth listening to, just as when they were abused in care.
- Although the Daly petition did not focus on the need for services, the Scottish Government regarded survivors' needs as, primarily, health needs. Provision of support for survivors was the major response between 2002 and 2014 to historical institutional child abuse. The Scottish Government failed to grasp the fundamental importance that survivors appropriately and justifiably attached to their need for justice, accountability and redress.
- The *Historical Abuse Systemic Review*, announced in December 2004, did not, and could not, meet survivors' needs for justice, accountability and redress. Unlike the Scottish Child Abuse Inquiry, the remit given to Tom Shaw deliberately did not permit him to make findings on the nature and extent of abuse of children whilst in care in Scotland during the period of living memory.
- Likewise, *Time To Be Heard* in 2010, and the National Confidential Forum established in 2014, did not, and could not, meet survivors' needs for justice, accountability and redress. Both were private, listening forums with no element of accountability.
- Litigation risk heavily influenced the Scottish Government's response to past institutional child abuse, including giving an apology. No apology was given by the Scottish Government on behalf of the state between 2002 and 2014.
- The Scottish Government denied liability to compensate individuals who had suffered abuse whilst in institutional care as children and maintained a defence that actions brought by them had been raised too late (the limitation defence).
- Survivors encountered major difficulties in accessing the civil justice system due to the operation of the laws of prescription and limitation.
- The Scottish Government's position was that people who had been abused could seek redress through the courts but claims concerning institutional abuse before 26 September 1964 could not be pursued against the Scottish Government or others through the courts because of the law of prescription.
- Test cases were dismissed by the courts because of the state and institutions who were being sued successfully relying on the defence of limitation; that resulted in many similar cases being abandoned.

- More in hope than expectation, the Scottish Government left it to the Scottish Law Commission to find a way of making access to civil justice easier for survivors. However, a referral to the Scottish Law Commission in 2004, meant to be a review of both the law of limitation and the law of prescription, was botched because the difference between limitation (time bar) and prescription was not understood by ministers or officials. And in 2005 the Scottish Government declined the offer of early advice from the Scottish Law Commission that the difficulty that prescription presented for survivors could not be overcome, thus prolonging a period of uncertainty.
- Despite survivors having no, or no effective, access to justice via the courts and there being clear calls for a compensation scheme (including PE1351 *Time For All To Be Heard* in 2010), the Scottish Government made no plans in the period 2002-2014 to establish a financial redress scheme for survivors of past institutional abuse.
- It took the involvement of the Scottish Human Rights Commission in March 2009 for real progress to be made towards achieving justice for survivors of past institutional child abuse. Its clear message to the Scottish Government was that a human rights-based approach to historical child abuse required the state to ensure that a range of remedies for survivors were available to meet the requirement for justice, redress, accountability and support.
- Without the Scottish Human Rights Commission's involvement, there would have been no *InterAction* process bringing all parties together, no Action Plan and, very probably, no inquiry of the kind sought by the Daly petition.
- The delay between 2002 and 2014 in setting up a public inquiry was woeful and wholly avoidable.
- The delay was the result of a variety of factors including:
  - some ineptitude,
  - some confusion on the part of ministers and officials,
  - diversion into areas that were not the subject of the Daly petition,
  - officials urging ministers not to hold an inquiry,
  - officials controlling the process up to the point of trying to prevent there being an inquiry,
  - ministers following the advice of officials whilst not reading and trying to understand the Daly petition for themselves, and
  - both ministers and officials failing to listen to and engage with survivors.
- There was a palpable sense of lack of urgency in the governmental response to the Daly petition. The Scottish Government failed to monitor its progress.
- The Scottish Government lacked the respect for the Public Petitions Committee that was, in all the circumstances, called for.

- It was not until 23 October 2018, 16 years after the Daly petition was presented to the Public Petitions Committee, that survivors of childhood abuse in care received an apology on behalf of the state. The apology was issued by the Deputy First Minister, John Swinney, at the Scottish Parliament.
- Whilst an apology had been made by the First Minister, Jack McConnell, in the Scottish Parliament on 1 December 2004, its wording was extremely cautious, drafted in a hurry, and did not meet what was called for in the Daly petition; it was **not** an apology on behalf of the state.
- Only since late 2017 has there been reform of the law of limitation and legislation for the establishment of a financial redress scheme for survivors was not enacted until this year (2021).



Campaigners who met Scottish Justice Minister Roseanna Cunningham at St Andrews House, Edinburgh on 14 August 2014. Left to right: George Clark, Dave Sharp, Jim Kane, Helen Holland, Chris Daly, Frank Docherty, and Alan Draper. Media Scotland Picture by: Phil Dye. Picture kindly provided by The Daily Record.

# 1

## Introduction

### The evidence

Using my statutory powers, a substantial volume of documentary evidence was recovered and analysed.<sup>3</sup> Many of the contemporaneous documents provide some of the best evidence of what was happening between 2002 and 2014, and why there was such a delay in addressing the key aims of the Daly petition. They are relied on and referred to throughout these findings.

Relevant evidence also came from witnesses, some of whom gave oral evidence whilst others had their signed statements read in at the hearings in November 2020. Those witnesses were government ministers,<sup>4</sup> MSPs,<sup>5</sup> civil servants,<sup>6</sup> and others.<sup>7</sup> This evidence is also relied on and referred to throughout these findings.

---

3 See the [Inquiries Act 2005, Section 21](#).

4 Cathy Jamieson (Minister for Education and Young People, 2001-03), Peter Peacock (Minister for Education and Young People, 2003-06), The Right Honourable Lord (Jack) McConnell of Glenscorrodale (First Minister of Scotland, 2001-07), Adam Ingram (Minister for Children and Early Years, 2007-11), Shona Robison (Minister for Public Health, 2007-09; Minister for Public Health and Sport, 2009-11), Fergus Ewing (Minister for Community Safety, 2007-11), Michael Russell (Cabinet Secretary for Education and Lifelong Learning, 2009-14), and John Swinney (Cabinet Secretary for Education and Skills, 2016-2021; Deputy First Minister for Scotland, 2014-present). These government ministers held responsibilities in relation to issues arising from historical institutional child abuse.

5 Former MSPs Michael McMahon and Frank McAveety. McMahon was convener of the Scottish Parliament's Public Petitions Committee (PPC) between 2003 and 2007. McMahon was succeeded by McAveety, who was convener of the PPC between 2007 and 2010.

6 Colin MacLean (retired senior civil servant formerly in the Department of Education), Gerald Byrne (civil servant in the Department of Education), and Jean MacLellan (retired senior civil servant formerly in the Department of Health).

7 Jeane Freeman (Special Adviser to the First Minister), Tom Shaw (who led the *Historical Abuse Systemic Review* in 2005-07, and chaired *Time To Be Heard: A Pilot Forum* in 2010-11), and Duncan Wilson (former Head of Strategy and Legal at the Scottish Human Rights Commission).

## The Daly Petition, PE535

Chris Daly, a survivor of childhood abuse in care, submitted a petition (the Daly petition) to the PPC on 20 August 2002.

	<b>PUBLIC PETITIONS</b> 20 AUG 2002 <b>SCOTS PARLIAMENT</b>
<p style="text-align: center;"><u>Public Petition to</u> <u>The Scottish Parliament</u></p> <p style="text-align: center;"><u>INQUIRY AND APOLOGY</u> <u>FOR ADULT SURVIVORS OF INSTITUTIONAL ABUSE IN SCOTLAND</u></p>	535
<p>Steve Farrell Clerk to the Public Petitions Committee The Scottish Parliament EDINBURGH EH99 1SP</p>	
<p>We the undersigned petitioners ask the Scottish Parliament to urge the Scottish Executive to commence an inquiry into past institutional child abuse. Survivors were subjected to systematic abuse including, sexual assaults, physical and emotional abuse, while they were as children resident in an institution in respect of which State bodies had regulatory or supervisory functions. In particular those in the care of the State under the supervision of religious orders.</p> <p>We also ask the Scottish Parliament to make an unreserved apology for said State bodies. And to urge the religious orders to apologize unconditionally.</p>	
<p><u>Terms of Reference for the Scottish Parliament / Scottish Executive.</u></p> <p>*To afford victims of institutional child abuse in Scotland an opportunity to tell of the abuse they suffered to a sympathetic experienced forum.</p> <p>*To establish a picture of causes, nature and extent of physical sexual and emotional abuse of children in institutions from around 1940 or before until the present, including the antecedents, circumstances, factors and context of such abuse, the perspectives of the victims and motives and perspectives of the persons responsible for committing the abuse.</p> <p>*To compile a report and make public, on the activities and findings of the inquiry, containing such recommendations as the inquiry considers appropriate including actions which should be taken to address the continuing effects of the abuse examined by the inquiry.</p> <p>*To appoint specialist advisers supply information or elucidate areas of complexity, to conduct investigations, hold hearings, both private and public and conduct or commission research for the purpose of carrying out these terms of reference.</p>	
<p><u>Principal Petitioners</u></p> <p>Christopher G Daly</p>	

Public Petition 535—the Daly petition.

That petition asked for the following:

*“We the undersigned petitioners ask the Scottish Parliament to urge the Scottish Executive to commence an inquiry into past institutional child abuse. Survivors were subjected to systematic abuse, including, sexual assaults, physical and emotional abuse, while they were as children resident in an institution in respect of which State bodies had regulatory or supervisory functions. In particular those in the care of the State under the supervision of religious orders.*

*We also ask the Scottish Parliament to make an unreserved apology for said State bodies. And to urge the religious orders to apologize unconditionally.*

Terms of Reference for the Scottish Parliament/Scottish Executive

*To afford victims of institutional child abuse in Scotland an opportunity to tell of the abuse they suffered to a sympathetic experienced forum.*

*To establish a picture of causes, nature and extent of physical sexual and emotional abuse of children in institutions from around 1940 or before until the present, including the antecedents, circumstances, factors and context of such abuse, the perspectives of victims and motives and perspectives of the persons responsible for committing the abuse.*

*To compile a report and make public, on the activities and findings of the inquiry containing such recommendations as the inquiry considers appropriate including actions which should be taken to address the continuing effects of the abuse examined by the inquiry.*

*To appoint specialist advisers supply information or elucidate areas of complexity, to conduct investigations, hold hearings, both private and public, and conduct or commission research for the purpose of carrying out these terms of reference.*

Principal Petitioners

*Christopher G Daly<sup>8</sup>*

Chris Daly had modelled the petition on the remit of the *Commission to Inquire into Child Abuse* (The Ryan Commission).<sup>9</sup>

## **Key aims of the Daly petition**

The Daly petition had two key aims: (i) the establishment of an inquiry into past institutional child abuse that occurred, in particular, in institutions in relation to which the state had responsibilities and in those run by religious orders; and (ii) the issuing of unreserved public apologies.

The first aim was not achieved until more than 13 years later—in December 2014, the Cabinet Secretary for Education and Lifelong Learning, Angela Constance, announced that SG would be establishing a public inquiry into the historical abuse of children in institutional care. This inquiry was established the following year, in October 2015.

---

8 Scottish Parliament Public Petition PE535, 20 August 2002, at [PAR.001.001.0001](#).

9 The Commission to Inquire into Child Abuse was established in Ireland in 1999 as an independent statutory body whose functions and powers were very similar to those of this Inquiry. It was initially chaired by Judge Laffoy. From September 2003 it was chaired by Mr Justice Seán Ryan. It issued its final report on 20 May 2009.

That part of the second aim asking for a state apology was not achieved until over 16 years later, in October 2018, when, in a statement in the Scottish Parliament, the Deputy First Minister (John Swinney) said: *"Today, on behalf of the Scottish Government, I offer an unreserved and heartfelt apology to everyone who suffered abuse in care in Scotland. We are deeply ashamed of what happened."*<sup>10</sup>

The part of the second aim asking for apologies by the religious orders, was achieved to some extent in the course of this Inquiry when leaders of some of those orders apologised at public hearings.

### **The First Minister of Scotland's apology on 1 December 2004**

The First Minister of Scotland had issued an apology in a statement in the Scottish Parliament on 1 December 2004 but it was not the apology asked for in the Daly petition. On 1 December 2004, speaking in the Scottish Parliament, he said:

*"It would be a mistake for us to try and fit all that happened in the past into the framework of our own knowledge and experience, but some things are and always have been wrong. Now that we know what has happened, it falls to us, as representatives of the Scottish people, to acknowledge it. It is for this generation of the people of Scotland to say quite clearly that it was unacceptable that young people were abused and that it was appalling that they were abused by those entrusted with their welfare. That is why, today, I offer a sincere and full apology on behalf of the people of Scotland to those who were subject to such abuse and neglect and who did not receive the level of love, care and support that they deserved, and who have coped with that burden all their lives."*<sup>11</sup>

### **A national public inquiry announced on 17 December 2014**

Angela Constance's announcement in the Scottish Parliament in December 2014 stated:

*"As part of our response to the Scottish Human Rights Commission's interaction process, I, the Minister for Community Safety and Legal Affairs and the Minister for Children and Young People met a number of survivors to discuss what an inquiry would mean to them. Having listened to their personal experiences and concerns, I have deliberated carefully, and I have also reflected on the words of Archbishop Desmond Tutu, who once said:*

*'If you are neutral in situations of injustice, you have chosen the side of the oppressor.'*

*This Parliament must always be on the side of victims of abuse. We must have the truth of what happened to them and how the organisations and individuals into whose care the children were entrusted failed them so catastrophically. We will get to that truth, and we will establish a national public inquiry into historical abuse of children in institutional care."*<sup>12</sup>

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10 Scottish Parliament Official Report, [Meeting of the Parliament](#), 23 October 2018, p.12. In the same statement, he set out SG's response to recommendations from the InterAction Action Plan Review Group on the provision of financial redress for victims and survivors of abuse in care. SG accepted the group's recommendation that such a scheme should be established, and committed to pass legislation, subject to parliamentary approval.

11 Scottish Parliament Official Report 1 December 2004, at [SGV-000046999](#), p.2.

12 See Scottish Government, *A Report on Certain Matters between 2002 and 2014*, 21 February 2020, at [SGV-000000056](#), at Chapter 3, paragraph 3.6.

## Legislation in 2014 to establish the National Confidential Forum

The National Confidential Forum (NCF) was established in 2014<sup>13</sup> to provide a means whereby persons were placed in institutional care as children could describe their experiences including any abuse, in confidence.<sup>14</sup> Its first hearing was in February 2015. The NCF<sup>15</sup> will be wound up when section 103(1) of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021<sup>16</sup> comes into force.

## The impact of delay

The Scottish Government took far too long to get to where we are today. Survivors acknowledge much has been done, but delays have had real consequences. Some have died without seeing the fruits of their considerable labour. Some have done so before being able to benefit from a financial redress scheme<sup>17</sup> or from participating in, seeing and hearing proper acknowledgement of their suffering and those who failed them being called to account.

## Response of the Scottish Government to some survivors' evidence

On behalf of SG, the Deputy First Minister, John Swinney, said, in the course of his evidence:

*"[A]t times some of the handling [of the issues raised by survivors] and the approach that we have taken forward to dealing with some of those concerns have not been appropriately and effectively handled and addressed, and indeed I have made comments about the testimony of Helen Holland, David Whelan and Chris Daly which cause me enormous concern as to how they have experienced dealing with Scottish Government, and I would want to...apologise unreservedly to any survivor who has felt they have not been properly supported or dealt with by the Scottish Government in raising their concerns and their aspirations to have their concerns addressed.*

[...]

*[W]hen I went to Parliament in 2018...I unreservedly apologised on behalf of the Government of Scotland for the experiences that survivors had. I reiterate that apology to the Inquiry today. The state failed a lot of young people in the past; children and young people who were at their most vulnerable and the state failed them. The state has to take responsibility for that and make account for it, and I unreservedly apologised on behalf of the Government and the state in Parliament in 2018 and I reiterate that apology here today."*<sup>18</sup>

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13 See Mental Health (Care and Treatment) (Scotland) Act 2003 section 4ZA, inserted by Victims and Witnesses (Scotland) Act 2014

14 For SG's account of the background to, and development of, the NCF: see [SGV-000000056](#), Chapter 14.

15 The final reports of the NCF *Shining a Light on Care* and *My Message for Scotland* were published in June 2021.

16 See [Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021](#).

17 See [Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021](#).

18 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, pp.59-61.

## What is now acknowledged and accepted by the Scottish Government

In her closing submissions senior counsel for SG also stated:

*“Scottish Government took a wide range of steps to meet the needs of survivors...Those steps were important and had real value, but cumulatively...were not enough and, in particular, they were not enough to meet the needs of survivors for accountability.*

*A key reason for the length of time it took for the Scottish Government to adopt a more comprehensive approach to the needs of survivors, and for the time it took in establishing this Inquiry, was that **on many occasions between 2002 and 2014 survivors were not properly listened to and heard.***

*There are a number of reasons why the Government did not effectively listen. They include, in the early part of the 2002-2014 period, an approach to policy making that did not seek out the views of survivors of abuse and, at later stages, an approach which included survivors in the process but which did not give sufficient weight to their views. More fundamentally, Scottish Government’s engagement with survivors was influenced by an attitude of paternalism – a view that the Government knew better than survivors what would be in their interests – and an assumption that the needs of survivors would be met by measures that would be ‘therapeutic’ and would allow them to move on from their experiences of abuse.*

***Despite not being listened to properly, survivors remained tenacious and did so despite experiencing, at times, conduct from officials that was wholly unacceptable.** Direct engagement with survivors was a critical factor in persuading ministers of the need for action, including the need for an inquiry. The crucial importance to survivors of a forum in which their abusers would be called to account for the abuse that they had suffered was not properly heard or understood by Scottish Government. When that importance was communicated directly to ministers by survivors, its effect was compelling and (relatively) immediate.*

***The Scottish Government’s handling of its response to the Public Petitions Committee in the period 2002-2004 was inadequate.** The Government does not attempt to excuse the delays that took place in responding to the Committee.*

***The language of the apology given by the First Minister...in the Scottish Parliament on 1 December 2004 was influenced by the concerns of government legal advisers about the implications of an apology for ongoing litigation against the Government and the potential for an apology to be used by litigants to establish state liability for past abuse.***

[...]

*The Daly Petition’s call for victims of abuse to be afforded “an opportunity to tell of the abuse they suffered to a sympathetic and experienced forum” was responded to by Scottish Government, first, by Time to be Heard (‘TTBH’), and subsequently, by the creation of the National Confidential Forum. Both TTBH and the National Confidential Forum provided an opportunity for survivors to talk about their experiences of abuse in a private setting. That opportunity was regarded as valuable by some survivors.*

*However **TTBH and the National Confidential Forum did not, and could not, meet survivors’ needs for accountability and it would have been better if steps had been taken, at the time TTBH was decided upon, to adequately address the issue of accountability.** The need for accountability is served in part by this Inquiry but could have*

been met by other investigation models: 2005 Act inquiries are not the only mechanism by which accountability can be achieved.

Scottish Government's decisions not to establish an inquiry prior to 2014 did not flow from any belief that abuse of children in care had not occurred. From the earliest point in the period under review it was accepted...that abuse had occurred and had been a widespread problem. Rather, there was an assumption that the failures that had allowed abuse to happen had already been explored in the context of earlier inquiries, that lessons had already been learned and that a programme of reform was in place to address previous failures.

The potential cost of a public inquiry or other similar forum was a factor referred to repeatedly in advice from officials. It is appropriate for officials to give advice to ministers on the financial implications of the policy choices before them and it is undoubtedly the case that in many cases public inquiries require substantial expenditure of public funds.

However **it is accepted that the analysis of the potential costs of an inquiry put to ministers at various times was relatively superficial and, more importantly, failed to address the question of 'value' by reference to the benefits to survivors in terms of accountability that would accrue from establishing an inquiry.**

Ministers have, on the whole, been clear in their evidence that cost was not a factor that led them to reject the call for a public inquiry and...the balance of evidence leads to a conclusion that an inquiry would have been more affordable in 2007-2010 – and its costs would have been met – if a decision had been made to establish an inquiry.

[...]

The civil justice system presented a number of barriers to survivors obtaining accountability (in the form of formal findings of abuse against defenders and in the form of financial redress) for the abuse they had suffered. Those barriers included laws on prescription and limitation...

Reform of the law on limitation was an issue of real difficulty for the Scottish Government. Legal advisers including the then Lord Advocate had, in 2006, expressed concern about the precedent effect of making changes to the law applying only to the issue of historic abuse. The Scottish Law Commission did not recommend reform of the then current law. The same concerns about singling out survivors of historical abuse in relation to the reform of the law were expressed by Government legal advisers in 2014.

**Scottish Government accepts that it took too long to make the decision to introduce the Bill that became the Limitation (Childhood Abuse) (Scotland) Act 2017.**

**Scottish Government also accepts that there are a range of ways, including but not limited to traditional claims for damages for personal injury, in which survivors' entitlement to financial redress may be met. The Advance Payment Scheme and the scheme that will be created if the Scottish Parliament passes the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill are two such initiatives. They ought to have been taken much sooner.**"<sup>19</sup>

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19 Closing Submissions for the Scottish Ministers, 4 December 2020, at SGV-000000731, pp.1-4, emphasis added.

## Public Petitions Committee

The PPC is a committee of the Scottish Parliament. Its remit is to consider all admissible petitions presented by members of the public, decide what action should be taken upon them and keep the operation of the petitions system under review. Its processes are intended to provide a means by which members of the public can raise awareness of an issue or try to change something about the way things work in Scotland.



A committee room at the Scottish Parliament.

The PPC may, for example, call on SG to provide explanations or information in relation to a matter raised in a petition. If the process is to work as it should, such a call should be taken seriously and responded to without undue delay, out of respect for the PPC and, moreover, to the member(s) of the public who presented the petition.

The Daly petition was one which concerned a matter of *“national importance and considerable public interest.”*<sup>20</sup> Despite that, it was not, for many years, treated with the respect it deserved.

In his evidence John Swinney, the Deputy First Minister acknowledged that the PPC plays an important role:

*“I think what has led up to this Inquiry is...an illustration of the power and effectiveness of the public petitions process because a citizen of our country has made a petition to the Public Petitions Committee, it has been considered through Parliamentary processes, it has been responded to by Government, and it has culminated in an inquiry which is looking in a forensic way at the issues that were raised in Mr Daly’s petition.”*<sup>21</sup>

Issue could be taken with his statement that the journey of the Daly petition illustrates the effectiveness of the PPC process. As the events explained in these findings demonstrate, that journey was a frustrating one in which numerous obstacles were unnecessarily placed in its pathway. It could, through no fault of Chris Daly or the survivors who supported its aims, easily have failed to achieve its objectives because of the way it was handled by ministers and officials alike.

20 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, pp.46-47.

21 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, p.8.

## 2 Overarching themes

In the chapters to follow, I will consider a number of overarching themes that emerge from the evidence:

- acknowledgement that children in institutional care in Scotland were abused and ministerial apology (chapter 3);
- justice, accountability, and redress for those who were abused as children in care (chapter 4);
- an inquiry into past institutional child abuse (chapter 5);
- some forum for survivors other than an inquiry (chapter 6);<sup>22</sup>
- financial redress for past abuse, other than through the civil justice system (chapter 7);
- support for adult survivors (chapter 8);
- the decision-making process including the impact and influence of advice from legal advisers and other officials (chapter 9); and
- engagement by SG with survivors (chapter 10).

### Key events

The developments below were particularly relevant to the above themes.

#### 2002

On 8 August 2002, the Secretary of State for Wales wrote to the First Minister to alert him to the fact that the Welsh Assembly and the Secretary of State for Wales were being sued by survivors of abuse whilst in care during childhood, alleging failures in inspection.<sup>23</sup> The scene was set for the growth of governmental concern at the prospect of being the subject of multiple litigations for past abuse of children in institutional care, with all that that could mean in terms of expense and potential reputational damage.

On 20 May 2002, the decision of the Outer House of the Court of Session in the case of *Kelly v Gilmartin's Executrix* 2002 SC 602 was issued. The court ruled that a claim for injuries arising from abuse in care that was alleged to have occurred 30 years earlier had, as a matter of law, prescribed after 20 years. That is, the pursuer had lost the right to seek damages. The same applied to the defenders' duty to pay such damages; any such duty had ceased to exist after 20 years. The fact that the claim was one of many that arose from abuse in care made no difference; whatever way it was analysed, the lapse of 20 years meant that the survivor could not obtain a remedy through the courts.

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22 SG established a review by an independent expert, Tom Shaw. After the review reported in late 2007, SG established a pilot forum, known as *Time To Be Heard*, in 2010. In 2014, SG legislated for the creation of the NCF. See [SGV-00000056](#), chapters 7, 13 and 14.

23 See [SGV-00000056](#), Chapter 2, paragraph 2.9.

On 20 August 2002, the Daly petition was presented to the PPC.

On 9 October 2002, the PPC asked SG to respond to the Daly petition.<sup>24</sup>

SG officials prepared advice for the Minister for Education and Young People, Cathy Jamieson. There was input from the SG's in-house legal advisers, the Office of the Solicitor to the Scottish Executive (OSSE). Collective advice was given to the minister in a submission dated 13 November 2002.<sup>25</sup>

The minister was advised to say to the PPC that, firstly, SG had no plans to hold a public inquiry and, secondly, that it would not be appropriate for the Scottish Parliament or SG to give an apology when the extent of the state's responsibility for past institutional child abuse was unclear.

This advice was given against a background of the First Minister having been made aware of litigation against the Welsh administration in which past abuse in institutional care was being alleged, and litigation against the SG and others having been commenced by persons seeking compensation for harm caused by past institutional child abuse.

Two main reasons were given in the submission for the advice. First, there was no evidence of "*systematic widespread abuse*" throughout residential establishments for children in Scotland. Second, the need for improved child protection was already being addressed by SG.

Cathy Jamieson "*fundamentally disagreed*" with the advice.<sup>26</sup> She responded to officials making it clear that she was not convinced that SG could resist doing something. In her view it would be "*hard to justify that Scotland is/was somehow different - practice was not necessarily better here.*"<sup>27</sup> In particular, she did not accept the recommendation that the response should say that SG had no plans to hold an inquiry; she wanted to look at that option in more detail.<sup>28</sup>

There is no evidence of the matter of an apology being addressed in 2002.

## 2003

On 17<sup>th</sup> January 2003 the PPC wrote a 'chaser' to SG asking for it to respond to their letter of 9 October 2002 by 14 February 2003.<sup>29</sup>

On 31 January 2003, the CEO of Quarriers wrote to the Minister for Education and Young People asserting that calls for an inquiry were "*quite unrealistic*" because their records did not include any information about what former boys or girls may or may not have been told about their natural families.<sup>30</sup>

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24 Letter from PPC to the SG Health Department, 9 October 2002, at [SGV.001.001.7519](#).

25 Submission from officials to Cathy Jamieson, Minister for Education and Young People, 13 November 2002, at [SGV-000017844](#).

26 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.129.

27 See [SGV-000000056](#), Chapter 2, paragraph 2.22.

28 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, pp.128-129.

29 Letter from PPC to the SG Health Department, 17 January 2003, at [SGV-000046928](#).

30 Letter from the CEO of Quarriers to Minister for Education and Young People, 31 January 2003. See [SGV-000000056](#), Chapter 2, paragraph 2.29.

SG wrote to the PPC on 17 February 2003 (four months after the PPC had first written asking for a response to the Daly petition and three days beyond the deadline given in the PPC's follow-up letter), in terms that kept open the possibility of an inquiry or "some other forum".<sup>31</sup> Michael McMahon, who became the convener of the PPC in June 2003, understood SG to be telling them that there would be some form of inquiry as it suggested that "they were taking advice on what level of Inquiry would be sufficient to address the concerns raised in the petition."<sup>32</sup>

On 28 March 2003, the PPC wrote urging SG to develop its thinking on the issue and provide an update on progress by mid-June 2003.<sup>33</sup>

The PPC repeatedly wrote 'chasers' to SG between March 2003 and June 2004, without success. Cathy Jamieson was asked, when giving evidence, whether there was any sense of urgency about responding to the PPC. She very frankly said:

*"I think the timing in the electoral cycle of this was not helpful in terms of trying to get something in the lead-up to an election and potential change of administration. And that is not an excuse, it is just the way things were. So while I think I certainly had a sense that we needed to do something, and I think others had, events and the cycle of things perhaps got in the way of that."*<sup>34</sup>

On 22 May 2003, following the Scottish parliamentary election, Peter Peacock became Minister for Education and Young People, replacing Cathy Jamieson (who became Minister for Justice).

At a meeting on 25 September 2003, the relevant ministers unanimously decided against having an inquiry or establishing what was being referred to as a truth and reconciliation commission.<sup>35</sup> In doing so, they were following the advice and recommendations of officials, set out in a submission dated 23 September 2003.<sup>36</sup> Officials did not engage or consult with survivors in advance of that submission.

By 22 December 2003, the First Minister, Jack McConnell, wanted consideration to be given to a new option, namely the appointment of an independent expert "to review the position, recent developments and recommend any procedural changes which might be advisable to reassure people now".<sup>37</sup>

Officials' reaction was that:

*"[T]he appointment of an independent expert falls on the same basis as an enquiry [sic] or commission, i.e that Ministers know what the problems were, there would be little, if anything, more to be learned, current procedures have changed so much since the alleged abuses that the circumstances could not be repeated now and all effort should therefore be focused on providing what help we can to the victims of the historical abuse. This was pretty much the view of all the Ministers at the meeting they had in September."*<sup>38</sup>

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31 See SG Education Department Memorandum, 17 February 2003, to PPC, at [SGV-000046928](#).

32 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, p.59.

33 Letter from PPC to SG Health Department, 28 March 2003, at [SGV-000032501](#).

34 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, pp.156-157.

35 Note of ministerial meeting, 25 September 2003, at [SGV-000046887](#).

36 Submission from officials to Minister for Education and Young People, 23 September 2003, at [SGV-000046937](#).

37 Email from First Minister's office to Minister for Education and Young People, 22 December 2003, at [SGV-000046922](#).

38 See [SGV-000046922](#).

There is no evidence of the matter of an apology being discussed or addressed in 2003 despite the “hundreds of exchanges, almost, emails and briefings and points made between officials in different departments on the issues around the Petition”. There is no reference to “‘Wait a minute, we haven’t got a decision yet on the apology’ or ‘We need to go to ministers to get some decision on the apology’”.<sup>39</sup>

## 2004

After a delay of five months from when Jack McConnell had asked for consideration to be given to the appointment of an independent expert (referred to as a “*rapporteur*”), officials recommended against it in a submission dated 20 May 2004.<sup>40</sup>

The principal solicitor in OSSE also advised in relation to the proposal to appoint a *rapporteur*, in written advice tendered on 25<sup>th</sup> November 2004, stating that any such investigation

*“...might significantly undermine the ability of Scottish Ministers successfully to defend pending litigation. There are currently some 80 actions for damages pending in the Court of Session and a further 20 legal aid applications. We understand there may be up to 1000 claims in prospect including @300 arising from List D schools.”*

And that there was

*“...a real risk that any such investigation would furnish claimants with the evidence which they need in order to make out their case based on an inadequate supervisory regime.”<sup>41</sup>*

He calculated the risk to SG in monetary terms as being in the order of at least £30 million.<sup>42</sup>

The ministerial decision not to establish an inquiry, taken on 25 September 2003, was not made public until 9 months later, on 30 June 2004, when it was set out in a letter from the Minister for Education and Young People, Peter Peacock, to the PPC.<sup>43</sup> Chris Daly was not given advance notice—belatedly, he was sent a copy of Peter Peacock’s letter, on 14 July 2004.<sup>44</sup>

Chris Daly continued trying to persuade ministers to establish an inquiry in a letter, dated 11 September 2004, in which, amongst other things he observed, that discussions with INCAS—a group representing the interests of survivors of past institutional abuse—and individual survivors prior to the decision being made public at the end of June 2004 “were not to any great length or depth.”<sup>45</sup>

On 29<sup>th</sup> September 2004, speaking to the media after Peter Peacock’s appearance before the PPC, he said: “There is nothing within the work that the Scottish Executive has done that says to me that there shouldn’t be a public inquiry. A public inquiry would bring about closure”.<sup>46</sup>

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39 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, pp.90-91.

40 Submission from officials to Minister for Education and Young People, 20 May 2004, at [SGV-000046956](#).

41 Note from the Solicitor, 25 November 2004, at [SGV-000046992](#).

42 See [SGV-000046992](#).

43 Letter from Minister for Education and Young People to Michael McMahon, Convener of PPC, 30 June 2004, at [SGV-000046961](#).

44 See [SGV-000000056](#), Chapter 2, paragraphs 2.65-2.68.

45 See [SGV-000000056](#), Chapter 2, paragraph 2.69.

46 See [SGV-000067497](#).

In September 2004, the Minister for Justice, Cathy Jamieson, wrote to the Chairman of the Scottish Law Commission (SLC) to invite the SLC to review the time bar provisions of the Prescription and Limitation (Scotland) Act 1973, namely those that impose a time limit within which a person seeking to assert their right to financial compensation for personal injury wrongfully caused must raise any court action.<sup>47</sup> She did not, at that time, make a similar reference in relation to the law of prescription, namely that law under which certain rights are extinguished and cease to exist.<sup>48</sup>

Peter Peacock gave oral evidence to the PPC on 29 September 2004.<sup>49</sup> He acknowledged past abuse of children in institutional care. He did not apologise for that abuse.

The PPC decided on the “*nuclear option*” of seeking a debate in the Scottish Parliament on the matters raised by the Daly petition. A debate was set down for 1 December 2004.

Between 29 September and 1 December 2004, SG officials engaged with INCAS. On 23 November 2004, Peter Peacock also met with them.<sup>50</sup> INCAS pressed for an inquiry and for an apology for past institutional child abuse to be given by the First Minister on behalf of the state.

Chris Daly and INCAS were not the only ones calling for a positive response to the issues raised in the Daly petition. It was reported in the press that, on 26 November 2004, an angry constituent, Mary Bradshaw, “*stormed*” into Jack McConnell’s constituency office and urged him to persuade SG to adopt Ireland’s answer, including the making of an apology.<sup>51</sup> She had, some months before, been emailing his office to similar effect, but had received no response.

On 30 November 2004, the Lord Advocate gave legal advice to the First Minister regarding the appropriate wording for him to use in an apology for past institutional child abuse he was intending to make in the Scottish Parliament the following day. The Lord Advocate was very concerned about the risk of the First Minister saying anything that might be construed as an admission of liability.<sup>52</sup>

There is no evidence of the need to address the matter of an apology being noted in writing earlier than September 2004. That was in circumstances where, although Lord McConnell could understand that there may have been no formal recording of the decision to issue an apology because “*as soon as you make that decision you have the potential for it to be perhaps inadvertently released*”,<sup>53</sup> he expected that the need to discuss it would—had that need been recognised—have been recorded somewhere at an earlier stage than late 2004.

On 1 December 2004, in the Scottish Parliament, the First Minister apologised for past institutional child abuse “*on behalf of the people of Scotland*”.<sup>54</sup>

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47 See [SGV-000000056](#), Chapter 15, paragraph 15.8.

48 As a result of the operation of the law of prescription, survivors of childhood abuse that occurred prior to September 1964 had lost any rights they previously had to claim compensation for that abuse.

49 Scottish Parliament Official Report, Public Petitions Committee, 29 September 2004, at [SGV.001.001.7531](#).

50 See note of meeting, at [SGV-000046958](#).

51 Sunday Mirror, 5 December 2004.

52 Email of 30 November 2004 from the Lord Advocate (Colin Boyd) to the First Minister, at [SGV-000017810](#).

53 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.92.

54 Scottish Parliament Official Report 1 December 2004, at [SGV-000046999](#), p.2.

During the debate, Peter Peacock stated that he intended to appoint an independent expert to carry out a historical systemic review. He also told MSPs that the SLC had been asked to review the law on limitation.<sup>55</sup>

## 2005

In August 2005, Tom Shaw was appointed to conduct the historical systemic review announced on 1 December 2004.<sup>56</sup>

Also, a further reference was made to the SLC in August 2005 in relation to personal injury claims which were extinguished by the law of prescription (pre-1964 claims).

A national strategy to improve services for adult survivors of childhood sexual abuse was launched in September 2005. A National Reference Group (NRG) was established to oversee implementation of the strategy. That strategy was the SG's response to a report by a short life working group. The strategy was termed so as to restrict its reach to survivors of childhood **sexual** abuse. That report highlighted the need to improve services for adult survivors of childhood sexual abuse. The national strategy later became known as SurvivorScotland.

## 2007

A Scottish parliamentary election took place in May 2007. The Scottish National Party formed a new minority administration. Alex Salmond became the First Minister.

In November 2007, the Shaw Review was published.<sup>57</sup>

In December 2007, the SLC published its report on both limitation and prescription.<sup>58</sup> It recommended against legislation to revive prescribed claims and did not recommend fundamental changes to the existing law of limitation.<sup>59</sup>

## 2008

In a parliamentary statement on 7 February 2008, the Minister for Children and Early Years, Adam Ingram, responded to the Shaw Review and the SLC's report.<sup>60</sup> He told the Scottish Parliament that SG:

- accepted the SLC's recommendation that prescribed claims should not be revived;
- did not believe that the law on limitation should be changed to give survivors of abuse whose claims had not prescribed the right to take their case to court regardless of how much time had passed since the abuse; and
- SG's focus would be on the development of a form of truth and reconciliation forum.

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55 Scottish Parliament Official Report 1 December 2004, at [SGV-000046999](#), pp.12-13.

56 See letter of appointment and remit from Minister for Education and Young People to Tom Shaw, August 2005, at [SGV-000047661](#).

57 Tom Shaw, *Historical Abuse Systemic Review*, November 2007, at [LIT.001.001.0811](#). For SG's account of the background to, and development of, the Shaw Review and its recommendations: see [SGV-000000056](#), Chapter 7.

58 Scot Law Com No 207 (2007), *Report on Personal Injury Actions: Limitation and Prescribed Claims*.

59 The approach of SLC was that historical child abuse claims ought not to be treated as a special class to which special rules should apply.

60 Scottish Parliament Official Report 7 February 2008, at [SGV.001.001.7608](#).

On 15 April 2008, the PPC closed the Daly petition.<sup>61</sup>

In October 2008, SG began a consultation on a proposal for an acknowledgement and accountability forum.<sup>62</sup>

In November 2008, SG launched the In Care Survivors Service Scotland.<sup>63</sup>

## 2009

In March 2009, SHRC was commissioned by SG to produce, independently of government, a *Human Rights Framework* to inform the design and implementation of the proposed acknowledgement and accountability forum.

The consultation on such a forum ended in April 2009. Part of the consultation process involved specifically seeking the views of survivors on the forum proposal between February and April 2009.<sup>64</sup>

On 30 September 2009, ministers accepted a recommendation that had been made by officials to pilot a confidential listening forum with **no** element of accountability.<sup>65</sup> The decision was made before SHRC had completed its work or advised on what would be its recommendations. SHRC was not consulted on nor was its views sought in relation to that preferred model for the pilot.

On 26 October 2009, the Minister for Community Safety (Fergus Ewing) told ministerial colleagues in Health (Shona Robison) and Education (Adam Ingram) that the approach of the Justice Department would be informed by the SLC's report on limitation and prescribed claims (published in 2007) and that he wished to avoid creating any expectation that the Justice Department would depart fundamentally from SLC's recommendations on reform of the law of limitation in relation to actions seeking damages for personal injury.<sup>66</sup>

## 2010

In February 2010 SHRC published its *Human Rights Framework*, in response to SG's commission.<sup>67</sup> Its clear and firm view was that a human rights-based approach to historical child abuse required the state to ensure a range of remedies for survivors to meet the requirement for justice, accountability, redress, acknowledgement, and support. The advice included that "*the rights of survivors...of historical child abuse are both to have an acknowledgement of the harms that they experienced and an accountability, and that may include individual accountability for criminal conduct but it would also include accountability of the State and public bodies for failures.*"<sup>68</sup> SG said it would respond to the recommendations in the Framework, other than any relating to the pilot forum, once the report of the pilot forum was available.

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61 Scottish Parliament Official Report, Public Petitions Committee, 15 April 2008, at [SGV-000047666](#).

62 SG Consultation, *Proposal to develop an Acknowledgement and Accountability Forum for adult survivors of childhood abuse*, 10 October 2008, at [SGV.001.001.7859](#).

63 For SG's account of the background to, and development of, the In Care Survivors Service Scotland: see [SGV-000000056](#), Chapter 11.

64 See [SGV-000000056](#), Chapter 13, paragraphs 13.20-13.21.

65 See briefing dated 24 September 2009 for cross-ministerial meeting on 30 September 2009, at [SGV.001.001.8028](#), and note of ministerial meeting on 30 September 2009, at [SGV.001.001.8059](#).

66 See [SGV-000000056](#), Chapter 15, paragraph 15.22.

67 See [SGV-000024135](#).

68 [Transcript, day 206](#): Duncan Wilson, at TRN-7-000000007, p.18.

The pilot forum, known as *Time To Be Heard* (TTBH), heard accounts from around 100 former residents of Quarriers during 2010. SHRC did not, however, accept that the pilot forum was capable of meeting all aspects of what was required of a human rights-based approach.

In August 2010, a further petition PE1351 *Time For All To Be Heard* was submitted to the PPC.<sup>69</sup> That petition was submitted because *Time To Be Heard* was restricted to a limited number of former residents of Quarriers. It also called for a compensation scheme.

On 21 December 2010, the Minister for Community Safety (Fergus Ewing) told the PPC that SG was “considering the important issue of prescription and limitation” and intended to consult formally on a range of matters relating to it.<sup>70</sup>

## 2011

The report of the *Time To Be Heard* pilot forum was published in February 2011.<sup>71</sup>

During the 21 months that elapsed between the SHRC publishing its *Human Rights Framework* in response to SG’s request in February 2010 and December 2011, SG would not commit to implementing its recommendations. The SHRC suggested setting up an *InterAction* process to resolve that impasse.<sup>72</sup>

In December 2011, SG agreed to participate.<sup>73</sup>

## 2012

During 2012, SHRC and CELCIS made preparations for an *InterAction* process.

In December 2012, SG published a consultation paper, *Civil Law of Damages: Issues in Personal Injury*, asking a series of questions in relation to proposals to reform the law of damages for personal injury under reference to a number of SLC reports including the report on limitation and prescribed claims published in December 2007.<sup>74</sup>

## 2013

On 29 July 2013, a powerful BBC television documentary, *Sins of Our Fathers*, was broadcast exploring what was described as “the shocking truth of physical and sexual abuse in one of Scotland’s most prestigious Catholic boarding schools”.<sup>75</sup> Former pupils spoke out, on screen, about having been dreadfully abused at the school. Some of those said to have been responsible for the abuse were confronted, and the programme was said to have exposed the widespread cover up that happened at the time.

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69 Scottish Parliament Public Petition PE1351, August 2010, at [PAR.001.001.0002](#).

70 Scottish Parliament Official Report, Public Petitions Committee, 21 December 2010, at [SGV-000000056](#), Chapter 15, paragraph 15.24. SG had set out plans in December 2009 to consult on various issues concerning the civil law of damages and claims for personal injury but those plans had been postponed when a Member’s Bill—the Damages (Scotland) Bill—was introduced in the Scottish Parliament (by Bill Butler MSP), on 1 June 2010. That Bill (which became the Damages (Scotland) Act 2011) was not intended to alter either the law of prescription or the law of limitation and did not do so. Fergus Ewing also told the PPC there had been significant developments in two court cases (*Bowden v Poor Sisters of Nazareth* in 2008 and *Aitchison v Glasgow City Council* in 2010) and that it would be sensible to take account of them as part of the consultation.

71 *Time To Be Heard: A Pilot Forum. An Independent Report by Tom Shaw, Commissioned by the Scottish Government*, February 2011.

72 See [SGV-000000056](#), Chapter 12.

73 See [SGV-000000056](#), Chapter 12, paragraph 12.17.

74 See [SGV-000000056](#), Chapter 15, paragraph 15.25.

75 Mark Daly, *Sins of our Fathers*, BBC Scotland Investigates, first broadcast on 29 July 2013.

That one hour television documentary affords a salutary lesson. Listening to and watching it made a greater impression on the Cabinet of SG, so far as the need for an inquiry was concerned, than had the Daly petition and the representations of many survivors over what, by then, was a period of 11 years. They 'sat up and listened' in a way that, hitherto, they had not done. When giving evidence, John Swinney said of *Sins of Our Fathers*:

*"What I think was different about Fort Augustus is that the revelations came at a moment where the Government of which I had been a member, and our predecessors, had taken a number of steps to address the issue of historical abuse...what Fort Augustus said to us was: you haven't done enough. We are seeing this almost piecemeal revelation of an unacceptable part of our history as a country, and Fort Augustus was another seminal moment in the piecemeal revelation of that shameful part of our history. What it did to the Cabinet was to say to us: this has to be done properly, it has to be done fully and comprehensively, and you can only do that with an inquiry."*<sup>76</sup>

That said, it still took a further 17 months or so for them to reach the decision to establish a public inquiry.

The *InterAction* process began. A draft Action Plan was produced by December 2013.<sup>77</sup>

In December 2013, SG responded to the consultation on *Civil Law of Damages: Issues in Personal Injury*. The intention at that time was to amend the Prescription and Limitation (Scotland) Act 1973 to increase the limitation period for raising an action for damages for personal injury from three to five years and to provide a non-exhaustive list of matters which the court may take into account in deciding whether an action brought outwith the limitation period should proceed.<sup>78</sup>

## 2014

Following consultation on the draft Action Plan, the *InterAction Action Plan* (the Action Plan) was published on 17 June 2014. The Action Plan dealt with the issue of an inquiry by saying:

*"There should be a review of the lessons learned from previous inquiries and related processes such as the Historical Abuse Systemic Review [the Shaw Review]. The review should consider what added value a National Inquiry on Historic Abuse would have, and should scope the potential costs."*<sup>79</sup>

The Action Plan also contained a recommendation that the civil justice system should be *"increasingly accessible, adapted and appropriate for survivors of historic abuse of children in care, including through the review of the way in which time bar operates"*.<sup>80</sup>

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76 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, p.23.

77 See [LIT.001.001.1240](#).

78 See [SGV-000000056](#), Chapter 15, paragraph 15.26.

79 CELCIS and Scottish Human Rights Commission, *SHRC InterAction on Historic Abuse of Children in Care: Action Plan on Justice for Victims of Historic Abuse of Children in Care*.

80 CELCIS and Scottish Human Rights Commission, *SHRC InterAction on Historic Abuse of Children in Care: Action Plan on Justice for Victims of Historic Abuse of Children in Care*.

By summer of 2014, the Cabinet Secretary for Education and Lifelong Learning, Mike Russell, became directly involved with the *InterAction* process. He attended an *InterAction* event for survivors on 27 October 2014 where he met with survivors beforehand.<sup>81</sup> He was struck by their “righteous anger”,<sup>82</sup> found the experience “utterly mind-blowing” and he left the event feeling that the call for an inquiry had to be moved forward, explaining when he gave evidence: “I couldn’t see how you could go through that experience and say to people ‘No, we are not doing it.’ I just couldn’t see that.”<sup>83</sup> SG responded formally to the Action Plan by letter of the same date.<sup>84</sup> Speaking in public, Mike Russell did not go as far as saying there would be an inquiry but he did not rule it out.

On 18 November 2014, Alex Salmond resigned as First Minister. Nicola Sturgeon became First Minister of Scotland the following day.

On 17 December 2014, the decision to establish a public inquiry was announced by Angela Constance, Mike Russell’s successor as Cabinet Secretary for Education and Lifelong Learning. She announced that SG would establish a national public inquiry into the historical abuse of children in care. SCAI commenced its work in October 2015, with my predecessor, Susan O’Brien QC, as its chair.

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81 See report of *InterAction* event, at [SGV-000046895](#).

82 [Transcript, day 207](#): Michael Russell, at TRN-7-000000008, p.162.

83 [Transcript, day 207](#): Michael Russell, at TRN-7-000000008, pp.163-164.

84 See letter from Cabinet Secretary for Education and Lifelong Learning to the SHRC, 27 October 2014, at [SGV-000046894](#).

# 3

## Acknowledgement and apology

In this chapter, I consider two issues. The first is acknowledgement of historical institutional child abuse. The second is the issuing of a governmental apology.

### Acknowledgement of abuse

Early in the period 2002-2014, SG accepted that children in institutional care in the past had been abused,<sup>85</sup> and acknowledged that abuse of children in care was wrong and unacceptable.<sup>86</sup>

#### Extent of abuse

Colin MacLean, a senior civil servant who worked in the SG Education Department (Education) in 2002, stated in evidence that officials recognised past institutional child abuse had been widespread and accepted there had been major systemic failings within the Scottish childcare system when such abuse took place.<sup>87</sup>

However, that evidence does not sit at all comfortably with what officials actually said in the submissions they provided to ministers in 2002 and 2003.

In an initial submission to Cathy Jamieson (Minister for Education and Young People, 2001-03), dated 13 November 2002, officials said, at paragraph 8:

*“There is not currently evidence of systematic widespread abuse throughout the residential establishments in Scotland”.*<sup>88</sup>

In a later submission, dated 23 September 2003, they said, at paragraph 2 of Annex B:

*“The criminal convictions so far have been isolated and no evidence has emerged of widespread or organised abuse at Scottish institutions.”*<sup>89</sup>

In that submission, they also stated, at, paragraph 5:

*“Neither the weight of cases nor the nature of the allegations indicates a systemic failure or organised abuse that might justify a full inquiry.”*<sup>90</sup>

These statements are surprising as submissions provided to ministers contained ample evidence of a widespread problem.

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85 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.11.

86 See SG Education Department Memorandum, 17 February 2003, to PPC, at [SGV-000046928](#).

87 Colin MacLean said that officials had been trying in submissions in 2002 and 2003 to convey to ministers that abuse, although widespread, did not appear to have been organised or systematic abuse. [Transcript, day 203](#): Colin MacLean, at TRN-7-000000004, pp.48-51; pp.58-59.

88 See [SGV-000017844](#).

89 See [SGV-000046937](#).

90 See [SGV-000046937](#).

Peter Peacock (Minister for Education and Young People, 2003-06) understood officials to be saying that abuse was not happening in institutions across Scotland. It was abuse by “rogue individuals” rather than a systemic or widespread problem affecting a large number of institutions.<sup>91</sup> When he gave evidence to the PPC on 29 September 2004, he said: “One of the purposes of seeking an inquiry might be to cause ministers to recognise publicly that the regimes in some residential care homes in the past **occasionally** resulted in some young people being treated in an unacceptable way.”<sup>92</sup> I infer from that statement that officials’ advice at that time continued to be that there was no evidence that abuse had been or continued to be a widespread or systemic problem.

The submission dated 23 September 2003, at paragraphs 1 and 2 of Annex A, stated:

*“1. In the past few years there have been a series of allegations of abuse of children in residential institutions, primarily List D schools (known as approved schools before 1972) in the 1940s, 50s, 60s and 70s. Attention has recently focused on the schools run by the De La Salle Brothers, a Roman Catholic Order, following a criminal case in July 2003 in which two members of staff and a former member of the De La Salle Order were found guilty of various offences of physical and sexual abuse, and received prison sentences. There have been previous police investigations of alleged abuse at other residential institutions, some of which also ended in criminal prosecutions.*

*2. There are also a number of civil cases before the courts seeking damages for alleged abuse at these institutions. Most are being handled by the law firm Ross Harper...The Lord Advocate, on behalf of Scottish Ministers, is cited as one of the defenders along with the religious orders, managers of the schools and the local authorities. We understand that 78 such cases have applied for Legal Aid. Ross Harper have suggested that there are potentially 300 such cases.”<sup>93</sup>*

The former First Minister, Lord McConnell, had no doubt that known cases of institutional abuse were only “the tip of the iceberg”.<sup>94</sup> Cathy Jamieson said she needed no convincing that abuse of children in institutional care had been a widespread problem.<sup>95</sup> And, when ministers decided to rule out an inquiry, at their meeting on 23 September 2003, they had “accepted completely that there was abuse and it was widespread” but the fact that it was widespread did not, they felt, justify the holding of a public inquiry.<sup>96</sup>

As my findings in case studies to date clearly show, the abuse of children in institutional care in Scotland was widespread over many decades. Officials should have recognised that.

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91 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.76-81.

92 Scottish Parliament Official Report, Public Petitions Committee, 29 September 2004, at [SGV.001.001.7533](#). Emphasis added.

93 See at [SGV-000046937](#).

94 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, pp.9, 11 and 60. [Written statement of Lord McConnell](#), paragraph 11, at WIT-1-000000403, p.3.

95 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.126.

96 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, p.104.

## **An apology for historical abuse**

In Ireland, on 11 May 1995, the Taoiseach (prime minister of Ireland) had given an unreserved apology on behalf of the state and all its citizens to victims of childhood abuse.

## **Court actions against the Scottish Government**

In Scotland, in 2002, by the time that the Daly petition called for an apology on behalf of state bodies, a significant number of civil actions had been raised against SG and others seeking financial compensation for past institutional child abuse.

In these litigations, SG denied liability on two main grounds. First, that they had been raised too late (time bar) and should be dismissed without a hearing on their merits.<sup>97</sup> Secondly, SG had no legal liability to compensate individuals who had suffered abuse whilst in institutional care as children.

### **The limitation (time bar) defence**

Any action claiming financial compensation for past abuse was an action for personal injuries to which the law of limitation—often referred to as time bar—applied.<sup>98</sup> It means that, generally, such a litigation requires to be raised within a set period of time, normally within three years of injury caused by a legal wrong. Once that period has passed, the action can only proceed with the court's permission unless, as rarely happens, the defender chooses not to rely on time bar. It is therefore a legal barrier, but not an insurmountable one.<sup>99</sup>

### **The prescription problem**

However, claims concerning institutional child abuse before 26 September 1964 did face an insurmountable legal barrier, due to the law of prescription. At the time of these events, where a person suffered personal injury and believed they had a legal right to compensation, the right had to be exercised within a fixed period of years. Once the period fixed by law<sup>100</sup>—20 years—had passed, the right no longer existed, and the court had no power to hear the merits of the case.

In May 2002, in the case of *Kelly v Gilmartin's Executrix*, the court dismissed a claim for compensation for institutional child abuse suffered before 1964, holding that the law of prescription applied and, consequently, any right to compensation no longer existed.<sup>101</sup> The claimant in that case relied on the conviction of an abuser as clear proof that abuse had occurred. That did not help. The problem was not that there was no proof of abuse; the problem was that the right to be compensated for it no longer existed. The decision was subsequently appealed. In July 2004, an appellate court upheld the original decision as correct in law.<sup>102</sup> There was no further appeal.

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97 Peter Peacock was Minister for Education and Young People between May 2003 and November 2006. He was opposed to SG taking and maintaining the limitation defence. He and the Lord Advocate exchanged views on the matter in 2005 and 2006. In May 2006, the First Minister, Jack McConnell, accepted advice given by the Lord Advocate to the effect that this defence should be maintained, and it was maintained. See emails between officials, Minister for Education and Young People and the Lord Advocate, 16 December 2005, 19 April 2006, 8 May 2006, and 22-25 May 2006, at [SGV-000047653](#).

98 See [Prescription and Limitation \(Scotland\) Act 1973 Part II](#), particularly sections 17-19A.

99 The [Limitation \(Childhood Abuse\) \(Scotland\) Act 2017](#), which came into force on 4 October 2017, removed the time bar defence from all claims for damages arising out of abuse suffered in childhood.

100 The long negative prescription.

101 *Kelly v Gilmartin's Executrix* 2002 SC 602.

102 *Kelly v Gilmartin's Executrix* 2004 SC 784.

The existence of ongoing litigations against SG, and the potential for further litigation involving SG, played an important part from the outset in its response to the Daly petition and associated issues, including the matter of an apology for such abuse.

### **Early legal advice**

In November 2002, SG's in-house legal advisers, OSSE, advised that nothing should be said in response to the Daly petition that might be interpreted as SG accepting responsibility for past institutional child abuse.<sup>103</sup>

### **An apology: First Minister's position in late 2002/early 2003**

In late 2002/early 2003, Lord McConnell was determined to ensure that a proper apology for past institutional child abuse was going to be issued by him, as First Minister.<sup>104</sup> He discussed this with Cathy Jamieson whilst she was still Minister for Education and Young People, and they agreed to work towards such an apology being given, in the Scottish Parliament, "at the appropriate time".<sup>105</sup> Cathy Jamieson thought he had decided to make a public apology "from the outset". She could not recall any particular discussion she had with him about it but did not take issue with Lord McConnell's evidence that such a discussion occurred.<sup>106</sup>

### **Knowledge of First Minister's position regarding an apology before 2004**

Peter Peacock succeeded Cathy Jamieson as Minister for Education and Young People. He was not aware of Jack McConnell's intention to issue a public apology until the latter part of 2004.<sup>107</sup> Peter Peacock and the First Minister first discussed the matter in 2004, in the run-up to Peter Peacock giving evidence to the PPC on 29 September 2004. His officials in the Education Department also seem not to have been aware of it before then. Colin MacLean, a senior official in the department at the time, said the issue of an apology only began to feature in 2004, in particular in the run-up to the PPC meeting on 29 September 2004, and between then and the debate on the Daly petition in the Scottish Parliament on 1 December 2004.<sup>108</sup>

At a meeting of officials, on 10 September 2003, no mention was made of an apology or of the First Minister's intentions.<sup>109</sup> Submissions by officials to ministers between 14 November 2002 and 30 June 2004 made no mention of the making of an apology either.<sup>110</sup>

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103 See email from Fiona Robertson, OSSE, to Gerald Byrne and other officials, 14 November 2002, at [SGV-000047663](#).

104 See [Written statement of Lord McConnell](#), paragraph 13, at WIT-1-000000403, p.4.

105 See [Written statement of Lord McConnell](#), paragraph 62, at WIT-1-000000403, p.14; [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.52.

106 See [Written statement of Cathy Jamieson](#), paragraph 80, at WIT-1-000000365, p.18; [Transcript, day 201](#): Cathy Jamieson at TRN-7-000000002, pp.157-158; 161-162.

107 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.44 and 47-49.

108 [Transcript, day 203](#): Colin MacLean, at TRN-7-000000004, pp.67-68.

109 See [SGV-000046949](#).

110 See submission from officials to Peter Peacock, 23 September 2003, at [SGV-000046937](#); submission from officials to Peter Peacock, 20 May 2004, at [SGV-000046956](#); submission from Colin MacLean to Peter Peacock and the First Minister, 8 June 2004 at [SGV-000046929](#); and revised submission from Colin MacLean to Peter Peacock and the First Minister, 16 June 2004, at [SGV-000047652](#).

Lord McConnell was surprised by the absence of any reference to an apology over the course of such a long period of time. He said:

*"The thing that surprises me is that at no stage in any document between November 2002 and pretty much November 2004 do any of the officials write in a note to themselves, never mind to ministers, in all the hundreds of exchanges there are amongst them, do they write 'Where are we with the apology?'"*<sup>111</sup>

Lord McConnell also said:

*"[I]n my own head, and certainly those who were closest to me around me, there was never any doubt from the very first discussions in late 2002 that at the right moment, I would deliver an apology and that would be done by the First Minister and it would be done in the strongest possible terms at that moment."*<sup>112</sup>

*"I think people in my own office would have been aware of that...I do recall discussing it with Cathy [Jamieson], and I am almost certain people around me in my own office would have been aware that was my general intention, possibly maybe even people in my press office, so that they were careful that what they said didn't dismiss the idea of an apology to the media, if they were asked the question...So my best guess would be, and I don't recall this in detail, I am afraid ...would be that the people closest to me in my private office and probably the senior people responsible for my media relationships would have been aware"*<sup>113</sup>

### **Further legal advice in 2004**

In the run-up to the PPC meeting on 29 September 2004, OSSE attempted to "tone down" Peter Peacock's proposed statement so as to avoid him saying anything they thought might be interpreted as an acceptance by SG of responsibility for past child abuse.<sup>114</sup> At that stage, they did not know about the First Minister's intention to issue a public apology.

OSSE was first informed of the First Minister's intentions on 16 November 2004 and asked for advice.<sup>115</sup>

### **The First Minister's apology on 1 December 2004**

On 1 December 2004, Jack McConnell gave an apology in the Scottish Parliament.

Prior to his appearance before the PPC on 29 September 2004, Peter Peacock had discussed the matter of an apology with Jack McConnell informally.<sup>116</sup> Officials then met with representatives of INCAS on 18 October 2004. INCAS wanted an apology by the First Minister on behalf of the state.<sup>117</sup> Colin MacLean and another official met Peter Peacock on 16 November 2004, discussed the possibility of making an apology and, at his request, sought OSSE's advice.<sup>118</sup> An apology

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111 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, pp.51-52 and p.88.

112 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.52.

113 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, pp.82-83.

114 See email dated 29 September 2004 from Gordon McNicoll of OSSE to Patrick Layden of OSSE, at [SGV-000046974](#).

115 See [SGV-000046978](#).

116 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.184-185.

117 See [SGV-000046930](#).

118 See [SGV-000046978](#).

drafted by officials “on behalf of the people of Scotland” was given to OSSE that day for their consideration. On 18 November 2004, Peter Peacock was given the text of an apology in terms that had been cleared by OSSE.<sup>119</sup>

At a meeting with INCAS on 23 November 2004, Peter Peacock asked what sort of apology they were looking for. INCAS confirmed they wanted a heartfelt apology from the First Minister on behalf of the state<sup>120</sup> and Peter Peacock indicated that an apology had neither been ruled in or out.<sup>121</sup> He then revised the draft apology to “on behalf of the Government in Scotland and the people of Scotland”.<sup>122</sup> Whilst OSSE made some further changes to the draft, those words were left untouched,<sup>123</sup> from which I infer that the revision made by Peter Peacock did not cause any concern to OSSE.

The Lord Advocate did not see the draft apology until Tuesday 30 November, the day before the debate at which the First Minister was due to deliver it. He emailed Jack McConnell at 2.34pm and gave firm advice at 4.11pm as a result of which the words “the Government of Scotland” were deleted.<sup>124</sup> The Lord Advocate’s advice was in these terms:

*“I have just seen the draft statement for the first time. It is, of course, your decision on what to say. There is a risk that any apology, however crafted, will be used against Ministers.*

*[As] presently drafted the apology is pretty unequivocal: it is on behalf of the Government and people of Scotland. It is done in a context of recognition of institutional abuse, and a recognition of the role of government in regulating such institutions.*

*I consider that at present there is a strong possibility that this could be taken as an admission of neglect, and failure by the predecessors of Scottish Ministers and opens the door to establish fault and liability against Ministers. There are at present some 1300 claims and the potential liability is enormous.*

*You should also be aware that the institutions where the abuse occurred and who, arguably, should bear the primary responsibility will only be too pleased to see Ministers seemingly accepting liability in order to minimise their exposure to actions for damages.”<sup>125</sup>*

This was all done in a rush; officials and the First Minister had had over two years to consider the wording of any apology but had not done so. If they had, they would have had time for reflection. As John Swinney observed:

*“[T]he fact that the legal advice was provided late in the day...illustrates...there was a bit of a hurry to get all of this together, because the Public Petitions Committee was putting pressure on to get this issue addressed, and therefore it was all being done in a very compressed timescale to address that fact...the advice from the then Lord Advocate came the day before the apology was given in Parliament.*

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119 See [SGV-000047664](#).

120 See [SGV-000046958](#).

121 See [SGV-000046958](#).

122 See [SGV-000063531](#).

123 See [SGV-000063531](#) and [SGV-000063490](#).

124 See [SGV-000017810](#) and [SGV-000063495](#).

125 See [SGV-000017810](#).

*Now on an issue of this magnitude, of this significance, of the need to say properly to survivors that the state failed those individuals, I think that was awful late in the day for that advice to be rendered and for it to be considered in relation to such a monumental moment that survivors were looking for. It wasn't a surprise, it had been there from Mr Daly's petition, and I think it was just very late in the day.*<sup>126</sup>

### **The Scottish Parliament's response to the apology**

MSPs of all parties welcomed the First Minister's apology and associated themselves with it.<sup>127</sup> No MSP who responded to the First Minister's statement or spoke in the debate that followed took issue with the fact that it was an apology on behalf of the people of Scotland.

Survivors did not, however, respond with the same unanimous approval.

### **Wording of the First Minister's apology**

The wording of the apology given by the First Minister was, as above noted, heavily influenced by legal advice given by the Lord Advocate in the afternoon before the debate.<sup>128</sup> The First Minister was not bound to follow the Lord Advocate's advice, but he chose to do so. As a result, he gave an apology that accepted no responsibility for past institutional child abuse and did not give the apology that INCAS had, just a week earlier, said, when asked, that they wanted.

His principal reason seems to have been a strong desire not to let those who were considered to have been primarily responsible for the abuse "off the hook".<sup>129</sup>

Lord McConnell wanted to engage others beyond SG who, as he saw it, had to "take responsibility for their inaction over these decades."<sup>130</sup> He said:

*"I did not want to let those organisations off the hook, and I was quite clear that this was going to be a difficult thing to make progress with. It was quite clear from discussions I had with Cardinal O'Brien at the time that the [Catholic] Church were not going to be voluntarily stepping up to the plate here.*

[...]

*I knew the hierarchy of the churches well and we were in regular contact and I knew there was an institutional resistance to accepting this responsibility.*<sup>131</sup>

Likewise, Michael McMahon, when convener of the PPC, had held discussions with the Catholic Church's parliamentary representative and the Bishops' Conference and it was clear to him then that they would not willingly take responsibility either.<sup>132</sup>

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126 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, p.14. FBGA, in closing submissions, made a similar point: "It is regrettable that the Lord Advocate's intervention came so late in the process. His further consideration might have led to a more tempered intervention...and even with such advice as was given, the First Minister might have had an opportunity to reflect on the advice in a less time pressured situation." [Transcript, day 209](#): Stuart Gale QC, at TRN-7-000000010, p.109.

127 See [SGV-000046999](#).

128 See [SGV-000017810](#).

129 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.81.

130 See [Written statement of Lord McConnell](#), paragraph 14, at WIT-1-000000403, p.4.

131 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.135.

132 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, pp.101-104.

Lord McConnell accepted that there had not been much engagement before the apology between SG and the Catholic Church in Scotland, or with the religious orders and other churches, on the issues raised by the Daly petition.<sup>133</sup>

Lord McConnell hoped his apology would cause others to volunteer similar apologies:

*"I hoped in the aftermath of an apology from me on behalf of the people of Scotland that that would have an influence over churches; that they would feel a public pressure to fall in behind and say something similar. In the event, I don't think it did in fact happen".<sup>134</sup>*

He wanted the apology to send a signal to others:

*"I wanted to not only send a signal to the survivors that they had been heard and not only send a signal to Scotland that this was unacceptable, but to send a signal to the churches and other care providers that had such momentum behind it that they would find it very difficult to avoid becoming part of the solution. In the event, for whatever reason, they did manage to, at least at that time, avoid that outcome. But it was a strategy...to try and maybe force them to engage more than they were doing previously."<sup>135</sup>*

Yet many of those to whom the First Minister was trying to send this signal were—as was widely known—vigorously defending the same litigations as was SG and relying on the same defences. They were not accepting responsibility nor even acknowledging that children in institutional care were abused. In such circumstances, hoping that his apology would somehow change their minds seems to have been surprisingly naïve.

### **An apology on behalf of the state**

No apology was given by SG on behalf of the state between 1 December 2004 and the announcement of this Inquiry 10 years later.

### **A meaningful apology or not?**

As for the reaction of survivors, the First Minister's apology met with a mixed reception. Whilst Chris Daly was positive and thought that it *"really did move things on"*,<sup>136</sup> Helen Holland, on behalf of INCAS, described it as *"just a diluted apology"*.<sup>137</sup> David Whelan, on behalf of FBGA, considered it was not a *"sincere"* apology, it was *"a political apology"* and *"fell far short of what was required"*.<sup>138</sup> Frank Docherty, one of the founders of INCAS, said the people of Scotland had not abused him or other survivors. The state had been responsible for placing him in the institution where he suffered abuse. It was the state that should have been apologising.<sup>139</sup>

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133 Transcript, day 204: Lord McConnell, at TRN-7-000000005, p.139.

134 Transcript, day 204: Lord McConnell, at TRN-7-000000005, p.138.

135 Transcript, day 204: Lord McConnell, at TRN-7-000000005, p.141.

136 Transcript, day 19: Christopher Daly, at TRN.001.001.5709.

137 Transcript, day 17: Helen Holland, at TRN.001.001.5489.

138 Transcript, day 18: David Whelan, at TRN.001.001.5640; [Written statement of David Whelan](#), paragraphs 31-34, at WIT.001.001.1597; and [Closing Submissions for FBGA](#), 4 December 2020, at TRN-7-000000010, p.111.

139 Transcript, day 17: Helen Holland, at TRN.001.001.5471 and 5487.

There is recent research well worth bearing in mind in this context. It has concluded that, for an apology to be a meaningful one, five elements need to be included:

- (i) an explicit acknowledgement of the wrongs and their consequences;
- (ii) acceptance of responsibility for the wrongs done;
- (iii) an expression of regret that the wrongs occurred;
- (iv) an assurance of non-repetition; and
- (v) in a case of serious wrongdoing, an apology must include an offer of repair or corrective action.<sup>140</sup>

These criteria all make perfect sense and, having heard from so many survivors over the years since this Inquiry began, I can readily understand why all five of them require to be present if an apology for past child abuse is to be genuinely meaningful. The second and fifth criteria were missing from the 2004 apology and it did not—unlike the later apology on 23 October 2018—accordingly, measure up to these standards.<sup>141</sup>

## Conclusion

An apology was given in December 2004, but it was not the apology that the Daly petition and INCAS had called for.

Rather than focusing energies on the apology called for in the Daly petition and what survivors had requested only a week earlier, the overriding concern had been to protect the interests of government. John Swinney (who was an MSP at the time the apology was issued, and therefore a member of the parliament that was unanimous in taking no issue with its wording at the time) now accepts that:

*“[T]here was a lot of careful wording going on around that apology.*

*So I suppose there are two observations: the first is that if survivors were dissatisfied with that apology it says to me the apology was not good enough, however it sounded to me at the time. And, secondly, with what we now know, there was a lot of careful wording going on at the time to, I suppose, position Government as best as Government could be positioned at the time, and that doesn't feel to me that it was – that that was appropriate, because what was needed was a forthright apology to people who had suffered in our country and they should not have suffered.*

*That is a very direct acceptance of responsibility that the state has to take on and I don't think that was represented by the apology that was given in 2004.”<sup>142</sup>*

It is clear that SG was not prepared in 2004 to give an apology on behalf of the state because the policy of the state was to deny legal liability for past institutional child abuse in ongoing litigations. It is hardly surprising that, for many survivors, the apology did not stand up to scrutiny.

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140 Catterall, Emma, et al., *Apologies & Institutional Child Abuse*, September 2018 (Queen's University Belfast), pp.1-2. This report was referred to by John Scott QC in the opening and closing statements he made on behalf of INCAS. See [Transcript, day 201](#): John Scott QC, at TRN-7-000000002, pp.9-11; [Transcript, day 209](#): John Scott QC, at TRN-7-000000010, pp.83-84.

141 The later apology was made by John Swinney, Deputy First Minister, in the Scottish Parliament.

142 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, pp.12-13.

I am satisfied that Jack McConnell had an informal discussion with Cathy Jamieson about giving an apology when she was Minister for Education and Young People. However, others with direct responsibility for the Daly petition, including Cathy Jamieson's successor as Minister for Education and Young People, and relevant officials, were unaware of the First Minister's position on an apology until 2004.

As a result, key submissions were prepared by officials in both 2003 and 2004 in ignorance of the First Minister's position on a key aim of the Daly petition.

Before late 2004, Lord McConnell had himself had ample opportunity to make his views on an apology more widely known. He did not do so and, if he felt so strongly about it, I find that surprising.

As First Minister, he took a close personal interest in, and commented on, the proposed response to issues raised by the Daly petition. In November 2002 he sought the views of his special adviser on the proposed initial response to the PPC.<sup>143</sup> In October 2003 he wanted to know the outcome of the ministerial meeting on 25 September 2003.<sup>144</sup> In December 2003 he commented on the course of action ministers had agreed.<sup>145</sup> On 21 June 2004 he made comments before the letter dated 30 June 2004 was sent to the PPC.<sup>146</sup> Having considered submissions in May and June 2004, he insisted on keeping open the option of an independent expert.<sup>147</sup> The letter to the PPC was cleared with him beforehand and was carefully worded to keep that option open.<sup>148</sup> Submissions provided to him between November 2002 and June 2004 were silent on the matter of an apology. Yet he said nothing about an apology or about the absence of any mention of an apology, on any of the occasions when he personally intervened. He could and, if it mattered to him, ought to have done so.

The First Minister was clear from the outset that he wanted to give an apology at the appropriate time. I cannot accept that no appropriate or right time arose before 1 December 2004.<sup>149</sup> The apology he gave was one that publicly acknowledged what ministers knew (or accepted) in late 2002 when called on to respond to the Daly petition—that children in institutional care in the past had been abused. When it arrived, it failed to include any state responsibility for past institutional child abuse. It said nothing about whether or not such abuse had been widespread. There was no reason to wait until December 2004 to give such an apology. It could have been given much earlier.

Further, Cathy Jamieson could not recall discussion at Cabinet before late 2004 of issues arising from historical abuse of children in care.<sup>150</sup> I find that surprising; these were such important issues and they had been so carefully and cogently raised in the Daly petition.

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143 See email from the First Minister's private office to Jeane Freeman, 19 November 2002, at [SGV-000063484](#).

144 See email sent on behalf of Minister for Education and Young People, to the First Minister, 9 October 2003, at [SGV-000061805](#).

145 See email from the First Minister's private office to the Minister for Education and Young People, 22 December 2003, at [SGV-000046922](#).

146 See email from the office of the First Minister dated 21 June 2004, at [SGV-000061806](#).

147 [Written statement of Lord McConnell](#), paragraph 79, at WIT-1-000000403, p.17.

148 [Written statement of Lord McConnell](#), paragraphs 81-82, at WIT-1-000000403, p.18.

149 Cathy Jamieson was asked whether there may have been missed opportunities and said there could have been. See [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.166.

150 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, pp.163-164.

The debate in the Scottish Parliament was instigated by the PPC. Facing a debate on issues raised by the Daly petition clearly focused minds. It may well have been an appropriate occasion to give an apology. But that was only because no apology had been forthcoming before then, despite calls for one since August 2002. SG's response undoubtedly lacked the sense of urgency that was called for, yet it would not have been difficult to drive forward much earlier. Perhaps other government business got in the way but if that is so, it should not have done.

I am left with the distinct impression that, whatever he feels now, whatever he recognises was the right thing to do, Lord McConnell did not, at the time, afford this matter the prioritisation that he can now see it deserved.

Sadly, once this inadequate apology had been delivered, any intensity of focus and pressure waned. Yet SG were far from being entitled to regard their response to the Daly petition as 'job done'.

# 4

## Justice, accountability and redress

Throughout the period 2002-2014, key themes for survivors were justice, accountability and redress.

### 2002-2007

#### *Policy position*

In the period 2002-2007, SG viewed justice, accountability and redress for survivors of institutional child abuse as matters for the Scottish civil and criminal justice systems.

A key aim of the Daly petition was an inquiry in line with the statutory public inquiry established in Ireland in 2000 (the Ryan Commission). The petition included proposed terms of reference drawn directly from those with which the Ryan Commission was tasked. Any such inquiry was, however, ruled out by SG on 25 September 2003.<sup>151</sup> A truth and reconciliation commission was also ruled out at that time.

Accordingly, SG set its face against an inquiry at an early stage.

Litigations against SG seeking compensation for past institutional child abuse were ongoing. Their existence, and the nature of the defences being maintained by SG, resulted in the apology from the First Minister on 1 December 2004 being worded so as to avoid SG accepting responsibility for past institutional child abuse.

A matter uppermost in the then First Minister's mind was the need to follow "*due legal process*".<sup>152</sup> Jack McConnell wanted the test cases pending before the courts to run their course unimpeded by other potentially overlapping extrajudicial processes, such as an investigation into institutional child abuse by a fact-finding body or as part of a compensation process. Lord McConnell told the Inquiry that the Lord Advocate's clear advice favoured this as a strategic approach. It had, he said, the advantage of avoiding potential prejudice to court proceedings concerning past institutional child abuse.<sup>153</sup>

Whilst there was, in 2004, a ministerial commitment to give access to SG records, it simply made evidence and information available which might be relevant to litigations in relation to institutional child abuse. It did nothing to address or further the possibility of an inquiry.

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151 See note of ministerial meeting, 25 September 2003, at [SGV-000046887](#).

152 [Written statement of Lord McConnell](#), paragraph 14, at WIT-1-000000403, p.4.

153 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, pp.129-134.

### **References to Scottish Law Commission (SLC) in 2004 and 2005**

Two references were made to the SLC by the Minister for Justice in the period 2002-2007.

The first reference was around September 2004. In it, the Minister for Justice, Cathy Jamieson, asked the SLC to review those provisions in the Prescription and Limitation (Scotland) Act 1973 relating to limitation of actions (time bar) seeking financial compensation for personal injury wrongfully caused.<sup>154</sup> It did not ask for a review of the time bar provisions **and** the law of prescription (which had the effect of extinguishing survivors' rights to compensation for pre-1964 abuse) although it seems that was what was intended.

Ministers and MSPs do not, however, appear to have understood the difference between limitation and prescription. They did not appreciate that, at that stage, the SLC had not been asked to review the law of prescription—for example, Nicola Sturgeon MSP, during the parliamentary debate on 1 December 2004, said that the reference to the SLC related to pre-1964 claims, when it did not, and Cathy Jamieson “naively” thought that the reference made in 2004 would somehow lead to the SLC review covering both pre and post-1964 claims.<sup>155</sup> Cathy Jamieson had, however, in a briefing paper prepared for the debate by an official in the Justice Department, been cautioned against creating a false expectation that the review by SLC would necessarily consider the difficulties facing those with pre-1964 claims; that same official had also, confusingly, suggested that rules relating to both limitation and prescription were “rules on time bar” but the expression “time bar” relates only to limitation.

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154 See [SGV-000000056](#), Chapter 15, paragraph 15.8.

155 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, pp.182-183.

The following explanations are intended to help readers understand the principal differences between “prescription” and “limitation”.

*What is “prescription”?*

Prescription is when a **right** to claim, and an **obligation** to pay, damages **cease to exist** because of the passage of time. Once a claim and obligation have prescribed (for example, after 20 years), they are lost forever. They cannot be resurrected by the court or by any other means.

*What is “limitation”?*

Limitation is about the time within which a claim that has not prescribed must be raised in court. A claim for damages to be paid for injuries caused by a wrongdoer must normally be **lodged in court** within a set period of time (for example, within three years). Unlike prescription, this does not mean that the right to claim and obligation to pay cease to exist at the end of the set period. It only matters if the defender in the litigation chooses to object to the claim on the basis that the case has been started too late (the “limitation defence”). The defender does not have to do so. If the defender does not take that objection, the claim can proceed even although the set period of time has expired. Further, even if the case has been started late and the defender takes that objection, the court can allow the case to continue if it considers that it is, nonetheless, fair to do so.

*What is “time bar”?*

Time bar is another name for limitation. It is **not** another name for prescription. Some people have wrongly used “time bar” to describe both limitation **and** prescription and that has caused confusion.

Around 3 August 2005, a second reference was made by the Minister for Justice, Cathy Jamieson, in which the SLC was asked to consider the position of claims for damages in respect of personal injury which had been extinguished by operation of the long negative prescription prior to 26 September 1984 (prescribed claims).<sup>156</sup>

By the time of these references, the time bar defence was presenting formidable problems for anyone trying to bring an action in respect of non-recent childhood abuse. It was also clear that those who had suffered abuse before 26 September 1964 had lost their right to raise actions in the civil courts because of the law of prescription.<sup>157</sup>

The SLC published a report on limitation and prescribed claims in December 2007.<sup>158</sup> The SLC did not recommend that the law should be changed so as to revive prescribed claims. Nor did it recommend fundamental changes to the existing time bar provisions.

As a result of the outcome of the Scottish parliamentary election in May 2007, the response to the SLC’s report became a matter for the new Scottish National Party administration under the leadership of a new First Minister, Alex Salmond.

156 See [SGV-000000056](#), Chapter 15, paragraphs 15.14-15.15.

157 The prescription problem had been highlighted in a submission to the Deputy First Minister (Jim Wallace) in October 2002 following the decision on 20 May 2002 in *Kelly v Gilmartin’s Executrix* 2002 SC 602. See [Transcript, day 203](#): Colin MacLean, at TRN-7-000000004, pp.43-43 and [SGV-000000056](#), Chapter 15, paragraphs 15.3-15.5.

158 Scot Law Com No 207 (2007), *Report on Personal Injury Actions: Limitation and Prescribed Claims*.

### **Pre-1964 survivors - missed opportunities**

SG could have considered affording financial redress to pre-1964 survivors before December 2007 but opportunities to do so were missed.

The possibility of an extrajudicial compensation scheme was considered as early as October 2002. However, at that time the legal advice was that it was unlikely SG would be found liable to compensate victims of historical child abuse whilst in care. The Deputy First Minister, Jim Wallace, appears to have favoured a reference to the SLC to consider whether changes to the law of prescription and limitation might assist those pursuing compensation for institutional child abuse through the courts. But he was of the view that SG should not be shouldering financial responsibility for the liabilities of others.<sup>159</sup> The references made to the SLC did not occur until two and three years later.

Before the second reference, in August 2005, informal discussions had taken place between the SLC and SG officials. The SLC had indicated that, if asked, it would recommend against any change in the law to re-create obligations which legally ceased to exist in or before 1984 i.e. they would recommend against any change to the law of prescription.<sup>160</sup> The SLC said it could provide formal advice in early course without waiting for the conclusion of its separate review of the law on time bar (limitation).

Officials recommended taking up the offer of early formal advice, adding it was likely they would support a recommendation by the SLC that the law of prescription should not be changed. The Minister for Justice sought comments.

The Education Minister, Peter Peacock, said: *"It seems to me that the issues of limitation and the 1964 issue need to be seen to be taken together and reported at the same time."* Optimistically, and without any apparent basis, he added: *"Who is to say that during the review, views might not mature and develop."*

He went on:

*"I am less concerned about timescales than I am about having the issues looked at in depth and in the round."*

*As a matter of principle, in the case of survivors of abuse, I am not clear how we can in all conscience maintain a limitation of this sort - it seems arbitrary, discriminatory and I am not clear of its necessity."<sup>161</sup>*

The Lord Advocate commented:

*"The Lord Advocate is reluctant to get involved in this issue but has seen Mr Peacock's response...He is content with the Scottish Law Commission being asked to take more time but is doubtful about the last point made by Mr Peacock. It seems difficult to argue that a limitation on actions should be extended solely for survivors of abuse. That might seem arbitrary and discriminatory to others."<sup>162</sup>*

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159 See [SGV-00000056](#), Chapter 15, paragraphs 15.3-15.5.

160 As was the effect of the operation of the law of prescription, it meant that the right to compensation for pre-1964 abuse no longer existed.

161 See [SGV-000067496](#).

162 See [SGV-000067495](#).

Cathy Jamieson declined the offer of early advice from the SLC.<sup>163</sup> Had she accepted it, the position of pre-1964 survivors would have been known earlier and the possibility of ameliorating it through, for example, a redress scheme, could have been addressed by SG in 2005.<sup>164</sup>

Cathy Jamieson said she was more on the side of the Minister for Education and Young People: "We wanted to try and find a way to do this [amend the law] and that is what we hoped that the [Scottish] Law Commission would do."<sup>165</sup>

She accepted it may have been naïve of her to hope, given the views SLC had expressed informally, that they would provide a solution to the prescription problem.<sup>166</sup> I agree.

## 2007-2014

### **No change of policy and no reform of the law**

In December 2007, the SLC published its report on limitation and prescribed claims.<sup>167</sup>

Following publication of that report, SG's policy on justice, accountability and redress for survivors did not change, namely that these were matters for the Scottish civil and criminal justice systems.

SG accepted SLC's recommendation regarding prescribed claims. As for time bar, there was simply a commitment to consult on reform.

On 7 February 2008, SG stated, in the Scottish Parliament, that its focus was the development of a form of truth and reconciliation forum.<sup>168</sup>

On 21 May 2008, there was a development which was not good news for survivors of abuse that had taken place many years earlier. The decision of the House of Lords in the appeal in the case of *Bowden v Poor Sisters of Nazareth and Others*<sup>169</sup> was issued. The judges unanimously dismissed it. Time bar applied, the litigation having been commenced long after the expiry of the limitation period. Lord Hope said, at paragraph 3: "The way the issue of time bar is disposed of in [these] cases is likely to affect many others that remain in the pipeline".

Many similar actions were abandoned or dismissed following that decision.

Adam Ingram, Minister for Children and Early Years in 2008, was aware of the significance of the decision in *Bowden* and that it meant that even claims which had not prescribed would generally not be able to proceed. That is, there was recognition at the ministerial level that it was extremely difficult for those who had suffered childhood abuse many years previously to secure effective access to the civil justice system.<sup>170</sup>

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163 See SGV-000067494.

164 The Criminal Injuries Compensation Scheme was not available to those who were abused before 1 August 1964.

165 Transcript, day 201: Cathy Jamieson, at TRN-7-000000002, p.190.

166 Transcript, day 201: Cathy Jamieson, at TRN-7-000000002, pp.190-191.

167 Scot Law Com No 207 (2007), *Report on Personal Injury Actions: Limitation and Prescribed Claims*.

168 See Scottish Parliament Official Report 7 February 2008, at SGV.001.001.7608.

169 [2008] UKHL 32.

170 Transcript, day 205: Adam Ingram, at TRN-7-000000006, pp.12-13.

In August 2008, the Cabinet Secretary for Justice, Kenny MacAskill, stated publicly that SG had no plans to compensate survivors of historical institutional child abuse.<sup>171</sup>

On 10 October 2008, SG consulted on a proposal for an 'acknowledgement and accountability' forum.<sup>172</sup>

In an important development in March 2009, the Scottish Human Rights Commission (SHRC)<sup>173</sup> was commissioned by SG to produce a *Human Rights Framework* to inform the design and implementation of an acknowledgement and accountability forum.

However, on 30 September 2009, ministers abandoned the proposal for an acknowledgement and accountability forum and decided instead to pilot a private listening forum with **no** element of accountability.<sup>174</sup> SHRC had **not**, however, reported at that stage, it was still working on its report, the report was not overdue, and its commission had not been cancelled by SG.

On 26 October 2009, the Minister for Community Safety, Fergus Ewing, told colleagues in the departments for Health (Shona Robison) and Education (Adam Ingram) that the approach of the Justice Department would be informed by the SLC's report on limitation and prescribed claims (published in December 2007) and that he wished to avoid creating any expectation that the Justice Department would depart fundamentally from the SLC's recommendations on reform of the law on limitation.<sup>175</sup>

The SHRC's *Human Rights Framework* was published in February 2010.<sup>176</sup> Its clear view was that a human rights-based approach to historical child abuse obliged the state to ensure that a range of remedies were available to survivors if the fundamental requirement for there to be justice, accountability, redress, acknowledgement and support was to be met.<sup>177</sup>

On 21 December 2010, the Minister for Community Safety, Fergus Ewing, in evidence to the PPC, acknowledged that many people might view the possible legal avenues for victims of childhood abuse as "*more theoretical than real*."<sup>178</sup> Earlier, he had concluded "*it was impossible or almost impossible for people who had been abused many years previously to have effective access to the civil justice system*".<sup>179</sup>

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171 See [Written statement of Fergus Ewing](#), paragraph 28, at WIT-1-000000341, p.6.

172 SG Consultation, *Proposal to develop an Acknowledgement and Accountability Forum for adult survivors of childhood abuse*, 10 October 2008, at [SGV.001.001.7859](#).

173 An independent statutory body established by the Scottish Commission for Human Rights Act 2006. The Commission became operational around December 2008. See [Written statement of Duncan Wilson](#), paragraph 7, at WIT-1-000000382, p.2.

174 See note of ministerial meeting, 30 September 2009, at [SGV.001.001.8059](#).

175 See [SGV-000000056](#), Chapter 15, paragraph 15.22.

176 SHRC, *A human rights framework for the design and implementation of the proposed "Acknowledgement and Accountability Forum" and other remedies for historic child abuse in Scotland*, February 2010, at [SGV-000024135](#).

177 [Written statement of Duncan Wilson](#), paragraph 18, at WIT-1-000000382, p.4.

178 Scottish Parliament Official Report, Public Petitions Committee, 21 December 2010, at [INQ.001.001.1276](#).

179 [Transcript, day 206](#): Fergus Ewing, at TRN-7-000000007, p.95.

### **Consultation on reform of the law of limitation and on the issue of prescribed claims<sup>180</sup>**

On 19 December 2012, SG published a Consultation Paper *Civil Law of Damages: Issues in Personal Injury*. It sought views on various proposals made by the SLC in its report of December 2007 for reform of the civil law of damages, including recommendations for clarifying and improving the law on limitation.

Consultees were given until 15 March 2013 to respond. They were not asked whether the limitation period should be removed for any particular type of claim, such as a claim concerning childhood abuse.

At paragraph 1.08 of the paper, SG stated:

*"The [Scottish] Government takes the view that, in principle, there could be merit in legislating along the broad lines suggested by the [Scottish Law] Commission in these reports. Therefore, subject to the views of consultees on detailed aspects, the Government anticipates legislating in the Scottish Parliament in the current session (2011-2016) to reform the law on damages for psychiatric injury and the law on limitation."<sup>181</sup>*

That is, SG was aiming at legislating to implement recommendations of the SLC between four and nine years after the SLC had issued its report.

As for prescription, consultees were asked, at paragraph 3.17 on page 27, whether they agreed with the SG's acceptance of the SLC's recommendation that prescribed claims should not be revived.

They were also asked, at paragraph 3.20 on page 28, whether the standard limitation period of three years should be raised to five years, as the SLC had recommended five years earlier in its report.

An analysis of consultation responses was published on 6 August 2013 and SG issued its response to the consultation in December 2013. The intention at that time was to introduce a Damages Bill to (i) increase the limitation period from three to five years and (ii) provide a list of factors to assist the court in exercising its statutory discretion to allow a litigation to proceed even if not raised within that limitation period.

In the event, no Damages Bill was introduced following this consultation. It appears that this was due principally to the need to give consideration to a recommendation contained in the *InterAction Action Plan* published by the SHRC on 17 June 2014 that:

*"The civil justice system should be increasingly accessible, adapted and appropriate for survivors of historic abuse of children in care, including through the review of the way in which time bar operates."<sup>182</sup>*

SG formally responded to the *InterAction Action Plan* on 27 October 2014. At that stage, SG did not commit to any specific action in response.<sup>183</sup>

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180 See [SGV-00000056](#), Chapter 15, paragraphs 15.22-15.29.

181 [Scottish Government, Consultation, \*Civil Law of Damages: Issues in Personal Injury\*](#), December 2012, p.8.

182 See [SGV-00000056](#), Chapter 15, para 15.28.

183 See [SGV-00000056](#), Chapter 12, para 12.36.

## Further consultation

Whether there should be a special time bar regime for childhood abuse cases was the subject of a further consultation in 2015.<sup>184</sup> A majority of respondents (58%) favoured there being a special regime.<sup>185</sup>

## 2013/2014: SHRC and the InterAction process

Crucially, SHRC is wholly independent of government and accountable not to SG but to the Scottish Parliament; it reports to a cross-party group. It became operational in late 2008.<sup>186</sup>

SG was slow to come to the realisation that they should adopt a comprehensive response and, importantly, that it needed to be human rights compliant. However, by about March 2009, the light had dawned in that regard and they sought the advice of SHRC to help them to develop an acknowledgement and accountability forum that was human rights compliant.<sup>187</sup> Prior to the involvement of SHRC, SG's approach to responding to non-recent abuse of children in institutional care had, as Duncan Wilson<sup>188</sup> observed and Mike Russell agreed, been "piecemeal".<sup>189</sup>

When commissioning this work, SG must have appreciated that SHRC might make recommendations which, if implemented, would involve going beyond what had previously been decided by SG. However, SG decided, on 30 September 2009, to pilot a confidential forum—which would not be an acknowledgement and accountability forum—before it had received SHRC's advice. In these circumstances, I am very surprised SG did this—what was the point of instructing SHRC to provide important advice if it was not going to wait for that advice before deciding what to do?

SG did not tell SHRC of its plan to pilot a confidential forum and SHRC did not regard that plan as a course of action that was human rights compliant. That was because it did not engage the elements of the human rights framework that was required, including that it did not encompass accountability.<sup>190</sup> As was evident from the report published by SHRC in February 2010, from a human rights perspective, concepts such as justice, accountability and redress were, in the context of past abuse of children in institutional care, wide concepts and they required a wider response than simply taking measures to afford access to the civil courts or prosecution of abusers.<sup>191</sup> SG had, however, been taking a narrow view, regarding accountability and redress as matters that were not for it but were for the civil and criminal justice systems to provide.

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184 Scottish Government, *Consultation on the Removal of the 3 Year Limitation period from Civil Actions for Damages for Personal Injury for In Care Survivors of Historical Child Abuse*, June 2015 .

185 See: SPICe Briefing, 19 January 2017 (Executive Summary) on the Limitation (Childhood Abuse) (Scotland) Bill,

186 Transcript, day 206: Duncan Wilson, at TRN-7-000000007, p.4.

187 Transcript, day 206: Duncan Wilson, at TRN-7-000000007, pp.4-5. A description of the approach taken by the SHRC to the commission from SG can be found in the [written statement of Duncan Wilson](#), paragraphs 11-14, 17-42, and 45, at WIT-1-000000382, pp.3-11.

188 Head of Strategy and Legal at the SHRC between December 2008 and October 2014.

189 Transcript, day 206: Duncan Wilson, at TRN-7-000000007, pp.5-6; [Written statement of Duncan Wilson](#), paragraph 116, at WIT-1-000000382, p.29; Transcript, day 207: Michael Russell, at TRN-7-000000008, pp.137-138.

190 Transcript, day 206: Duncan Wilson, at TRN-7-000000007, pp.9-32.

191 Transcript, day 206: Duncan Wilson, at TRN-7-000000007, pp.18-19.

SHRC's work on this commission from SG included (i) an analysis of Article 3 of the European Convention on Human Rights (prohibiting torture and inhuman or degrading treatment or punishment), including the proper approach when determining whether or not particular conduct amounts to a violation of Article 3 and (ii) an explanation of the state's positive obligation under Article 3 to protect persons at risk of abuse, the state's duty under Article 3 to investigate credible allegations of inhuman or degrading treatment, and ways in which that duty can be fulfilled.

SHRC's report contained nine recommendations.<sup>192</sup> Duncan Wilson explained:

*"The [Commission's] position in 2010 was that there should be some kind of investigation by the state into the whole situation. That position did not change from 2010. The InterAction process was less a discussion as to whether people agreed with our recommendations, as the recommendations were based on international human rights obligations. It was more about how we implemented these recommendations as a nation. The entire ethos of the Human Rights Framework and then the InterAction process was to move away from the previous piecemeal approach. Instead, it laid out the comprehensive framework of what is required of the state in order to respond to serious, systemic human rights violations that we have yet to fully account for. The response to the inquiry and investigations requirement is one aspect of the Scottish Government being slow to come to the realisation that what was needed was an overall, comprehensive response."*<sup>193</sup>

The recommendations in the *Human Rights Framework*, published in February 2010, did not include a recommendation for an *InterAction* process. SHRC's intention had been to publish its report, with recommendations, and then *"to revert to the role as a national human rights institution to monitor the implementation of those recommendations."*<sup>194</sup>

However, that proved not to be possible given the absence of any commitment by SG to implementation. The *InterAction* process was a response by SHRC to that lack of commitment.<sup>195</sup> Such a process involves bringing all interested parties together to discuss all relevant issues in the hope that, through discussion, they can agree a way forward which complies with human rights principles.<sup>196</sup> SG eventually agreed to participate in such a process in about December 2011<sup>197</sup> but only after a group of survivors had marched down the Royal Mile in Edinburgh in the rain, led by Frank Docherty of INCAS, and carrying banners demanding justice and accountability.

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192 SHRC, *A human rights framework for the design and implementation of the proposed "Acknowledgement and Accountability Forum" and other remedies for historic child abuse in Scotland*, February 2010, at [SGV-000024135](#).

193 [Written statement of Duncan Wilson](#), paragraph 116, at WIT-1-000000382, p.29; [Transcript, day 206](#): Duncan Wilson, at TRN-7-000000007, pp.5-7 and pp.61-62.

194 [Transcript, day 206](#): Duncan Wilson, at TRN-7-000000007, p.33.

195 Duncan Wilson gives a detailed description of the *InterAction* process. See [written statement of Duncan Wilson](#), paragraphs 87-130, at WIT-1-000000382, pp.22-34.

196 [Transcript, day 206](#): Duncan Wilson, at TRN-7-000000007, pp.33-35 and p.77. The process had previously been developed by Alan Miller, then Chair of the SHRC, as a mechanism for resolving human rights disputes.

197 [Transcript, day 206](#): Duncan Wilson, at TRN-7-000000007, p.56.

For most of the *InterAction* process, SG's position was that it did not accept there would be value in having a national inquiry. Its position was there had been many inquiries and lessons had been learned: those inquiries and the *Historical Abuse Systemic Review* (the Shaw Review) negated the need for a public inquiry.<sup>198</sup> However, the Action Plan kept open the option of an investigation of some kind by recommending that consideration be given to other reviews and inquiries and whether there would be added value in having a national inquiry.<sup>199</sup>

The Action Plan, published on 17 June 2014, also contained this recommendation in relation to the Scottish civil justice system:

*"The civil justice system should be increasingly accessible, adapted and appropriate for survivors of historic abuse of children in care, including through the review of the way in which the time bar operates."*<sup>200</sup>

### **2014: Whether to hold an inquiry? A change of position**

In the summer of 2014, Mike Russell, Cabinet Secretary for Education and Lifelong Learning, became directly involved in the *InterAction* process. Within a few months, he reached the view that there needed to be an inquiry.<sup>201</sup>

Before then, his involvement with the issues arising from the historical abuse of children in care and SG's responses had been "*tangential*".<sup>202</sup>

He experienced some personal engagement with survivors in late 2014—it proved to be highly significant:

*"My personal involvement and engagement with survivors through the InterAction Process was influential in persuading me more needed to be done. I was more directly involved with survivors towards the end of the InterAction process in 2014. I intervened in 2014 because I was afraid that the whole issue was not going towards resolution fast enough."*<sup>203</sup>

*"[T]he impact of meeting the survivors and talking to them during the interaction process was enormously strong. And I came pretty quickly to the conclusion that what they were arguing was irresistible and what we needed was to find the right way to take that forward."*<sup>204</sup>

Through his direct involvement with the *InterAction* process and, in particular, his direct engagement with survivors, he was persuaded that there ought to be an inquiry.<sup>205</sup>

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198 See [Transcript, day 206](#): Duncan Wilson, at TRN-7-000000007, pp.58-59.

199 See [Transcript, day 207](#), Michael Russell, at TRN-7-000000008, pp.145-146; [Written statement of Michael Russell](#), paragraphs 32-35, at WIT-1-000000368, pp.9-10.

200 See [SGV-000000056](#), Chapter 15, paragraph 15.28. SG formally responded to the *InterAction Action Plan* on 27 October 2014: see [SGV-000000056](#), chapter 12, paragraph 12.36.

201 [Written statement of Michael Russell](#), paragraphs 37-140, at WIT-1-000000368, pp.10-36.

202 [Written statement of Michael Russell](#), paragraph 6, at WIT-1-000000368, p.2.

203 [Written statement of Michael Russell](#), paragraph 27, at WIT-1-000000368, p.8.

204 [Transcript, day 207](#): Michael Russell, at TRN-7-000000008, p.145.

205 See [Written statement of Michael Russell](#), paragraphs 85-93, at WIT-1-000000368, pp.22-24; [Transcript, day 207](#): Michael Russell, at TRN-7-000000008, pp.153-154 and pp.161-164.

## Post-2014

### **Reform of the law of limitation and redress for survivors of institutional child abuse**

By 2017, SG had come to the view that claims in relation to abuse when in care during childhood ought to be treated differently for time bar purposes. The Limitation (Childhood Abuse) (Scotland) Act 2017 came into force on 4 October 2017; it introduced a special limitation regime, exempting such claims from the general three-year time limit.

On 28 May 2015, Angela Constance MSP, Cabinet Secretary for Education and Lifelong Learning, announced the terms of reference of this Inquiry. She also referred to the removal of the three-year time bar for cases involving historical childhood abuse, and the reasons for it:

*“Acknowledging that delivering the right to reparation called for by survivors through the SHRC [Scottish Human Rights Commission] interaction process would involve removing the time bar, which requires a civil case for damages to be brought to court within the 3 year limitation period, the Cabinet Secretary announced that the Scottish Government intends to lift the 3 year time-bar on civil actions in cases of historical childhood abuse that took place after the 26th of September 1964.*

*Ministers are of the view that the victims of child abuse should not have to demonstrate to the court that they have a right to raise litigation before the case can proceed. The circumstances of survivors of historic abuse, in particular, the class of pursuer, the type of injury and the impact on the victim are such that they should be treated differently.”<sup>206</sup>*

As explained in SG’s 2015 consultation paper, it had had regard to the impact of the law of prescription on pre-1964 cases and given serious consideration to a legislative solution but had, unsurprisingly, concluded that *“the legal issues relating to the removal of the law of prescription for these cases has proved too difficult to overcome”*.<sup>207</sup>

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill was introduced in the Scottish Parliament on 13 August 2020 to establish a financial redress scheme for survivors of institutional child abuse. It received the Royal Assent on 23 April 2021.

## Conclusion

Over the period 2002-2014, some progress was, eventually, made in relation to providing for acknowledgement of past abuse but there was a particularly marked lack of urgency in SG’s approach to addressing justice, accountability and redress. That was despite survivors’ inability to access the civil justice system being known to it at the start of that period. The situation cried out for a just solution. None was forthcoming.

A significant amount of time was lost because ministers did not understand the fundamental difference between prescription and limitation. Nor, it seems, was their misunderstanding effectively corrected by officials or by SG’s lawyers. The problem for pre-1964 claims was not limitation—not time bar—the problem for those claims was prescription.

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206 Scottish Government, *Consultation on the Removal of the 3 Year Limitation period from Civil Actions for Damages for Personal Injury for In Care Survivors of Historical Child Abuse*, June 2015, chapter 1, paragraphs 1.2-1.3.

207 Scottish Government, *Consultation on the Removal of the 3 Year Limitation period from Civil Actions for Damages for Personal Injury for In Care Survivors of Historical Child Abuse*, June 2015, chapter 1, paragraph 1.6. The legal issues are discussed at Chapter 3.

Peter Peacock did not properly grasp it. It was something which, on his own admission, he “never completely understood”.<sup>208</sup> When he appeared before the PPC on 29 September 2004, he told them that “concerns have been expressed about the time bar that can operate to bar claims relating to child abuse that occurred many years ago, as was shown in the recent Kelly case. I advise the committee that we have asked the Scottish Law Commission to review and report on the law of limitation”.<sup>209</sup> But the Kelly<sup>210</sup> case did not concern time bar—the rule imposed by the law of limitation—it concerned the law of prescription.

Members of the PPC and MSPs attending the debate in the Scottish Parliament on 1 December 2004 thought that the first reference to the SLC covered pre-1964 claims -prescribed claims—as well as time bar; they were erroneously reassured by that.<sup>211</sup> For example, Nicola Sturgeon MSP, said: “many survivors cannot seek redress through the courts, as they would wish to do, because they were abused prior to 1964 and a time bar applies. I have no doubt that it is time to change the law of limitation.”<sup>212</sup>

Addressing the difficulties arising from the operation of the laws of prescription and limitation was poorly handled by SG. Lord McConnell accepted that SG could have dealt with the problems arising from prescription ahead of those caused by limitation.<sup>213</sup> He accepted it was illogical to refer limitation to the SLC before prescription—there was greater urgency in relation to pre-1964 cases given that, as compared with post-1964 cases, they were likely to involve a significantly higher proportion of survivors. That was, he accepted, a mistake. It was a mistake that the Minister for Justice sought to rectify in 2005.<sup>214</sup>

In the period 2002-2007, SG’s policy position on justice, accountability and redress for survivors of past institutional child abuse was that they were matters for the civil and criminal justice systems in Scotland. Alternative mechanisms, including an inquiry, were not pursued notwithstanding the known difficulties being encountered by survivors whose only option, at that time, was to try to litigate in pursuit of justice, accountability and redress for institutional child abuse in circumstances where the law was so often against them.

Over the seven-year period 2007-2014, SG’s response to calls by survivors for justice, accountability and redress did not change.<sup>215</sup> It still saw these as matters for the Scottish civil and criminal justice systems. However, the difficulties which survivors had in accessing the civil justice system were not resolved. In December 2014, when a public inquiry was announced, the law on

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208 The difference between prescription and limitation was explained to Peter Peacock during his oral evidence. See [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.70-72 and p.123.

209 Scottish Parliament Official Report, Public Petitions Committee, 29 September 2004, at [SGV.001.001.7536](#).

210 *Kelly v Gilmartin’s Executrix* 2004 SC 784

211 Michael McMahon, then Convener of the PPC, said the Committee was under the impression, having heard from Peter Peacock about the first reference to the SLC that SLC would be looking broadly at time bar problems, including claims that could not be pursued due to the law of prescription: [Transcript, day 201](#): Michael McMahon at TRN-7-000000002, pp.81-82 and p.85.

212 See [SGV-000046999](#), p.26.

213 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.160.

214 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, pp.161-162.

215 Any prospect of some degree of accountability through the establishment of a truth and reconciliation commission or acknowledgement and accountability forum - raised by the statement of Adam Ingram on behalf of SG on 7 February 2008 - evaporated when ministers decided on 30 September 2009, on the advice of officials, to pilot *TTBH* a forum with no element of accountability.

limitation had still not been reformed. There were still no plans to establish a financial redress scheme for survivors of past institutional child abuse who had no, or no effective, access to the courts.

Throughout the period 2002-2014, the sense of urgency that was needed was wholly absent from SG's response to the situation of survivors—many of them elderly—having no, or no effective, means to secure justice in its proper sense, namely a response from the state affording acknowledgement and accountability and redress.

It took the involvement of SHRC from March 2009 for real progress to be made towards achieving justice for survivors of past child abuse.

SHRC's *Human Rights Framework* (February 2010), and the subsequent *InterAction* process driven by it in 2013 and 2014, were key to securing aims which survivors had been calling for many years namely an inquiry into past institutional child abuse, financial redress for survivors of such abuse, and changes to the law on limitation.

SG's decision to establish a public inquiry was announced in December 2014.

In 2015, SG consulted on a special limitation regime for victims and survivors of childhood abuse. Legislation introducing such a regime was passed in 2017.

In November 2016, there was a commitment by SG to a formal process of consultation and engagement on financial redress. On 23 October 2018, SG responded to the recommendations of the *InterAction Action Plan Review Group* on the provision of financial redress for victims and survivors of abuse in care.<sup>216</sup> The main recommendation—which was accepted by SG—was to establish a financial redress scheme.<sup>217</sup> However, for those who died between 2002 and 2018, it was too late. For them, justice delayed was justice denied.

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216 The *InterAction Action Plan Review Group* monitors the implementation of the Action Plan for Justice for Victims of Historic Abuse in Care, published in 2014. Members of the Group include survivors, a care provider representative, Social Work Scotland, the SHRC, CELCIS and SG.

217 [Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021](#).

# 5 An inquiry

A key aim of the Daly petition was a wide-ranging inquiry or investigation into past institutional child abuse.<sup>218</sup>

## 9 October 2002 - 17 February 2003

On 9 October 2002, the PPC asked SG to respond to the issues raised in the Daly petition, in particular the calls for an apology to victims of child abuse and an inquiry into past institutional child abuse. The PPC also told SG they were seeking the views of the Cross-Party Group on Survivors of Childhood Sexual Abuse.<sup>219</sup>

The PPC's letter was sent to the Department of Health (Health); it's not clear why they did so. It ought to have been sent to the Department of Education (Education).<sup>220</sup>

### **Initial advice**

Officials in the Adoption and Looked After Children section of Education provided advice to the Minister for Education and Young People on an appropriate response and initial written advice was tendered to the Cathy Jamieson, in a submission dated 13 November 2002.<sup>221</sup>

Officials sought her agreement to rejecting the request for an inquiry on the basis that (i) there was "not currently evidence of systematic widespread abuse throughout the residential establishments in Scotland" and (ii) "the need for improved child protection is already being addressed by the Executive". They also sought her agreement to refrain from agreeing to the apology sought in the petition because they did not think "it would be appropriate for the Parliament or the Executive to issue an apology at present when the extent of the State's responsibility for institutional abuse is unclear."<sup>222</sup>

They proposed that she respond to the PPC in these terms:

#### ***"Scottish Executive Response***

1. *The Scottish Executive has no plans to hold an inquiry into allegations of institutional child abuse at present. The Scottish Executive is aware of recent court cases and of a number of representations from victims of child abuse which have been made to the Executive.*

2. *The Scottish Executive has given careful consideration to the request but are not convinced that sufficient evidence of past widespread systematic child abuse in residential institutions exists*

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218 See [PAR.001.001.0001](#).

219 Letter from PPC to SG Health Department, 9 October 2002, at [SGV.001.001.7519](#).

220 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, pp.54-55.

221 See [Written statement of Gerald Byrne](#), paragraph 16, at WIT-1-000000362, p.3; Submission from officials to Minister for Education and Young People, 13 November 2002, at [SGV-000017844](#).

222 See [SGV-000017844](#).

at present to warrant an inquiry. The Scottish Executive also considers that a general apology on behalf of public institutions to victims of child abuse would not be justified at this time.

3. The Scottish Executive is committed to ensuring that appropriate systems are in place to protect vulnerable children from abuse. Much has been done to improve child protection in recent years and further measures are planned including:

- A review of the safeguards in place to protect children in residential care from abuse and their effectiveness was carried out by Roger Kent, and a report of the review, *Children's Safeguards Review*, was published by the Scottish Office in 1998. Many of the report's recommendations have now been implemented.
- Guidance on inter-agency collaboration in child protection was published at the same time.
- The *Protection of Children (Scotland) Bill* currently at Stage 1 provides for a list of persons unsuitable to work with children either in paid or unpaid employment. Those on the list will commit an offence if they apply to work with children as will organisations which employ a listed individual. The Bill is an important piece of legislation which will close a loophole currently allowing people who have lost a child care position – over clear concerns about their conduct towards children – to then find other positions working with children.
- An inter-agency audit and review of child protection in Scotland was set up in March last year following the Hammond report into the death of Kennedy McFarlane. The Review has looked at ways of reducing child abuse and neglect and ways to strengthen services for those children who have experienced abuse or neglect. The review report, including recommendations, is due to be published shortly.

The Scottish Executive does not consider that an inquiry into the events mentioned in the petition would add to the lessons learnt from this recent work."<sup>223</sup>

### **Minister's response to initial advice**

Cathy Jamieson was not happy with the proposed response; she was not convinced that SG could resist doing something.<sup>224</sup> She wanted to keep open the option of an inquiry and did not think it credible to say that SG did not believe there was sufficient evidence of past widespread institutional child abuse.<sup>225</sup> Officials' reasoning about that was not based on reliable data. In particular, it was not based on, for example, a structured central database capable of providing a clear picture of either the current or historical position on treatment of children in care in residential institutions.<sup>226</sup> She sought to make it clear to officials from the outset that the recommended response was not "*the direction of travel we should be going in, and I wanted to see something different and to get the officials thinking differently.*"<sup>227</sup> She "*fundamentally disagreed*" with the advice and recommendations in the submission of 13 November 2002.<sup>228</sup>

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223 See [SGV-000017844](#).

224 See email from Minister for Education and Young People to Gerald Byrne, 13 November 2002, at [SGV-000000056](#), Chapter 2 paragraph 2.22; [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.125.

225 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.128.

226 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, pp.132-133.

227 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.131.

228 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.129.

## **Revised advice**

A revised submission, dated 14 November 2002, was prepared by officials and tendered to Cathy Jamieson. Paragraphs 1 and 2, in the section headed *Scottish Executive Response*, set out a proposed response which kept open the possibility of an inquiry:

### ***“Scottish Executive Response***

1. *Any case of child abuse is unacceptable. Abuse of vulnerable children in institutions which should provide them with safety is particularly deplorable.*

2. *The Scottish Executive will consider whether a forum of inquiry of the sort requested should be established having regard to cases that have come to light in recent years. The Scottish Executive will also consider the experiences of institutional child abuse in other countries.”<sup>229</sup>*

## **Initial response to PPC**

On 19 November 2002, the First Minister, Jack McConnell, asked a senior special adviser, Jeane Freeman, for her comments on the revised submission.<sup>230</sup> There were discussions between Cathy Jamieson and her.<sup>231</sup> This culminated in the following initial response being sent to the PPC on 17 February 2003:

### ***“Scottish Executive Response***

1. *Any case of child abuse is unacceptable. Abuse of vulnerable children in institutions which should provide them with safety is particularly deplorable.*

2. *The Scottish Executive is considering whether an inquiry of the sort requested, or some other forum, should be established to look into cases of abuse in institutions in Scotland, having regard to cases that have come to light in recent years, and what other role the Executive might take in addressing these cases. The Scottish Executive will also consider the experiences of institutional child abuse in other countries.*

3. *The Scottish Executive is committed to ensuring that appropriate systems are in place to protect vulnerable children from abuse. Much has been done to improve child protection in recent years and further measures are planned including:*

- *The report of the inter-agency audit and review of child protection in Scotland – It’s everyone’s job to make sure I’m alright – was published in November last year.*
- *From April 2002, the Scottish Commission for the Regulation of Care has regulated and inspected care homes for children and is working collaboratively with HM Inspectorate of Education to regulate and inspect school care accommodation services. These inspections of care homes and residential schools are carried out against published national care standards.*
- *Since 1995, HM Inspectorate of Education has carried out inspections of boarding schools and hostels to evaluate and report on the quality of care and welfare for children. The Social Work Services Inspectorate with HM Inspectorate of Education inspect secure care establishments.*

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229 See [SGV-000063478](#).

230 See [SGV-000063484](#).

231 See email from Minister for Education and Young People to Gerald Byrne, 13 February 2003, at [SGV-000063482](#), p.10.

- Many of the recommendations of the review of safeguards in place to protect children in residential care from abuse (published in 1998) have now been implemented.
- Funding has been provided to groups providing advocacy services to young people in residential care so their voices are heard.
- The Protection of Children (Scotland) Bill provides for a list of persons unsuitable to work with children in either paid or unpaid employment.
- The Executive has welcomed the proposed establishment of a Commissioner for Children and Young People who could promote and safeguard the rights of children and young people."<sup>232</sup>

## 17 February 2003 - 25 September 2003

The PPC discussed SG's initial response at a meeting on 25 March 2003. They understood it as indicating that SG was considering the setting up of some form of inquiry; an inquiry had not been ruled out. The then convener, John McAllion, said:

*"PE535, from Mr Daly...concerns institutional child abuse. Mr Daly was particularly concerned that the Executive should follow the example of the Irish Government in recognising the need to acknowledge and support victims of past childhood abuse.*

*The Irish Government set up a commission to inquire into child abuse in Ireland and allocated £4 million per annum to establish a dedicated professional counselling service in all regions for victims of abuse. It also announced proposals concerning the mandatory reporting of abuse.*

*We sought the views of both the Executive and the cross-party group in the Scottish Parliament on survivors of childhood sexual abuse. In its response, the Executive indicates that it is considering whether an inquiry of the sort requested, or some other forum, should be established to consider cases of abuse in institutions in Scotland and what other role the Executive might take in addressing those cases. It states that it will also consider the experiences of institutional child abuse in other countries.*

*The cross-party group in the Scottish Parliament on survivors of childhood sexual abuse is of the view that it is right to expect such an inquiry and that an unreserved apology from the religious orders concerned to survivors would be appropriate.*

*Although the Executive response is positive to the extent that it indicates a willingness to consider some form of inquiry, it is short on detail and makes no mention of a timetable for a decision on how it intends to advance the matter. It is suggested that we write back to the Executive requesting that it develops its thinking on this extremely important matter and that it provides the committee with an update on progress early in the new session. In view of the complex issues involved and the intervening parliamentary elections, a reasonable amount of time should be provided for that; a reply could be requested by the middle of June 2003. That would allow the committee's successors to consider the petition again in advance of the summer recess. Is that agreed?"<sup>233</sup>*

232 See SG Education Department Memorandum, 17 February 2003 to PPC, at [SGV-000046928](#).

233 See [SGV-000046927](#).

Likewise, when Michael McMahon became Convener in June 2003, he and other members of the Committee had read SG's response as indicating that the option of holding some sort of inquiry was not ruled out and that SG was taking advice on what level of inquiry would be appropriate.<sup>234</sup>

The PPC wrote to SG in terms reflecting John McAllion's suggestion on 28 March 2003.<sup>235</sup> However, no action in response to that letter appears to have been taken until late August 2003. The letter had been sent to Health. It ought to have been sent to Education. A 'chaser' letter dated 19 August 2003<sup>236</sup> from the PPC was also sent to Health, asking for a response by 19 September 2003. Records provided to the Inquiry indicate that Education does not seem to have become aware of the letters of 28 March and 19 August from the PPC until about 22 August 2003. Why it took so long for Health to realise it was in possession of correspondence that needed to be passed to Education remains a mystery.

After the Scottish parliamentary election in May 2003, Jack McConnell remained First Minister of Scotland. Cathy Jamieson became Minister for Justice and Peter Peacock became Minister for Education and Young People.

### ***Delay in further consideration of the Daly petition by the Scottish Government***

Peter Peacock first became aware that the task of responding to the PPC remained outstanding in about late August 2003. Had he been made aware sooner, he would have given it immediate attention.<sup>237</sup>

On 10 September 2003, officials in Education met to discuss "*how to deal with allegations of sexual abuse in children's homes.*" This was an important meeting. There was no engagement or consultation with survivors about the Daly petition in advance of the meeting but there could have been. There was no good reason for not doing so. They missed a valuable opportunity to show respect for survivors, to demonstrate a genuine desire to understand their concerns and, moreover, to increase their own learning on the subject matter of the petition. At the meeting, what were described as "*the key issues*" were discussed in advance of preparation of a submission to ministers for consideration at a ministerial meeting on 25 September 2003. The key issues were said to be:

- whether or not to hold an inquiry—on balance officials felt the potential benefits (to meet the needs of victims, or to ensure lessons were learned) were limited and were outweighed by the disadvantages (to victims as well as the wider system)
- whether or not to establish a truth and reconciliation commission—officials felt the arguments for such a commission were weak
- whether or not to take specific action to support victims—officials identified a wide range of work already underway to support victims and said the question for ministers would be whether that needed to be extended, either for the particular group (victims of institutional child abuse), or for a wider group of survivors

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234 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, pp.59-60.

235 See [SGV-000032501](#).

236 See [SGV-000046939](#).

237 [Written statement of Peter Peacock](#), paragraph 32, at WIT-1-0000000370, pp.9-10; [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, p.53 and p.62.

- whether or not to introduce a compensation scheme—officials said the decision would be affected “by the current test case to establish whether these cases are time barred” and they would advise the decision should be delayed
- how to give access to relevant files—officials said that issue remained complex but they had succeeded “in identifying a relatively small range of options and related legal and policy issues”
- whether or not any of the above “sets precedents”—officials said they would work with relevant colleagues to identify any potential difficulties.<sup>238</sup>

Officials agreed the submission would cover each of these issues and offer advice to ministers on the way forward.

### **Advice to ministers in September 2003**

A submission addressed to the Minister for Education and Young People, dated 23 September 2003, headed *Allegations of Abuse at Residential Institutions* and heavily influenced by legal advice was prepared.<sup>239</sup>

Officials presented four options in that advice:

- i. a full inquiry, in public or private, chaired by a senior figure, involving a wide-ranging remit, evidence from witnesses, counsel for parties affected;
- ii. a ‘truth and reconciliation’ commission, allowing survivors of abuse to tell their stories, in private, not as evidence and probably without counsel;
- iii. no inquiry, but a package of other measures including access to files for legal advisers, improved health and social care services for survivors of sexual abuse and, in some cases, compensation;
- iv. do nothing and let existing criminal and civil cases run their course in the normal way, but retaining the health dimension.

They advised against setting up an inquiry. Instead, the advice was to improve services for adult survivors and to offer to help with access to files held by SG.

Officials also advised:

*“Our advice is that the Executive should not set up an inquiry or commission...Neither the weight of cases nor the nature of the allegations indicates a systemic failure or organised abuse that might justify a full inquiry. We are confident that work being done through the Child Protection Reform Programme will address any remaining institutional issues. A commission does not provide a satisfactory forum for these issues to [be] aired. The issue of compensation should be looked at again in the light of the Courts’ decisions on the civil cases in the next few months.”*

238 See [SGV-000046949](#).

239 See [SGV-000046937](#) and [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.118-120.

As for what was meant by a “full inquiry”, Peter Peacock took it to refer to an adversarial-style inquiry that adopted legalistic processes and procedures, including cross-examination of witnesses by the legal representatives of participants.<sup>240</sup> There does not, however, appear to have been any exploration of what would be involved or, importantly, whether the assumptions being made about what would be the nature of a public inquiry investigating past child abuse were based on fact.

The options were discussed in Annex B of the submission, at paragraphs 2 to 16:

*“2. The pressure for the Executive to act on this issue has not been intense. Aside from the petition to the Parliament and...two stories in the Sunday Mail, there has not been widespread Parliamentary or press interest. It is noticeable that the Cross Party Group has not taken up the case, and that the Sunday Mail story attracted less than 20 requests to see our files from former List D pupils. The criminal convictions so far have been isolated and no evidence has emerged of widespread or organised abuse at Scottish institutions. It would therefore be feasible at this stage to **do nothing**...*

*3. On the other hand, there have been criminal convictions, and it is hard to believe that there were no other instances of abuse at these institutions in Scotland. The civil claims now number in the hundreds. Whether or not these are justified, there is a strong case for the Executive acting now on this issue, rather than waiting for further evidence to emerge in the Courts or for political and press pressure to grow.*

*4. A **full inquiry** headed by a senior, probably legal, figure would provide the best opportunity to establish events in our institutions over the last 30-40 years. The aim of the inquiry would be to come to conclusions on the truth of the allegations and make recommendations. Advantages of such an inquiry include that it would not be bound by strict rules of evidence and would not be time barred. However, as these are serious allegations, we would have to look at how the evidence was given and what procedural safeguards were need[ed] for the victims and the alleged perpetrators. This would probably involve legal representation, at a minimum. The standard of proof would also have to be considered. The inquiry need not all be in public, as private sessions can encourage candour, particularly from staff members.*

*5. There are other issues with this option. For example:*

- i. drawing up a practical remit. The allegations range from the 1940s onwards and cover sexual, physical and psychological abuse. There would be criminal allegations against individuals and failures of management. The most wide-ranging remit might be open ended, and any limitation on that would exclude individuals. We would have to let the inquiry interpret its remit in a practical way but it will need to be given direction.*
- ii. the level and nature of the allegations do not seem adequate to justify a full inquiry. The allegations are against isolated individuals rather than widespread evidence of systemic failure or conspiracy by management across a number of schools.*
- iii. the relationship between the inquiry and the criminal and civil justice systems would have to be considered. For example, what would happen with existing live civil proceedings (which would normally bar the Executive from taking action as the inquiry would risk prejudicing*

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240 Transcript, day 202: Peter Peacock, at TRN-7-000000003, pp.126-127.

the issues before the court)...? Would the inquiry have power to make compensation awards, or would individuals have to return to the courts? Could the jurisdiction of the Courts be excluded if individuals were unhappy with the inquiry's conclusions?

- iv. the time and costs of the inquiry are likely to be substantial. For example, the Savile [sic] Inquiry on Bloody Sunday, which will take some six years, is currently estimated at £155 million. The Hutton Inquiry, on a very short timescale, will cost over £1 million. The Executive can expect to be invited to pay for legal representation, at least for victims.
- v. it is not clear what useful lessons could be learnt or recommendations for improving current practice could be made by such an inquiry.

We do not recommend the full inquiry option. It does not seem that the allegations that have emerged are sufficient to justify this route, nor do they disclose a pattern that would allow a sensible and practical remit to be drawn up. The inquiry is unlikely to make recommendations relevant to modern practice in residential institutions and any findings it makes with regard to compensation or the culpability of individuals would need to work with the criminal and civil courts.

6. The **truth and reconciliation commission** would avoid some of these difficulties. It would not be taking evidence in a legal sense, so representation would not be required and it would not be taking the place of the criminal and civil courts. It could have a more open ended remit as its purpose would not be to inquire into events but to allow people to come forward if they wished. It might encourage people who want not want to give evidence in a court or to an inquiry to come forward (although there could be defamation issues that would arise from unanswered and untested testimony, and those coming forward and the commission would have to be protected from such actions, provided the claims were not genuinely malicious).

7. The major difficulty is to establish what the purpose of the commission would be. If it is to aid the (mental) health recovery of survivors by providing a vehicle for airing past grievances, there is ample evidence of disclosure of abuse resulting in traumatic episodes through the reliving of experiences. Those feeling a need to disclose past abuse would, we suggest, be better served through accessing the health and social care services available to them. If it is to learn lessons, then again their relevance to the modern system must be questionable, particularly as the evidence heard by the commission would be self-selecting, unbalanced and untested.

8. Finally, it must be questionable whether anyone would find the commission a satisfactory conclusion to this process. By its nature it could not make awards of compensation or condemn individuals. It could act as a gateway to more flexible and responsive health and social care services but it is not necessary for this process. Overall, we therefore conclude that the commission has little to recommend it as a way forward.

9. The final option we have considered is a **package of other measures**. Our main focus would be on current activity to improve **services for adult survivors of childhood sex abuse**. HD [Health Department] has a short life working group on this issue which is due to report to Mr Chisholm in February of next year. It is common for survivors of CSA [childhood sex abuse] to have complex needs e.g. co-existing alcohol/substance misuse problems, low self-esteem, and meeting their needs requires more flexible, integrated, and responsive care services - pointing to multi-disciplinary, inter-agency co-operation to break down traditional service barriers.

*There are significant challenges for statutory providers, not least in improving education and awareness-raising of CSA, so that care workers are better trained to identify signs of abuse, and to cope with disclosure of it. Survivors wish to access services at times when they most need help and support, and the SLWG [short life working group] will be framing its recommendations on how best to achieve this, highlighting good practice models, and including a key role for voluntary sector providers - who are presently struggling to cope with demand for their services. This would not cover the survivors of other abuse, which make up the vast majority of the allegations so far, but would look at the services for the most serious cases. We would have to look again at services for survivors of physical and psychological abuse...*

*10. The other area we have looked at closely is how we could allow **access to files** on residential establishments held by the Executive. Officials are concerned that there may be material on the files that would be useful to those pursuing civil cases which would currently only be revealed in response to an order from the court. We also have to consider how we would handle an increase in requests to see materials under the Data Protection Act...*

*[...]*

*16. We have also considered whether the Executive should set up a no fault **compensation scheme** for those alleging abuse. There could be argued to be a general moral responsibility for the Executive to meet claims, as victims would have been in the public care system under the general supervision of the Government when they suffered abuse. (The Executive's strict legal liability is one of the matters to be determined by the Courts in the current civil cases.) This case would be strengthened if existing civil claims proved to be time barred when the test case gets to court next June, leaving some genuine claimants with no recourse to compensation. On the other hand, there are arguments about setting a precedent for Executive compensation schemes in the absence of legal liability, and we would want to establish our possible compensation. A mechanism for testing claims (modelled on Criminal Injuries for example) would have to be established. We recommend that this issue is considered further when the test case has been resolved."<sup>241</sup>*

Officials were clearly concerned about what they saw as the likely cost of a public inquiry. They referred to the estimated cost of the Saville Inquiry (£155 million) and the cost of the Hutton Inquiry (over £1 million). Colin MacLean accepted that the advice tendered to ministers could have been read as warning them they could be walking into a very costly exercise.<sup>242</sup> However, according to Peter Peacock, while cost was a relevant consideration, it was not a major consideration for ministers at that time; if ministers had decided such an inquiry was the right road to go down, it would have happened. Money would have been found. SG was not, he said, short of money in those days<sup>243</sup>—a matter which was borne out when, in 2007, John Swinney, then Minister for Finance, “stumbled across” “a hidden money tree”, namely £1.6 billion of unspent public money that was being held in a Treasury account.<sup>244</sup>

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241 Emphasis in original text.

242 [Transcript, day 203](#): Colin MacLean, at TRN-7-000000004, pp.129-131.

243 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.140-143.

244 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, pp.44-45.

It is also of note that in Annexes A and B of the Submission, officials provided information to ministers that was plainly not correct. In Annex A, they stated: “No interest in this subject has so far been shown by the Cross Party Group on Survivors of Childhood Sexual Abuse.” In Annex B, they said: “It is noticeable that the Cross Party Group has not taken up the case”<sup>245</sup> In fact, the Cross-Party Group **had** taken an interest in the Daly petition. The Group told the PPC it was right to expect an inquiry.<sup>246</sup>

### **Decision of ministers on 25 September 2003**

On 25 September 2003, ministers met. The following ministers and officials were present:

- Minister for Education and Young People (Peter Peacock)
- Minister for Justice (Cathy Jamieson)
- Minister for Finance and Public Services (Andy Kerr)
- Deputy Minister for Education and Young People (Euan Robson)
- Solicitor General (Elish Angiolini)
- Deputy Crown Agent (Bill Gilchrist)
- Legal Secretary to the Law Officers (Stuart Foubister)
- Assistant Private Secretary to the Deputy Minister for Education and Young People (Claire Corbett)
- Two officials from Education (Maureen Verrall and Gerald Byrne)

In their discussions, a critical consideration for ministers was to avoid doing anything that would or might cause prejudice to the civil and criminal justice systems and the investigation of crime.<sup>247</sup> They focused very much on a matter **not** raised in the Daly petition, namely what support SG could make available to survivors.<sup>248</sup> Whilst ministers did not accept officials’ advice regarding the extent of institutional child abuse—they were clear that it had been a widespread problem—they did not challenge any other aspect of the advice.<sup>249</sup> In accordance with it, they quite quickly decided against setting up an inquiry, or any other investigation, into past institutional child abuse.

### **So - why did ministers decide against a public inquiry?**

There are two particular sources of evidence that disclose ministers’ thinking and reasoning at that time. The first is a note of the meeting of ministers on 25 September 2003. The second is a letter, dated 30 June 2004, to the PPC making public their decision to rule out an inquiry.

The note of the meeting, insofar as relevant, states:

*“1. [T]he **Minister for Education and Young People** noted that the advice from officials laid out three options for proceeding: an inquiry; a truth and reconciliation commission, and a package of other measures. The meeting should decide how to proceed from these options.*

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245 Submission from officials to Minister for Education and Young People, at [SGV-000046937](#).

246 See [SGV-000046927](#).

247 See [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, p.138.

248 See [SGV-000046887](#); [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, p.86.

249 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.118-120.

2. In discussion the following points were made:

- a public inquiry was unlikely to help the individuals concerned or help to inform on how to improve things for the future. It would be likely to reveal lessons already learned about residential child care in the period.
- the purpose of a commission was unclear and operational questions, such as how any such commission would fit in with the legal redress system, were problematic. It was also unclear what it would add to existing processes and services for abuse survivors.
- both a public inquiry and a truth and reconciliation commission would involve heavy costs, most of which would be likely to accrue to legal and other advisers rather than to the victims themselves.
- the issue was not confined to adult survivors of sexual abuse in residential care. There were other forms of abuse to be considered, for example physical and emotional abuse, and other settings, for example foster care, which had not so far attracted much attention. The costs of extending services to these groups would have to be identified but, at this stage, the extent of the support should not be limited.
- there were different reasons for accessing information on files, to allow counselling for those suffering or to justify compensation.
- allowing access to files and divulging the names of individuals (both pupils and teachers) raised a number of difficult issues...

[...]

- the Executive's legal liability for compensation might be limited. There might have been methods of complaining to Ministers that would have to be investigated, but generally Government involvement was only in inspection.
- compensation beyond the Executive's strict legal liability would raise difficult issues and should be considered further when the prospects for existing civil claims was clearer, which would not be until legal argument in the test case in June 2004.
- there was a need to consider how other organisations had handled similar claims, for example the churches and voluntary organisations...
- the experiences of other countries might also be relevant...
- previous public announcements by the Executive, and in particular any Ministerial statements, on a response to these allegations should be checked for any existing commitments.

3. Summing up, the **Minister for Education and Young People** said that the meeting agreed that a package of other measures was the preferred option. A number of actions had been identified. The options for and costs of allowing access to files should be examined further with a view to the files being redacted for access by those making allegations. Barnardo's and other voluntary organisations should be contacted to see what actions they had taken, and methods of access to other institutions should be considered. The approach in other countries, particularly Australia should be looked at in more detail. Current Health Department work would have to be examined to see how it could relate to adult survivors of abuse other

than sexual abuse. The experiences of those in foster care in the relevant period should be examined further. Previous Ministerial statements should be established. The public handling of this issue would also have to be considered and Ministers should be given further advice on all of these issues.”<sup>250</sup>

The letter dated 30 June 2004 from the Minister for Education and Young People, Peter Peacock, to the PPC, insofar as relevant, states:

*“Recent criminal convictions show that abuse took place in residential establishments in Scotland. Any case of child abuse is unacceptable. Abuse of vulnerable children in institutions which should provide them with safety is particularly deplorable.*

*In deciding whether to hold an Inquiry into allegations of historic abuse in residential children’s homes, we first considered what we were already doing to:*

- *Minimise the risks to children currently living in these homes*
- *Provide high quality support to adult survivors of past abuse*
- *Ensure survivors have full access to their legal rights and remedies*

*We then considered whether an Inquiry would prevent future abuse, help meet the needs of survivors, or be in the wider public interest. On balance, after very careful consideration, we decided that it would not. Our reasoning is as follows:*

**Minimising the risk of abuse to children and young people currently in residential establishments in Scotland.** *Following inquiries and reports into residential establishments, we have taken steps to improve the protection afforded to these vulnerable children. Since 1995, HM Inspectorate of Education has carried out regular inspections of boarding schools and hostels. From April 2002 the Scottish Commission for the Regulation of Care has regulated and inspected care homes for children. The Protection of Children (Scotland) Act 2003 is being implemented to provide a list of persons unsuitable to work with children in either paid or unpaid employment. We are undertaking an extensive Child Protection Reform Programme, following the publication of It’s everyone’s job to make sure I’m alright in November 2002. That programme will provide extensive advice and guidance, staff development and a rigorous inspection regime. Most recently, in March 2004, we issued Protecting Children and Young People - The Charter and a Framework for Standards to help translate the Charter into practice. These set out what children, their parents and members of communities can expect from agencies tasked with the protection of children. Taken together, these measures will provide much greater protection for all children, including those living in residential care homes.*

**Providing high quality support for survivors of past abuse.** *Ministers are anxious to do the right thing by the survivors of past abuse. A short life working group to consider the detail of what is needed was established by Malcolm Chisholm to look at services for adult survivors of childhood sex abuse. It hopes to report to Ministers early in the autumn. On receipt of that report, Ministers will consider the detailed actions that will be required by them, and by local statutory and voluntary agencies, to meet the needs of survivors.*

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250 Note of ministerial meeting, 25 September 2003, at [SGV-000046887](#). Emphasis in original text.

The remit of the working group is broad, and goes beyond those who were abused in the setting of a residential institution. It is considering the best ways for designing and delivering services for survivors. There is broad consensus among the Group that there are key areas for improvement in both statutory and voluntary sectors to enhance services for survivors. These include a general awareness campaign, improving training and education for professionals and key workers, and the need to build capacity within the voluntary sector agencies working with survivors which are bearing the brunt of referrals. The Group recognise that these and other issues require a coherent commitment to improve understanding of survivors' needs. While focused on survivors of sexual abuse, it is acknowledged that more can be done to improve the links with child protection, domestic abuse, and victims' strategies. We will also consider the application of recommendations for survivors of other forms of abuse.

**Ensuring that individuals who have suffered abuse have access to legal rights and remedies.** There are already a large number of civil claims currently before the courts, and the Executive has been asked to provide access to papers relevant to these cases. We want to be helpful and open to those who are pursuing their claims in this way, while taking careful account of due judicial process and making sure we do not inadvertently harm the interests of others.

We plan to make public the information held by the Executive on List D schools and other residential establishments. It is clear that these papers can be of help in these cases or that access to them can help survivors understand the background to the schools and their management. The Executive also wants to be completely open about the information we hold in relation to these cases to demonstrate we are not withholding evidence of abuse in these establishments or Government knowledge of such abuse.

However, the files contain personal details about pupils and teachers. We have a duty to protect the personal privacy of these individuals and we could not open the files for public inspection in their current form. Last year we closed some files that had been open to the public when it was discovered they contained such information. We are now in the process of 'redacting' relevant files (Redacting is the process of blocking out names and other sensitive information so that files can be made public without damaging individuals' legitimate interests). This is a time consuming and complex process, but will allow us to make the information we hold publicly available.

We are also aware, having consulted organisations that have extensive experience of this type of work, that it can be very traumatic for individuals to read files and papers relating to their experiences, whether or not they are named or suffered abuse. We are therefore planning support to be available to individuals who come forward seeking access to files. We will make files available as soon as possible, but not before the files have been redacted, and suitable arrangements are in place to support the individuals concerned. We hope to be in a position to make these files available by the end of this calendar year at the latest.

**Whether an Inquiry would prevent future abuse, help to meet the needs of survivors, or be in the public interest.** We have given very careful consideration to this. We have concluded that, on balance, an inquiry would not achieve these purposes.

- We have taken a range of steps to improve the protection of children in residential establishments, based on the best evidence of what works, and do not believe that an inquiry into historical events would lead to further changes in current practice.

- *We recognise that some survivors might welcome an inquiry, but also that others might prefer the issue was not raised in public because that would reopen old wounds. We need to find a way of meeting the needs of both sets of survivors. We are already considering what steps we can take to provide maximum support for survivors, targeted on their individual needs, and are providing as much information as we can to support any legal challenges that might be raised. Individuals are already pursuing their legal rights to compensation through the civil courts and we would need to be very careful not [to] jeopardise that process through an inquiry.*
- *Finally, the public has a number of potential interests. They need to be reassured that such abuse cannot recur, that lessons have been learned, that survivors have the support they need, and that the legal process is able to take its course with full access to relevant information. We believe that the work described above would provide these reassurances. In addition, we consider that the holding of an inquiry would have an unpredictable impact on public confidence. It might be perceived as a means of ensuring there were no residual issues, but it might be perceived, mistakenly, as an admission that there were issues still to be resolved, and lead to an unfair and damaging loss of confidence in existing provision.”<sup>251</sup>*

## **25 September 2003 – 30 June 2004**

### **Continuing failure to provide substantive response to the PPC**

The PPC carried on pressing for a response to their letter of 28 March 2003, a response which was long overdue. They wrote again by letter of 26 September 2003, setting a new deadline of 24 October 2003 for SG to respond.<sup>252</sup>

On 6 October 2003, the First Minister, Jack McConnell, asked about the outcome of the ministerial meeting on 25 September. He was told that ministers supported the “*package of other measures*” option and that there was a consensus that neither an inquiry nor a commission were justified—an inquiry was likely to tell SG what it already knew and it was not clear what a commission would achieve. There was agreement that ministers should not consider the question of compensation further until the outcome of the test case was known.<sup>253</sup>

On 18 December 2003, Peter Peacock sent a minute to the First Minister to ensure the First Minister was content with what had been decided on 25 September 2003.<sup>254</sup>

### **First Minister’s option in December 2003**

On 22 December 2003, the First Minister responded with the following comment:

*“Are the 4 options in the [submission] of 23 September the only options? Have Ministers considered appointing an expert (without a working group or committee) to review the position, recent developments and recommend any procedural changes which might be advisable to reassure people now?”<sup>255</sup>*

251 Letter from Minister for Education and Young People to PPC, 30 June 2004, at [SGV-000046961](#). Emphasis in original text.

252 See [SGV-000046921](#).

253 See [SGV-000061804](#) and [SGV-000061805](#).

254 See [SGV-000046936](#).

255 Email from the office of the First Minister to Minister for Education and Young People, 22 December 2003, at [SGV-000046922](#).

At that time, he had in mind that those survivors who were involved in litigation should be able to “have their day in court” and “wanted to see if the court was going to allow them to do that” but, “at that point if necessary perhaps return to the idea of a public inquiry.”<sup>256</sup>

On the same day, an official in Education reacted to the First Minister’s comments in the following terms:

*“We’ll need to put supplementary advice to the Minister for his return in January. My initial reaction is that the appointment of an independent expert falls on the same basis as an enquiry [sic] or commission i.e. that Ministers know what the problems were, there would be little, if anything, more to be learned, current procedures have changed so much since the alleged abuses that the circumstances could not be repeated now and all effort should therefore be focused on providing what help we can to the victims of the historical abuse. This was pretty much the view of all the Ministers at the meeting they had in September. However, when we spoke to the Minister in November he was concerned that we be absolutely clear about the views of FM [First Minister] before going public, so we need to think about whether there would be anything to be gained from the appointment of an independent [expert] – even if only in handling and presentational terms – before going back to the Minister. Can we have a word when we are all here on 5/1?”<sup>257</sup>*

On 11 March 2004, the same official asked Gerald Byrne, Head of the Adoption and Looked After Children division within Education, to check whether advice had been given to the Minister for Education and Young People.<sup>258</sup> Records show it took another two months, until 20 May 2004, to provide that advice.<sup>259</sup>

By early May 2004, a journalist, aware that the PPC was meeting on 12 May and the Daly petition was on the agenda, queried why SG had still not responded to the PPC.<sup>260</sup>

Told about this press interest, Gerald Byrne, whose team had lead responsibility for responding to the PPC, wrote on 7 May 2004:

*“Oh dear. This is difficult. Mr Daly and the Committee have indeed been waiting for an answer for a while. To be fair, the first six months (ie from March 2003 to October 2003) were lost because the Committee’s request was sent to the Health Department, where it vanished. However, the delay of the last 6 months is all our own doing.”<sup>261</sup>*

The PPC discussed the Daly petition on 12 May 2004. By then, they had lost patience with SG due to its continuing failure to respond to the letter they had sent well over a year earlier, on 28 March 2003.<sup>262</sup> These contributions from members of the PPC capture their mood which was—unsurprisingly, given the circumstances—really quite angry:

*“I was...absolutely appalled to learn that our predecessor committee asked the Executive for a response more than a year ago, but no response has been forthcoming. That is completely*

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256 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.103.

257 Email to Gerald Byrne, Colin MacLean and others, 22 December 2003, at [SGV-000046922](#).

258 Email to Gerald Byrne and others, 11 March 2004, at [SGV-000046942](#).

259 Submission from officials to Minister for Education and Young People, 20 May 2004, at [SGV-000046956](#).

260 See emails between officials, 7 May 2004, at [SGV-000046955](#).

261 Email from Gerald Byrne, 7 May 2004, at [SGV-000046955](#).

262 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, p.62.

*unacceptable...I want the committee to write in the strongest possible terms to the Executive to say that it is treating Parliament with contempt, and that it is treating people who have suffered abuse and who are waiting for answers with the same contempt.”<sup>263</sup>*

*“Given that we have had on a number of occasions to comment on the lack of timeous response from ministers, and that the First Minister is responsible for ministers and for how they respond, it would not be wrong of us to ask the First Minister to ensure that he and his ministers treat the Public Petitions Committee with some respect and give us the timeous responses that we seek.”<sup>264</sup>*

Members of the PPC agreed unanimously to write to both the First Minister and the Minister for Education and Young People to express deep concern that Education had still to respond to their letter of 28 March 2003, on behalf of SG, despite a number of reminders. Accordingly, they wrote to the First Minister by letter dated 17 May 2004.<sup>265</sup> A similar letter was sent to the Minister for Education and Young People on 19 May 2004.<sup>266</sup>

### **Advice in May 2004 on First Minister’s option**

Around the same time, officials sent a submission dated 20 May 2004 to the Minister for Education and Young People.<sup>267</sup> Its principal purpose was to provide advice on the First Minister’s option of appointing an independent expert. Officials said this:

*“The option of an investigation by an independent expert has some advantages, but it retains the fundamental problem of not having a clear purpose that would satisfy those involved. We therefore conclude that we should continue with our focus on releasing Executive material, with suitable support, and looking at services for survivors.”*

In Annex A of the submission, officials considered advantages and disadvantages of this option:

#### **“INVESTIGATION BY OUTSIDE EXPERT**

*1. An independent expert would be appointed by the Executive to review the files held by the Executive, take other evidence (including interviewing those complaining of abuse and staff and others involved at the time) and review practice to see if there are any lessons to be learnt. We assume that the inquiry would be carried out in private, with no evidential rules or legal representation. Although the expert could come to a conclusion on the existence and extent of abuse, he or she would not name individuals in the report.*

#### **Advantages**

*2. The advantages of this approach are:*

- i. it would give survivors an opportunity to be heard by an independent person, in private;*
- ii. the expert could take into account the developments in residential care practice in recent years;*
- iii. it would be comparatively inexpensive given the lack of legal representation;*
- iv. it would avoid complications with current legal actions which could continue at the same time.*

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263 Linda Fabiani, Scottish Parliament Official Report, Public Petitions Committee, 12 May 2004, at [SGV-000046946](#).

264 Convener (Michael McMahon), at [SGV-000046946](#).

265 See [SGV-000046908](#).

266 See [SGV-000046910](#).

267 See [SGV-000046956](#).

## **Disadvantages**

3. The disadvantages would be:

- i. it would not satisfy those who want compensation or findings of guilt against individuals;
- ii. it could only take place in private, and so would be open to criticism;
- iii. the personal evidence it hears would be self-selecting, unbalanced and untested;
- iv. there is a risk it might take a considerable period of time as it is conducted by an individual (with secretariat support from the Executive) and it is not clear how many people might wish to come forward.

## **Conclusion**

4. Our conclusion is that an inquiry by an expert has the same drawback as a commission which is that it is unlikely [to] provide a satisfactory resolution to demands from survivors for a public hearing or compensation, and that it is unlikely to produce recommendations relevant to current practice which has changed considerably. This is not outweighed by the advantage of having an independent person to whom survivors can tell their story."

## **Further submissions in June 2004**

The submission dated 20 May 2004 was not the final submission provided to ministers before a response was sent to the PPC. Colin MacLean provided a further one, dated 8 June 2004, addressed to Peter Peacock and to the First Minister.<sup>268</sup> There was no change of advice regarding the option of setting up an inquiry. The further submission simply provided an improved version of a proposed response to the PPC.

Peter Peacock commented on the submission of June 2004 by email of 14 June 2004:

*"Sorry to come back on this again, however the [submission] does not acknowledge that Minister's [sic] - me, Cathy [Jamieson], Euan [Robson], Solicitor General unanimously concluded consideration of the merits of an inquiry last year. It was only when our recommendations went to FM [First Minister] that he was not content and suggested a single person [be] considered. The [submission] needs to set out the sequence of events - this is not the first time the FM has considered the issues here."<sup>269</sup>*

Colin MacLean prepared a revised submission, dated 16 June 2004, taking on board these comments.<sup>270</sup>

## **Response to the PPC dated 30 June 2004**

By letter dated 30 June 2004, SG finally responded to the PPC.<sup>271</sup> However, in doing so, SG had missed yet another deadline. The PPC planned to meet before the end of June 2004 to discuss the Daly petition and had sought a response by 22 June 2004. Officials aimed to provide a response on 25 June 2004, having taken action to address points raised by the First Minister on 21 June. The First Minister, having seen the submissions of 8 and 16 June, had commented: "to go public on the rejection of an inquiry without proactive media work - especially with the

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268 See [SGV-000046929](#).

269 Email from Minister for Education and Young People to Colin MacLean, 14 June 2004, at [SGV-000046919](#).

270 See [SGV-000047652](#).

271 See [SGV-000046961](#).

*Sunday Mail - is unwise...we must be able to say something about support for survivors and that a delay in that will not be helpful.*"<sup>272</sup>

The letter to the PPC was not sent on 25 June because the First Minister had not cleared the proposed response by then.<sup>273</sup> Clearance was given around 30 June.

The PPC met on 29 June 2004 to discuss the Daly petition.<sup>274</sup> They still had no response from SG. One member expressed her anger.<sup>275</sup> The Convener told the members of the PPC he had spoken to the Minister for Education and Young People who, he said, had apologised and assured the Convener a response would be forthcoming.<sup>276</sup> One member said the lack of a response was *"disrespectful to the committee, but more important than that are the delays."*<sup>277</sup> Another said *"[w]hen the public raise an issue it is totally unacceptable for ministers to fail to respond to the committee's requests."*<sup>278</sup>

These reactions are entirely understandable and their anger was entirely justified. Also understandable was Peter Peacock's reaction when he studied the files for this period in preparation for giving evidence: *"When I got into looking at these files 17 or 16 years later and I saw the sequence of events I thought, my God, how on earth did we get into this mess?"*<sup>279</sup>

The PPC decided to invite the Minister for Education and Young People to appear before them.

### **30 June 2004 - 1 December 2004**

#### ***Peter Peacock gives evidence to the PPC on 29 September 2004***

The Minister for Education and Young People gave evidence to the PPC on 29 September 2004. He knew he was going to be given a hard time:

*"When I was going to the Petitions Committee I knew I was going to get a hard time, I couldn't not get a hard time given what had happened...I also knew I had to openly acknowledge in public, personally, for the first time properly, that abuse had taken place, and it was inexcusable that that happened, and that the survivors were being believed by the Executive [Scottish Government] in what they were saying. There was no real doubt about that. And we were going to prioritise giving support to survivors [the third option in the submission of 23 September 2003]...But I was also clear, I wanted to make it clear I had an open mind to doing more, and I went out of my way to make that point."*<sup>280</sup>

OSSE attempted to *"tone down"* the statement that Peter Peacock was intending to make at his appearance before the PPC.<sup>281</sup> OSSE advised that nothing should be said by the minister which could, or might, be interpreted as an acceptance of responsibility by SG for past institutional

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272 See [SGV-000061806](#). [SGV-000063527](#)

273 See [SGV-000063527](#).

274 See [SGV-000046941](#).

275 This was Linda Fabiani. See [SGV-000046941](#).

276 See: [SGV-000046941](#).

277 This was Carolyn Leckie. See [SGV-000046941](#).

278 This was Campbell Martin. See [SGV-000046941](#).

279 [Transcript, day 202](#): Peter Peacock, TRN-7-000000003, p.158.

280 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.183-184.

281 See memo from Gordon McNicoll to Patrick Layden, at [SGV-000046974](#).

child abuse.<sup>282</sup> Their concerns reflected the fact that SG was defending a number of civil actions in which survivors were seeking compensation and their approach to the possibility of an apology—which Peter Peacock was discussing informally with Jack McConnell at about that time—was to the same effect.<sup>283</sup>

Peter Peacock appeared before the PPC on 29 September 2004. He did not seek to justify the lengthy delay by SG in responding to the PPC’s requests for information.<sup>284</sup> He said he wanted to set out the reasoning behind the SG’s decision not to hold an inquiry into past institutional abuse:

*“[A] number of civil actions are under way in the courts or are in the course of being prepared. Nothing that I am about to say can or should be taken as referring to any particular case or individual circumstance that is currently before the courts or may come before the courts in the future...*

*I fully recognise that there is a danger that to decline the request for an inquiry could be interpreted as the state’s trying to cover something up or not acknowledge that things happened to some young people who were in residential care that should not have happened to them. I make as clear as I possibly can that the decision not to proceed to an inquiry does not imply that the Executive does not acknowledge that, at times in the past, the treatment of some of our young people fell well short of what should be regarded as acceptable. Indeed, it is shocking to imagine that, at any time in the past, what happened to some young people may have been regarded as falling within the bounds of what was acceptable.*

*[S]ome of the things that happened to young people in residential settings were gross and truly appalling.*

*[...]*

*Ministers fully understand and empathise with the sense of betrayal, bewilderment and anger that many individuals who have been abused feel...and that some feel shame or guilt for things that were not their responsibility. When adults abuse children, the children are never to blame.*

*It falls to this generation of ministers to acknowledge that, where wrongs occurred in the past, they were unacceptable. We share with others profound sorrow for the damage that has been experienced by individuals*

*[...]*

*[I]t also falls to this generation of ministers to decide what it is right to do today to address the outstanding concerns of many individuals...we considered whether to hold an inquiry. One of the purposes of seeking an inquiry might be to cause ministers to recognise publicly that the regimes in some residential care homes in the past occasionally resulted in some young people being treated in an unacceptable way. It is unnecessary to have an inquiry, with all the time and expense to individuals and the complex legal and evidential intricacy we know about*

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282 See, for example, email dated 27 September 2004 from Gordon McNicoll to colleagues in OSSE, at [SGV-000047663](#).

283 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, p.187.

284 See [SGV.001.001.7532](#).

from the experience in Ireland, to get the acknowledgement we give today, that some young people were wronged.

*We considered further reasons for holding an inquiry including whether an inquiry would lead to policy changes that would further reduce the risks to children who currently live in residential care, and to lead to more and high-quality support to adult survivors of past abuse. We also considered the impact of any inquiry on survivors' access to their legal rights and remedies. We identified several key questions, the answers to which would enable us to decide whether an inquiry was the best way forward. Would an inquiry prevent future abuse? Would it be in the public interest? Would it help to meet the needs of survivors today?"<sup>285</sup>*

He detailed actions taken since 1995 to improve the protection, care and welfare of children in Scotland, including children in residential care, and mentioned work to improve services for survivors of past abuse, the intention to give access to SG files on residential establishments for children, and the referral to the SLC to review the law on limitation. He said he had an open mind on what more SG could do to support survivors.<sup>286</sup>

Regarding the possibility of an inquiry, he said:

*"We considered whether the holding of an inquiry would have an unpredictable impact on public confidence. An inquiry might be perceived as a means to ensure that there are no residual issues, but it might be perceived, mistakenly, as an admission that there are major issues still to be resolved and it might lead to an unfair and damaging loss of confidence in existing provision.*

*We concluded that an inquiry would not add to our current actions and considerations for the reasons that I set out: because of our recognition that wrongs were committed in respect of some young people; because we are further reforming our child protection measures; because we believe that our actions meet the public interest considerations that we have examined; because we will do more for survivors and continue dialogue with them; and because an inquiry could have unintended consequences."<sup>287</sup>*

In accordance with the practice at the time, he took questions from members of the PPC:<sup>288</sup>

**"Campbell Martin:** *[W]ithout an inquiry, what mechanism is available to the people who were abused in homes some years ago to bring to account the people who ran and were responsible for the homes? [...]*

**Peter Peacock:** *There is a legal mechanism. There is potential for hundreds of cases to go before the court in which people will pursue their rights in law and seek redress for what they feel happened to them. People would have to prove what has happened to them and then seek redress through the courts - that is the normal provision in any society... If criminal acts are apparent or there are allegations of criminal acts, the police will investigate and, if necessary or appropriate, charges will be brought."<sup>289</sup>*

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285 See [SGV.001.001.7532-7533](#).

286 See [SGV.001.001.7534-7536](#).

287 See [SGV.001.001.7537](#).

288 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, p.76.

289 See [SGV.001.001.7540-7541](#).

John Scott and the minister had the following exchange:

**John Scott:** *If the measures that are now being put in place are so effective—and we all hope that they will be—why are the survivors of the abuse still seeking an inquiry?...Do you accept that the public would be reassured by an independent inquiry that sought not only to uncover the problems of the past, but to evaluate whether the measures that have been put in place over the past 10 years, which you have described, are effective and whether other measures need to be taken? [...]*

**Peter Peacock:** *I completely understand that people would prefer a public inquiry for the reasons set out in the petition. I acknowledge where they are coming from. However, I have analysed the position that the Government took and how we examined the issue. We took the matter seriously, considered the issues and concluded that an inquiry would not cause things to happen that are not already happening or that we can make happen now. I have tried to acknowledge today that we completely recognise that people have been wronged in the past and that we need to redouble our efforts, but we do not need an inquiry to do that. That is why we have chosen the route we have chosen, which is a different route from the one that the petitioner and others would much rather choose.*

**John Scott:** *The point is that that you are judge and jury in this situation. The public are seeking independent reassurance, not just ministerial reassurance, but I am afraid that they are not getting it from you.*

**Peter Peacock:** *That is the privilege but also the burden of Government. That is why we are here. We have to make decisions and we are doing so openly. I have tried honestly to set out what our considerations were.*

*The kernel of your second point is whether an inquiry is necessary to evaluate the effectiveness of our policies and I do not believe that it is. Part of what we are doing involves setting up a multi-agency inspection process for children's services, which we have not had before. Its purpose will be to test—independently of Government—whether our policies are working or need to be improved."<sup>290</sup>*

Janis Hughes said an inquiry was one way of aiding the process for people seeking some sort of closure in relation to what had happened in the past. She then asked:

**Janis Hughes:** *You said that some survivors might not welcome an inquiry. Can you give us any evidence for that?*

**Peter Peacock:** *[W]e are aware from some correspondence that we have received that not everybody is seeking an inquiry. Some people would rather that the resources that an inquiry would eat up went into providing services. However, I do not wish to overstate that. I completely recognise that there are strong views from others who want an inquiry. I was simply recording the fact that not everybody wishes one."<sup>291</sup>*

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290 See [SGV.001.001.7546-7547](#).

291 See [SGV.001.001.7550-7551](#).

Mike Watson focused on the aims of the Daly petition. He said:

**“Mike Watson:** *The petition explicitly calls for ‘an inquiry into past institutional abuse’ and seeks an apology for that abuse. Although the information the minister provided in his letter of [30] June and in his opening statement is important and refers to essential work that any Government should be doing...the minister has not dealt with the petition. The petition is about what happened in the past. For one reason or another, people are locked into that past and cannot escape from it. Some of them might never escape from it...However, people want the opportunity to try to escape from that past. The petition raises a fairly narrow issue, which you and your officials have widened in a way that is not helpful to the petitioner, although you are obviously dealing with important issues. For example, one of the headings in your letter asks ‘Whether an Inquiry would prevent future abuse’. That is not the issue. You have outlined action that might help to prevent future abuse. Your letter questions whether an inquiry would be in the public interest. There is a huge amount of public interest in the issue.*

[...]

*What can you say on the subject of the petition? The petitioner calls for an inquiry into past institutional child abuse. I accept that some of those who were subject to that abuse would not want to be part of an inquiry, but they do not need to be part of it. The petitioner also calls for an apology. I am aware that you cannot speak for outside organisations, but surely you could apologise on behalf of state bodies [...]*

**Peter Peacock:** *On the subject of an inquiry into past abuse, I have tried again today to set out that, if part of the purpose—and it has to be part of the purpose—of a public inquiry is to cause the Government to acknowledge publicly that there had been past abuse, there is no need for one, given that I have made that acknowledgement today. I said that we acknowledge that there has been abuse; children were wronged-*

**Mike Watson:** *With respect, that is not the issue. There is no doubt about that.*

**Peter Peacock:** *What I am saying is that that is part of the purpose of a public inquiry. We are not saying in any way that past abuse did not occur. We are saying we know that it occurred in the system in the past.*

[...]

*I have tried to express our sorrow that those events occurred. I am trying to do that honestly and openly. I am not seeking to condone, hide or cover anything that happened in the past—it would be wholly wrong of me to do so.*

*Again, if that was part of the purpose of the inquiry, I am prepared to do that today without the necessity for an inquiry. The Executive came to its conclusions on an inquiry for the reasons that I have tried to set out as honestly as I can.”<sup>292</sup>*

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292 See [SGV.001.001.7552-7554](#).

Karen Gillon followed up that exchange by focusing on two matters, one being the matter of an apology. She put the minister on the spot on the issue of an apology for past institutional child abuse by SG on behalf of the state:

**"Karen Gillon:** *[A]cknowledging something is not apologising for it. Are you formally apologising for the actions of the state in respect of child abuse?*

**Peter Peacock:** *[W]e are in the midst of legal proceedings and particular words have particular connotations in terms of those proceedings. I have tried to go as far as I can today in making it clear where the Executive [Scottish Government] stands, what we believe and how we empathise with people's feelings and recognise the consequences of what happened. I have expressed our profound sorrow, in concert with others, about the things that happened. That is as far as I can go on the matter today.*"<sup>293</sup>

Peter Peacock did not apologise for past institutional child abuse. He did not consider that it would have been appropriate for him to do so.<sup>294</sup>

The reaction of the PPC after having heard from the Minister for Education and Young People, was to take the "nuclear option" of seeking a debate in the Scottish Parliament to discuss the issues raised by the Daly petition.<sup>295</sup> They secured a debate and it was fixed for 1 December 2004. The PPC had never before sought a parliamentary debate on a petition presented to them.<sup>296</sup>

### **Engagement with INCAS**

SG engaged with INCAS between 29 September and 1 December 2004. Officials met with representatives of INCAS on several occasions. INCAS continued to call for an inquiry into past institutional child abuse.

However, during this period, SG did not, at any point, retreat from the position ministers had decided upon on 25 September 2003 regarding an inquiry. Its settled position was there would be **no** inquiry of the kind the Daly petition was calling for.<sup>297</sup>

### **The "rapporteur" proposal**

However, there was always what was seen as a compromise, namely the First Minister's "independent expert" option, first raised by him in December 2003 because what ministers had opted for on 25 September 2003 did not allow for survivors to be heard.<sup>298</sup> It was also referred to as being a proposal to appoint a "rapporteur". His idea in December 2003 of a review by an independent expert was somewhat embryonic, but what he had in mind was some means of enabling people to tell their story; he did not, however, envisage a fact-finding investigation.<sup>299</sup>

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293 See [SGV.001.001.7554-7555](#).

294 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, p.45.

295 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, pp.88-89.

296 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, p.47.

297 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.177.

298 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.57 and p.97.

299 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, pp.104-105.

Officials had rejected the independent expert option in May and June 2004. But it re-emerged, as a proposal for the appointment of a *rapporteur*, when the Minister for Education and Young People met with representatives of INCAS on 23 November 2004.<sup>300</sup> The *rapporteur* proposal, though not an inquiry or investigation into allegations of institutional child abuse, was to involve looking at the past and was seen by Peter Peacock as a way of finding an answer to a question continually raised by survivors: “*why was [such abuse] allowed to happen...?*”<sup>301</sup>

OSSE expressed very serious concerns about the *rapporteur* proposal.<sup>302</sup> OSSE would have much preferred for it to be abandoned.<sup>303</sup> The night before the debate, they advised that, if it was to be mentioned, the minister should only say that it was being considered. The Lord Advocate was less convinced by the points raised by OSSE in support of their concerns.<sup>304</sup> Late in the day, the Crown Agent, looking at matters from the perspective of the criminal justice system in Scotland, voiced his concerns about the proposal which, he said, were shared by the Lord Advocate.<sup>305</sup>

The politicians’ instincts were, despite OSSE’s reservations, to run with the *rapporteur* proposal. On 1 December 2004, the day of the debate in the Scottish Parliament, the First Minister said he wanted the Minister for Education and Young People to announce his intention to appoint an independent expert.<sup>306</sup> Peter Peacock went ahead and did so.

### **First Minister’s statement and debate on 1 December 2004**

On 1 December 2004, the First Minister made an apology on behalf of the people of Scotland for past institutional child abuse.

In the debate that followed, the Convener of the PPC told MSPs that the Committee had not taken a view on whether or not to recommend that the Scottish Parliament should support the aims of the Daly petition:

*“In seeking today’s debate, our aim has been to facilitate a full consideration of the issues raised by the petition. The committee will consider the petition further, along with the Official Report of today’s debate and any additional evidence, and agree what action to take when we meet on 22 December.”*<sup>307</sup>

Peter Peacock announced a package of measures to support survivors of abuse.<sup>308</sup>

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300 See note of meeting, at [SGV-000046958](#).

301 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.231-235.

302 See Note from Richard Henderson, Solicitor, OSSE to Minister for Education and Young People, 25 November 2004, at [SGV-000046992](#).

303 See Note from Patrick Layden, OSSE to Minister for Education and Young People, 30 November 2004, at [SGV-000063515](#).

304 See email from Richard Henderson, Solicitor, OSSE to OSSE officials, 25 November 2004, at [SGV-000063498](#).

305 See email from Norman McFadyen, Crown Agent, to Richard Henderson, OSSE, and other OSSE officials, 29 November 2004, at [SGV-000046996](#).

306 See [SGV-000063518](#).

307 See [SGV-000046999](#), p.6.

308 See [SGV-000046999](#), pp.11-15.

Regarding an inquiry into past institutional child abuse, the minister did not depart from SG's position that there would be no inquiry of the kind called for by the Daly petition. However, he announced the SG's intention to appoint an independent expert to conduct a systemic review. He said:

*"One issue that keeps arising in discussions with survivors is their need to understand more fully why the abuse that they experienced was—as they would put it—allowed to happen. Why could no one stop what was happening to them? That is an entirely reasonable question. Understanding why is not reasonable only for survivors, but for wider society, and will help us to explore any lessons from the past for what we are currently doing...The issue is difficult, and I am conscious that a number of court actions are currently on-going and that we cannot discount the possibility that there will be further criminal proceedings. It is vital that any other process that we undertake in looking into the matter should not interfere with such proceedings.*

*However, I can say to Parliament that I intend to appoint someone with experience to analyse independently the regulatory requirements of the time, the systems that were in place to monitor operation of those requirements and, in general, to analyse how that monitoring was carried out in practice. I wish to discuss that with other interested parties so that the process can start as soon as possible; I will keep members informed of progress. As I told INCAS, I will of course consider any conclusions that are reached and any policy questions that arise as a result of that further examination. I intend to report to Parliament on the outcome of that process."<sup>309</sup>*

### **Views of MSPs on whether or not there should be an inquiry**

Annabel Goldie spoke on behalf of the Scottish Conservatives. They urged the setting up of an independent inquiry "not only to uncover the problems of the past but to evaluate whether the measures that have been put in place during the past 10 years are effective and whether other measures need to be taken."<sup>310</sup>

Lord James Douglas-Hamilton explained what the Scottish Conservatives had in mind. SG should establish an independent inquiry, but not a public inquiry. There were two reasons, he said, why an inquiry should not take place in public:

*"First, some criminal cases are outstanding and are subject to sub judice provisions. It would be wrong to prejudice criminal trials that could take place. Secondly, many of the children concerned endured traumatic experiences, so it would be contrary to their best interests and to the public interest to rake over and revisit their experiences in a brutal and public way."<sup>311</sup>*

Fiona Hyslop (Scottish National Party):

*"As someone who supports [the aim of the Daly petition of establishing a public inquiry], I listened with interest to what the minister said. His proposals need hard examination concerning the status of the reporter, what teeth the reporter will have, what scope the inquiry [by the reporter] will have, what redress the survivors will have and—importantly—what recourse*

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309 See [SGV-000046999](#), p.14.

310 See [SGV-000046999](#), p.3.

311 See [SGV-000046999](#), p.18.

to law and justice they will have as a result. In this instance, I welcome the comments that were made about lifting the 1964 time bar [...]

We need to pursue specific questions. Will successful pursuance of one case—established in the report—enable other cases to be pursued? Will the public interest be taken to mean that one successful pursuit of a case will negate the need for pursuing others? I welcome the information commissioner's role and want to know what powers he will have, particularly in respect of organisations that are outwith the state's statutory responsibility. I also want to know about the ability to pursue subsequent legal cases and what role the survivors will have in the support and counselling that has been announced.

A reporter, however, is not a public inquiry. Until and unless those questions can be answered to the survivors' satisfaction—we all need to hear their response to the minister's announcement—it may be too early to give up the aim of there being public inquiry. If we as a Parliament, after listening to the survivors, still want to pursue a public inquiry, it will [be] possible to bring the issue back to Parliament."<sup>312</sup>

Robert Brown (Scottish Liberal Democrats)

"[O]n the call for a public inquiry, Chris Daly made a powerful case for such an inquiry when I met him. He obviously also made a similar case to the Public Petitions Committee. That said, the actions that Peter Peacock has detailed this afternoon will deal with the key concerns of survivors of abuse. For example, he talked about opening up files and information, establishing a short life working group, reviewing the 1964 time bar and providing funding for the broad range of support and counselling that is to be offered, to say nothing of his commitment to investigating the regulation and monitoring of children's residential homes at the relevant time. I hope, however, that the minister agrees that the precise terms of the investigation's remit should be shared with the Public Petitions Committee, which has done so much to progress this issue, and that the outcome report and other documents will be shared with the Education Committee."<sup>313</sup>

Janis Hughes (Scottish Labour):

"Although I am sure that each and every person who was abused will welcome the steps that the [Scottish Government] has taken to improve child protection, they need to know why the abuse was allowed to happen and why it was not stopped. I support them in that.

[...]

I welcome the minister's announcement of the appointment of an experienced person to gather evidence on behalf of those who have suffered abuse. I hope that that person will be given sufficient powers to make the appointment meaningful and to deliver the results that the survivors deserve. I look forward to hearing further details on the scope of the inquiry. As we have heard from other members, a full public inquiry has pros and cons, but the petitioners must be assured that the minister's proposals will be firmed up and that they will be given more information that might allay some of their fears."<sup>314</sup>

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312 See [SGV-000046999](#), pp.15-16.

313 See [SGV-000046999](#), p.20.

314 See [SGV-000046999](#), pp.21-22.

Patrick Harvie (Scottish Green Party):

*“That leaves us with what is perhaps the most troubling and difficult question: why? Why was abuse allowed to take place? Why was so much of it left hidden for so long? Why, when it was known about, was that often not enough to bring it to an end? As many members have said, the petition calls for a public inquiry. I admit to having some concerns about that. Public inquiries generally seem to promise the undeliverable and I am concerned that an inquiry would create false hope. I am also concerned about whether public evidence sessions would be the best way of ensuring that all potential witnesses would be willing to give evidence. Such an inquiry would undoubtedly generate a high level of media attention and I worry that that would be a threat to its effectiveness. However, the call is an urgent one and it has been waiting too long to be heard. We should also not forget the importance of the point that Fiona Hyslop made, which was that anything less than a full public inquiry might be less able to result in legal action, where appropriate. If the concerns that I have expressed can be met and, perhaps more important, if the survivors of historical abuse do not share those concerns, I will add my voice to the call for a full public inquiry without further hesitation.”<sup>315</sup>*

Nicola Sturgeon (Scottish National Party):

*“I hope that all the survivors of abuse who are listening carefully to what is said in the Scottish Parliament today...will take at least some comfort from the sincere and heartfelt apology that was offered earlier today. However, we all know that, in any walk of life, although saying sorry is often important and a prerequisite for moving on, it is equally often not enough, and the survivors of care home abuse have forcibly and powerfully expressed a desire for a public inquiry into the catalogue of abuse that took place. I accept that there is a legitimate debate to be had about the nature and scope of any inquiry that might take place. I accept that many survivors of abuse would not welcome the public examination of many of the issues. I also welcome and acknowledge the many important steps forward that the minister has announced today, particularly on the opening up of files, the appointment of a reporter and the reappointment of a short-life working group. Those are all important steps forward, but it is equally important that we continue the debate and dialogue about how to take the process forward and what form the inquiry that many people want should take.*

*I hope that today is the start of that dialogue, not the end of it, because it is important to acknowledge why so many people want a public inquiry. The first reason is that it would give the opportunity for survivors to recount what happened to them, for them to be listened to and for any appropriate action to be taken. It would be a cathartic experience for many people and it would also provide an opportunity for the [Scottish] Government to learn lessons from the past. I accept that we have taken great strides forward in child care and protection—for example, the establishment of the Scottish Commission for the Regulation of Care is an important development—but I do not accept that there is no possibility that there are further lessons to be learned, and that is why it is important that, in some form, there be a full examination of what went wrong.”<sup>316</sup>*

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315 See [SGV-000046999](#), pp.23-24.

316 See [SGV-000046999](#), pp.25-26.

Rosie Kane (Scottish Socialist Party):

*"I support fully the request from Chris Daly and others for a full public inquiry...It is surely the only way to get to the core of what has taken place over the decades, which it is important and essential that we do.*

[...]

*There are missing records...We need to know why records are missing and whether the matter is significant. Have some simply been lost or damaged or were there attempted cover-ups? What types of network were in place during this terrible period, who was involved and at what level? Were there opportunities for interventions when complaints were made? Were such opportunities missed or were they ignored? Are some of the perpetrators still out there and, if so, where are they, what are they doing and who are they with? How many more adults out there are buckled with pain and how do we reach them?*

*We might well open a can of worms, but I want to see those worms and I want to ask them questions. We might well open wounds, but the fact that there are wounds means that we need to visit them and I agree with Fiona Hyslop that we need to start healing them. I do not know what today's debate will ultimately offer, but we must ensure that we get answers to all the aforementioned questions.*

[...]

*Dealing with the effects and prevention requires a thorough study of the various and far-reaching parts of this horrid jigsaw that is part of our recent history. I heard what the First Minister said today, but I believe that only a public inquiry—even though it may be lengthy and painful—will begin the process that needs to take place. However, we must ensure that the appropriate safety nets are in place to prevent the media from having full access to the proceedings and so on. We need to ensure that people feel able to come forward and that all areas of the issue can be accessed by a body with teeth.*

*More than that, we must consider what the experts want and demand. By 'experts', I mean Chris [Daly], David [Whelan], Helen [Holland], Lizzie [Elizabeth McWilliams], Frank [Docherty] and many others whose names we do not yet know."<sup>317</sup>*

Marilyn Livingstone (Scottish Labour):

*"As the convener of the cross-party group in the Scottish Parliament on survivors of childhood sexual abuse, I welcome the package of measures that the minister has announced not only to address the petition, which relates to abuse that happened in the past, but to help to safeguard our children now and in the future.*

[...]

*I am pleased that—as we heard today—there will be public inspection of files and an investigation into the law on limitation. I welcome the commitment from Peter Peacock and his department to consider truncating the timescales. I look forward to hearing the detail of the proposal to appoint a reporter."<sup>318</sup>*

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317 See [SGV-000046999](#), pp.27-28.

318 See [SGV-000046999](#), pp.29-30.

Phil Gallie (Scottish Conservatives):

*“Although I support Lord James Douglas-Hamilton’s call for an independent inquiry, and although it is important to look back, we should only look back with the future in mind...we must think of the children of the future. There will be a need for care homes in the future, so an independent inquiry is much needed.*

*[...]The independent inquiry suggested by Lord James Douglas-Hamilton would be the way ahead because it would not be overly intrusive and it would not impose the rigours of court appearances on those who have suffered considerably in the past. An independent inquiry could be headed by a judge and could be supported by someone who had been abused in the past, perhaps with someone who runs a care home. That seems to offer a reasonable way ahead.”<sup>319</sup>*

John Farquhar Munro (Scottish Liberal Democrats):

*“Unlike several members who have spoken, I do not believe that an inquiry on institutional child abuse would be useful or appropriate. It is too late—the stable door has been left off the latch for far too long and the proverbial horse has bolted. I cannot bring myself to support the calls for an inquiry. Although an inquiry could be useful for some victims, many victims who have been abused might not wish to relive their dreadful experiences by giving evidence. It must be remembered that many victims of state, religious or charitable establishments might no longer live in this country.*

*However, there is no doubt that victims have a right to answers. They have a right to know why they were taken away from their parents in the first place, why—in some circumstances—they had their names changed and why the state failed to protect them from abuse. They most certainly have a right to justice.*

*The [Scottish Government] now needs to ensure that the police and the Crown Office are sympathetic to possible victims of abuse and are properly funded to investigate such cases. When there is evidence that abuse has taken place or is taking place, they should take action without delay. That is a reasonable suggestion.”<sup>320</sup>*

At this point Phil Gallie asked whether John Farquhar Munro accepted that, if there was an inquiry, many individuals who would not want to go through full legal proceedings would be prepared to come forward to share their experiences and, if they did, SG could learn much from the issues that would arise. John Farquhar Munro responded by saying:

*“I would be more inclined to agree to an inquiry if the circumstances had arisen in the recent past...We are talking about incidents that happened away in the dim and distant past and it might be difficult, if not impossible, to hold an inquiry to investigate those events.”<sup>321</sup>*

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319 See [SGV-000046999](#), p.32.

320 See [SGV-000046999](#), p.34.

321 See [SGV-000046999](#), p.34.

Campbell Martin (Independent MSP):

*"We know that some of the children who were abused while in the care of the state are in the public gallery today. Of course, we will not recognise them as children, because they are now adults. However, in quiet moments and at times of sadness or stress, those adults are again young children. The memories, the nightmares and the faces have lived with them. While they were young, vulnerable children, we as the state failed to protect them. Because of that, we as the state have saddled them with burdens that most of us, thankfully, cannot even begin to imagine. They do not need to imagine those burdens, because for them abuse was a reality. They lived it and continue to relive it.*

*Those children, now adults, need to be able to talk about their experiences. They need to be able to know that the people to whom they talk will understand what they are talking about and will believe them. They need to know that the people to whom they talk will help to bring closure to what has been a lifelong nightmare. I believe that a public inquiry would do that. That is why Chris Daly and the people behind petition PE535 have asked for a public inquiry.*

*There is too much denial on this issue. At the meeting of the Public Petitions Committee of 29 September [2004], the minister accepted that institutional child abuse had happened. We all know that it has happened; we have living proof that that is the case. Surely if those responsible are to be held to account and those who are abused are finally to have closure, we need a public inquiry with the full powers that are necessary to investigate every case and organisation.*

*Of course, some people who were abused do not want that aspect of their past to be raised in public and we must respect their position. A public inquiry would not compel people who had been in the care of the state to come forward to speak about their experiences—it would be for them to make that decision. However, for those who need finally to put the nightmare behind them, having the option of speaking about their experiences and knowing that the forum to which they speak has the power to act are absolutely essential."<sup>322</sup>*

Scott Barrie (Scottish Labour):

*"The petition calls for an inquiry into past institutional child abuse. Many members have asked for a full public inquiry; I fully understand that desire and I do not necessarily rule out such an inquiry. However, most survivors of abuse—particularly abuse that has occurred in the public care system—want to know why that abuse was allowed to occur and why nothing was done to stop it. We must ask ourselves whether a public inquiry would achieve that objective.*

*Other inquiries have partly been held in public and have resulted in answers to such questions. Perhaps the most salient example is the Edinburgh inquiry into residential care, which not only investigated past abuses but came up with a raft of proposals—many of which the [Scottish Government] has implemented—to ensure that our residential child care is much more robust and much more thoroughly inspected than it was. What I want from today's debate, if nothing else, is for people to consider what we are asking a public inquiry to achieve. Like other members, I want to ensure that all the facts come to light, but the issue is how we should get those facts into the public domain."<sup>323</sup>*

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322 See [SGV-000046999](#), pp.35-36.

323 See [SGV-000046999](#), pp.38-39.

Linda Fabiani (Scottish National Party):

*"We have heard a lot...in the debate [about whether an inquiry would prevent further abuse] and there is unanimity in the Parliament and throughout society on the need to prevent as far as possible any abuse in future. However, that is not the issue; the issue is the survivors of institutional child abuse and their campaign for a public inquiry. The survivors are saying to us, 'You didn't listen to us then; please listen to us now.'*

[...]

*If the people who suffered think that...reparation [for past institutional child abuse] could be provided in part by a public inquiry, the onus is on the Parliament and on Scotland to listen to them and to hold such an inquiry. I am not sure why people keep saying that an inquiry would be inappropriate. Public inquiries have been held in Canada, Australia and Ireland, so what is wrong with us? Why cannot we address the matter?"<sup>324</sup>*

Karen Gillon (Scottish Labour):

*"Just as the abuse that was suffered varies from individual to individual, so does the course of action that people now want us to follow. A number of constituents have come to me. For some, all they want is an apology and recognition that they suffered abuse, that it was real and that it was not their fault. That is why I welcome the First Minister's statement, and urge others to do likewise. Others feel that only by pursuing their cases through the courts will they find closure. That is their right. Others, like the petitioners, seek a public inquiry, so that the full facts of their case and of others can be put on public record.*

*There are strong views on all sides among the survivors. Some want a full public inquiry, others do not. On the surface, the measures outlined by the Minister for Education and Young People today strike the right balance between those two views, but I would like more information on what the independent investigation will cover, who will be able to give evidence, and how the information will be used.*

[...]

*Like other members, I reserve judgment on whether a public inquiry is needed until I have had time to consider the details of the proposals and to speak to my constituents about the proposals and what they want."<sup>325</sup>*

Jamie Stone (Scottish Liberal Democrats) said the important question in the minds of all MSPs was *"whether we should have a public inquiry, a semi-public inquiry, a private inquiry or no inquiry at all."<sup>326</sup>* He did not say however which of these options he supported.

Towards the end of the debate, Bill Aitken (Scottish Conservatives) said that there *"is an arguable case for holding a full public inquiry, but on balance, that is not the best way forward."* He added:

*"The potential for a public inquiry to cause trauma to the individuals involved and the real danger that evidence given at a public hearing might contaminate the evidence in future*

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324 See [SGV-000046999](#), pp.40-41.

325 See [SGV-000046999](#), pp.44-45.

326 See [SGV-000046999](#), p.46.

*civil or criminal actions are risks that we would be most unwise to take. We all seek justice for the victims, and some of the victims would achieve a degree of satisfaction from seeing their abusers dealt with by the courts. It took a long time for the courts and the law of Scotland to catch up with abusers, but when they did, it was with high-tariff sentencing and the realisation that such behaviour was utterly abhorrent. Therefore, we cannot take the chance of a public inquiry leading to a situation where anyone can escape justice.*

*The minister presented a number of constructive ideas on how we can emerge from this extremely difficult debate...The Conservatives fully agree that the inquiry he suggests is the way forward and we are encouraged by the fact that he has stated clearly that he will be inclusive in the matter and will take the Parliament with him.”<sup>327</sup>*

Kenny MacAskill (Scottish National Party):

*“We [SNP members] have listened with interest to the minister’s statement about appointing a reporter, which is to be welcomed. However, the point was made that some of us support having a public inquiry, for which the petition calls. The petition has two objectives: it seeks both an apology and a public inquiry.*

*Scott Barrie has made the valid point that unless we have a clear focus and remit, holding an inquiry will be pointless. If there is to be an inquiry, we have to be clear about what we hope to achieve. The fact that inquiries normally relate to incidents that have just happened is not a reason to repudiate holding them in these circumstances. There are precedents elsewhere, such as in Australia, Canada and Ireland, where similar inquiries have been carried out. It is important that such inquiries are carried out. The points made and position adopted by the reporter might satisfy SNP members and it might be possible to deal with the matter in that way. We will have to see the fine print. We will require to be satisfied that the inquiry will have powers, that it will be a full inquiry and that there will be outcomes and effects. The matter is difficult, because of the problems of how an inquiry would interact with on-going civil and perhaps criminal proceedings, which we have to address.*

*It is fair to say that justice must not only be done but seen to be done. The reporter and any investigatory body must be accountable. Legal issues have to be addressed.”<sup>328</sup>*

In his closing speech, the Minister for Education thanked members *“for the support, albeit qualified, that they have given to the general initiatives that I have indicated.”<sup>329</sup>* On the issue of support for a public inquiry, he said this:

*“Lord James [Douglas-Hamilton] raised the question of an independent inquiry. I respect the fact that the contributions from Rosie Kane, Campbell Martin, Linda Fabiani, Kenny MacAskill and others indicated that some people are certain that a public inquiry would be the right way forward, but I have to say that the debate demonstrated the degree of uncertainty about that. Nicola Sturgeon, Patrick Harvie, Fiona Hyslop, Robert Brown, Janis Hughes, Scott Barrie, Bill Aitken, Kenny MacAskill and Karen Gillon pointed to reservations about the outcome of an inquiry.*

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327 See [SGV-000046999](#), p.48.

328 See [SGV-000046999](#), p.50.

329 See [SGV-000046999](#), p.51.

*I will run through the points that Lord James made about what an independent Inquiry would do. He said that it might allow the proper recognition of what had happened; let lessons from the past be understood, to inform today's practice; ensure high-quality support for survivors; ensure access to rights and remedies; and address the question of a time bar. Others said that an inquiry might give rise to an apology, and Scott Barrie said that it would allow us to address why abuse was allowed to happen. However, I addressed each of those matters today in a way that genuinely takes them forward. If we can do that work without the complexity of a public inquiry, given the legalisation of the process that might arise and the long time that that would take, it seems to me that that is the right course of action. I welcome the Parliament's qualified support on that. I fully expect members to continue to scrutinise the process, me and what I do [...]*

*I told the Public Petitions Committee, and I repeated today, that a new chapter has opened. Today we set out a comprehensive approach to try to deal with the issues constructively, but I make it clear that that is not the end of the process. I believe that the new chapter will be interesting, intensive and revealing. As the picture reveals itself, we must continue to reflect on what else we might have to do in the future.”<sup>330</sup>*

A range of views were expressed during the parliamentary debate in relation to the question of whether or not there should be an inquiry. Once more, the assumption that a public inquiry would be too legalistic and complex was referred to, but so was the reluctance to opt for a course of action that would not call perpetrators to account.

As the above extracts from the debate demonstrate, there was no consensus that there should be a public inquiry. That said, the MSPs who spoke favoured some form of investigation or inquiry, in particular so as to obtain answers to questions such as why abuse of children in institutional care happened, why such abuse was not detected and why it was not stopped or prevented.<sup>331</sup> Fiona Hyslop clearly saw there ought to be a possibility of the Scottish Parliament looking again at the option of a public inquiry as remaining open.<sup>332</sup>

Those who favoured a public inquiry did not, however, table an amendment in an attempt to force a vote on the matter.<sup>333</sup> Despite the limitations of his remit, the appointment of an independent expert was seen by MSPs, even those who favoured a public inquiry, as a form of investigation or inquiry that might provide answers to questions such as why abuse of children in institutional care was allowed to happen and why such abuse was not detected and stopped or prevented. That seems to have been why MSPs were prepared to let the independent expert (Tom Shaw) get on with his work. He reported in November 2007.

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330 See [SGV-000046999](#), p.53.

331 Michael McMahon felt MSPs generally favoured some form of investigation or inquiry: see [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, p.99.

332 See [SGV-000046999](#), pp.15-16. When the Shaw Review was published in November 2007, there was a new SNP administration. The response of the new administration on 7 February 2008 in the Scottish Parliament to (i) the Shaw Review and (ii) the SLC's report on limitation and prescribed claims (published in December 2007) was not met by calls from MSPs—a significant number of whom were new to the Parliament and had not participated in the debate on 1 December 2004—to hold a wide-ranging public inquiry: see [SGV.001.001.7608](#).

333 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, p.98. SG's response to the Daly petition was subject to scrutiny in Parliament both by the PPC and by MSPs in the chamber on 1 December 2004: [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, p.145.

## 2004-2014

Calls for a public inquiry during this period were continuous.

However, SG did not revisit the issue of a public inquiry into historical institutional child abuse for another decade. Nor did the Scottish Parliament. That was despite the state's positive obligation under article 3 of the European Convention on Human Rights to investigate inhuman or degrading treatment or punishment of its citizens—adults and children alike—in circumstances where there was widespread evidence of abuse, including serious sexual and physical abuse of children in institutional care in Scotland over many decades.

When SG responded to the Shaw Review in the Scottish Parliament on 7 February 2008, the Minister for Children and Early Years (Adam Ingram) said that no further inquiries into historical abuse were considered necessary.<sup>334</sup> At that time, MSPs who questioned the minister did not raise the issue of whether, following upon the Shaw Review, there was a need to hold a public inquiry into past institutional child abuse. The Shaw Review itself did not recommend that there should be such an inquiry.

In December 2014, almost 12 and a half years after the Daly petition was first presented to the PPC, SG announced an inquiry under the Inquiries Act 2005.

## Conclusion

Clearly, SG had engagement with INCAS between 29 September 2004 and 1 December 2004. What is striking, however, is the absence of engagement with survivors prior to 25 September 2003, the date on which the holding of an inquiry was ruled out. That is, a decision on one of the key aims of the Daly petition was made by ministers without taking steps to obtain the views of those who were at its heart, namely the survivors.

Given Peter Peacock's comments on 14 June 2004, in response to the submission of 8 June 2004, there is no doubt that the issue of whether to hold an inquiry had been settled by the unanimous decision of ministers on 25 September 2003 and would not be reconsidered.<sup>335</sup> Nothing in the submissions dated 8 and 16 June 2004 suggests that officials were advising ministers to reopen the question of whether or not to hold an inquiry. I do **not** accept Colin MacLean's suggestion that those submissions included an invitation to ministers to review the decision not to hold an inquiry.

The lack of any sense of urgency is striking. There were unacceptable delays in providing supplementary advice to Peter Peacock on the option put forward by the First Minister in December 2003. The time taken to respond to the PPC's letter of 28 March 2003 dragged on for far too long.

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334 See [SGV.001.001.7610-7611](#).

335 That was confirmed by Peter Peacock in his evidence to the Inquiry: See [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.102-103.

The importance of the provision of accurate information by officials to ministers cannot be overstated. Officials' submissions to ministers are influential. Ministers are reliant to a large extent on advice and on the information they are given being accurate.<sup>336</sup> They depend on their officials and "will at times feel quite constrained by the advice [they] are getting."<sup>337</sup> Inevitably, ministers rely on information provided by officials when making decisions and bad information may give rise to bad decisions.

On 25 September 2003, ministers had a major decision to make on a major issue: whether to hold an inquiry into past widespread abuse of children in institutional care. We will never know whether all ministers would have agreed to rule out holding a full inquiry had the submission dated 23 September 2003 set out accurately the Cross-Party Group's position. Nor will we know whether they would have done so if the submission had refrained from indicating that "*neither the weight of cases nor the nature of the allegations indicates a systemic failure or organised abuse.*"<sup>338</sup> That statement was not supported by any sound basis in fact. Ministers would, however, have had a more accurate picture on which to base their decision and it is very difficult to accept that these factors would not have carried weight. They certainly appear to have had the potential to lead ministers either to decide on an inquiry at that stage or, at least, to keep it open as a viable option. Even if the decision had been to rule out an inquiry, it may not have been a unanimous one.

The fact that the decision regarding whether or not to have an inquiry had been a unanimous one had an impact on the First Minister in December 2003, when he considered and accepted what had been agreed at the meeting of ministers on 25 September 2003. Had it not been unanimous, his response might well have been different.<sup>339</sup>

It seems clear that ministers were, on the basis of the advice they received, concerned about setting up an inquiry while there were ongoing legal proceedings in the courts. Establishing a compensation scheme probably gave rise to similar concerns since such a scheme would necessarily involve making judgements about allegations of institutional child abuse that were or might come before the courts.

There was, though, a real difficulty with that approach, namely, the lack of effective access to justice. That difficulty was exposed by the effect of the law of prescription in the case of pre-1964 survivors and the problem, in the case of claims which had not prescribed, of survivors being confronted with the hurdle of time bar. The reality was that survivors could not achieve the key aims of justice, accountability and redress through the civil justice system.

In 2005, Tom Shaw was appointed to conduct a systemic review. His remit, as drafted, made clear however that he had no power to investigate allegations of abuse or to make findings of fact.<sup>340</sup> Such a remit was intended to avoid potential prejudice to court proceedings. But, so far as survivors were concerned, it was not a satisfactory alternative to the inquiry that the Daly petition called for in August 2002.

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336 [Transcript, day 202](#): Peter Peacock, at TRN-7-000000003, pp.96-97 and p.100.

337 [Transcript, day 202](#): Peter Peacock, TRN-7-000000003, p.57.

338 See [SGV-000046937](#).

339 [Transcript, day 204](#): Lord McConnell at TRN-7-000000005, pp.132-133.

340 See [SGV-000047661](#).

Lord McConnell said in evidence that he did not, in December 2003, want to close off completely the idea of a public inquiry and that he thought the issue might be returned to if survivors were unable to “have their day in court”:

*“In my mind there were two things that I perhaps focused on in broadly accepting their [the Ministers’] recommendation but suggesting an alternative, and one was the fact that we had this big programme of reform work going on and maybe affecting confidence in that reform programme by having an inquiry would be a bad thing. But I was also very conscious of these court cases taking place, and that we needed to make sure that we didn’t do anything that would complicate the situation in court, because there were survivors who had been brave enough to go to court and take on the legal challenge, and I felt they needed to have their day in court and I wanted to see if the court was going to allow them to do that, so - and at that point if necessary perhaps return to the idea of a public inquiry.*

*So I didn’t want to close off the idea of a public inquiry completely and have no alternative option because at some point we might want to come back to it.”<sup>341</sup>*

But this reasoning does not add up. Access to the civil justice system and holding a wide-ranging public inquiry were not alternatives. Even if individual survivors were able to have their day in court, the court’s decision and its reasoning in each case would have been framed by the written pleadings specific to the individual case, the evidence led relating to the experiences of that individual, and the arguments advanced on her/his behalf. The civil courts in Scotland were not the appropriate forum for a wide-ranging investigation into past institutional child abuse of the type that the Daly petition was plainly calling for.

The First Minister put forward the option of a review by an independent expert for consideration in December 2003.<sup>342</sup> The approach that ministers had opted for on 25 September 2003 was forward looking only. It did not involve looking into the past, other than through the lens of such court proceedings as might take place. In putting forward the option of a review by an independent expert, it seems clear that the First Minister wanted to offer survivors something that, he hoped, would be sufficient to resist parliamentary support for a public inquiry but would not result in any prejudice to existing or future court cases—civil or criminal—concerning institutional child abuse.

There is nothing to suggest the First Minister demonstrated that he wanted to keep the option of such an inquiry on the table after ministers had ruled it out in September 2003. It may well have been in his mind that SG might need to consider financial redress for survivors of institutional child abuse if they could not litigate because of the laws of prescription and limitation. I am not, however, convinced that he did, at that time, have in mind reopening the much wider issue of a public inquiry at a later stage.

From the evidence as a whole, I have the clear impression that there was certainly no appetite within SG, at official level, for setting up a public inquiry in 2003 or between then and 2014. Nor was there an appetite for it on the part of the ministers to whom they tendered their advice.

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341 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.103.

342 See [SGV-000046922](#).

What ministers and officials in the period 2002-2014 did not bargain for was the persistence and tenacity of survivors who refused to take no for an answer. As “Dexter”, an applicant who was a child in care in Smyllum Park Orphanage<sup>343</sup> in the 1940s, wrote in his *Applicant’s verdict on the Inquiry Report*, after my findings in relation to that case study were published:

*“The Scottish Child Abuse Inquiry is the belated recognition of something denied by politicians and the Roman Catholic Church, and the Order of Sisters, for many decades. And it recalls for us the words of Saint Augustine that: ‘The reward for patience is patience.’”*

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343 Smyllum was run by the Daughters of Charity of St Vincent de Paul and accommodated approximately 20,000 children between 1864 and 1999.



## Some other forum

In its initial response to the PPC (on 17 February 2003) SG said it was considering whether an inquiry of the sort requested by the Daly petition “*or some other forum*” should be established to look into cases of past abuse of children in institutions in Scotland.<sup>344</sup>

### 2003-2007

On 25 September 2003, ministers ruled out setting up an inquiry into past institutional child abuse. Ministers also decided against a truth and reconciliation commission as a forum for survivors of abuse to speak about their experiences.<sup>345</sup>

On 22 December 2003, the First Minister, Jack McConnell, took no issue with what had been decided on 25 September 2003. But he put forward a further option for consideration: the appointment of an independent expert to carry out a review.<sup>346</sup> Officials advised against that option in a submission dated 20 May 2004. Their reaction was that it would involve the same drawbacks as a public inquiry.<sup>347</sup>

### Review by independent expert

However, a year later, on 1 December 2004, in the Scottish Parliament, Peter Peacock told MSPs that SG intended to appoint an independent expert:

*“One issue that keeps arising in discussions with survivors is their need to understand more fully why the abuse that they experienced was—as they would put it—allowed to happen. Why could no one stop what was happening to them? That is an entirely reasonable question. Understanding why is not reasonable only for survivors, but for wider society, and will help us to explore any lessons from the past for what we are currently doing...The issue is difficult, and I am conscious that a number of court actions are currently on-going and that we cannot discount the possibility that there will be further criminal proceedings. It is vital that any other process that we undertake in looking into the matter should not interfere with such proceedings.*

*However, I can say to Parliament that I intend to appoint someone with experience to analyse independently the regulatory requirements of the time, the systems that were in place to monitor operation of those requirements and, in general, to analyse how that monitoring was carried out in practice.”<sup>348</sup>*

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344 SG Education Department Memorandum, 17 February 2003, at [SGV-000046928](#).

345 See [SGV-000046887](#) and [SGV-000046937](#).

346 See [SGV-000046922](#).

347 See [SGV-000046956](#).

348 See [SGV-000046999](#), p.14.

## **Remit of independent expert**

Eight months later, in August 2005, Tom Shaw was appointed as the independent expert, with the following remit:

### **"REMIT OF INDEPENDENT EXPERT**

*1. Against the background of the abuse suffered by children up to the age of 16 in residential schools and children's homes in Scotland over the period from 1950 to 1995 the Independent Expert is instructed to carry out an investigation and, as soon as may be practicable, to present a report for consideration and for publication by Scottish Ministers with the following objectives:*

*(1) to identify what regulatory requirements and powers were in place from time to time over that period and which provided for the provision, regulation and inspection of such schools and homes and for the welfare and protection from abuse of children resident in them;*

*(2) to identify, and review the adequacy of any systems, whether at national, local or organisational levels, intended to ensure compliance with those requirements and with any prescribed procedures and standards from time to time including systems of monitoring and inspection;*

*(3) to review the practical operation and effectiveness of such systems.*

*2. While the remit is primarily concerned with the period 1950 to 1995 the Independent Expert should not regard himself as precluded from considering material from outwith that period which he considers to be of relevance.*

**3. So as not to prejudice either any possible criminal proceedings or any litigation at the instance of the survivors of abuse the Independent Expert is not to report on the facts or circumstances of any individual cases of abuse.**

*4. For the purposes of his investigation the Independent Expert will, in addition to information that is publicly available:*

*(1) have access to all documentary records of the former Scottish Office in so far as in the possession of Scottish Ministers from the period under consideration and in so far as relating to residential schools and children's homes which will be subject to redaction to ensure that no individual can be identified;*

*(2) be expected to seek the cooperation of local authorities and other organisations with responsibility for the management and administration of residential schools and children's homes in making available to him such documentary records and explanation of such records as he considers to be necessary for his purposes.*

*5. Except in so far as provided above the Independent Expert is not expected to consider material or submissions from individuals or from local authorities or such organisations except to the extent that he may consider it necessary for the purposes of his investigation to obtain information from organisations representing the interests of survivors of abuse."<sup>349</sup>*

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349 See [SGV-000047661](#). Emphasis added. During the review, Tom Shaw requested, and was given, permission to have contact with individual survivors: See [Written statement of Tom Shaw](#), paragraph 14, at WIT-1-000000355, p.4.

The crucial point to note is that this was not, and was not intended to be, a forum where survivors could go to speak about their experiences of life in institutional care.<sup>350</sup> Therefore, the intention was not “to afford victims of institutional child abuse in Scotland an opportunity to tell of the abuse they suffered to a sympathetic experienced forum”—one of the key aims of the Daly petition.<sup>351</sup>

The Shaw Review was a non-statutory, systemic review. It had no power to investigate, or to make findings on, individual cases of alleged abuse of children in institutional care.

*“The review was not an investigation of particular experiences of abuse. For individual survivors it could not answer the question ‘Why was this allowed to happen to me?’ but the review identified a number of factors which may have given rise to circumstances in which children in residential establishments could be abused. Many of those factors were systemic failings.”<sup>352</sup>*

It did not have the ability to achieve a key aim of the Daly petition—an inquiry into past institutional child abuse.

However, publication of the Shaw Review in November 2007 caused SG to look again at the option of a truth and reconciliation forum.<sup>353</sup>

## **2007-2014**

In May 2007, the Scottish National Party won more seats than any other party in the Scottish parliamentary election, but not an overall majority.

### ***Health Department and the “survivors’ agenda”***

Shortly after the Shaw Review was published, the Minister for Public Health, Shona Robison, proposed a meeting of the three ministers for Health, Justice and Education respectively, to discuss “the survivors’ agenda” with a view to agreeing a collective response.

She suggested SurvivorScotland, the National Strategy for Adult Survivors of Childhood Sexual Abuse, might serve as “the principal positive response”.<sup>354</sup>

At that time, Health was developing—as part of SurvivorScotland—specific proposals for the support of survivors of historical in-care and institutional abuse.<sup>355</sup>

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350 See [Written statement of Tom Shaw](#), paragraph 6, at WIT-1-000000355, p.2.

351 See [PAR.001.001.0001](#).

352 [Transcript, day 205](#): Tom Shaw, at TRN-7-000000006, p.157; [Written statement of Tom Shaw](#), paragraph 59, at WIT-1-000000355, p.14.

353 Tom Shaw, *Historical Abuse Systemic Review*, November 2007, at [LIT.001.001.0811](#).

354 Note and annex from Minister for Public Health to Cabinet Secretary for Justice and Minister for Children and Early Years, 28 November 2007, at [SGV-000047665](#).

355 The National Strategy for Adult Survivors of Childhood Sexual Abuse was launched in 2005 and the National Reference Group was established to take the strategy forward. In 2007 The NRG established a sub-group whose remit was to produce proposals for a national framework for support services for in-care abuse survivors by February 2008. The sub-group’s report led to the establishment of the In Care Survivors Service Scotland in November 2008.

Shona Robison explained:

*“SurvivorScotland involves close liaison with survivors and their representatives, and my officials have come to be aware of the importance of acknowledging the suffering that many survivors have experienced. **The notion of adapting the principles of the Truth and Reconciliation model is something which we can actively explore and which could help appease some of the criticism around the lack of any recommendation in Tom Shaw’s report that there should be a public inquiry and to give those individuals who are unable to seek redress through the courts an alternative means of acknowledgement.**”<sup>356</sup>*

On 12 December 2007, officials prepared a briefing for a cross-ministerial meeting on 18 December 2007. It included:

*“Many survivors make it clear that what they seek is not monetary compensation but acknowledgement through acceptance that they are telling the truth. On this basis, Minister for Public Health has recently asked her officials to begin to explore the use of **a truth and reconciliation model**. The way in which this could operate is not yet clear, but **could have the benefit of bringing parties together without the stress and costs of court action (for those who are not debarred)**. It is likely that, given the time that has elapsed since the incidents, that individual perpetrators will no longer be around to be answerable. But the organisations who employed them will be and may be persuaded to engage in this type of exchange to move on from the adverse publicity that has surrounded them. Great care would need to be taken to ensure that victims understood that the process was instead of court proceedings...It would, therefore, be helpful to agree to piloting of this approach and reviewing the findings at a later date.”<sup>357</sup>*

### **Developing a truth and reconciliation/acknowledgement and accountability forum**

Adam Ingram, the Minister for Children and Early Years, made a statement in the Scottish Parliament on behalf of SG on 7 February 2008.<sup>358</sup> He said that SG accepted the recommendations of the Shaw Review in full.<sup>359</sup> There would be a review of legislation about public records.<sup>360</sup> Residential care workers would be required to register with the Scottish Social Services Council.<sup>361</sup> He said SG accepted the SLC’s recommendation, in its report on prescription and limitation (published in December 2007), that prescribed claims should not be revived. He also said SG did not believe a change in the law to remove the limitation defence in cases involving childhood abuse was the right course of action.<sup>362</sup>

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356 See [SGV-000047665](#). Emphasis added.

357 Briefing, dated 12 December 2007, for cross-ministerial meeting on 18 December 2007, at [SGV-000047654](#). Emphasis added. There appears to be no record of the meeting itself.

358 See [SGV.001.001.7608-7617](#).

359 See [SGV.001.001.7608](#).

360 See [SGV.001.001.7609-7610](#). For SG’s account of the records review, see [SGV-000000056](#), Chapter 8.

361 See [SGV.001.001.7610](#). Following publication of the Shaw Review, SG also commissioned a strategic review of residential childcare, the National Residential Childcare Initiative (“NRCCI”). For information on the work of the NRCCI, including the reports published by them, see [SGV-000000056](#), Chapter 9.

362 See [SGV.001.001.7609](#). On 15 April 2008, the PPC decided to close consideration of the Daly petition: see [SGV-000047666](#).

SG did not, by then, believe a change in the law to enable survivors of institutional child abuse to bring an action for damages regardless of the time which had passed since the abuse would necessarily achieve the desired outcome. Fergus Ewing, Minister for Community Safety, explained the reasons for that in a letter he wrote to the PPC. Essentially, the problem was that SG could not remove judges' discretion and force them to allow cases to proceed. Witnesses might be missing or might have died. Documents might be unavailable. Judges might, therefore, continue to dismiss cases, and survivors would be no nearer to feeling they had achieved some kind of redress. A move towards a Scottish truth and reconciliation forum was a better way forward.<sup>363</sup>

Adam Ingram told MSPs that SG did not consider it necessary to have any further inquiries into historical abuse "*knowing what we know now*".<sup>364</sup> SG's focus would be on the development of a truth and reconciliation forum:

*"[T]he Scottish Government has listened to survivors and their explanations of the importance of society acknowledging the suffering that they have experienced. At the moment, the courts are the only avenue by which survivors can receive such public acknowledgement. Of course, it is essential that abusers are brought to justice, but often that route alone will not meet survivors' needs.*

*I am pleased to inform Parliament that we have been actively scoping the adaptation of the principles of a truth and reconciliation model. We are committed to that. We are considering good practice examples for establishing a forum to give survivors the chance to speak about their experiences and to help them to come to terms with the past. That will provide an invaluable opportunity to establish the facts, learn from the suffering and use the experience to help us protect and provide for children in the future."*<sup>365</sup>

He had in mind a forum where survivors could speak about their experiences and perhaps have their abusers and organisations employing the abusers involved in the process. He was not entirely clear what the benefits would be, if any; he thought there would be "*some sort of therapeutic value*", hoping that there would be "*some sort of recourse*", and "*some sort of admission*" by perpetrators who would realise that they would need to "*make some sort of reparation*".<sup>366</sup> But none of these hopes were supported by a basis in fact:

*"[W]hat had been in my mind was [a forum] where survivors could - there would be some sort of therapeutic value in coming forward and being able to unburden, but in addition to that there was the need for the perpetrators to be faced with the reality of what they had done, and hopefully there would be some sort of recourse and some sort of admission that this is what had happened and they need to make some sort of, not recompense...reparation for the harm they had done."*<sup>367</sup>

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363 Letter from Fergus Ewing to the PPC, 26 March 2008, at [PAR.001.001.0316](#).

364 See [SGV.001.001.7610](#).

365 See [SGV.001.001.7609](#). Adam Ingram said in evidence that a truth and reconciliation model was a model that had appealed to him at the time of this statement as a way of meeting the needs of adult survivors. Such a model was seen by him as a model that would, to some extent, address issues of importance to survivors, such as acknowledgement of past abuse and accountability for that abuse having occurred. See [Transcript, day 205](#): Adam Ingram, at TRN-7-000000006, pp.15-17.

366 [Transcript, day 205](#): Adam Ingram, at TRN-7-000000006, pp.17-18.

367 [Transcript, day 205](#): Adam Ingram, at TRN-7-000000006, pp.17-18.

Whilst a truth and reconciliation model, as used in South Africa, appealed to Adam Ingram, he in fact had no direct knowledge or experience of the model. His knowledge was superficial—it was no more than a matter of him having had regard to what was in the media about the South African experience at the time.<sup>368</sup>

So, by February 2008, SG envisaged perpetrators and providers participating in a Scottish truth and reconciliation forum but no thought appears to have been given as to how it would work or whether the benefits SG hoped would arise from it were in fact likely to do so. Also, the provision of financial compensation or redress was not seen as being part of the model.<sup>369</sup>

### **Decision in September 2009 to pilot a forum with no element of accountability**

SG did not, in the event, put in place a truth and reconciliation forum. Nor did it establish any forum that would provide both acknowledgement and accountability. Instead, on 30 September 2009, following the advice of officials, SG opted for a private listening forum for survivors only, piloted in 2010 as *Time To Be Heard* and rolled out nationally as the National Confidential Forum in 2015.<sup>370</sup>

To understand why any thought of establishing a forum that would afford both acknowledgement and accountability was abandoned by SG in favour of a listening forum for survivors only, it is necessary to consider what happened between Adam Ingram's parliamentary statement on 7 February 2008 and the decision, over 18 months later, on 30 September 2009 to pilot a forum with the sole purpose of listening to survivors, with no element of accountability.

### **Between February 2008 and September 2009**

Before the ministerial decision on 30 September 2009, the NRG had been discussing a forum with two key elements: acknowledgement and accountability.<sup>371</sup>

Between October 2008 and April 2009, SG carried out a lengthy consultation on a proposal to develop an acknowledgement and accountability forum.

A consultation paper on a proposal for an acknowledgement and accountability forum was issued on 10 October 2008.<sup>372</sup>

Between October 2008 and January 2009, 51 responses were received from:

- 11 individuals (two legal, two social work, one mental health, four survivors, two unclear);
- three major non-governmental bodies/commissions;
- 11 social work services;
- four NHS general or community health partnerships;

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368 [Transcript, day 205](#): Adam Ingram, at TRN-7-000000006, p.18.

369 See [SGV.001.001.7611](#).

370 See briefing, dated 24 September 2009, for cross-ministerial meeting on 30 September 2009, at [SGV.001.001.8028](#).

371 A standing item on the agenda for meetings of the NRG between 7 February 2008 and the ministerial meeting on 30 September 2009 was *Truth and Reconciliation* [meetings on 29 February and 25 June 2008] or, as it became known, *Acknowledgement and Accountability* [meetings on 26 September 2008, 5 February 2009, 21 May 2009 and 26 August 2009]. The first discussion of a different model, a private confidential forum for survivors only, was on 26 August 2009, the last meeting of the Group prior to the ministerial meeting on 30 September 2009.

372 See [SGV.001.001.7859](#).

- seven voluntary sector support organisations for adult survivors of childhood sexual abuse, victims of sexual violence, or survivors of historical abuse;
- two advocacy services;
- three general counselling agencies;
- four royal colleges or professional representative bodies;
- four children’s support agencies or bodies; and
- two child protection committees.<sup>373</sup>

The vast majority (40) of the 51 respondents were **not** survivors of childhood abuse.

To ensure as many survivors as possible gave their views, there was an additional consultation exercise between February and April 2009 during which 36 responses were received from survivors.<sup>374</sup>

Survivors who responded to the consultation between February and April 2009 favoured a model that provided both acknowledgement for past institutional abuse and accountability for that abuse. In a separate summary of the consultation responses between October 2008 and January 2009 from a range of organisations and individuals, it was said there was unanimous agreement that it would be a good idea to trial an acknowledgement and accountability forum.

Around March 2009, the SHRC<sup>375</sup> was commissioned by SG to produce an independent *Human Rights Framework* to inform the design and implementation of a proposed acknowledgement and accountability forum.<sup>376</sup>

On 19 May 2009, shortly after the consultation process ended, officials discussed using Quarriers as the focus of a pilot forum.<sup>377</sup> Officials had a further meeting on 3 August 2009 about the proposal for an acknowledgement and accountability forum and discussed what might be included in a draft submission for a cross-ministerial meeting. Officials discussed the relative advantages and disadvantages of three options on 3 August 2009:

- i. a confidential committee model;
- ii. an investigation committee model; and
- iii. a model that included both a confidential committee and an investigative committee.<sup>378</sup>

Officials agreed that the investigation committee model entailed “*high legal costs*” and that this should be highlighted more in the submission to ministers.<sup>379</sup> Officials from Education identified the advantages of using Quarriers for the pilot but said the organisation’s lawyers and insurers might have reservations about Quarriers getting involved.<sup>380</sup>

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373 See [SGV.001.001.7898](#).

374 The 36 responses included 19 survivors abused in care and looked after settings: see [SGV.001.001.7899](#).

375 The Scottish Human Rights Commission had been established, by legislation, in 2006 and became operational in the latter part of 2008.

376 A *Human Rights Framework* was published by the SHRC in February 2010: see [SGV-000024135](#).

377 Note of meeting between officials to discuss an Acknowledgement and Accountability Forum, 19 May 2009, at [SGV-000060024](#).

378 See [SGV-000060026](#).

379 See [SGV-000060026](#).

380 See [SGV-000060026](#).

## **Sue Moody's paper**

A paper—*Update on Acknowledgement and Accountability Forum* was produced by an official, Sue Moody,<sup>381</sup> for the NRG. The paper included:

### **"Background**

2. Tom Shaw's Review...noted that:

*'Many [survivors] would like to have their experiences as a child in a residential establishment heard and recorded – a means of acknowledging and believing what they need to tell.'*

He recommended that:

*'The process of relating to and responding to former residents needs to be respectful, empathetic and constructive; for some, the experience to date has been dismissive and abusive. Listening to them and believing them is essential – after all that's what so many of them were denied as children in residential child care.'*

3. On 7 February 2008 Adam Ingram, on behalf of Scottish Ministers, announced their commitment to scoping a Scottish truth and reconciliation forum to address issues for adults who had suffered any form of childhood abuse whilst in care. Funding of £375,000 a year for three years was set aside for this purpose.

4. This commitment stands alongside other proposals to assist survivors that will be familiar to members of this [National Reference] Group. All these initiatives come under the umbrella of the National Strategy for Adult Survivors of Childhood Sexual Abuse [...]

5. Staff involved in this part of the Strategy implementation include Jeannie Hunter, Policy Officer, and Anne Macdonald and Sarah Nelson, professional advisers. They have been joined by Sue Moody, who is on secondment half time from the Crown Office and Procurator Fiscal Service to assist with the legal, procedural and planning issues arising in relation to the Forum. Jean MacLellan has overall responsibility for the Strategy, including this area of work

### **Progress to date**

#### **Results from the Consultation**

6. With assistance from the [National] Reference Group, a consultation paper seeking views on a proposed forum, to be called the Acknowledgement and Accountability Forum, was circulated in October 2008. Extensive efforts were made to ensure that all the stakeholders had the opportunity to respond and particular attention was paid to reaching survivors whose voices might not otherwise be heard.

7. Respondents strongly supported a forum, although they had mixed views on what its remit should be, and they also wanted an initial pilot to test out the viability of a forum.

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381 Sue Moody joined the Adult Care and Support Division in the Health Department on a part-time basis around May 2009. Before then, she had worked full-time in the Crown Office and Procurator Fiscal Service. See [Transcript, day 207](#): Jean MacLellan, at TRN-7-000000008, p.20.

### **Human Rights Framework**

8. During the consultation process, we were approached by the Scottish Human Rights Commission (SHRC) who offered their expertise in considering how the rights of both survivors and those involved in institutions where abuse had happened could best be protected in any forum. SHRC has been commissioned to provide a framework for the Forum which will ensure that the rights of all parties are represented.

### **Links with Similar Work in other Countries**

9. Officials also visited Ireland to hear about the Irish Commission to Inquire Child Abuse (the Ryan Commission), and have considered other international models in Canada and Australia [...]

### **Setting Up a Pilot Forum**

10. We are currently working towards establishing a Pilot Forum in 2010...We have looked at a variety of different models for a pilot, particularly the Confidential and Investigation Committees that were used by the Ryan Commission to collect evidence and give survivors the chance to describe their experiences. At present the Confidential Committee option seems to offer a way forward that fits with human rights requirements for survivors and alleged abusers but no decisions have been made about the pilot as yet.

### **Managing a Pilot Forum**

11. If Ministers agree that a pilot should be established we are proposing setting up an Advisory Group which will oversee plans for the pilot [...]

### **Pilot Outcomes**

12. These will include a record of the proceedings (with confidentiality a key issue) and an evaluation of the pilot process [...]

[...]

### **Next Steps**

14. A meeting of Ministers in Education, Justice and Health Directorates (and including the views of the Lord Advocate) will be held in September to consider the options for a pilot. It would be helpful for us to be able to give Ministers some feedback from members of this [National Reference] Group about the proposals for a pilot."<sup>382</sup>

## **National Reference Group meeting 26 August 2009**

At a NRG meeting on 26 August 2009 at which Sue Moody was not present, her paper was discussed:

### **"Acknowledgement and Accountability**

Jean MacLellan led discussion on the Acknowledgement and Accountability paper that Sue [Moody] had produced. She intimated that detailed papers on all the options will be presented to Ministers shortly and that the decision for proceeding with a pilot lies with them.

Jean [MacLellan] opened discussion by the group.

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382 SurvivorScotland National Reference Group, Paper 4: Update on Acknowledgement and Accountability Forum, November 2009, at [SGV-000063502](#).

*A lengthy discussion on A&A [Acknowledgement and Accountability] followed and a large number of points were raised [...]*

*Queries on access to justice for survivors was discussed at length. Time bar essentially bars survivors from access to justice and infringes their human rights. In Care Survivors Service Scotland has had several contacts from survivors on this issue.*

*It was highlighted that time bar was an issue for all survivors, not just in care. Also mentioned was that not all survivors wish to go down a legal route, therefore the Forum would be a positive opportunity for them as a restorative justice approach.*

*The role of the SHRC was discussed in light of this issue. SHRC have openly expressed that it is an area they wish to scrutinise.*

*We discussed evaluation of any pilot and it was agreed that this would inevitably provide us with rich details of survivors feelings and experiences in relation to time bar, as well as other areas where they feel justice has been compromised for them.*

*It was agreed that we incorporate Articles (5-8) from the Declaration of Human Rights<sup>383</sup> into the paper to Ministers [...]*

*It was clarified that any Advisory Group set up for A&A would not be a sub-group to the [National] reference group.*

*There was a great deal of discussion on how the journey for survivors giving testimony to the Forum would go [...]*

*Confidentiality/anonymity on alleged abusers was discussed, as was their human rights. There will need to be further discussion on this.*

*The Group asked if we could invite Alan Miller [Chair of the SHRC] or someone from SHRC to our next meeting to give a presentation [...]*

*The role of LA's [local authorities] was discussed in their placement of children, the fact parents very often paid financial contributions towards their care, and how we can, if we go forward, get LA's to take some financial responsibility for support for survivors.*

***It was asked why the confidential model not the investigative model had been chosen as possibly the best route for the Forum. It was explained that in Ireland both models were used. The investigative model was hugely expensive (the vast majority of this expenditure was on legal fees) and it was doubtful whether the process had been in the best interests of the survivors.***

*The findings of the Forum would definitely form the basis of a public record.*

*ACTION: Sue Moody to present on A&A at the next meeting."<sup>384</sup>*

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383 See the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948. Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without discrimination to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.

384 See [SGV-000019655](#). Emphasis added.

This note discloses that the “*confidential model*” rather than the “*investigative model*” were thought to be the “*best route for the Forum*”. It also discloses that the reasons for that conclusion included (i) that in Ireland, the investigative model was “*hugely expensive*” with “*the vast majority*” of that expenditure being on legal fees, and (ii) the “*findings of the Forum would definitely form the basis of a public record.*”

However, as was accepted by Jean MacLellan when she gave evidence, to compare the cost of a much more limited exercise (a confidential forum) with the cost of the wide ranging and detailed exercise that the investigative committee model would involve was not a like for like comparison.<sup>385</sup> Further, the Ryan figures were partly estimates and officials had no basis for assuming that costs incurred and estimated in relation to an inquiry in a different country conducted in accordance with its rules and practices, including the levels of legal fees, could be regarded as indicative of what a Scottish inquiry would cost.

Also, the type of confidential forum being considered was not going to involve its Chair deciding what facts, if any, were established from the evidence gathered from survivors. He was not, unlike as would routinely happen in an inquiry, going to be tasked with deciding what findings could be made based on evidence gathered through active investigations.

### **Advice to ministers in September 2009**

On 24 September 2009, officials provided ministers and the Lord Advocate with a submission on the proposal for an acknowledgement and accountability forum. The submission explained that, at the request of the NRG, the term “*truth and reconciliation*”—used by Adam Ingram in his parliamentary statement on 7 February 2008—had been replaced by “*acknowledgement and accountability*”.<sup>386</sup>

Options for a pilot forum were set out in Annex A of the submission. The options were:

- Option 1: No Action
- Option 2: Confidential Committee Model
- Option 3: Investigation Committee Model
- Option 4: Confidential and Investigation Committees.<sup>387</sup>

Annex A also discussed the advantages and disadvantages of each option. Officials said their preferred option was the second option, a confidential forum where survivors could go to speak about their experiences in care. They would do so in an informal setting, without legal representation. Institutions and alleged abusers would not be participants in the forum. Officials said they were “*seeking to ensure that we keep **within a modest budget** and the proposals are designed accordingly.*”<sup>388</sup>

At various points in the submission, reference was made to the cost, in particular the legal costs, incurred in relation to the work of the Ryan Commission in Ireland.

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385 [Transcript, day 207](#): Jean MacLellan, at TRN-7-000000008, p.103.

386 See [SGV.001.001.8028](#).

387 See [SGV.001.001.8031-8036](#).

388 See [SGV.001.001.8028](#). Emphasis added.

At paragraph 4 of the submission, officials stated: “We are aware that the Irish Commission’s work is likely to cost about 136m Euros, over 60% of which was spent on legal costs.”<sup>389</sup>

At paragraph 3 of Annex A, officials highlighted the cost to the Ryan Commission of legal fees:

*“The Irish Commission recently published its final report...Key issues for the Commission were the hugely escalating costs of their inquiries and the delays in completing the work. The original estimate was 2.5 million euros over two years; the Auditor General in Ireland now estimates the cost as 136 million Euros over at least 9 years, **with the majority of that expenditure on legal fees for appearances before the Investigation Committee**, where there were also significant delays.”<sup>390</sup>*

In Annex A, when discussing Option 2, the Confidential Committee model, officials returned to, and again highlighted, the costs of the Irish Commission at paragraph 9:

*“While survivors can be accompanied [to the Confidential Committee] by a supporter and expenses for that person will be paid survivors are not legally represented at hearings. This reduces considerably the cost of any forum. **In Ireland nearly 60% of the Commission’s costs were to cover legal fees for survivors, institutions, Government departments and the Commission itself but this expenditure was not incurred as part of the Confidential Committee’s work.**”<sup>391</sup>*

In Annex A, when discussing Option 3, the Investigation Committee model, officials again referred to expenditure in Ireland on legal costs at paragraph 15: “All parties are legally represented with costs met as part of the [Investigation] Committee expenses. The Auditor General of Ireland has estimated that 78 million Euros have been spent on legal costs.”<sup>392</sup>

At paragraph 16 of Annex A, the Investigation Committee model was said to offer “some opportunity for survivors to publicly name and shame alleged abusers but this is severely constrained by human rights concerns. There are also significant drawbacks in relation to the cost of legal representation and concomitant delays.”<sup>393</sup>

At paragraphs 19 and 20, officials gave their reasons for choosing Option 2, the Confidential Committee model, as the preferred option:

### **“Conclusion**

*19. It is suggested that Option 2 is the preferred option for the pilot in Scotland. An Investigation Committee model on its own would not provide a therapeutic forum for survivors and would create considerable difficulties in terms of ‘due process’ rights for alleged abusers, with the potential for significant breaches of human rights. Institutions are likely to be hostile to such an approach and survivors might find it overformal and possibly even unsympathetic. It would take time to establish such a committee as legal challenges may well be made to its legitimacy. The cost of an Investigation Committee would undoubtedly be high and it is unlikely that there would be funds available to meet the heavy costs of legal representation.*

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389 See [SGV.001.001.8028](#).

390 See [SGV.001.001.8031](#). Emphasis in original text.

391 See [SGV.001.001.8032-8033](#). Emphasis in original text.

392 See [SGV.001.001.8034](#).

393 See [SGV.001.001.8035](#).

20. A combination of the two models undoubtedly has some appeal but there would continue to be difficulties in relation to 'due process' and the costs are well beyond what is affordable, even for a pilot."<sup>394</sup>

Nowhere in the paper is there, however, an assessment of what would be the costs of a Scottish combination of the two models. Nowhere is there an assessment based on the costs likely to be incurred in **this** jurisdiction. It seems to have been assumed, on no proper basis, that they would be the same as had been incurred and would continue to be incurred in Ireland.<sup>395</sup> Further, money—thanks to the “hidden money tree” of £1.6 billion was in fact available, as John Swinney explained when he gave evidence.<sup>396</sup>

Nor did it present ministers with a workable model of a forum that included an element of accountability so as to allow for the possibility of ministers rejecting their proposals for a pilot forum containing no such element.

In Annex C of the submission, officials provided information to ministers on the consultation process. Ministers were told:

*“1. The consultation process consisted of a range of elements, including conventional written submissions, stakeholder meetings and specific survivor events and interviews to ensure that their voices were heard. Some limited media coverage may also have raised awareness that consultation was taking place.*

*2. In addition, a major conference was held in November 2008 to debate the Shaw Report (one year on from its publication) and the progress of SurvivorScotland. Attendees gave their views on Acknowledgement and Accountability in sessions devoted to progressing this agenda.”<sup>397</sup>*

Twelve questions had been included in the Consultation Paper, dated 10 October 2008.<sup>398</sup> All were included in Annex C. Officials attempted to summarise, in a few brief bullet points, the response to each question. For present purposes, it is sufficient to set out the following questions and officials' summary of the responses elicited:

**“1) Should Scotland trial an acknowledgement and accountability forum?**

- Unanimous agreement
- Need for clear framework, structure and remit
- Must not take resources away from existing supports

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394 See [SGV.001.001.8036](#).

395 In addition, no consideration was given to relevant provisions of the Inquiries Act 2005 containing control mechanisms in relation to the costs of inquiries under that Act, in particular section 17 (the chair's obligation, in making any decision as to the procedure and conduct of an inquiry, to have regard to the need to avoid any unnecessary costs, whether to public funds or to witnesses or others) and sections 39 and 40 (ministerial powers to control inquiry expenses).

396 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, p.26 and p.45.

397 See [SGV.001.001.8042](#).

398 The questions can be found at [SGV.001.001.7859-7869](#).

**2) If so, do you think 'acknowledgement and accountability' is an appropriate title, or would you prefer other terms to be used?**

- Acknowledgement and accountability rejected by vast majority as 'professional' rather than 'user-focused'
- No clear alternative title offered

**3) If you think it should be adopted, which of the following elements would need to be included in such an approach:**

**Establishing a historical record as an act of remembrance.**

- Agreed by the majority
- Clear guidelines necessary to ensure confidentiality

**Identifying for current institutions additional ways of safeguarding children and young people in care.**

- Unanimous agreement
- Learning from the past integral to informing current and future practice
- Ongoing training critical

**Recognition of levels of accountability from the individual abuser through to Scottish society as a whole.**

- Clear split in responses
- Those in favour - important for many parties to recognise they failed in their duty of care to protect children
- Those against - recognition of accountability from such a wide range of parties would be unlikely
- Those against - problem with idea of society as a whole being accountable

**Acknowledgement and apology.**

- Vast majority agreed
- Being believed is critical

**Acceptance of levels of accountability from the individual abuser through to Scottish society as a whole.**

- Mixed response
- Competing elements recognised

**Public recognition of the survivors' experience.**

- Majority in favour
- Minority wary of what this might mean

**Access by survivors to short, medium and long-term therapy and counselling as necessary.**

- Agreed as vital by vast majority
- Needs to extend beyond financial redress

**Access for survivors to education and training to compensate for lost opportunity and to increase the likelihood of gaining employment.**

- *Widespread agreement*

**Enhanced access to financial compensation for survivors**

- *Divided response*
- *Most supported need for financial compensation*
- *Many felt Forum should not take on this responsibility*
- *Need for independent assessment through different procedure (CICA [Criminal Injuries Compensation Authority] suggested as appropriate body by one respondent)<sup>399</sup>*

Question 3 is convoluted and, in part, unnecessary given that it proceeds on the basis that the answer to Question 1 is 'Yes'—that would make redundant any follow-up question asking whether such a forum should include the elements of accountability and acknowledgement. In the event of the first question being answered 'No', it would have been better to have had a question directed at establishing the reasons for that response.

**"6) Available research emphasises the importance of having survivors shaping what forum would look like and what it would do. Would you agree that this is the case and, if so, how best can this be achieved?**

- *General agreement*

[...]

**9) It is also essential to get accurate staff perspectives. How would we set about doing this?**

- *No clear ideas on how to achieve this*
- *Some concerns about potential barriers to staff involvement*
- *Those staff who participated would need appropriate support too*

**10) Focusing on the mechanisms and process of the approach, who should lead the work and how should these individuals be appointed?**

- *Needs to be independent*
- *Needs to be supported by Government*

**11) Testing out the approach in one geographical area may be an appropriate way to begin. What are your views on this?**

- *Vast majority in favour.<sup>400</sup>*

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399 See [SGV.001.001.8042-8043](#).

400 See [SGV.001.001.8044](#).

## **Decision of ministers on 30 September 2009**

At the ministerial meeting on 30 September 2009 ministers agreed unanimously to conduct a pilot of a forum that would give adult survivors of in-care abuse an opportunity to describe their experiences. It is plain from contemporaneous records, including the note of the meeting itself, that officials advice on likely costs—based on the Irish experience—heavily influenced ministers. The proposals contained in the submission to ministers of 24 September 2009 were accepted.<sup>401</sup> Adam Ingram was disappointed that the pilot would not involve care providers and perpetrators.<sup>402</sup> He had doubts about this model but was prepared to agree to the proposal, leaving any deficiencies to be addressed later on.<sup>403</sup>

The note of the meeting records:

### **“Confidential Committee Model**

*There was discussion instigated by Mr Ingram about the strength of the model being proposed and whether a confidential committee would be ambitious enough, particularly since it was proposed that the institution [Quarriers] from which survivors would be drawn should not be given any formal status at the Pilot Forum. Officials noted the difficulties (revealed in the work of the Irish Commission on the Investigation of Child Abuse) associated with institutions’ direct involvement in the process, as the Pilot Forum would then have to consider evidence from both parties. All parties would have to be given legal representation. This could radically alter the nature of the process, making it more difficult to create a therapeutic environment, adding hugely to costs, creating possible delays and taking the focus away from survivors. Institutions might refuse to take part in such a ‘fact-finding’ process. Ms Robison stressed the therapeutic nature of the Pilot Forum. The extensive consultation that had taken place with survivors and the significant contribution made by...the National Reference Group taking forward the SurvivorScotland Strategy were noted.*

### **ACTION**

*It was agreed that consideration should be given to finding ways of involving the pilot institution which would not adversely affect the process, through, for example, restorative justice approaches.*

### **Pilot Forum Name**

*It was agreed that the current name ‘Acknowledgement and Accountability’ was not an accurate representation of what was proposed and was not favoured by those who responded to the Consultation Exercise.*

### **ACTION**

*The Pilot Forum Advisory Group should be asked to consider a more appropriate title, drawing on the views of the consultees.”<sup>404</sup>*

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401 See [SGV.001.001.8059](#).

402 [Transcript, day 205](#): Adam Ingram, at TRN-7-000000006, pp.20-21.

403 [Transcript, day 205](#): Adam Ingram, at TRN-7-000000006, p.26.

404 See [SGV.001.001.8059](#).

### **Shona Robison's involvement**

When this decision was made, the lead minister was Shona Robison, then Minister for Public Health and Sport (the Health Minister), and the lead official was Jean MacLellan, a senior official in Health. However, Ms Robison was, in the period 2007-2009, inexperienced and she relied heavily at that time on experienced officials in Health. On matters relating to adult survivors of past institutional child abuse, she appears to have readily accepted the advice and recommendations of officials. I can find no example of her challenging or questioning such advice and recommendations in, for example, the manner that Cathy Jamieson did in November 2002.

Shona Robison could not recall any ministerial discussion between December 2007 and Adam Ingram's parliamentary statement on 7 February 2008 about whether there should be a public inquiry into past institutional child abuse.<sup>405</sup>

While Ms Robison said that an inquiry was never ruled in or ruled out during that period, it seems clear that the decision taken by SG on 25 September 2003 (to rule out an inquiry) was not revisited, either by officials or ministers. Her own note makes it clear that SG was not looking into establishing a public inquiry.<sup>406</sup> She does now, however, concede (i) that the Irish model offered choice (ii) that it would have achieved the aims of the Daly petition (iii) that the choice of pilot denied survivors an accountability mechanism (other than litigation in the courts) and (iv) that the model chosen for the pilot forum resulted in a negative reaction from survivors at the time that was completely understandable.<sup>407</sup> Whilst she went on to suggest that the pilot forum was in fact part of a jigsaw that would involve many other elements,<sup>408</sup> I do not accept that there was any planned SG jigsaw or that SG appreciated what the jigsaw pieces were that it needed; its approach all along was, rather, best described as piecemeal.

Her recollection was that a forum with an element of accountability would be "*an impediment*" to getting care providers—who had been responsible for running institutions where child abuse had allegedly occurred—involved in a forum of the kind which ministers had in mind in February 2008.<sup>409</sup> It was hoped that they would engage and accept responsibility if there was no element of accountability. But the First Minister had, in December 2004, hoped that his apology would have that effect; it hadn't.<sup>410</sup> In the interim, nothing had changed so far as the attitude of providers was concerned. It seems extraordinary that SG thought in 2009 that a Confidential Committee type forum would be able to do what the First Minister's apology had failed to do. It is surprising that this was the thinking—that care organisations would acknowledge and accept responsibility for past abuse—if the model used to encourage them to do so was a private confidential forum from which they would be excluded and where there were no safeguards for their interests built into its structure. It was quite unrealistic to expect a forum of this type to achieve that.

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405 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, pp.42-43.

406 See [SGV-000047665](#).

407 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, pp.69-70.

408 [Transcript, day 205](#): Shona Robison at TRN-7-000000006, p.70.

409 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, pp.60-62.

410 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, pp.62-64.

The impression given to Shona Robison by officials was that there was broad support among survivors for a listening forum.<sup>411</sup> She has no recollection of being made aware, prior to the decision on 30 September 2009, that survivors on the NRG were angered and disappointed by the choice of pilot forum:

*"If I had been told that the survivors were as - up in arms and were totally against this, I think I would recall that. I don't recall that at all. I was under the impression that, although I knew there were differences of opinion among survivors about what the emphasis should be on, some were in favour of a public inquiry but not all, there were different emphases of what people wanted, but I think if I had been told survivors are totally against this and to a person - or the majority, I think I would have been concerned about that and would obviously have questioned it."<sup>412</sup>*

I accept that she was not told about the reaction of survivors—but she should have been. She accepted, rightly, that the forum chosen for the pilot was a different process to an acknowledgement and accountability type forum.<sup>413</sup>

When asked if she was aware that survivor responses from the consultation exercise between February and April 2009 were saying that most favoured the title *Acknowledgement and Accountability Forum* and most survivors agreed that abusers and organisations that looked after children in institutional care should be held accountable, her response was: *"Not that I recollect as clear as that, no."<sup>414</sup>*

She added:

*"I don't think, as a minister, if I had felt that what we were pursuing didn't have the support of survivors that we would have pursued it in the way that we did...had we [ministers] met more directly with survivors themselves, we might have heard those messages [that survivors wanted acknowledgement and accountability] more directly and clear[ly]."<sup>415</sup>*

She accepted that, had she been told in September 2009 that survivors wanted a model that offered both acknowledgement and accountability, that would have caused ministers to seek a way of delivering such a model.<sup>416</sup>

The ministerial decision on 30 September 2009 to pilot a private confidential forum was taken without consulting the SHRC.<sup>417</sup> Shona Robison accepted that no decision should have been made until the SHRC's report was available.<sup>418</sup> Now, she also accepts that if ministers had waited,

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411 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.84.

412 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, pp.81-82. She said in evidence that she was getting this impression from what she was being told by officials.

413 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.86.

414 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.87. The "second consultation exercise" referred to in that passage is the consultation that took place between February and April 2009 to obtain survivors' views on a proposed acknowledgement and accountability forum.

415 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, pp.89-90.

416 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, pp.91-92.

417 [Written statement of Tom Shaw](#), paragraph 74, at WIT-1-000000355, p.17; [Transcript, day 205](#): read in statement of Tom Shaw, at TRN-7-000000006, p.162; [Written statement of Duncan Wilson](#), paragraph 47, at WIT-1-000000382, p.11.

418 [Written statement of Shona Robison](#), paragraphs 34-36, at WIT-1-000000379, pp.8-9; [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.121.

it would probably have been a broader, better informed discussion than the one that took place on 30 September 2009.<sup>419</sup> Ministers were “*in the dark*” about what the SHRC was going to say at this point.<sup>420</sup> In the event, ministers’ decision was narrowly focused but, as Duncan Wilson of SHRC explained: “*The state cannot just focus narrowly on one aspect such as acknowledgement, whether private or public. It also has to focus on other aspects such as justice, accountability, redress and support. If a state does not do that, it would not be meeting its obligations from a human rights perspective.*”<sup>421</sup>

Shona Robison accepted that, before any decision had been taken by ministers, detailed preparations had already been made by officials in relation to one option only—the option preferred by them.<sup>422</sup> That they had done so is clear from the documentary evidence. For example, Annex E of the submission of 24 September 2009 contained detailed proposals in relation to the preferred model for the pilot forum. There had been informal discussions with Quarriers, in advance of the ministers’ decision, and they had identified a suitable Chair for their preferred forum.<sup>423</sup>

This was an example of a situation which was, according to Shona Robison, not unusual, where officials see the outcome of a ministerial meeting as a foregone conclusion.<sup>424</sup>

### **Jean MacLellan’s involvement**

Jean MacLellan considered that the consultation between October 2008 and April 2009 showed that: “*Most people [i.e. survivors] were looking for acknowledgement*”.<sup>425</sup>

When she was referred to the 36 responses from survivors that were received between February and April 2009 and it was put to her—as is clearly correct—that those responses made plain that survivors wanted accountability **as well as** acknowledgement, her response was to focus on the 51 responses received between October 2008 and January 2009, yet the vast majority of those responses did not come from survivors.<sup>426</sup> She seemed unable to entertain the possibility that she might, from the outset, have proceeded on an erroneous basis.

On whether care providers would in 2008-2009 have been willing to participate in a forum with an element of accountability, she said it was “*well known with ministers and with the team in which I worked that getting care providers on board was going to take a long time.*”<sup>427</sup> Yet, as noted above, the position adopted by providers had never changed and they had given no inkling of being prepared to shift from it simply because there was a private confidential forum for survivors.

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419 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.127.

420 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.103 and p.126.

421 [Written statement of Duncan Wilson](#), paragraph 18, at WIT-1-000000382, p.4.

422 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.104.

423 See [SGV.001.001.8028](#).

424 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.105.

425 [Transcript, day 207](#): Jean MacLellan, at TRN-7-000000008, p.31.

426 [Transcript, day 207](#): Jean MacLellan, at TRN-7-000000008, pp.35-46.

427 [Transcript, day 207](#): Jean MacLellan, at TRN-7-000000008, pp.47-48.

### **Costs, invalid comparison, a hidden money tree, and misconceptions about lawyers**

At the time of the decision on 30 September 2009 to pilot a private confidential forum, Jean MacLellan thought, as did the ministers taking the decision, that the Irish model was directly comparable to what a Scottish inquiry would cost (without any proper examination of the facts) and, without any approach having been made by ministers to the Cabinet Secretary for Finance (then John Swinney) to see if money was available, that it would be unaffordable.<sup>428</sup> Shona Robison herself was “very keen” to avoid money being spent on lawyers: “if the costs were going to end up basically going to two sets of lawyers involved on either side, that was a concern to me, to be honest.”<sup>429</sup> There was, however, no basis in fact for an assumption or apparent belief that money spent on lawyers would inevitably be wasted. Further neither she nor anyone else appear to have had any regard to the benefits that arise from the different interests involved in a public inquiry having legal representation—including the part their lawyers play in ensuring a just and fair process. It was not even as if anyone had ever said that money could be spent on support for survivors **or** on legal costs, but not both—although her thinking and that of others did appear to involve such an assumption.

The anxieties over legal costs also made no allowance for the possibility of the involvement of lawyers representing the providers leading to their clients engaging in exactly the sort of responsible acknowledgement and accountability that was desired, something I have seen happen in this Inquiry on a number of occasions.

She agreed that, at the time of the ministerial decision, she did not know what the SHRC was going to say about the options that were under discussion, including the preferred model.<sup>430</sup>

### **National Reference Group meeting on 25 November 2009**

Tom Shaw was appointed as independent chair of the pilot forum on 12 November 2009.<sup>431</sup>

The NRG met on 25 November 2009. The Group discussed acknowledgement and accountability. The minutes of the meeting record the following:

#### **“4. Acknowledgement and Accountability**

*4.1 Sue Moody advised that Ministerial approval had been given for a pilot forum. She gave an informative presentation...on the arrangements for the forum and the Advisory Group. There was considerable discussion on survivor involvement in the establishment of the forum as survivors were currently being interviewed about their expectations by the Scottish Institute for Residential Child Care.*

*The following points were made:*

- *Survivor views had been sought through the written consultation and through the various outreach workshops.*
- *There would be survivors on the Advisory Group.*

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428 Transcript, day 207: Jean MacLellan, at TRN-7-000000008, pp.51-52.

429 Transcript, day 205: Shona Robison, at TRN-7-000000006, p.68.

430 Transcript, day 207: Jean MacLellan, at TRN-7-000000008, pp.130-131.

431 See SGV-000060025.

- Sue Moody and Anne MacDonald were meeting SIRCC [Scottish Institute for Residential Child Care] to avoid unnecessary duplication.
- There is a need to have a pack of options for people considering attending the pilot forum.
- All of this work is to be survivor centred.
- The importance of working in harmony with the Scottish Human Rights Commission whilst also recognising their independent status.
- How best data could be collected to provide statistics on abuse.
- Procedures would have to be in place to refer persons identified as abusers to the police if they worked with children.
- Requirement to have support for survivors in the event of re-traumatisation.
- Whether the forum should focus on one organisation or several organisations.
- The need to formally evaluate the pilot as it will raise expectations for the future.

Chris Daly expressed his dissatisfaction that the current proposals were about acknowledgement but not about accountability. Jean [MacLellan] explained that the team were looking at how to strengthen this aspect and other team members explained that many of these important points were under active consideration. **Jean MacLellan thanked Sue Moody for her considerable work in taking this forward.**<sup>432</sup>

The pilot forum was given the title *Time To Be Heard*. The forum was restricted to 100 former residents of Quarriers. Hearings of the forum took place during 2010.

### **Time For All To Be Heard**

Chris Daly and Helen Holland submitted a further petition, PE1351, to the PPC in August 2010. This petition called on the Scottish Parliament to urge the SG to establish, for all victims of institutional child abuse, a forum called *Time For All To Be Heard*, incorporating a compensation scheme similar to the scheme established in Ireland.

The petitioners had two principal concerns. The first was the dropping of the accountability element as part of the pilot forum. The second was the absence of consultation before the decision to restrict participation in the pilot confidential forum to 100 former residents at Quarriers.<sup>433</sup>

SG was asked by the PPC to respond to a series of questions from the Committee arising from PE1351.<sup>434</sup>

### **Assumptions about legal processes**

In a letter dated 21 October 2010 on behalf of SG, Jean MacLellan told the PPC that accountability did not form part of the pilot forum *“as it would require full investigation of any allegations and therefore would take longer and be much closer to a legal process.”*<sup>435</sup>

432 See [SGV-000024461](#). Emphasis in original text.

433 Scottish Parliament Public Petition, PE1351, August 2010, at [PAR.001.001.0002](#).

434 See [PAR.001.001.0321](#).

435 See [INQ.001.001.1400](#).

This notion that being closer to a legal process was to be regarded undesirable appears as ‘received wisdom’—without any further examination—throughout the history of the journey of the Daly petition and petition PE1351.

However, there is no evidence of anyone ever asking whether a process that is entirely independent of government, that has a structure, that is flexible, that endows the Chair with a wide discretion regarding procedure and conduct, that can adopt a trauma-informed approach, and that has fairness to all at its heart should be assumed to be a bad thing?

Nor is there any evidence of anyone informing themselves what actually would happen in an inquiry into past child abuse and whether in fact, it need feel like a court process at all?

Had such enquiries been made, the outcome would have been bound to be that the assumptions about the likely impact of lawyer involvement were ill founded as were those about what had to be the nature of a public inquiry, to say nothing of the advantages, including those listed above, that would have been bound to have been identified.

Quarriers was chosen for the pilot because it was “*fairly representative*”, being one of the largest institutions providing residential care for young people, many of whom had been placed there by local authorities from across Scotland. Quarriers had recognised, and apologised for, past abuse.<sup>436</sup> This point did not impress the petitioners. They felt that Quarriers was very different in its administration and systems. Quarriers had a village with cottages and allocated ‘house parents’ to each cottage. There was, they said, no other model like that in Scotland. Most large residential childcare institutions were Victorian in style and far removed from the way Quarriers was run. These were fair points. Jean MacLellan said the pilot forum’s Advisory Group had agreed to prioritise older and ill survivors from Quarriers and it would not have been feasible to widen this to include only older and ill survivors from other organisations as doing that would have been discriminatory.<sup>437</sup> She did not explain the nature of the discrimination she had in mind.

As for financial compensation, she said survivors could make an application to the Criminal Injuries Compensation Scheme. However, the PPC was also advised that applications could not be made to that scheme for pre-August 1964 cases or where there had been a failure to take “*all reasonable steps*” to inform the police or co-operate with any other appropriate body, and applications were time barred two years after any injury.<sup>438</sup>

The PPC considered PE1351 when it met on 21 December 2010. Shona Robison, Adam Ingram and Fergus Ewing gave oral evidence at that meeting.<sup>439</sup> Questions to ministers sought to establish whether the recommendations in the SHRC’s *Human Rights Framework* would be taken forward by SG to secure effective access to justice, remedies and reparation for survivors.<sup>440</sup> Ministers fielded such questions by saying that SG would wait until *Time To Be Heard* was published in early 2011.<sup>441</sup>

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436 See [INQ.001.001.1402](#).

437 See [INQ.001.001.1401](#).

438 The PPC was told that legislation would be required in Scotland to introduce a scheme similar to the financial redress scheme in Ireland: see [INQ.001.001.1401-1402](#).

439 See [INQ.001.001.1269-1284](#).

440 See [INQ.001.001.1273-1274](#).

441 See [INQ.001.001.1274](#).

## Conclusion

The choice of a private confidential forum—a listening forum—avoided any potential clash between the civil and criminal justice system and a forum which included an element of accountability. It was therefore consistent with the SG’s general policy during that period that issues of justice, accountability and redress were matters for the courts.

However, in February 2008, SG had been considering a forum with an element of accountability. By 30 September 2009, that type of forum had been abandoned in favour of a model with no element of accountability. Why?

The short answer is that ministers followed the strong and firm advice of officials. They did so in circumstances where those officials had, in Michael McMahon’s opinion *“controlled the process up to the point of trying to stop it [a public inquiry] from happening.”*<sup>442</sup>

Sadly, Michael McMahon finds that instances of officials seeking to exercise control still happen: *“Too often in my experience, and I am still experiencing it now in the job I have, because I am engaging with civil servants...and being told exactly the same things ‘That is not how we do things, Michael.’”*<sup>443</sup>

Why did officials recommend a model that included no element of accountability?

Between February 2008 and September 2009, when it came to the option of a model incorporating an element of accountability, officials had cooled considerably. There were probably two main reasons for that. First, even before SG consulted on the proposal to develop an acknowledgement and accountability forum, a majority of members on the NRG favoured a private confidential forum and the Chair of that group, Jean MacLellan, favoured such a forum.<sup>444</sup> Secondly, there was a growing realisation that providers might not be willing to participate in a process involving them being expected to accept any responsibility for past institutional child abuse, with officials telling ministers that institutions were likely to be hostile to a fact-finding process and refuse to participate.<sup>445</sup> There were ongoing litigations and they were being vigorously defended by providers.

By May 2009, the model later chosen by ministers for the pilot was identified by officials as their preferred model. It was the least expensive one.<sup>446</sup> Officials continued to describe what had become their preferred model as an acknowledgement and accountability forum. It was not. However, as ministers rightly recognised when opting for the confidential committee model on 30 September 2009, it could not properly be described as an acknowledgement and accountability forum.

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442 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, p.109.

443 [Transcript, day 201](#): Michael McMahon at TRN-7-000000002, p.110.

444 The Group was a large group, only some of whom were survivors. Jean MacLellan chaired the Group. It was clear from her evidence that she favoured such a forum. [Transcript, day 207](#): Jean MacLellan, at TRN-7-000000008, pp.29-30.

445 See [SGV.001.001.8036](#) and [SGV.001.001.8059](#).

446 Note of meeting between officials to discuss the Acknowledgement and Accountability Forum, 19 May 2009, at [SGV-000060024](#). Helen Holland described it as *“a softer option”* than an acknowledgement and accountability forum: [Transcript, day 17](#): Helen Holland, at TRN.001.001.5525.

Officials paid lip service to Adam Ingram's parliamentary statement on 7 February 2008 for some time prior to September 2009 but, in reality, their thinking was moving far from the type of model he had in mind. It is not surprising that Adam Ingram questioned the preferred model proposed by officials when ministers met on 30 September 2009. It is understandable why SG officials incurred the wrath of survivors on the NRG.

The submission of 24 September 2009 was a lengthy submission. It is clear that ministers relied heavily on it when deciding to pilot something very different from an acknowledgement and accountability forum of the kind being discussed by the NRG before September 2009 and, importantly, from what had been consulted on between October 2008 and April 2009.

The summary of responses to the consultation exercise in Annex C of the submission was, in essence, an edited version of the *Summary Account of Acknowledgement and Accountability Consultation*.<sup>447</sup> That Summary Account was itself a summary of 51 responses received by the SG. Annex C does not appear to have drawn upon the *Summary of Additional Survivor Responses to the Consultation: February - April 2009*.<sup>448</sup> Annex C did not set out separately (i) the views of survivors, in particular the views expressed by 36 survivors between February and April 2009, and (ii) the views of other respondents.<sup>449</sup> By failing to do that, the submission created the impression that respondents as a whole, including survivors, were divided on whether the forum should include an element of accountability. Yet that was misleading. That was, manifestly, not correct.

In fact, **most** survivors who responded to the consultation wanted an acknowledgement and accountability forum. **Most** survivors were telling SG they wanted that type of forum. But SG, as it is now acknowledges, did not listen. Those responsible for the preparation of the submission of 24 September 2009 must shoulder significant responsibility for that failure. The position of survivors on the issue of accountability was clear and should have been made clear to ministers in that submission. However, as Michael McMahon observed, there was "a culture in which they [civil servants] control how things move" and that officials "controlled the process up to the point of trying to stop it [a public inquiry] from happening".<sup>450</sup> Officials tried to stop a public inquiry from happening. It did not seem surprising to hear Lord McConnell say that he sometimes worries whether the modernisation of the civil service has ignored some important traditions of professionalism.<sup>451</sup> This must surely involve paying more than lip service to the mantra that officials advise whilst ministers decide?

However, ministers did and do, of course, have a duty to ensure that they fully understand the nature of any issue they are asked to determine, to read the papers thoroughly, and to notice where advice is deficient. There were a number of examples of ministers failing to question what ought to have been questioned such as whether the reliance on the Irish costs as comparable was justifiable, whether the proposals did in fact meet the key aspects of the Daly petition, and whether what was proposed was in accordance with human rights requirements. There were also others.

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447 See [SGV.001.001.7881](#).

448 See [SGV.001.001.7899](#).

449 See [SGV.001.001.8042-8044](#).

450 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, pp.109-110.

451 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.127.

As for the human rights aspect, having commissioned the SHRC to provide a *Human Rights Framework* to inform the design and development of an acknowledgement and accountability forum, it seems extraordinary that officials did not advise ministers to consider awaiting completion of that work or, at the very least, to seek the views of the SHRC on the course of action that was being favoured by officials. And it seems extraordinary that ministers did not themselves notice that they were being asked to decide a matter on which they had sought advice on a crucial aspect from an independent expert body whose views were not yet available.

Further, there was dreadful delay. Lord McConnell was not slow to criticise the part played by officials in causing the inordinate delays in SG's response to the Daly petition: "*Culturally did nobody think at some point that this is becoming a bit of problem here, we are now on our fifth reminder?*"<sup>452</sup> His comments are understandable and were, in the circumstances, well founded.

Ministers were, however, ultimately responsible. That was accepted by senior counsel, on their behalf. Whilst, for example, Lord McConnell was furious in May 2004 when he discovered that nothing had been done to look into or advance the proposal he had made six months earlier that an independent person be appointed, what had he done during that period to check what was happening? Nothing, it seems. Perhaps more fundamentally, the Daly petition was a carefully prepared, articulate and impressive piece of work, based on an ongoing inquiry into institutional abuse of children in care. Had any of the ministers involved actually read the Daly petition for themselves? Had they themselves sought to understand it? No—not on the evidence before me. Rather, they appear to have relied on officials to tell them what it was about.

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452 Transcript, day 204: Lord McConnell, at TRN-7-000000005, p.127.

# 7

## Financial Redress Scheme

In this chapter, I consider financial redress for survivors of institutional child abuse through mechanisms other than the civil justice system. I do so, not because SCAI's ToR require me to consider or make recommendations in relation to a redress scheme, but because the question of whether there was a need for such a scheme and how it might work appear in some ways to have been regarded and treated by officials as though they were either an aspect of the Daly petition or might be enough to satisfy the calls within it.

I can deal briefly with this. Redress including compensation was undoubtedly an important issue for survivors. However, it was not an issue to which SG gave any detailed consideration in the period 2002-2014.

It is important to note that the Daly petition,<sup>453</sup> presented to the PPC in August 2002, did **not** ask SG to establish a compensation scheme for survivors of past institutional child abuse.

However, in 2002 officials decided that a key issue was whether or not SG should set up a compensation scheme for survivors of past institutional abuse. They did so before ministers decided on 25 September 2003 to rule out an inquiry. In the submission of 23 September 2003, officials recommended that the question of whether or not to establish a scheme should be considered not then but when “*the test case*”<sup>454</sup> had been resolved:

*“We have...considered whether the Executive [Scottish Government] should set up a no fault **compensation scheme** for those alleging abuse. There could be argued to be a general moral responsibility for the Executive to meet claims, as victims would have been in the public care system under the general supervision of the Government when they suffered abuse. (The Executive’s strict legal liability is one of the matters to be determined by the Courts in the current civil cases.) This case would be strengthened if existing civil claims prove to be time barred when the test case gets to court next June, leaving some genuine claimants with no recourse to compensation. On the other hand, there are arguments about setting a precedent for Executive compensation schemes in the absence of legal liability, and we would want to establish our possible compensation. A mechanism for testing claims (modelled on Criminal Injuries, for example) would have to be established. We recommend that this issue is considered further when the test case has been resolved.”*<sup>455</sup>

This recommendation was accepted by ministers when they met on 25 September 2003.<sup>456</sup>

Before 2017, the laws of prescription and limitation presented significant barriers to survivors who wished to litigate claims for having been abused as children in care and where these laws

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453 See [PAR.001.001.0001](#).

454 *M v Hendron and Others* 2005 SLT 1122 (Outer House) and 2007 SC 556 (Inner House).

455 See [SGV-000046937](#). Emphasis in original text.

456 See [SGV-000061804](#) and [SGV-000061805](#)

prevented them from doing so, they could not obtain justice, accountability and financial redress anywhere else.

References made to the SLC by SG in 2004 and 2005 did not result in recommendations for changes to these laws that would have the effect of removing such barriers.

The law of prescription, which applied to institutional abuse occurring on or before 26 September 1964, meant financial redress could not be secured through civil litigation. The case of *Kelly v Gilmartin's Executrix*,<sup>457</sup> decided at first instance in May 2002 and on appeal in July 2004, confirmed that claims for monetary compensation for such abuse could not be litigated in the Scottish courts. Nor was the Criminal Injuries Compensation Scheme available to compensate for harm caused by criminal conduct occurring before 1 August 1964.

Reform of the law of limitation was legally possible but did not happen until 2017.<sup>458</sup>

A scheme to provide financial redress was finally legislated for in March 2021.<sup>459</sup> This was 11 years after the presentation of the *Time For All To Be Heard* petition, and 21 years after Jackie Baillie had asked for SG to look into the possibility of changing the law to enable those abused prior to 1964 to receive compensation.<sup>460</sup> An Advance Payments Scheme for older survivors and those who were terminally ill opened on 25 April 2019.

The prescription and limitation problems confronting survivors were apparent long before 2019. The decision in *Kelly* in May 2002 led to MSPs writing letters between September and November 2002 to SG on behalf of constituents affected by it. In 2000 there had been previous correspondence between Jackie Baillie MSP and the Deputy First Minister (Jim Wallace) in which she had asked for a change in the law to remove the barrier the law of prescription posed for pre-1964 claims. Letters from her asking for an update were amongst those sent in 2002. Some of the other 2002 letters called for a change to the law of prescription. Some called for the establishment by SG of a compensation scheme. Ministers were briefed about the *Kelly* decision in October 2002. The possibility of a reference to the SLC was raised in 2002 by officials.<sup>461</sup> But the reference was not made until August 2005.

By 2002, there were ongoing litigations at the instance of individuals who had been in institutional care as children in which they claimed compensation for having been abused as children. Their claims were directed at both SG and other organisations. SG's response was to defend these litigations in their entirety. SG denied it was liable for abuse and also maintained a limitation defence. Other defenders did likewise. Conscious of the existence of relevant litigation against SG, its in-house lawyers, OSSE, were advising as early as 2002 that nothing should be said by SG that could, or might, be interpreted as an acceptance of responsibility for past institutional child abuse.<sup>462</sup>

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457 *Kelly v Gilmartin's Executrix* 2002 SC 602 and *Kelly v Gilmartin's Executrix* 2004 SC 784

458 See [Limitation \(Childhood Abuse\) \(Scotland\) Act 2017 Section 1](#).

459 See [Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021](#).

460 See [SGV-000000056](#), Chapter 15, paragraph 15.3.

461 [SGV-000000056](#), Chapter 15, paragraphs 15.3-15.5.

462 See email exchanges between officials, OSSE and others, 14 November 2002 and 27 September 2004, at [SGV-000047663](#), pp.6-10.

SG's approach throughout the period 2002-2014 was to see whether the law might be changed to remove the barriers preventing survivors achieving justice, accountability and redress by referrals to the SLC. Alternative mechanisms such as a redress scheme were not on its agenda for survivors.

Before May 2007, SG's approach was to let test litigations run their course without what it saw as the complication of other extrajudicial processes, such as a redress scheme. There was no appetite for establishing alternative mechanisms for survivors to receive appropriate financial compensation.

Accordingly, consideration of a redress scheme was deferred to await the outcome of test cases and the review of the law of prescription and limitation by the SLC, and SG gave no detailed consideration to the issue prior to May 2007. When he gave evidence to the PPC on 29 September 2004, Peter Peacock, on being asked what mechanism was available to people who had been abused to bring to account those responsible, responded by saying there was a legal mechanism. People could seek redress through the courts.<sup>463</sup> Whilst the possibility of a compensation scheme was mentioned in the run-up to the debate in the Scottish Parliament on 1 December 2004 in exchanges between officials and ministers, Peter Peacock told officials that he would not require formal advice about it in advance of the debate. He appears to have spoken to the Lord Advocate before doing so.<sup>464</sup>

The SLC reported in December 2007 on limitation and prescribed claims. Initially, the response of SG in 2008 was to focus on developing a truth and reconciliation forum, later renamed an acknowledgement and accountability forum. However, that forum was never intended by SG to include a mechanism through which survivors could seek financial compensation.<sup>465</sup>

What began in early 2008 as a proposal for a forum with elements of acknowledgement and accountability, was then abandoned in 2009 and replaced by a private confidential forum—known as *Time To Be Heard*—with no element of accountability.

There is no indication, despite the decision in *Bowden*<sup>466</sup> in May 2008, that SG gave active consideration to establishing a compensation scheme for survivors of institutional child abuse. Indeed, in August 2008, the Cabinet Secretary for Justice, Kenny MacAskill, publicly stated that the SG had no plans to establish such a scheme.

The *Human Rights Framework* produced by the SHRC in February 2010 included advice in relation to redress:

*“Providing forms of redress or reparation was built into the Human Rights Framework as a component of a human rights compliant response by the state to the historical abuse of children in care, particularly children who were in the care of the state.*

*One of the recommendations in the Human Rights Framework was that the Scottish Government should develop a redress or reparation programme, including different elements.*

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463 See [SGV.001.001.7540-7541](#).

464 See [SGV-000046994](#).

465 See [SGV.001.001.7611](#).

466 *Bowden v Sisters of Nazareth* [2008] UKHL 32.

*Adequate compensation was one of those elements. Due to the operation of time bar and the limitations of the Criminal Injuries Compensation Scheme, there was no adequate compensation route for all survivors of historical child abuse when the SHRC published the Human Rights Framework in February 2010. Remedies have to be real and actually accessible. They cannot be theoretical.*<sup>467</sup>

In early 2011, in response to the *Human Rights Framework*, SG said it intended to conduct a scoping exercise to consider issues surrounding a possible reparation scheme.<sup>468</sup>

However, by the end of 2014, to the regret of many, including Lord McConnell, there were still no plans to establish any such scheme for survivors of historical institutional abuse.<sup>469</sup>

## Conclusion

Litigation against SG heavily influenced its policy responses.<sup>470</sup>

Why?

I am satisfied that the possibility of prejudice to SG's position in ongoing litigations if a non-judicial body had power to determine the veracity of claims involving allegations of past institutional abuse was a major concern. Those concerns also extended to possible prejudice to future prosecutions in relation to historical cases.

When Peter Peacock announced that SG intended to appoint an independent expert to conduct a systemic review on 1 December 2004, he said:

*"I am conscious that a number of current court actions are currently on-going and that we cannot discount the possibility that there will be further criminal proceedings. It is vital that any other process that we undertake...should not interfere with such proceedings."*<sup>471</sup>

When the First Minister gave an apology in the Scottish Parliament on 1 December 2004, he said:

*"Members will be aware that litigations are currently before the courts in which...issues [of abuse of children in residential care] are being examined. Those proceedings will establish, in accordance with the law, where responsibility lies and what should happen as a result. It would be inappropriate for me to say anything that would cut across the work of the courts and that is not my purpose here today."*<sup>472</sup>

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467 Written statement of Duncan Wilson, paragraphs 76-77, at WIT-1-000000382, p.19.

468 Written statement of Duncan Wilson, at WIT-1-000000382, paragraph 78, p.19.

469 Lord McConnell, in an interview with the BBC in 2013, expressed regret that almost 10 years after his apology as First Minister in December 2004, there had been no progress on compensation for victims of past institutional child abuse and he called upon the Scottish Government to "do the right thing". See BBC News, "Regret over Nazareth House abuse compensation." Accessed 5 May 2021.

470 The apology given by the First Minister on 1 December 2004 was carefully worded, on the advice of the Lord Advocate, to avoid acceptance of responsibility for institutional abuse. See email from the Lord Advocate to Jack McConnell, the First Minister, and other ministers and officials, 30 November 2004, at [SGV-000017810](#).

471 See [SGV-000046999](#), p.14.

472 See [SGV-000046999](#), p.1.

The remit of the independent expert, Tom Shaw, did not permit him to investigate, and report on, the facts or circumstances of any individual cases of abuse.<sup>473</sup>

However, there were other significant factors that weighed heavily with SG and caused it to shy away from establishing a financial redress scheme.

In particular, during the period between 2002 and 2014, those responsible for running institutions where abuse occurred—care providers—were seen by SG as the ones who should bear the primary responsibility for providing financial redress to survivors of past institutional child abuse. SG was determined not to let them off the hook. In December 2004, there was real concern within SG, at the highest level, that an apology on behalf of SG or the state might allow that to happen.<sup>474</sup> It is clear that the possibility of care providers escaping responsibility for providing financial redress to survivors and of SG being left to meet the potentially huge cost of redress from public funds, in circumstances where it might not in fact be liable to do so, were real deterrents to the establishment of a compensation scheme both at that time and between then and the announcement of an inquiry in December 2014. That was so despite the clear advice from the SHRC that, to accord with human rights requirements, there required to be a means whereby survivors would be provided with redress and reparation.

For most of the period 2002-2014, save perhaps during the *InterAction* process, SG had no meaningful engagement with the Catholic Church in Scotland, religious orders, other churches, local authorities, and/or the major voluntary care providers regarding the possibility of establishing a compensation scheme for survivors of past institutional child abuse.

Until the decision in *Bowden* in 2008, that is probably best explained by the fact that all those whom survivors sought to have held liable for the abuse, and its harmful consequences, including SG, were vigorously defending the litigations against them. Nobody, including SG, wanted to foot the bill unless compelled by law to do so.

After *Bowden*, many cases were either abandoned or dismissed. Once that happened there was still no meaningful engagement regarding compensation. The most likely explanation is that SG knew there was continuing resistance on the part of the other defenders to financial redress being afforded by them to survivors. From the perspective of erstwhile defenders, having successfully avoided being held liable in court, why would they agree to provide compensation by a different route?

After the SLC published its report on limitation and prescribed claims in December 2007 and the decision in *Bowden* in May 2008, it seems that SG still clung to the hope that changes to the law on limitation might secure effective access to the courts for survivors seeking financial redress. Not, of course, that any changes to the law of limitation could help in relation to claims for pre-1964 abuse. And provision of financial redress was not seen, in February 2008, as being part of a Scottish truth and reconciliation forum.

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473 See [SGV-000047661](#).

474 See [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, p.140.

The Minister for Community Safety, Fergus Ewing, accepted, when he appeared before the PPC in December 2010 to respond to PE1351—which was calling for a compensation scheme—that the legal avenue to redress was more theoretical than real for many victims of historical child abuse.<sup>475</sup>

However, SG’s position remained that it had no plans to remove the limitation defence. Nor did it have plans then, or at any time prior to December 2014, to establish a compensation scheme for those unable to resort to litigation due to prescription or limitation.

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475 Transcript, day 206: Fergus Ewing at TRN-7-000000007, p.96.

# 8

## Support for survivors of institutional child abuse

In 2002, the Daly petition asked for victims of abuse to be afforded “an opportunity to tell of the abuse they suffered to a sympathetic, experienced forum.”<sup>476</sup> That call related to all forms of abuse, not just sexual abuse. SG responded by deciding, on 30 September 2009, to pilot a confidential forum, *Time To Be Heard*, and also, in 2014, by establishing the statutory body, the National Confidential Forum (NCF).

SG’s initial response, however, was not to establish any type of forum but—following the advice of officials—decide on 25 September 2003 to put in place a package of measures of support, including giving access to SG files relating to relevant establishments and improving health and social care services for survivors<sup>477</sup> and, on 1 December 2004, Peter Peacock announced, during the debate on the Daly petition in the Scottish Parliament, that there would be such a package.<sup>478</sup>

Support for adult survivors of childhood **sexual** abuse, **wherever such abuse had occurred**, had been a live issue—being considered by a cross party working group—before the Daly petition was submitted to the PPC in August 2002. The group had been looking into addressing the long-term effects of childhood sexual abuse through a programme of action.<sup>479</sup> It aimed to produce a national strategy.<sup>480</sup>

In 2003, the Minister for Health and Community Care, Malcolm Chisholm, agreed to establish a short life working group to address issues raised in relation to care and support for survivors of childhood sexual abuse. That group reported in July 2004, highlighting the need for improved health and social care services for survivors of childhood sexual abuse (whether they had been in care or not) and making recommendations.<sup>481</sup>

Originally, Peter Peacock, as Minister for Education and Young People, intended to establish a further short life working group to look specifically at what needed to be done to improve support services for meeting the needs of adult survivors of **all** institutional child abuse, whether sexual, physical, emotional or psychological.<sup>482</sup>

However, on 2 February 2005, at a ministerial meeting to discuss how to respond to the recommendations in the report of the short life working group on adult survivors of childhood sexual abuse, it was agreed there should be a co-ordinated response by the various SG departments with responsibility for issues concerning adult survivors of childhood abuse.<sup>483</sup>

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476 See [PAR.001.001.0001](#).

477 Submission from officials to Minister for Education and Young People, 23 September 2003, at [SGV-000046937](#); Note of ministerial meeting, 25 September 2003, at [SGV-000046887](#).

478 See [SGV-000046999](#), pp.11-15.

479 See [SGV-000000056](#), chapter 10, paragraphs 10.2-10.5.

480 See [SGV-000046999](#), pp.29-31.

481 See [SGV-000000056](#), chapter 10, paragraphs 10.8-10.14.

482 See letter dated 30 June 2005 from Minister for Education and Young People to the Convener of the PPC, at [SGV-000046934](#).

483 See note of ministerial meeting on 2 February 2005, at [SGV-000046924](#).

A national strategy, which came to be known as SurvivorScotland, was launched in September 2005. A National Reference Group was established to oversee implementation of the strategy. The strategy was SG's response to the report of the short life working group on adult survivors of childhood sexual abuse. Originally, the strategy was for the benefit only of adult survivors of childhood sexual abuse, wherever such abuse occurred.<sup>484</sup>

Subsequently, in 2007, a sub-group of the NRG was formed to look specifically at services for survivors of all in-care abuse. The sub-group's remit was to produce proposals for a national framework for support services for survivors of in-care abuse by February 2008.<sup>485</sup> Following a report of that sub-group in February 2008, SG launched the In Care Survivors Service Scotland in November 2008, one year after the publication of the *Historical Abuse Systemic Review* (the Shaw Review).<sup>486</sup>

Work done before September 2009 on developing a truth and reconciliation forum—subsequently renamed an acknowledgement and accountability forum—was regarded at the time by SG as part of the SurvivorScotland agenda, a Health Department initiative.<sup>487</sup>

## Conclusion

The provision of support was the major response of SG between 2002 and 2014 to the issue of historical institutional child abuse.

SG regarded survivors' needs as, primarily, health needs. The measures determined on by SG were health measures. After the First Minister's apology on 1 December 2004, the survivors' agenda was driven by one SG department—Health.

However, this was inappropriately paternalistic. The Daly petition did not focus on the need for services, whether for counselling and support or other services. SG failed to grasp the paramount importance that survivors attached to a quite different need, fundamentally their need for justice, including those aspects of justice that were the need to afford them the opportunity for public acknowledgement of their experiences as children in care, the need to hold to account those who did not listen to them when they were children, to hold to account those who abused them, and those who failed to prevent that abuse.<sup>488</sup>

The Daly petition was a call for justice for those who had been abused in care as children. Justice is not a service and those who call for it where it has been denied are not customers of a service that may or may not be available depending on the choices of the administration of the day. That key point was missed.

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484 See briefing for cross-ministerial meeting on 18 December 2007, at [SGV-000047654](#). There appears to be no record of the meeting itself.

485 See briefing for cross-ministerial meeting on 18 December 2007, at [SGV-000047654](#). See also [Written statement of David Whelan](#), paragraphs 35-36, at [WIT.001.001.1598](#).

486 See SG conference proceedings, *Tom Shaw Historic Abuse Systemic Review: One Year On, SurvivorScotland: Progress and Potential*, 25 November 2008, at [SGV.001.001.7904](#).

487 See letter from Minister for Community Safety to PPC, 26 March 2008, at [PAR.001.001.0318](#).

488 See [Transcript, day 17](#): Helen Holland, at [TRN.001.001.5521-5528](#).



## Decision-making process

### **The workings of SG in the period 2002-2014: the decision-making process and the impact and influence of advice from officials and legal advisers**

This case study has included an examination of how significant decisions in relation to addressing past institutional child abuse were made and has shown that there were marked deficiencies in the process. It has shown that there were many informal conversations that were not recorded or minuted and that a great deal of “*extremely cautious*” legal advice was involved in relation to addressing past institutional child abuse.<sup>489</sup> It was likely that “*sidebar discussions*” between officials and ministers occurred throughout in relation to decision-making.<sup>490</sup>

#### ***The power of officials, and duties of trust***

Officials and legal advisers were able to wield significant power. However, officials and advisers hold such power in trust. To be true to that trust, they must be impartial at all times when advising, careful to provide ministers with all relevant information and to ensure that the information they provide is accurate. Officials and advisers cannot assume, when preparing a submission, that ministers are familiar with the subject matter or that they will recall all relevant prior activity they may have had in relation to it. And, where the subject matter affects a number of portfolio interests, giving rise to a cross-ministerial meeting, it cannot be assumed that all ministers will necessarily see it as their job to keep a close watch on what is happening; the norm seems to be that they do not do so. Officials and advisers have and, in this case, certainly had the power, through giving advice and making recommendations, to influence key ministerial decisions. They did so.

#### ***Busy ministers***

Busy ministers relied heavily on the submissions of officials and advice from SG’s lawyers when they made important decisions affecting the interests of adult survivors of institutional child abuse. In a remarkably frank observation, Fergus Ewing said: “*it might seem to the lay person odd that ministers don’t know things. But...we are doing a huge number of different things all the time...we are just extremely busy as ministers.*”<sup>491</sup> Where the subject matter of a meeting involves a number of portfolio interests and therefore, a number of ministers, those on the periphery are likely to leave the lead minister to drive the agenda, generally assuming that all is well and there are no problems they need to think about: “*I hope this doesn’t sound callous...it is simply that in government you have quite a lot on your own plate to deal with and you generally don’t, and are not well advised to, start telling your colleagues....how to do their job unless you are absolutely certain that you know there is a serious flaw*”.<sup>492</sup>

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489 Transcript, day 202: Peter Peacock, at TRN-7-000000003, p.28 and p.31.

490 Transcript, day 206: Fergus Ewing, at TRN-7-000000007, p.118.

491 Transcript, day 206: Fergus Ewing, at TRN-7-000000007, pp.102-103.

492 Transcript, day 206: Fergus Ewing, at TRN-7-000000007, p.113.

### **Ministers lacking experience**

A further weakness, in this case, was that some ministers were inexperienced or lacked previous experience relating to the matters under consideration. An example was Shona Robison who, had she been more experienced, might well have asked questions she did not ask about the proposal to pilot a confidential forum at the meeting on 30 September 2009.<sup>493</sup> In such circumstances, it is and was inevitable that ministers depended on officials, hoping that their advice was guiding them towards the right decision.

### **Advice and decisions**

Ministers can, of course, decide not to follow advice tendered to them but throughout the course of events examined in this case study, with very few exceptions, they did not do so. There were just one or two notable exceptions namely when Cathy Jamieson rejected officials' initial advice about how to respond to the PPC in 2002, and when Peter Peacock and Jack McConnell disagreed with the advice from OSSE regarding the proposal to appoint a *rappporteur* in December 2004. When the response of officials to ministerial disagreement is as slow as they experienced in relation to the *rappporteur* proposal, they are hardly likely to rush to repeat the experience or feel that it will be acted on if they have an idea that differs from what officials are proposing. That is no excuse but it is a real risk that needs to be recognised.

Jack McConnell was angry when he *"found out in May 2004 that on top of the delays that had already happened, virtually no work had been done on the proposal I had put into the mix in December, I think those who were in my office that day probably remember the explosion. To say I was not happy would be a serious understatement."*<sup>494</sup>

Officials and legal advisers did not make decisions. But they wielded enormous influence, particularly the legal advisers. From the outset of the period between 2002 and 2014, OSSE were advising against saying or doing anything that might be interpreted as an acceptance by SG of responsibility for past institutional child abuse. Advice to that effect was tendered *"on numerous occasions"*.<sup>495</sup> Also, from the outset, officials advised against holding a public inquiry; that advice was followed by ministers on 25 September 2003 and not departed from until 11 years later, in 2014.

The advice given, both by officials and by SG's legal advisers, heavily influenced, and to a great extent explains, the response of SG between 2002 and 2014 to issues arising from past institutional child abuse and the inordinate delays that occurred. So does the fact that the advice was, for the most part, not challenged by ministers.

On 25 September 2003, ministers rejected the calls for an inquiry (set out in the Daly petition) on the basis of advice from officials that they should do so. The First Minister's apology on 1 December 2004 is another obvious example of SG following officials' advice. Jack McConnell explained to Michael McMahon (who, in addition to being convener of the PPC was also the First Minister's parliamentary aide) *"It's not as straightforward as it looks, Michael. You know where my sympathies lie in this, but we have taken advice, we are being told what we can say and what we*

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493 [Transcript, day 205](#): Shona Robison, at TRN-7-000000006, p.72.

494 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, p.113.

495 [Transcript, day 201](#): Cathy Jamieson, at TRN-7-000000002, pp.138-139.

can't say".<sup>496</sup> The advice on the apology was driven by anxiety about litigation risks. It is worth noting, though, that Lord Hope pointed out in *Bowden v Sisters of Nazareth*: "It must be stressed, however, that this was a purely political initiative. It has no legal significance whatsoever."<sup>497</sup> And, although the Minister for Education and Young People, Peter Peacock, did not agree with the advice from OSSE in relation to the proposal to appoint a *rapporteur*, the remit given to the independent expert, Tom Shaw, accommodated the concerns expressed by OSSE, the Crown Agent and the Lord Advocate.

## Conclusion

Lord McConnell said:

*"[T]he judgements that we were making on the apology, the inquiry, on compensation, on handling the court case, and so on, at all times those judgements were being made on the basis of trying to do the right thing by the survivors and by those who might go into care in the future and need any protection.*

[...]

*[T]he core decision-making on this at every stage by ministers was about trying to do the right thing".<sup>498</sup>*

Although it was ministers who, between 2002 and 2014, made the decisions on issues arising from past institutional child abuse, I have no doubt that they were in many respects influenced and felt constrained by the advice they were getting from officials and from SG's legal advisers. I can accept that they wanted "to do the right thing by survivors". But the fact remains that, by following that advice, by not questioning it when they should have done, key aims of the Daly petition were resisted by ministers—for far too long—as not being the right thing to do. I can only echo the sentiment expressed by Michael McMahon: "I am sorry, but when you've got people who have suffered abuse when they were supposed to be protected and cared for, I really don't care what your structures and your culture tells you, you should be pursuing it. You need to listen to those people and you need to give those people the outcome that they expect."<sup>499</sup>

SG now acknowledges that its handling of matters was not always appropriate between 2002 and 2014.<sup>500</sup> SG certainly failed survivors in important respects and it is, in all the circumstances, absolutely right that it does so.

First, the needs of survivors were not fully met.

Second, there was an absence of engagement with survivors prior to the decision on 25 September 2003 to rule out an inquiry and a truth and reconciliation commission.

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496 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, p.93.

497 See *Bowden v Sisters of Nazareth* (2008) UKHL 32.

498 [Transcript, day 204](#): Lord McConnell, at TRN-7-000000005, pp.62-64.

499 [Transcript, day 201](#): Michael McMahon, at TRN-7-000000002, pp.109-110.

500 On behalf of SG, the current Deputy First Minister, John Swinney, accepted that handling of issues raised by survivors was not always appropriate between 2002 and 2014. See [Transcript, day 208](#): John Swinney, at TRN-7-000000009, pp.59-61.

Third, when engagement did take place, survivors were not properly listened to on many occasions. These were the people who had directly experienced institutional childhood abuse and they knew what they were talking about, but their views were not given the weight they merited.

Fourth, submissions given to ministers by officials were inadequate and, in some respects, misleading.

Some examples can be given:

- Advice, in submissions between 14 November 2002 and 29 September 2004, failed to address the call for an apology.
- Key submissions on 23 September 2003 (when an inquiry was ruled out) and 24 September 2009 (when ministers decided to pilot a private confidential forum, rather than an acknowledgement and accountability forum) were deficient in important respects.
- The submission of 23 September 2003 did not clearly say or convey to ministers what officials had intended to say and convey. Given the importance of the decision facing ministers, it ought to have done.
- The submission of 23 September 2003 contained inaccurate information in important respects.
- In the submission of 24 September 2009, regarding the advice on the potential cost of an acknowledgement and accountability forum was superficial and officials resorted to the liberal use of off-putting headline figures for the potential costs of a forum with an element of accountability—figures for which there was no sound evidential basis.
- The submission of 24 September 2009 failed to address the value to survivors of a forum that would cover not only acknowledgement but also accountability.
- Information in that submission about the consultation process failed to separate out the views of survivors and the views of other respondents so as to show that survivors who participated in the process overwhelmingly favoured a forum that would include accountability.
- SHRC had not reported in response to SG having commissioned them to advise on a *Human Rights Framework* and officials did not draw that to the attention of ministers, giving that fact the weight and prominence it required; instead, they invited ministers to agree to their preferred model for a pilot forum when neither they nor ministers had the benefit of SHRC's report or knew the views of SHRC on the model they were recommending to ministers.

Fifth, in the period between 2002 and 2007, delays occurred that should never have happened.

Due to oversight, there was a lengthy delay in 2004 before officials provided advice to ministers on the option put on the table by the First Minister in December 2003. That oversight should have been noticed much earlier. This contributed to an inexcusable delay on the part of SG in responding to the PPC between 2002 and 2004.

Some of the delays in responding to the PPC were attributable to poor, or poorly functioning, systems within SG:

- correspondence sent by the PPC to Health should have reached the appropriate department, Education, much quicker than in fact happened.

- once there, appropriate systems should have been in place to ensure responses to outstanding correspondence from the PPC were prepared in good time for meeting what were entirely reasonable deadlines set by the PPC.
- following the Scottish parliamentary election in May 2003, the new Minister for Education and Young People, Peter Peacock, should have been made aware of the outstanding correspondence from the PPC long before late August 2003.

The realisation that a government that aspires to be just needs to be a government of the people, by the people and for the people can probably be traced back to John Wycliffe's prologue to his translation of the Bible into English, in 1384. 600 or so years later, the idea remains as valid now as it was then. The first step towards achieving that goal must always be to listen to the people, to do so respectfully and to seek to understand. However, SG failed to listen to survivors for many years. Eventually, this inquiry was established and their needs are being addressed. But there is no room for complacency.

Historically, children in care in Scotland were frequently abused and treated badly in residential care. Many suffered sexual, physical and emotional abuse. As adults, survivors of abuse sought to bring to the attention of the state their terrible experiences and those of others like them. In 2002, the Daly petition set out clearly what was required. For far too long their voices were not listened to, not heard, they were treated as if their views did not matter and as if they were not worth listening to, just as when they were abused in care.

# 10 Engagement with survivors

During Phase I, the Inquiry heard clear, credible and reliable evidence from Chris Daly, Helen Holland and David Whelan about how, at times, survivors were treated by SG. It was profoundly disturbing.

In its report for this case study SG has included a section headed *“The relationship between survivors and the Scottish Government”*. Paragraph 1.6 refers to evidence of Helen Holland, David Whelan and Chris Daly that was provided to the Inquiry:

*“Helen Holland*

*Survivors are sick to the back teeth of the Government treating them as if they [have] all got mental health problems.*

*You will always get a lack of trust with survivors in relation to anything that is to do with the government...*

*There is a question if civil servants are providing all of the accurate information to Ministers. There is also a question why certain survivor groups meet independently and if this is strategic.*

*We get a phone call before the announcement is going to be made. I just find that really disrespectful to engage in that way...*

*If you are representing the government or the Scottish Executive, surely you are there to listen to the concerns of the people you are engaging with...it was almost as if the decision has been made and these meetings were taking place so that the government could stand up and say ‘we have engaged with survivors’. I think that has been used on more than one occasion.*

*What I mean by that [that is, abuse should be seen as a psychological injury and not a mental health issue] is the way that survivors have been dealt with over the years – it hurts to say this – but one of the meetings I was at – and it was a government meeting – at the time there were more service providers and stakeholders than [there] were survivors and I asked the question, ‘Why is it that there aren’t so many survivors here?’. The response I got back was, ‘Well, we can’t have the room full of nutters’. That to me spoke volumes because that said to me that we were always going to be seen by government as people with mental health issues, people who were aggressive, people who couldn’t engage, when the reality is from any number of survivors I have spoken to, whether they can engage at a simple level or whether they can engage at a more professional level, every single one of them is able to engage because they are able to speak about their own experience and that is the most important thing.*

David Whelan

*We were the bad guys at one point. We were left out of the processes. We were not invited into the processes. We kept knocking at the door to be included in the processes...What I will say is I think some of the civil servants have been selective over the years and I actually think they haven't helped the processes move forward faster or in a more progressive way than they should have done.*

*There has been a mistrust built up...when people go into processes and we are told certain things and we buy into these things...and something happens and there is an impact on trust, it just makes people untrusting of this process*

Christopher Daly

*Q. The comment that you have recorded in the statement is that: 'There's Chris Daly, what a waste of space.' A. Yes, that's what was said. Q. That was the confusion. Did you respond to that at the time or did you just let it slide? A. I ignored that. Yes."<sup>501</sup>*

SG's response is at paragraphs 1.7 and 1.8:

*"The Scottish Government fully accepts that its engagement with these survivors and, through them, with the groups they represent:*

- *was not always as it should have been,*
- *on too many occasions fell far short of what they were entitled to expect, and*
- *led to hurt and mistrust.*

*That should not have happened and the Scottish Ministers are extremely sorry that it did."<sup>502</sup>*

In his oral evidence, the current Deputy First Minister, John Swinney, apologised on behalf of SG for past failings and deficiencies in engagement and treatment of survivors.<sup>503</sup> He added:

*"I have read testimony from survivors of some of the ways in which they have been spoken to or spoken about by representatives of Government and I find it almost unreadable because it is disrespectful, it's contemptuous, and people should never be spoken to - anybody shouldn't be spoken to like that, least of all people who have had the experiences that survivors have had."<sup>504</sup>*

These concessions were well made. All people, whatever their status or background, are entitled at all times to be heard properly, and with respect, by public representatives, as he recognised.<sup>505</sup> Also, he accepted that, in the case of officials who are to have engagement with survivors, it is vitally important to choose such officials carefully. Those selected may need specialist training.<sup>506</sup>

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501 [SGV-000000056](#), Chapter 1, paragraph 1.6.

502 See [SGV-000000056](#), Chapter 1, paragraphs 1.7-1.8.

503 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, p.54.

504 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, pp.42-43.

505 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, p.43.

506 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, pp.51-52.

He indicated that he now chairs a national steering group on trauma training with the objective of creating a trauma-informed workforce. That development is not specifically a response to the issue of engagement with survivors of childhood abuse—although I cannot help but think the discovery of that shameful chapter in the history of governmental attitudes to survivors of abuse in care has played a part in the establishment of this initiative.<sup>507</sup> I welcome it.

## Conclusion

SG now acknowledges there was a lack of engagement with survivors in the early part of the period 2002-2014. In particular, there was no engagement with survivors before the decision on 25 September 2003 to rule out both an inquiry and a truth and reconciliation commission.

SG also acknowledges that when engagement did take place, survivors were often not properly listened to nor were their views given sufficient weight.

There was clearly a failure on the part of SG to understand properly why survivors continued to press for a public inquiry. Their needs were largely seen as health needs despite the fact that the three calls the Daly petition made to the Scottish Parliament were for an inquiry to be established, for an unreserved apology and for the religious orders to be urged to apologise unreservedly—these were calls for justice, not for health needs to be met. What acknowledgement meant to survivors was not properly understood:

- the need to make the public at large aware of what had happened to them as children in care;
- the need to make the public aware of, and through such awareness acknowledge, the extent of institutional child abuse;
- the need to tell the public about the lasting impact on the lives of the many children who suffered abuse;
- the need to tell the public about the opportunities that survivors lost or were denied, both as children and as adults;
- the need, through a public forum, to change negative public perceptions and attitudes towards those who, through no fault or choice of their own, were placed in care as children, in particular the commonly held assumption that children were in care because they were bad children;<sup>508</sup>
- the need to have institutions publicly acknowledge what happened to children in their care and accept responsibility for the harmful consequences of past institutional abuse; and
- the need, through an independent inquiry, to obtain public acknowledgement that the state, having had responsibilities towards children in the public care system, failed the many children who were victims of institutional abuse.<sup>509</sup>

SG further acknowledges there were times when the conduct of those engaging with survivors on its behalf was unacceptable and indefensible.

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507 [Transcript, day 208](#): John Swinney, at TRN-7-000000009, p.53.

508 [Transcript, day 17](#): Helen Holland, at TRN.001.001.5521 and 5568.

509 [Transcript, day 17](#): Helen Holland, at TRN.001.001.5521-5523.

Between 2002 and 2014, those meeting with survivors of childhood abuse on behalf of SG were engaging with people who, whatever their background and circumstances, were entitled to be treated with dignity and respect—not as an underclass. That did not, however, always happen.

As Helen Holland put it: *"[I]t wasn't the children's fault. The children were innocent. The children were placed [in care] there through no choice of their own. No child chooses what family they are born into or what circumstances they are born into."*<sup>510</sup>

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510 Transcript, day 17: Helen Holland, at TRN.001.001.5521.

## Appendix A - Terms of Reference

### Introduction

The overall aim and purpose of this Inquiry is to raise public awareness of the abuse of children in care, particularly during the period covered by SCAI. It will provide an opportunity for public acknowledgement of the suffering of those children and a forum for validation of their experience and testimony.

The Inquiry will do this by fulfilling its Terms of Reference which are set out below.

1. To investigate the nature and extent of abuse of children whilst in care in Scotland, during the relevant time frame.
2. To consider the extent to which institutions and bodies with legal responsibility for the care of children failed in their duty to protect children in care in Scotland (or children whose care was arranged in Scotland) from abuse, regardless of where that abuse occurred, and in particular to identify any systemic failures in fulfilling that duty.
3. To create a national public record and commentary on abuse of children in care in Scotland during the relevant time frame.
4. To examine how abuse affected and still affects these victims in the long term, and how in turn it affects their families.
5. The Inquiry is to cover that period which is within living memory of any person who suffered such abuse, up until such date as the Chair may determine, and in any event not beyond 17 December 2014.
6. To consider the extent to which failures by state or non-state institutions (including the courts) to protect children in care in Scotland from abuse have been addressed by changes to practice, policy or legislation, up until such date as the Chair may determine.
7. To consider whether further changes in practice, policy or legislation are necessary in order to protect children in care in Scotland from such abuse in future.
8. To report to the Scottish Ministers on the above matters, and to make recommendations, as soon as reasonably practicable.

## Definitions

'Child' means a person under the age of 18.

For the purpose of this Inquiry, children in care includes children in institutional residential care such as children's homes (including residential care provided by faith based groups); secure care units including List D schools; Borstals; Young Offenders' Institutions; places provided for Boarded Out children in the Highlands and Islands; state, private and independent Boarding Schools, including state funded school hostels; healthcare establishments providing long term care; and any similar establishments intended to provide children with long term residential care. The term also includes children in foster care.

The term does not include: children living with their natural families; children living with members of their natural families, children living with adoptive families, children using sports and leisure clubs or attending faith based organisations on a day to day basis; hospitals and similar treatment centres attended on a short term basis; nursery and day-care; short term respite care for vulnerable children; schools, whether public or private, which did not have boarding facilities; police cells and similar holding centres which were intended to provide care temporarily or for the short term; or 16 and 17 year old children in the armed forces and accommodated by the relevant service.

Abuse for the purpose of this Inquiry is to be taken to mean primarily physical abuse and sexual abuse, with associated psychological and emotional abuse. The Inquiry will be entitled to consider other forms of abuse at its discretion, including medical experimentation, spiritual abuse, unacceptable practices (such as deprivation of contact with siblings) and neglect, but these matters do not require to be examined individually or in isolation.

