



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 17 May 2017  
SP Paper 143  
12th Report, 2017 (Session 5)

## **Justice Committee Comataidh a' Cheartais**

# **Apologies (Scotland) Act 2016 (Excepted Proceedings) Regulations 2017**



**Published in Scotland by the Scottish Parliamentary Corporate Body.**

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# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



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# Introduction

1. At its meeting on the 9 May 2017 the Justice Committee considered the following draft instrument:

[Apologies \(Scotland\) Act 2016 \(Excepted Proceedings\) Regulations 2017 \[draft\]](#)

2. The instrument was laid before Parliament on 18 April 2017 and referred to the Justice Committee as lead committee. The instrument is subject to the affirmative procedure.
3. The instrument is made under section 2(4) of the Apologies (Scotland) Act 2016 ("the 2016 Act").
4. The policy intention of the 2016 Act was to encourage the use of apologies and a change in social and cultural attitudes towards apologising. <sup>1</sup> The 2016 Act provides that, in certain civil proceedings, an apology is (a) not admissible as evidence of anything relevant to the determination of liability, and (b) cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made.
5. An apology is defined in section 3 of the 2016 Act as "any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing recurrence".
6. The 2016 Act applies to all civil proceedings except those listed in section 2. The instrument makes two changes to this section. The first change involves an amendment to the existing exception for inquiries in section 2(1)(a), applying that exception to all inquiries held under section 1 of the Inquiries Act 2005 ("the 2005 Act"), or converted under section 15 of the 2005 Act, regardless of their origin.
7. The second change involves the addition of an exception for proceedings held by 10 professional regulatory bodies that have as their main purpose the determination of whether or not a person meets the body's requirements for registration and/or meets the standards or requirements for practising a profession regulated by that body. This exception would apply to:
  - the General Chiropractic Council,
  - the General Dental Council,
  - the General Medical Council,
  - the General Optical Council,
  - the General Osteopathic Council,
  - the General Pharmaceutical Council,
  - the Health and Care Professions Council,

- the Nursing and Midwifery Council,
- the Scottish Social Services Council, and
- the General Teaching Council for Scotland.

## Background to the instrument

8. In its Stage 1 Report on the Apologies (Scotland) Bill, the previous Justice Committee stated: "The Committee notes the concerns of health professionals regarding the interaction between the Bill and their UK-wide professional standards. We further note the member's view that this issue can be considered at Stage 2".<sup>2</sup> The policy note accompanying the draft instrument notes that "the work on this exception was not complete at Stage 2 nor Stage 3 of the Bill".
9. During the Stage 3 debate on the Bill, the then Minister for Community Safety and Legal Affairs, Paul Wheelhouse stated:

” I mentioned earlier concerns that were raised at stage 1 regarding the effect of the bill on regulators of health professionals such as the General Medical Council and the Nursing and Midwifery Council. The committee heard from those regulators about the potential unintended consequences of preventing apologies being used as evidence in their fitness-to-practise proceedings, which could impact on their ability to assess the risk that a doctor or nurse might pose to the public in future.

My officials have been working closely with the NMC and the GMC to find a solution to their concerns. It is clear from those discussions that an exception for civil proceedings undertaken by health professional regulatory bodies is needed. However, more work is still required to establish exactly what form such an exception should take. I would therefore like to take this opportunity to state my intention to use the powers of the Scottish ministers as outlined in section 2(3) of the bill to add an exception for proceedings held by health professional regulators once that additional work has been concluded.

Source: [Official Report, 19 January 2016, col. 17.](#)

# Scrutiny of the draft instrument

## Delegated Powers and Law Reform Committee consideration

10. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 25 April 2017 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

## Justice Committee consideration

### Written evidence received

11. The Committee received written submissions from the General Medical Council (GMC), the Nursing Midwifery Council (NMC), the General Teaching Council for Scotland, the Scottish Social Service Council and the General Dental Council (Annex A). These submissions set out the reasons why the respective regulatory bodies consider that their proceedings should be exempt from the application of the 2016 Act. For example, the submission from the General Medical Council argues that an exception would "protect patients' recourse to the professional regulator, and our ability to make fair and informed judgements about a doctor's fitness to practise, in case of any concerns about apparent non-compliance with the professional duty".
12. The submission from the General Teaching Council for Scotland (GTCS) states that "whilst we recognise that an apology does not necessarily mean that a teacher is admitting the facts (i.e.) liability, we think that the terms of the apology and the relevant context may have a bearing on a determination of the facts and will always be relevant to making a determination on fitness to teach." The GTCS also points to the practical difficulties which may arise in relation to its proceedings if the 2016 Act applied. Similar points are made in the submission by the Scottish Social Services Council (SSSC).
13. The Committee also received a written submission from Former Boys and Girls Abused in Quarriers Homes (FBGA) (Annex A), which argues against the inclusion of the GTCS and the SSSC in the list of excepted bodies in the instrument. The submission highlights that no mention of the GTCS or SSSC was made when the then Minister for Community Safety and Legal Affairs, Paul Wheelhouse, undertook to bring forward an exception for health regulators at Stage 3. FBGA argues that including the GTCS and SSSC could deny survivors of sexual, physical and emotional abuse "the closure an apology could provide" and undermines "the very principles and intended purpose" of the 2016 Act. It goes on to say that the exemptions of GTCS and SSSC "would create classes of discrimination whereby some survivors may receive an apology but others do not".

## Evidence session with Minister for Community Safety and Legal Affairs

14. The Justice Committee considered the instrument at its meeting of [9 May 2017](#) where it took evidence from Annabelle Ewing, Minister for Community Safety and Legal Affairs, and Elinor Owe, Civil Law Policy Manager, Scottish Government.
15. In her opening statement, the Minister explained that 2016 Act excepts inquiries that Scottish Ministers cause, or jointly cause, to be held under the Inquiries Act



2005, but does not except inquiries that are held in Scotland solely at the insistence of UK Ministers. The Minister told the Committee that although such inquiries are likely to be rare, the amendment to the exception to cover these inquiries would provide consistency. In response to a question on whether the UK Government had expressed a view on this exception, the Minister stated that the proposal had "received no opposition from the UK Government".<sup>3</sup> There were no further questions from the Committee on this aspect of the instrument.

16. On the second exception in the instrument, which adds an exemption for 10 regulatory bodies, the Minister told the Committee that the 2016 Act could have "negative unintended consequences" for the fitness-to-practise proceedings of those bodies. In particular, she argued that the 2016 Act "would impact on their ability to establish facts and to make risk assessments".<sup>4</sup> She went on to say:

” With regard to the regulators’ procedures, an apology can provide an important piece of the full evidential picture—not just the terms of the apology and any undertaking that was made, but the circumstances of the case. An apology can be used as evidence of the level of insight into wrongdoing that the professional had, which, in turn, can be an important part of an assessment of the risk that they may pose to the public in future.

Source: Justice Committee 09 May 2017 [Draft], The Minister for Community Safety and Legal Affairs (Annabelle Ewing), contrib. 5<sup>5</sup>

17. During the evidence session, the Committee raised a number of concerns about the exception for regulatory bodies from the 2016 Act. In particular, the Committee questioned the inclusion of the GTCS and SSSC in the list of regulators to be excepted. The Committee asked why these regulators had been included, when the then Minister's commitment at Stage 3 of the Apologies (Scotland) Bill had only referred to an exception for health regulators. Ms Ewing responded that during work to scope out the drafting of the exception discussions were held that extended beyond the GMC and NMC. She stated that the instrument today was a result of "those 10 regulatory bodies making it clear that they share concern that the application of the 2016 Act would impact negatively, by way of unintended consequences, on their fitness-to-practise processes and regulatory proceedings".<sup>6</sup>

18. The Minister later accepted that the commitment made at Stage 3 had related only to health regulators but again reiterated that the GTCS and SSSC had been added as they "shared the same concerns". She stated:

” It is fair to say, as the Convener has, that the reference at that time was specifically to health professional regulators, such as the GMC and the Nursing and Midwifery Council. However, in subsequent discussions that officials were required to carry out in the interests of due diligence and the exercise of good governance, it became quite clear that the two additional non-health professional regulatory bodies shared exactly the same concerns with regard to the nature of their proceedings and the role that an apology could or could not play in those proceedings. They were concerned that, if they were not also excepted, it would impinge on their ability to police their profession and ensure that the public are protected.

Source: Justice Committee 09 May 2017 [Draft], Annabelle Ewing, contrib. 34<sup>7</sup>

19. The Committee nonetheless raised concerns that this same argument - that the 2016 Act would negatively impact on fitness-to-practise proceedings - could be put forward by every regulatory body. The Minister noted that a number of other bodies had not sought an exception to the 2016 Act including the Law Society of Scotland, the Faculty of Advocates, the Institute of Chartered Accountants of Scotland, the Institute and Faculty of Actuaries, the Chartered Banker Professional Standards Board and the Civil Aviation Authority.
20. The Committee asked whether any of these bodies had explained why they were not seeking an exception. Elinor Owe from the Scottish Government told the Committee: "the Law Society of Scotland said that apologies do not feature in its proceedings: apologies are not useful evidence in its proceedings"<sup>8</sup>. The Committee also asked whether any regulators had suggested they might adapt their proceedings in light of the 2016 Act. The Committee noted that it would have been helpful to know whether regulators had reviewed their processes. The Minister undertook to contact the regulators to ask for this information.
21. The Minister also told the Committee that she could not rule out other organisations coming forward to seek an exception. She said that she did not expect there to be "any great clamour".<sup>9</sup> Nonetheless, the Committee raised concerns that if all bodies that might be affected by the 2016 Act (because they use apologies as part of their proceedings) seek an exception, this could undermine the purpose of the Act. It noted that there may be a perception that bodies are trying to opt-out of the application of measures already approved by Parliament in passing the 2016 Act.
22. The Committee also questioned whether the same rationale for excepting health regulators did indeed apply to the GTCS and the SSSC. In particular, it was suggested that during the passage of the Apologies (Scotland) Bill, the exception for health regulators had been seen as necessary to avoid conflict with the "duty of candour".
23. The Minister told the Committee that the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 ("the Health Act 2016") had introduced an organisational duty of candour and that there was ongoing discussion about that during the passage of the Apologies (Scotland) Bill. An exception for that organisational duty of candour was included in the 2016 Act (section 2(2)). The Minister said this exception was "not deemed sufficient" and that is why there were on-going discussions about adding an exception for regulatory proceedings. She went on to say that the eight health bodies covered by the instrument "are not being excepted on the basis of the duty of candour".<sup>10</sup>
24. However, the Committee notes that the submissions from the GMC and NMC specifically refer to the duty of candour as a reason for exempting their proceedings from the application of the 2016 Act. The NMC, for example, notes that harm to a patient could occur which would not meet the threshold for the organisational duty of candour in the Health Act 2016 but meets the threshold for a nurse or midwife to be bound to follow their professional duty of candour. It argues, therefore, that "this creates a slight conflict between the organisational duty in the Health Act 2016 and the professional duty which could have implications for the regulation of nurses and midwives". It goes on to say that "a similar rationale for the exception for apologies made under the organisational duty applies to excepting professional regulatory proceedings".

25. During the evidence session, the Minister was asked to give an example as to how the GTCS and the SSSC would be negatively affected by the provisions of the 2016 Act. The Minister referred the Committee to the written submissions of the GTCS and the SSSC.
26. The Minister was also asked whether there had been any discussion between the Scottish Government and the regulators listed in the instrument, particularly the GTCS and the SSSC, as to whether they could adapt their proceedings in light of the 2016 Act. The Minister responded that she was not sure it was for the Government to tell the regulatory bodies to change their procedures and this discussion had not been part of the Government's "due diligence obligations" in preparing the instrument.<sup>11</sup> Nonetheless, the Committee suggested that there may have been other ways to address the issues raised by the regulators rather than excepting them from the 2016 Act.
27. The Committee also asked the Minister to respond to the concerns raised by the FBGA in its written submission. The Committee noted the importance that survivors had placed on the 2016 Act. It questioned whether the instrument would disadvantage survivors seeking an apology for childhood abuse. The Minister said that the instrument did not prevent institutions from apologising, and that it only related to individuals who are members of the listed professional bodies and the fitness-to-practise proceedings that could be brought against them. The Committee, however, suggested that the instrument could discourage a person giving an apology on behalf of someone else, if that apology could then be used to their detriment.
28. The Minister was asked whether the Scottish Human Rights Commission (SHRC) had any views on the instrument, given its central involvement in the InterAction Action Plan for victims of historic abuse of children in care. A key element of that plan was removing barriers to effective apologies.<sup>12</sup> The Minister told the Committee that she had raised a number of issues, including the instrument, at a recent meeting with the SHRC and that it "made no comment".<sup>9</sup> The Committee, however, considered that this was an issue it would follow-up with the SHRC directly, in order to better understand the implications, if any, of the instrument for survivors seeking an apology.
29. After the conclusion of the evidence session on the instrument, the Minister moved the motion in her own name: S5M-05334—That the Justice Committee recommends that the Apologies (Scotland) Act 2016 (Excepted Proceedings) Regulations 2017 [draft] be approved.
30. After debate, the motion was agreed to (by division: For 7, Against 4, Abstentions 0).<sup>i</sup>
31. The Justice Committee recommends to the Parliament that it approve the draft instrument. A majority of the Committee are satisfied that it is appropriate for the

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<sup>i</sup> Margaret Mitchell MSP, Mary Fee MSP, Oliver Mundell MSP and Douglas Ross MSP voted against the motion.

10 regulators listed in the instrument to be excepted from the application of the Apologies (Scotland) Act 2016 in respect of their fitness-to-practise proceedings.

32. The Committee notes that the commitment given by the then Minister for Community Safety and Legal Affairs during the Stage 3 debate on the Apologies (Scotland) Bill to bring forward an exception referred only to health regulators. A minority of the Committee notes that excepting further regulatory bodies as provided for by this instrument could undermine the policy intent of the Apologies (Scotland) Act 2016, which has been approved by Parliament.
33. The Committee has asked the Scottish Government to provide further information on whether and, if so, how other regulators intend to adapt their proceedings in light of the Apologies (Scotland) Act 2016. The Committee has also agreed to write to the Scottish Human Rights Commission to seek its views on the instrument.

# Annex A - Written submissions

[Former Boys and Girls Abused in Quarriers Homes](#)

[General Dental Council](#)

[General Medical Council](#)

[General Teaching Council for Scotland](#)

[Nursing and Midwifery Council](#)

[Scottish Social Services Council](#)

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