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Tuesday 23 May 2017

Dear Margaret Mitchell MSP,

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

Thank you for your letter of 12 May requesting the Commission's input into consideration of the above draft instrument and apologies for the delay in responding to you on this important issue.

Our primary concern relates to the participation of survivors in considering these exemptions. In keeping with the spirit and principles of the Scottish Historic Child Abuse Interaction and Action Plan, changes to apology law, particularly those that have the potential to reduce access to apologies, should be considered by survivors and carried out with their understanding and involvement. It is of concern to us that the Former Boys and Girls Abused in Quarriers Homes do not seem to have been involved to this degree. It is evident from their written submission that the draft instrument raises important issues of trust. We consider that these proposals should have been brought before the Historic Child Abuse Action Plan Review Group which would have been ideally placed to canvas the issues. The Action Plan Review Group includes representation from survivors, survivor support organisations, service providers, SHRC, the Scottish Government, CELCIS and Social Work Scotland. The Group monitors the implementation of the Historic Child Abuse InterAction Action Plan.

In terms of the draft instrument itself, it raises a number of factors which we consider require to be carefully balanced and we therefore find it useful to return to the principles of the Human Rights Framework for Justice and Remedies for Historic Child Abuse (the

SHRC Framework)¹ and the Action Plan on Justice for Victims of Historic Abuse of Children in Care.

The Action Plan identified two overarching outcomes – Acknowledgement of historic abuse of children in care and effective apologies; and Accountability, including access to justice. It agreed to a full consideration of the merits of an apology law, “carefully thought through in order to ensure that it is meaningful and effective, benefiting the survivor, increasing public awareness and improving future practice”². The question of exemptions concerns each of these factors and must be considered in this context of all of the constituent elements of the Action Plan.

In order to be meaningful and effective, the Apologies (Scotland) Act 2016 should encourage the giving of apologies as far as possible. The principle of the Act, particularly as understood by survivors, is to facilitate the widest possible access to apology. Preventing apologies from having evidential consequences insofar as possible for those who give them would work to this end. As you are well aware the Act primarily serves to remove the risk of civil liability and the consequent barrier of insurers dissuading apologies. It is recognised, however, that some consequences may still occur, in particular, the prospect of criminal liability. This is important in order to ensure that perpetrators of abuse are prosecuted, to fulfil requirements of accountability. The exemption of the GTC and SSSC (and the designated health regulatory bodies) raises the additional prospect of professional regulatory consequences for individuals. From the debate, two effects of such an exemption appear to us to be of particular importance.

Firstly, it seems likely that the potential for professional proceedings to examine an apology would act as a disincentive to the giving of apologies by individuals. The Committee debate identified that the type of apologies this might affect, in particular, are those that suggest that an individual may have failed in their duty of care, even where they themselves have not committed a criminal act. The SHRC Framework originally envisioned the development of legislation to facilitate apologies by institutions³ and we take the point that there is no disincentive to institutions apologising (as opposed to individuals). It does, however, significantly reduce the scope of those likely to offer

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http://www.scottishhumanrights.com/media/1285/justicehistoricabusewordhrcframeworkjustice_remedies.doc

² SHRC InterAction on Historic Abuse of Children in Care - Action Plan on Justice for Victims of Historic Abuse of Children in Care, p.7

³ The SHRC Framework, p.43

apologies and, importantly, appears to conflict with the expectations of at least those survivors who have made representations to the Committee.

Secondly, however, it is important to balance the need for acknowledgement and apology against the need to prevent repetition. As outlined in the SHRC Framework, it is the State's responsibility to exercise due diligence to prevent and protect individuals from ill-treatment and to adequately and effectively investigate where reasonable grounds exist⁴. SSSC and GTC regulatory proceedings have an important role to play by assessing the risk presented by those they regulate, which they have pointed out is a delicate exercise. The SHRC Framework identified that guarantees of non-repetition should be part of an effective reparations programme⁵. The Action Plan also envisaged that "implementation [...] will further a process of constructive accountability and continual improvement – learning from what went wrong in the past to improve standards of child care and accountability in the present and for the future." Exemptions could therefore serve to ensure the Act improves future practice by allowing all relevant factors to be taken into account in assessing whether action needs to be taken in relation to regulated professionals.

It may be that regulatory proceedings are viewed as akin to criminal proceedings in that there is a strong public protection element of such proceedings. This would suggest that relevant information disclosed in the context of an apology should be allowed to be taken into account, albeit not as an admission of liability and weighed against other relevant factors, such as an indication of insight. We do question, however, the extent to which it is necessary or essential for the regulatory bodies to be able to consider apologies in order to perform their function effectively. It does seem to us significant that a number of other regulatory bodies do not consider that they require an exemption. While only the reasons of the Law Society are available, we would agree with their assessment that an apology is not a reliable indicator of wrongdoing, particularly as defined by section 3 of the Act.

Given the move away from the principles of the Act and the outstanding question of necessity, we do not believe the case has been fully made that exempting GTC and SSSC is the only option which would allow them to fulfil their role. We suggest two alternative options are considered before resorting to exemptions:

- GTC and SSSC should consider ways in which their processes could be adjusted to allow them to work within the Apologies (Scotland) Act 2016, without

⁴ *ibid*, p.23

⁵ *ibid*, p.42

- exemption. If this is not possible, explanation should be given by those bodies as to why their regulatory processes differ from those of bodies who have not requested exemption.
- The impact on GTC and SSSC processes should be monitored to assess whether not providing an exemption has a detrimental impact on their ability to carry out their role. Again, it is not clear that this will be the case, given the position of other regulatory bodies.

Additionally, we note that the Committee did not take issue with the inclusion of health regulatory bodies being exempted, largely on the basis that this was necessary to avoid conflict with the duty of candour. However, as the Minister pointed out, there is a separate exemption dealing with the duty of candour already at s.2(2) of the Act. The draft instrument therefore appears, as confirmed by the Minister, to be aimed solely at addressing conflict with the procedures of the ten regulatory bodies identified. We accept that a commitment was made by the previous Minister to exempting health regulatory bodies and that the same rationale is being applied to SSSC and GTC. Given that the duty of candour has been dealt with separately, the arguments appear to be essentially the same for any regulatory body.

We wish to reiterate the point that any changes with the potential to impact on survivors should only be made with their full participation. We consider this necessary to ensure the Act is meaningful and effective and benefits the survivor, as originally intended. We recommend that any future changes adhere to this principle.

We hope that this brief analysis is helpful in setting the debate in the context of the wider Action Plan, its principles and agreed outcomes.

Yours Sincerely



Judith Robertson
Chair, Scottish Human Rights Commission