

Justice Committee

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

Written submission from the Nursing and Midwifery Council

Summary

1. This briefing sets out our desire for our proceedings to be excepted from the application of the Apologies (Scotland) Act 2016 (the Act).
2. We regulate nurses and midwives across the UK. As of 31 March 2016, there were around 68,000 nurses and midwives registered with an address in Scotland. The vast majority of these work in Scotland though a small number may work in other parts of the UK.
3. We are concerned that the Act, without an exception, would prevent our regulatory proceedings (including fitness to practise panels held in Scotland) relying on evidence that is currently admitted to:
 - Prove the factual part of a regulatory proceeding; and
 - Decide whether a registrant is currently impaired.
4. Other regulatory proceedings that may be impacted by this Act, without an exception, include appeals about a health professional's registration.
5. The consequence of a lack of exception would mean that we would be restricted in our ability to protect the public and uphold public confidence in the professions we regulate. In addition, it will create legal uncertainty in our proceedings given the often subjective nature in which apologies can be considered.

About the Nursing and Midwifery Council

6. We are the independent nursing and midwifery regulator for England, Wales, Scotland and Northern Ireland, established by the UK Parliament under the Nursing and Midwifery Order 2001.
7. Our role is to protect the public. This includes promoting and maintaining proper professional standards and conduct for members of the nursing and midwifery profession, and having clear and transparent processes to investigate nurses and midwives who fall short of our standards.

Professional standards, the Code and the professional duty of candour

8. We have a legal duty to set professional standards for registered nurses and midwives. In particular, we set the [Code](#), professional standards of practice and behaviour for nurses and midwives. The Code sets out four key values and principles which are to prioritise people, practise effectively, preserve safety and promote professionalism and trust.

The professional duty of candour

9. In particular, we expect that nurses and midwives are open and candid with service users about all aspects of care and treatment, including when any mistakes or harm have taken place. Nurses and midwives must:
 - act immediately to put right the situation if someone has suffered actual harm for any reason or an incident has happened which had the potential for harm
 - explain fully and promptly what has happened, including the likely effects, and apologise to the person affected and, where appropriate, their advocate, family or carers, and
 - document all these events formally and take further action (escalate) if appropriate so they can be dealt with quickly.
10. This is known as the professional duty of candour. Together with the General Medical Council, we have published [guidance on the professional duty](#) for doctors, nurses and midwives.

The role of fitness to practise

11. We describe fitness to practise as a person's suitability to be on the register without restriction. Being fit to practise requires nurses and midwives to have the skills, knowledge, health and character to do their job safely and effectively, and help maintain public confidence in the nursing and midwifery professions.
12. We investigate if a concern is raised that a registered nurse or midwife does not meet the professional standards that we set. Only we can restrict the ability of a registered nurse or midwife to maintain their registration (and therefore practise). During 2015–2016, 419 concerns were raised about nurses or midwives registered in Scotland.
13. After an investigation, if we are satisfied that there is sufficient evidence of a failure to meet standards, we have a variety of powers to limit that registered nurse or midwife's ability to practise.
14. We hold hearings to consider regulatory concerns and determine whether the registered nurse or midwife's fitness to practise is impaired, and ultimately decide whether a restriction on their practise is appropriate. The hearings are heard by an independent panel with appropriate legal support.

The role of apologies in proceedings

15. Apologies may be used in our proceedings regarding an individual's fitness to practise or registration. Below we set out the role of apologies in fitness to practise hearings which is where we believe uncertainty about the use of apologies could have the greatest impact on our regulatory work.
16. In a hearing, it is our role to demonstrate to the panel that the fitness to practise of an individual is impaired. This requires us to provide evidence that a situation

that gave rise to potential impairment took place. In proving the facts of a case, we may rely on a statement which could be argued to fall within the broad definition of an apology, as defined in section 3 of the Act, as evidence that something took place.

17. At a subsequent part of a panel's proceedings, a panel would consider whether a nurse or midwife had any insight into their breach of professional standards. An apology (or lack of) and the way in which it is given and presented, can be used as evidence of insight – and this may be used to the individual's detriment or benefit.
18. The level of insight that a nurse or midwife has is often key to determining whether they may represent a risk to patient safety, or public confidence in their profession. Insight includes recognising what went wrong, accepting their role and responsibilities at the time, appreciating what could and should have been done differently, and understanding how to act differently in the future.
19. We may also rely on insight (or lack thereof) as part of the investigatory process when deciding whether a nurse or midwife should be referred to a panel.

Why the exception is needed

20. If the Scotland (Apologies) Act 2016 is not amended then we consider that there will be significant legal uncertainty around the use of apologies in our regulatory proceedings.
21. If panels cannot hear evidence of an apology, then we may be severely restricted in terms of the evidence that panels can hear.
22. In addition, we anticipate that there may be times when it is subjective whether an apology is used to an individual's detriment or benefit which may give rise to legal uncertainty.
23. We believe that this will have a negative impact on our ability to fulfil our statutory duties to protect the public and uphold public confidence in nursing and midwifery.

The duty of candour procedure in the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016

24. The Act excepts apologies made in accordance with the organisational duty of candour procedure set out in Part 2 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (the Health Act 2016).
25. A further exception is needed to cover apologies for the purposes of our proceedings. It is entirely possible that harm to a patient could occur that does not meet the threshold in subsection 21(4) of the Health Act 2016, but meets the threshold for a nurse or midwife to be bound to follow their professional duty of candour.

26. 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 and consequently patient safety and public confidence.
27. We believe that a similar rationale for the exception for apologies made under the organisational duty applies to excepting professional regulatory proceedings. The exception should be consistently applied across both types of proceedings.

**Statement on health professional regulation exception to the Apologies
(Scotland) Act 2016**

1. This is a joint statement from health professional regulators setting out our desire for our proceedings to be excepted from the application of the Apologies (Scotland) Act 2016 (the Act). The health professional regulators endorsing this statement are the General Chiropractic Council, the General Medical Council, the General Optical Council, the General Osteopathic Council, the Health and Care Professions Council and the Nursing and Midwifery Council.
2. We regulate health professionals and have a common statutory overarching objective to protect the public. Our role includes setting standards of education, training, conduct and performance for the professions we regulate, maintaining a register of those health professionals who meet those standards and are allowed to practise in the UK; and investigating fitness to practise concerns raised about health professionals who fall short of our standards. Some professional regulators also have processes known as revalidation or continuing fitness to practise which are aimed at ensuring that health professionals continue to maintain their skills, knowledge and experience.
3. We are each in agreement that there is a need for an exception for our proceedings in order for us to continue to meet our common statutory objective to protect the public.
4. The GMC and NMC provide examples of how they use apologies in their standalone briefings.
5. Each of the regulators is content that the Scottish Government's proposed language for the exception is merited and would serve the purpose of excluding our proceedings from the Act.