

Justice Committee

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

Written submission from the Scottish Social Services Council

This submission is from the Scottish Social Services Council (SSSC). We are the regulator for the social services workforce in Scotland. Our work means the people of Scotland can count on social services being provided by a trusted, skilled and confident workforce. We protect the public by registering social service workers, setting standards for their practice, conduct, training and education and by supporting their professional development. Where people fall below the standards of practice and conduct we can investigate and take action.

We:

- publish the national codes of practice for people working in social services and their employers
- register people working in social services and make sure they adhere to our codes of practice
- promote and regulate the learning and development of the social service workforce
- are the national lead for workforce development and planning for social services in Scotland.

The Apologies (Scotland) Act 2016

We welcome the intention of the Act. In our Decisions Guidance for Fitness to Practise Panels and SSSC staff we set out the importance of insight, regret and apology.¹ We have previously highlighted the implications of the Act for our work as the professional regulator of social service workers in Scotland. We made the case for making an exception for the SSSC as the Act may restrict our ability to protect the public. We welcome the proposal to provide the SSSC and other regulators with an appropriate exception.

This briefing paper outlines why the exception is required when the Act only restricts the inadmissibility of apologies to determinations of liability.

Our proceedings

We operate a model of regulation whereby we investigate whether a social service worker's fitness to practise may be impaired. When temporary action is needed to protect the public or maintain public confidence in the profession we may suspend a social service worker's right to work, or restrict their practice. A range of final sanctions are available to us if it is established that a worker's fitness to practise is impaired, including removal from our register. Sanctions can be imposed with a social service worker's consent. If a social service worker does not consent to a sanction we will refer the case to be heard by a panel. A worker can appeal our decision. The statutory right of appeal is to the Sheriff Court.

¹ SSSC (2016) Decisions Guidance for Fitness to Practise Panels and SSSC staff

Our proceedings are civil proceedings within the scope of the Act.

Temporary orders

In the most serious of cases we can take interim measures to protect the public while we investigate the matter fully. We can temporarily suspend or restrict a worker's practise where we consider there to be a real risk to members of the public, the public interest or the worker themselves.² In light of acute concerns in such a case, it is well established in law that the facts at temporary order stage only need to be established on a prima facie basis.³

While acknowledging that an apology does not necessarily indicate a worker is admitting liability, it may be an important piece of evidence in performing the delicate risk management exercise needed before imposing a temporary order. Preventing a panel from considering a) the fact an apology was made and b) the terms of that apology could prevent temporary orders being imposed in the most serious of cases we deal with.

Final sanctions

At the conclusion of our investigation a decision will be made as to whether any final sanction is required. Our model of regulation involves a panel considering the facts of a case. Our final hearing is divided into 3 stages:

1. a consideration of the factual matters (the 'liability' issue, in this context)
2. whether the workers fitness to practise is currently impaired
3. what sanction, if any, should be imposed.

As acknowledged above, an apology by a worker does not necessarily mean that the worker is admitting liability. However the terms of the apology and the circumstances around which it is made may be relevant to the factual consideration. We consider that the probative value of an apology, often made near the time of the incident, should be admissible and be capable of being explored in a hearing. This process assists panels to reach a determination on facts.

A worker may apologise near the time of the incident but then deny any wrongdoing when it comes to regulatory action. An inability to explore the fact an apology was made at Stage 1 may potentially result in a panel being unable to find charges proven. This would prejudice public protection as we would be unable to take action to remove unsuitable workers from our register. It may also require that in order to prove a charge we have to call more witnesses to give evidence with the resultant impact on witnesses and employers in terms of shift time and lengthen our formal panel hearing process. Our primary submission is that it is therefore crucial that apologies are admissible when issues of liability are considered.

Our secondary submission is around practical difficulties if an exception is not granted. Without an exception, we acknowledge that the Act aims to only make an

² SSSC (2016) Decisions Guidance for Fitness to Practise Panels and SSSC staff, p17

³ R (George) v General Medical Council [2003] EWHC 1124 amongst others.

apology inadmissible in relation to the determination of liability. This would mean that while we would be prevented from exploring the probative value of an apology at Stage 1 the apology could be brought forward at Stage 2 and 3 when the panel considers mitigation in favour of the worker. We do not consider that this would operate effectively in practise. Witnesses, including the worker, at stage 1 may speak to the apology when being asked about liability. Without the exception, they would need to be interrupted as any mention of the apology would be inadmissible.

In acting fairly, we would want the information about the apology to be received by the panel as it is relevant to the panel's decision making at stage 2 and 3. The insight, apology and remorse of a worker is likely to affect the outcome for them favourably. This could lead to having to recall witnesses or for the worker to give further evidence at a later date after the factual stage. Where possible all relevant evidence should be brought out at one sitting:

- Giving evidence is a stressful experience. Having to recall witnesses can cause additional stress.
- It can cause additional expense to the public purse and delay to our proceedings when the evidence is more naturally obtained when the witness is taking about the factual chronology.
- We currently have no power to compel witnesses to attend and recalling witnesses at a later date leads to a risk that they will not attend and the panel would not have the benefit of hearing evidence about the worker's apology.

As mentioned earlier in this document, we highlight the importance of a worker making an apology when something goes wrong. This is an important part of a worker showing they have learned from what went wrong and helps show that the worker has insight. We believe that a panel should remove social service workers who persistently fail to show a lack of insight into the seriousness of their misconduct. It may substantially prejudice the worker if there were practical difficulties in a panel being able to take a worker's apology into account. It is also worth noting a potentially perverse situation where a worker denies any wrongdoing, we are prevented at Stage 1 from exploring the fact they apologised but are still able to prove the charges without this evidence. The worker then goes on to rely on the fact they made an apology at Stage 2 and 3 as evidence they have shown insight and remorse for wrongdoing that they have denied. Accordingly, an exception is required to considerations of liability.

Possible amendment

We note that the General Medical Council and Nursing and Midwifery Council raise similar issues during the development of the Act. We are of the view that the simplest way to amend the Act and to address our concerns is to include an exception at clause 2(1) which refers to proceedings of the Scottish Social Services Council.

Scottish Social Services Council
January 2017