



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

17th Meeting, 2017 (Session 5)

Tuesday 9 May 2017

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.
2. **Subordinate legislation:** The Committee will take evidence on the Apologies (Scotland) Act 2016 (Excepted Proceedings) Regulations 2017 [draft] from—  
  
Annabelle Ewing, Minister for Community Safety and Legal Affairs, Elinor Owe, Civil Law Policy Manager, and Catriona Marshall, Directorate for Legal Services, Scottish Government.
3. **Subordinate legislation:** Annabelle Ewing (Minister for Community Safety and Legal Affairs) to move—  
  
S5M-05334—That the Justice Committee recommends that the Apologies (Scotland) Act 2016 (Excepted Proceedings) Regulations 2017 [draft] be approved.
4. **Domestic Abuse (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—  
  
Philip Lamont, Bill Team Leader, Kevin Philpott, Bill Team, Patrick Down, Bill Team, and Catherine Scott, Directorate for Legal Services, Scottish Government.
5. **Domestic Abuse (Scotland) Bill:** The Committee will consider witnesses for its scrutiny of the Bill at Stage 1.

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The papers for this meeting are as follows—

**Agenda items 2 and 3**

Paper by the clerk - Apologies (Scotland) Act 2016  
(Excepted Proceedings) Regulations 2017 J/S5/17/17/1

**Agenda item 4**

Paper by the clerk - Domestic Abuse (Scotland) Bill J/S5/17/17/2

Private paper 1 - Domestic Abuse (Scotland) Bill J/S5/17/17/3 (P)

[Domestic Abuse \(Scotland\) Bill and accompanying documents](#)

[Written submissions received on the Bill](#)

**Agenda item 5**

Private paper 2 - Domestic Abuse (Scotland) Bill J/S5/17/17/4 (P)

## Justice Committee

17<sup>th</sup> Meeting, 2017 (Session 5), Tuesday 9 May 2017

### Subordinate legislation

#### Note by the clerk

#### Purpose

1. This paper invites the Committee to consider the following affirmative instrument:
  - [Apologies \(Scotland\) Act 2016 \(Excepted Proceedings\) Regulations 2017 \[draft\]](#)

#### Introduction

2. This instrument is made under section 2(4) of the Apologies (Scotland) Act 2016 (“the 2016 Act”). The 2016 Act provides that an apology is inadmissible in certain civil proceedings as evidence of anything relevant to the determination of liability, and cannot otherwise be used to the prejudice of the person making the apology (or on whose behalf it was made). The 2016 Act applies to all civil proceedings except those listed in section 2(1).

3. The instrument makes two changes to section 2(1) of the 2016 Act. The first change involves an amendment to the exception for inquiries, applying the exemption 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.

4. The second change involves the addition of an exception for proceedings held by a professional regulatory body. This exception would apply to the following bodies:

- 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
- the General Teaching Council for Scotland.

5. Further details on the purpose of the instrument can be found in the policy note attached at **Annexe A**.

#### Justice Committee consideration

6. Two written submissions have been received in advance of the Committee’s consideration of the instrument on 9 May from (1) the General Medical Council (**Annexe B**) and (2) the Nursing and Midwifery Council (**Annexe C**). Both these submissions refer to a joint statement from health professional regulators setting out

their desire for their proceedings to be excepted from the application the 2016 Act (**Annexe D**).

7. The Justice Committee is required to report to the Parliament on the instrument by 27 May 2017. The Minister for Community Safety and Legal Affairs has lodged motion S5M-05334 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 9 May to answer any questions on the instrument and to move the motion for approval.

8. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 27 May 2017. Thereafter, the Parliament will be invited to approve the instrument.

**9. The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

#### **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.

## Policy Note

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

1. The above instrument is made in exercise of the powers conferred by section 2(4) of the Apologies (Scotland) Act 2016 (“the 2016 Act”).

#### Policy Objectives

2. The 2016 Act aims to encourage the use of apologies by providing that an apology (as defined in section 3) is inadmissible in certain civil proceedings as evidence of anything relevant to the determination of liability, and cannot otherwise be used to the prejudice of the person making the apology (or on whose behalf it was made).

3. The legal proceedings which are covered by the 2016 Act are set out in section 2. The 2016 Act applies to all civil proceedings except those listed in section 2(1). The 2016 Act allows the Scottish Ministers to add to, vary or remove the exceptions in section 2(1).

4. These regulations make two changes to section 2(1) of the 2016 Act. The first change involves an amendment to the exception for inquiries, applying the exemption to all inquiries held under section 1 of the Inquiries Act 2005 (“2005 Act”), or converted under section 15 of the 2005 Act, regardless of their origin. The second change involves the addition of an exception for proceedings of certain professional regulatory bodies.

#### Inquiries

5. Regulation 2(2)(a) amends the inquiries exception with a view to providing consistency. The inquiries exception is set out at section 2(1)(a) of the 2016 Act. It currently exempts inquiries which Scottish Ministers cause or jointly cause to be held under the 2005 Act, but does not exempt inquiries held in Scotland solely at the instance of UK Ministers. While this may be a rare occurrence, it does mean that apologies will be inadmissible as evidence in any 2005 Act inquiry instigated by the UK Government in Scotland whereas apologies may be admissible in a 2005 Act inquiry instigated or jointly instigated by the Scottish Government. For policy reasons, the same exemption should apply to all inquiries under the 2005 Act which are held in Scotland.

6. With a view to achieving consistency in the way in which apologies are treated in such inquiries across the UK, regulation 2(2)(a) amends the 2016 Act to extend the exception to all inquiries held in Scotland under the 2005 Act, including inquiries in Scotland caused to be held by UK Ministers. The Act will therefore apply the exemption to all inquiries held under the 2005 Act in Scotland regardless of their origin.

## Professional regulatory proceedings

7. Regulation 2(2)(c) creates a further exception in section 2 of the 2016 Act for proceedings of some professional regulatory bodies. The need for making this further exception was identified at Stage 1 of the Bill's passage through Parliament. Evidence was provided by the General Medical Council (GMC) and the Nursing and Midwifery Council (NMC) about the potential impact of the Bill on their proceedings. These professional regulatory bodies expressed concern about the potential unintended consequences of preventing access to apologies, particularly in their fitness to practise proceedings, which may impact on the ability to assess the risk that a doctor, nurse or midwife may pose to the public in future.

8. The Justice Committee's Stage 1 report 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*" (p. 19). The work on this exception was not complete at Stage 2 nor Stage 3 of the Bill and the Minister for Community Safety and Legal Affairs therefore made a commitment in the Stage 3 debate to add an exception to the Bill for proceedings held by health professional regulatory bodies.

9. The concerns raised by the GMC and the NMC were shared by other regulators, specifically the other six health regulators (the General Chiropractic Council, the General Dental Council, the General Optical Council, the General Osteopathic Council, the General Pharmaceutical Council and the Health and Care Professions Council), as well as the Scottish Social Services Council and the General Teaching Council for Scotland. The evidence provided by the regulators sets out that access to apologies is important to enable them to assess the risk that a professional may pose to the public in the future, and could result in a restriction of their ability to protect the public. In order for the 2016 Act to have as much benefit as possible, the draft Regulations only except the proceedings of professional regulatory bodies who have a shared rationale for the need for their proceedings to be excepted from the 2016 Act, ultimately with a view to preserving their ability to protect the public.

10. Regulation 2(2)(c) introduces an exception for proceedings of the 10 professional regulatory bodies named above. These regulators have as their main purpose the determination of whether or not a person meets that body's requirements for registration and/or the standards or requirements for practising a profession regulated by that body. This includes proceedings that determine whether the person meets the body's requirements to practise, is fit to practise or is fit to continue to practise in a profession. These are all proceedings which ultimately decide whether or not a person will be allowed to work or continue to work in a particular profession.

## Consultation

11. The amendment of the inquiry exception has been discussed with the UK Government. The exception in relation to professional regulatory bodies has been developed through discussion with the relevant professional regulatory bodies. Draft provisions were shared and revised in light of comments from these regulatory bodies. Other regulators were contacted as part of this work but only the 10 listed regulators expressed concerns to the Scottish Government.

## **Impact Assessments**

12. An Equality Impact Assessment was not carried out. These regulations, as well as the 2016 Act, do not have differential effect on the basis of the protected characteristics.

13. A Business and Regulatory Impact Assessment is not required as the instrument has no financial effects on the Scottish Government, local government or on business.

### Written submission from the General Medical Council

1. This briefing by the GMC sets out why we are seeking for our proceedings to be excepted from the application of the Apologies (Scotland) Act 2016 (the Act). Whilst many of our proceedings are similar to those of the other healthcare professional regulators, the ways in which apologies are treated are slightly different and we therefore feel it is important that we outline the role they play in the regulation of the medical profession.
2. This briefing is in addition to the standalone statement made jointly by healthcare professional regulators, setting out our common position on the need for an exception to the Act, which we have signed and fully endorse.

#### Our role

3. The General Medical Council (GMC) is an independent organisation that helps to protect patients and improve medical education and practice across the UK.
  - We decide which doctors are qualified to work here and we oversee UK medical education and training.
  - We set standards that doctors need to follow, and make sure that they continue to meet these standards throughout their careers.
  - We take action to prevent a doctor from putting the safety of patients, or the public's confidence in doctors, at risk.

Every patient should receive a high standard of care. Our role is to help achieve that by working closely with doctors, their employers and patients, to make sure that the trust patients have in their doctors is fully justified.

4. Broadly, the role of apologies may impact on the following areas of our work:
  - Investigating and acting on [fitness to practise concerns about doctors](#) – As GMC fitness to practise proceedings are about protecting the public and not punishing doctors, the fact that a doctor has insight into what went wrong is a significant factor in reducing the risk that they are likely to repeat it. If a doctor has insight and is unlikely to repeat failings or concerns, we may not need to take any action.
  - An apology may act as evidence of a doctor's insight to support a doctor's submission during a GMC investigation or a Medical Practitioners Tribunal Service (MPTS) tribunal that concerns are unlikely to be repeated and that therefore GMC action is not required. Where a doctor is making submissions that they have insight, the fact that they have failed to make an apology may be raised. A range of factors can influence whether, or how, a doctor apologises – such as fear of legal action and personal circumstances (e.g. ill health) and these would be taken into account. The presence or lack of an apology may lead a tribunal to decide whether a doctor has demonstrated insight and to consider how presence or lack of

insight impacts on the risk they represent to public safety or public confidence in the medical profession.

- [Revalidation](#) – when doctors are preparing their supporting information, they are required to collect and review information on significant events. Appraisers will be interested in any actions the doctor took or any changes they implemented to prevent such events or incidents happening again.
- GMC guidance - our core guidance for doctors [Good medical practice](#), and our explanatory guidance [Openness and honesty when things go wrong- the professional duty of candour](#), set out the standards we set for doctors in terms of apologies.

We expand on these areas below.

### *Fitness to Practise Proceedings*

5. GMC/MPTS Sanctions Guidance makes clear that ‘a doctor’s apology by itself does not necessarily mean that they accept legal liability for what has happened or a breach of statutory duty’. The guidance goes on to say ‘For the purpose of [GMC] fitness to practise proceedings, an apology by itself will not be treated as an admission of guilt (whether as to facts or impairment).’ This sets out clearly the GMC’s policy that an apology, of itself, will not be used in GMC proceedings to prove allegations made against them. However, when a doctor makes an apology, they may, at the same time, provide other information that is not part of the apology that is critical to the fitness to practise proceedings and our ability to protect patients. For example, if a doctor says they are sorry for what has happened to a patient, we would not use the fact of the apology alone as evidence of impairment. However, if at the same time as they apologise, they make a clear admission that they carried out serious misconduct (this does not include general expressions of regret about the care or the outcome), that information (and not the apology) would be used to prove their actions or omissions.
6. In GMC fitness to practise proceedings, there are circumstances in which an apology could be used to a doctor’s advantage or the failure to make an apology could be used to their detriment. The apology itself, would only ever be submitted by a doctor to support their submission that they have insight and the only circumstances in which the GMC would use an apology (or lack of an apology) in itself to a doctor’s disadvantage in proceedings would be to question why a doctor who has submitted they have insight didn’t apologise, or why there was delay in making an apology (for example, not apologising until fitness to practise proceedings have commenced). Without an exception being drafted, an apology would be prevented from being considered fully in fitness to practise proceedings, for example an apology being used as evidence of insight, or delay in providing an apology being used as evidence of lack of insight.
7. The definition of an apology at section 3 of the Act is drafted more broadly than just an expression of sorrow or regret. Under this definition, an apology may also include “an undertaking to look at circumstances giving rise to the act or omission or outcome with a view to preventing the recurrence”. In a GMC fitness to practise context, we envisage that such an “undertaking” may provide evidence of

the extent to which a doctor has shown insight and remediated the relevant act or omission and such remediation evidence will be relevant to the question of whether there is an ongoing risk and whether the GMC needs to take action. Like an apology, we would not use the fact that a doctor gives an undertaking (as described at section 3) as an admission of liability (either as to facts or impairment). However, if a tribunal has already made findings about what happened, such an undertaking may be used to someone's disadvantage if, for example, the terms of such an "undertaking" provided by a doctor about the steps to be taken to remediate/put right the matter are found by a tribunal not to be sufficient and/or appropriate in the circumstances given their findings about what happened and this may be relevant evidence which (amongst other evidence) supports a finding of impairment against the doctor. It could also be used to the doctor's detriment, where a doctor, as part of his apology, promises to remediate, but subsequently fails to take appropriate steps to do so.

8. More information can be found in the GMC/MPTS [Sanctions Guidance](#), which sets out the relevance of an apology to a doctor's insight/remediation in fitness to practise proceedings (see paragraphs 35 to 39).
9. Our Sanctions Guidance provides assurance that an apology in itself will not be used as evidence of liability in GMC fitness to practise proceedings. It is important that an apology is allowed to be considered (i.e. to be admissible) throughout the course of the GMC's fitness to practise processes so that any information that does not form part of the apology, but is contained within it, and is relevant to whether the doctor poses a serious ongoing risk to the public can be considered. Also we think it important that doctors can present an apology as evidence of insight in mitigation and conversely that the GMC should be able to reference a failure to apologise as evidence of lack of insight.
10. GMC fitness to practise procedures may involve referral of a doctor to a hearing before a MPTS tribunal<sup>1</sup> or determination by other GMC decision-makers, known as Case Examiners. Some appeals and other challenges to fitness to practise decisions will be heard in the Scottish courts. The absence of an exception for regulatory proceedings under the Act would lead to inconsistency in what evidence would be admissible at different stages of fitness to practise proceedings and would ultimately affect our ability to ensure the public is protected.

### *Registration and revalidation*

11. The GMC's processes for registration and maintaining a licence to practise medicine (known as revalidation) may result in appeals before the Scottish courts. We can potentially foresee a situation where an issue, which is the subject of a registration or revalidation appeal could relate to a matter in which an apology was given. Whilst evidence regarding the apology would be admissible before the independent registration and revalidation appeal panel in the case, should any further appeal be made and fall to be heard in the Scottish courts, unless there was an exception for regulatory proceedings, there would be an inconsistency in what would be admissible and relevant evidence in the appeal proceedings.

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<sup>1</sup> Interim orders tribunals hear cases, and may make an order suspending a doctor's registration or imposing conditions upon a doctor's registration, whilst a GMC investigation is in progress. Medical practitioners tribunals hear evidence and decide whether a doctor's fitness to practise is impaired.

Whilst this may be a less likely scenario than the issues we have identified about fitness to practise cases, our concerns about differences between the GMC and the Scottish courts, discrepancies in approach, potential unfairness and inconsistency in outcome are similar.

*The professional vs the organisational duty of candour*

12. The [organisational duty of candour](#) and professional duty of candour are two separate duties, which have similarities but do not apply in entirely the same way. Therefore excepting only the organisational duty from the application of the Act would lead to inconsistencies in how apologies made in respect of the same act or omission, but provided in accordance with different duties, will be treated. We note that it is accepted that an exception is needed for the organisational duty of candour and we cannot see why the same rationale should not apply to excepting apologies made in accordance with the professional duty of candour, which is outlined below.
13. Our professional standards define what makes a good doctor by setting out the professional values, knowledge, skills and behaviours required of all registered doctors in the UK. We consult with a wide range of people, including patients, doctors, employers and educators to develop our standards and guidance.

The core professional standards expected of all doctors are set out in [Good medical practice](#) which covers fundamental aspects of a doctor's role, including working in partnership with patients and treating them with respect. We provide detailed guidance on ethical principles that most doctors will use every day, such as consent and confidentiality, and more specific guidance on a range of areas such as raising concerns about patient safety and the professional duty of candour.

14. Good medical practice outlines that when things go wrong, doctors have a duty to put matters right (if that is possible), offer an apology, and explain fully and promptly what has happened and the likely short-term and long-term effects. This professional duty is expanded on within our joint explanatory guidance, with the Nursing and Midwifery Council, '[Openness and honesty when things go wrong – the professional duty of candour](#)', which applies to every doctor, nurse and midwife in the UK. Our professional guidance and the joint GMC/NMC guidance are widely promoted including to organisations that provide support and advocacy to patients.
15. Our guidance on the professional duty is not prescriptive about the circumstances in which it applies but makes clear that it applies when something goes wrong with a patient's care, and they suffer harm or distress as a result, or in situations where a patient may yet suffer harm or distress as a result of something that has gone wrong with their care (paragraph 8).

16. The Health (Tobacco, Nicotine etc. and Care) (Scotland) Act is more prescriptive about the circumstances in which it applies and states that the organisational duty of candour applies if an incident appears to have resulted in, or could result in, an outcome mentioned in subsection 21(4).<sup>2</sup> We would envisage situations where an act or omission may be subject to the professional duty but not the organisational duty (or vice versa).

If there is an exception for apologies made in accordance with the duty of candour procedure set out in Part 2 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act, but this is not replicated for the professional duty of candour, then it would lead to discrepancies which could have implications for the regulation of healthcare professionals, and consequently patient safety and the public's confidence in the professions.

17. As described at paragraph 5 above, we do not see complying with the professional duty by apologising to a patient as an admission of legal liability for what has happened. Nor do we expect doctors to take personal responsibility for something that wasn't their fault when apologising. We stress this in paragraphs 14 and 15 of the guidance.
18. So an exception for GMC proceedings from the application of the Act will 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.

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<sup>2</sup> "(4) The outcomes are- (a) the death of the person, (b) a permanent lessening of bodily, sensory, motor, physiologic or intellectual functions (including removal of the wrong limb or organ or brain damage) ("severe harm"), (c) harm which is not severe but which results in- (i) an increase in the person's treatment, (ii) changes to the structure of the person's body, (iii) the shortening of the life expectancy of the person, (iv) an impairment of the sensory, motor or intellectual functions of the person which has lasted, or is likely to last, for a continuous period of at least 28 days, (v) the person experiencing pain or psychological harm which has been, or is likely to be, experienced by the person for a continuous period of at least 28 days, (d) the person requiring treatment by a registered health professional in order to prevent- (i) the death of the person, or (ii) any injury to the person which, if left untreated, would lead to one or more of the outcomes mentioned in paragraph (b) or (c)."

<http://www.legislation.gov.uk/asp/2016/14/section/21/enacted>

## 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.

**Justice Committee**  
**17th Meeting, 2017 (Session 5), Tuesday 9 May 2017**  
**Domestic Abuse (Scotland) Bill**  
**Note by the clerk**

**Introduction**

1. The Scottish Government introduced the Domestic Abuse (Scotland) Bill<sup>1</sup> in the Scottish Parliament on 17 March 2017. The Parliamentary Bureau designated the Justice Committee as lead committee for Stage 1 scrutiny on 29 March 2017.
2. The Committee agreed its overall approach to scrutiny of the Bill at Stage 1 at its meeting on 29 March 2017 and issued a call for evidence. Responses received and accepted as evidence are published on the Committee's [webpage](#).

**Justice Committee consideration**

3. At its meeting on 9 May 2017, the Committee will take evidence from Scottish Government officials assisting Ministers in taking the Bill through the Parliament (the "Bill team"). This is the Committee's first evidence session on the Bill. In future sessions, the Committee will hear from stakeholders and experts with an interest in the Bill.

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<sup>1</sup> <http://www.parliament.scot/parliamentarybusiness/Bills/103883.aspx>