I am grateful to the Committee for providing me with an opportunity to give evidence on the Apologies (Scotland) Bill – I hope the evidence was helpful and will assist the Committee with its deliberation on the Bill.

As I indicated at Tuesday's evidence session, I am more than happy to provide some further detail on a number of the points raised.

In particular, I agreed to provide a view on whether certain court proceedings under the Children's Hearings (Scotland) Act 2011 (2011 Act) should be added to the list of excluded actions in section 2(1) of the Bill.

The Scottish Government has noted with interest the points made by the Scottish Children's Reporter Administration (SCRA), in particular, the fact that as part of the SCRA's Complaints Handling Procedures they encourage staff to resolve complaints at the front line wherever possible and recognise the importance of making an apology as part of this process. From this evidence, they encourage a culture where apologies are currently part of their response to complaints.

You have specifically asked if certain court proceedings under the 2011 Act should be added to the list of excluded actions in section 2(1) of the Bill. I note that the SCRA advised that "if children's hearing court proceedings were not excluded from the Bill's scope, there would be potentially significant consequences for the children's hearings system, in relation both to child protection and youth justice concerns". If Children's hearings court proceedings were not excluded, I understand that apologies given outwith proceedings may be unable to be used as evidence to establish grounds of referral under the 2011 Act. This could have a direct impact on the children's hearing system in Scotland as, if the apology was part of the evidence...
available for establishing these grounds, it might remove the legal basis to bring a child before a children's hearing and therefore the ability to impose appropriate measures of supervision and protection. For these reasons, if the definition is to remain as currently drafted, we would agree with SCRA that consideration should be given to excluding court proceedings under the 2011 Act from the scope of the Bill.

As raised in my evidence, if it is thought that there should be legislative provision for apologies, in my view, putting the common law in Scotland on a statutory footing in a similar manner to that which has occurred in England and Wales under section 2 of the Compensation Act 2006 would be a preferable approach. As others have noted in their evidence, legislative provision may send a signal but it does not in of itself provide the solution to ensuring cultural change which will result in more apologies being given. Putting the common law on a statutory footing would not impact on the effectiveness of the Children's Hearing system and if this legislation was amended in this regard we are not of the view that the system would require to be excluded from the scope of the legislation.

More generally, the attached Annex provides a summary of the Scottish Government's main concerns with the Bill. These follow on from the concerns I raised in evidence and reflect the correspondence that I have had with Margaret Mitchell on this matter. In response to particular points raised by Ms Mitchell at committee the Annex includes some further detail on the guidance issued by General Medical Council (GMC) on the way in which apologies are considered through their regulatory and fitness to practise systems. And in this regard, I can also confirm that as stated at the committee the Association of British Insurers did not respond to the duty of candour consultation proposals.

I have also provided a copy of this letter to Margaret Mitchell MSP for her information.

I hope this is of assistance.
Apologies (Scotland) Bill – Scottish Government comments on the Bill

Definition

(a) Concerns with the proposed definition in section 3

Although we agree that there is merit in encouraging a culture where apologies are readily provided this should not be at the expense of potential injustice to pursuers. We also understand from the evidence of Mr Watson last week, that this could also have a “deleterious effect on defenders”.

We agree with the Faculty of Advocates, that the effect of the Bill if enacted would be to take away from people rights they currently have. People who wanted to rely on admissions of fault or fact or simple apologies will no longer be able to put them before the courts in civil proceedings, and courts would no longer be able to take into account evidential matters that they are currently able to consider. By defining apology in the manner proposed in the legislation, in my view, the benefit of hearing an apology may be outweighed by the inability to use this as evidence in any civil proceedings.

In a common law, adversarial system, as we have in Scotland, making apologies inadmissible as evidence has a greater impact on the rights of the victim and the person who injured them and makes it more difficult for the victim to pursue and vindicate those rights.

These risks must be weighed against the impact that defining apologies in legislation may have. Although we appreciate the evidence is mixed and is often in respect of legal systems which are different to the common law, adversarial system we have in Scotland, there appears to be little or no evidence that defining apologies in the manner proposed in this Bill has had the desired effect. I refer to the quote from Professor Carroll cited at page 18 of the SPICE memorandum to the committee:

"The limited research available does not show that apology legislation has worked as a 'magic wand'. To the contrary, the little data that exists as to the shift in behaviour of potential apologisers, from the field of medical practice, tells us that the legislation has been relatively ineffective."

This raises the question as to whether legislation is required at all and, in our view, provides more support if a legislative solution is deemed appropriate that this should be merely to put the common law onto a statutory footing.

(b) Putting the common law on a statutory footing

If apologies legislation is desirable, in our view, it would be preferable not to attempt to provide a definition for apology, which could lead to unintended consequences. Instead there would appear to be merit in putting the common law on a statutory footing in a similar manner to that which has occurred in England and Wales under section 2 of the Compensation Act 2006.
Section 2 essentially replicates the common law in Scotland on apologies. It encourages appropriate expressions of regret whilst retaining the capability to use the expression where there is a clear acceptance of legal responsibility. It strikes a balance and recognises that an apology is not the only redress that victims may be seeking and may in turn encourage more apologies to be made in the future. We have heard from those giving evidence that there is a perception that apologies are automatically admissible in Scotland. In light of this, there would appear be benefit in promoting the common law position by committing it to statute. This would provide certainty and place beyond doubt the effect of an apology in civil proceedings.

Section 2 of the 2006 Act is straightforward legislation that makes it clear that an act of apology, of itself, does not amount to an admission of liability. It also does not result in unintended consequences as it does not change the law in Scotland but merely puts it on a statutory footing. This approach would ensure that misunderstandings about the application of the law on apologies between Scotland and England and Wales and misconceived perceptions about the application of the common law in Scotland would be overcome. In our view it would also increase understanding and the profile of the law on apologies which is hoped will result in a cultural change. Most importantly, putting the law on a common law footing would confirm the legal position on apologies without the potential injustice for pursuers due to the inability to use the apology as evidence in any civil proceedings.

Exploring further the potential injustice to pursuers

The Scottish Government is concerned with the wide application of the definition afforded to an apology within section 3 of the Apologies (Scotland) Bill. By way of example, I refer to the two statements below:

"I'm very sorry that I amputated your left leg when I was supposed to amputate your right but I was tired, harassed and didn't pay enough attention and when the theatre sister and the anaesthetist tried to tell me I was cutting into the wrong leg I'm really very sorry that, despite their protestations, I kept going."

"I'm very sorry that the wrong leg was amputated - that was unfortunate and shouldn't have happened"

Both apologies are protected under the terms of the Bill, even though the former is a clear admission of fault. The policy memorandum states that the pursuer in such a situation can lead other evidence and therefore they are not prejudiced by this legislation. However, leading other evidence, but not being able to lead the admission, would appear in our view to strike the wrong balance.

We remain concerned that the benefits of hearing an apology will, in certain circumstances, not be sufficient to outweigh the potential injustice to pursuers in actions for damages. That injustice could arise in cases where an admission of fault or statement of fact is the only means of demonstrating liability for the harm caused but that admission is protected and so cannot be led in evidence because it is part of
the statutory apology. If there is no other evidence available on liability, a pursuer would be unable to succeed in an action for damages for compensation.

**Duty of Candour**

The proposed health legislation makes provision for apologies given in the context of the duty of candour to be admissible but the intention is that any apology and other information obtained through the duty of candour procedure could be founded on in legal proceedings though would not of itself represent admission of negligence or breach of a statutory duty. Whereas the Apologies (Scotland) Bill provisions make apologies inadmissible in determining liability and as evidence for the purposes of civil legal proceedings.

The approach taken to an apology under the Duty of Candour provisions in the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill is more aligned to section 2 of the Compensation Act 2006 in that an apology or other step taken in accordance with the duty of candour procedure cannot of itself be used to prove liability but can be admissible in court. Given that we understand one of the main reasons for the Apologies (Scotland) Bill is to enable apologies to be made more freely in the health sector this may suggest that a similar approach could be adopted here. This further supports the view that legislation similar to section 2 of the 2006 Act would be a more effective means of delivering the aims of this legislation. If the definition of Apology remains as currently detailed in the Bill, we are of the view that apologies given in the context of Duty of Candour should be excluded from the Apologies (Scotland) Bill. The rationale for this position reflects that outlined for the proposed exclusion for Fatal Accident Inquiries – the same public interest considerations that relate to FAls also relate to the sort of events and incidents that will fall within the scope of the duty of candour procedure (i.e. death, significant permanent physical harm),

**General Medical Council (GMC) approach to Apologies**

The GMC provide medical practitioners and those involved with revalidation of doctors and fitness to practise casework with guidance on how apologies should be considered. Fitness to practice investigations consider the offering of an apology as an indication of level of insight of a medical practitioner. Their guidance reflects the need to consider whether a medical practitioner’s failure to apologise following harm might indicate a lack of insight that panels should take into account in considering sanctions. Medical practitioners are also expected to collect and review information about significant adverse events, including their individual responses following such events.

The GMC has committed to making explicit the clear the responsibility that all doctors have to be open, honest and transparent when things go wrong with the care and treatment they provide. Between November 2014 and January 2015 the GMC ran a consultation with the Nursing and Midwifery Council on new joint explanatory guidance for doctors, nurses and midwives. This will be published imminently, focusing on how registrants should comply with their professional duty to be open and honest when they make mistakes. This will include guidance on the provision of
an apology and will make it clear that this does not equate to an admission of liability.

In the Justice Committee session on 9th June, the representative of the Medical Protection Society stated that the duty of candour procedure would not protect doctors as it was a prod in the back to make doctors give an apology under duress. This is not an accurate assessment of the provisions of the duty of candour procedure as presented in the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill. The duty of candour procedures, which will be set out in secondary legislation, will place a duty on health and social care organisations, through a nominated responsible person, to ensure that an apology is provided as part of the overall duty of candour procedure. This focus on organisational duty will complement the existing professional duty that applies to medical practitioners. Doctors should already provide an apology in circumstances where there has been an unexpected or unintended incident resulting in death or harm – the duty of candour provisions do not change that requirement for members of the Medical Protection Society.

The duty of candour procedure will emphasise the responsibilities of health and social care organisations to create the conditions where, following instances of death or significant harm, apologies are provided as part of a wider set of responses including review of the events, support for those affected, training for those involved with this work and the publication of an annual report outlining procedural changes as a result of review and learning.

**Types of Legal Proceedings**

We raised a concern that the Bill did not exclude public inquiries under the Inquiries (Scotland) Act 2005 in the legislation. The policy reasons for excluding Fatal Accident Inquiries would equally apply to public inquiries.

There are also concerns that extending the scope to tribunals and inquiries may result in the legislation straying into reserved matters.

The Bill would also apply to arbitration proceedings which can generally admit any evidence and take a case by case approach to whether to do so. Restricting that freedom in any way could lessen the effectiveness of arbitration. This will also impact on the Arbitration (Scotland) Act which allows the arbitration tribunal to decide on admissibility.

The Bill would also apply to tribunal proceedings which are designed to avoid points of law and focus on points of fact. If a party to a tribunal cannot describe what someone said, this could limit the tribunal's power to consider all the relevant facts.

We note that both the Faculty of Advocates and the Association of Personal Injury Lawyers indicated that consideration should be given to the potential conflict of the Bill with personal injury pre-action protocols which seek to establish at the outset whether fault is in issue and encourage early and frank exchange of factual information, we too would urge consideration of exclusion of pre-action protocols from the scope of the Bill.
**Insurance Law**

As we indicated in the Scottish Government memorandum, it remains unclear how the insurance industry would interpret this legislation in their contracts, and the implications for insurance cover. Would a person giving an apology under this legislation invalidate their insurance contract if their terms and conditions expressly stated that they were not able to give such an apology?

Moreover, it is noted that in the evidence by Bruce Adamson, SHRC in the context of historical child abuse that “care providers often wanted to give an apology but were given legal advice or told be insurers that they could not do so”. In our view, even with Apologies legislation of the kind proposed by Ms Mitchell, there would be nothing to stop insurers from preventing those insured from making such apologies. This would mean that registered health professionals would face a conflict between their professional duty and potential demands from insurers. In health and social care situations, early disclosure and communicating organisational responsibilities in respect of harm often leads to a less protracted process and earlier resolution of cases – which is often beneficial to insurance companies in terms of time taken to support claims and the nature of settlements offered.

**Historical Child Abuse**

In terms of claims against public bodies, a survivor of child abuse or someone aggrieved by the actions of a health board or local authority, might well benefit from hearing an apology, and those sorts of situations were the focus of the consultation by Ms Mitchell. Again, however, should that survivor or aggrieved person later decide to seek damages in court for the harm which was the subject of the apology, they too could not rely on the apology but would have to find other evidence to support their claim.

Concern also exists about the relationship between civil and criminal proceedings. In a criminal case an apology will be admissible and could lead to a conviction. However, that same statement will not be admissible in any subsequent civil proceedings. We know that survivors of historic abuse can face significant evidential hurdles when seeking to progress a court action. Protecting an apology in the way proposed could add to their evidential difficulties.

We note that the SHRC view is that Apologies legislation is an important aspect of promoting effective access to justice and remedies for survivors of historic child abuse. Bruce Adamson appeared to accept in his evidence that consideration would need to be given to whether the value of effecting the cultural change of promoting apologies outweighs any potential unintended consequences for individual pursuers. The Scottish Government is concerned that the proposed Apologies Bill fails to strike that balance.