The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 23 June 2015

Session 4

Tuesday 23 June 2015

CONTENTS

JUSTICE COMMITTEE
22nd Meeting 2015, Session 4

CONVENER

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Joanne Clinton

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 23 June 2015

[The Deputy Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Deputy Convener (Elaine Murray): Good morning and welcome to the Justice Committee's 22nd meeting of 2015. I ask everyone to turn off all mobile phones and other electronic devices or switch them to airplane mode, so that they do not interfere with the sound system.

I have received apologies from Christine Grahame, which is why I am sitting in her seat today.

Under item 1, I invite the committee to agree to consider our draft stage 1 report on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill in private under item 7 and at any future meetings. Are we agreed?

Members *indicated agreement.*

Subordinate Legislation

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 3) Regulations 2015 [Draft]

09:30

The Deputy Convener: Item 2 is consideration of an affirmative instrument. I welcome Paul Wheelhouse, the Minister for Community Safety and Legal Affairs. He is accompanied by two Scottish Government officials: Catriona MacKenzie of the civil law and legal system division, and Alastair Smith of the directorate for legal services.

This item allows us to gather evidence in advance of the debate on the instrument under the next item. Members will have seen the submission from the Law Society of Scotland confirming that it had no comment to make on the regulations.

I understand that the minister does not need to make an opening statement, so I will go straight to questions from members.

Roderick Campbell (North East Fife) (SNP): Good morning, minister. How was this problem detected, as it were?

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): That is a good point. The provision for double jeopardy has rarely been used. Indeed, the case that we are concerned with today is only the third application to have been made to the High Court by the Lord Advocate. Earlier this month, we were informed that there is an individual who is the subject of a double jeopardy application who does not qualify for assistance by way of representation but who will not be able to afford the cost of his legal representation without it. Therefore, as a result of deliberations, we consider that public funding should be made available in order to secure the individual's right to effective access to justice in terms of article 6 of the European convention on human rights. The urgency of the case is why we are here today to seek the committee's approval for the regulations.

Roderick Campbell: Do you have any further comments on the financial effects? Do you regard this as a one-off, or could it be a trend?

Paul Wheelhouse: To repeat the point, these proceedings are rare—this is only the third such application. The change is expected to have relatively little impact on the overall expenditure from the legal aid fund. However, the case will be significant in its own right. Case costs are typically

fairly high, and we estimate that the costs for this case will be in the region of £100,000.

As I said, there are few cases of this kind. The regulations will add this kind of cost to the fund only in cases in which the person involved would not previously have been financially eligible for ABWOR. I cannot discuss the case itself, but the reason why that is necessary is that the individual concerned has been acquitted of a crime and therefore, under double jeopardy procedures, is not technically accused of anything. An application has been made for double jeopardy procedure.

Roderick Campbell: So, in broad terms, you are not concerned about any on-going financial implications.

Paul Wheelhouse: Clearly, as Mr Campbell will be aware, we are trying to manage legal aid budgets. I would not want to say that we have no concerns about additional expense, but we think that this is a level of expenditure that can be borne by the legal aid budget, so we have no significant concerns on that front.

The Deputy Convener: If there are no further questions, we can move to item 3, which is the formal debate on the motion to approve the regulations.

Motion moved,

That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 3) Regulations 2015 [draft] be approved.—[*Paul Wheelhouse*.]

Motion agreed to.

The Deputy Convener: I thank the minister for his attendance.

All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015 (SSI 2015/213)

The Deputy Convener: Agenda item 4 is consideration of a negative instrument. The order designates Edinburgh sheriff court as the sheriff personal injury court to exercise all-Scotland jurisdiction in cases above £5,000, and jurisdiction in specific cases below £5,000 designated by the order. The Delegated Powers and Law Reform Committee is content with the drafting of the order.

There are no comments from members. Are members are content to make no recommendation in relation to the order?

Members *indicated agreement.*

The Deputy Convener: I suspend the meeting briefly to allow Margaret Mitchell and her officials to take their seats as witnesses.

09:36

Meeting suspended.

09:37

On resuming—

Apologies (Scotland) Bill: Stage 1

The Deputy Convener: Agenda item 5 is our final evidence session on the Apologies (Scotland) Bill. I welcome Margaret Mitchell, the member in charge of the bill, and Scottish Parliament officials Mary Dinsdale, senior assistant clerk in the non-Government bills unit, and Neil Ross, solicitor with the committee and chamber team. I understand that Margaret Mitchell would like to make a brief opening statement.

Margaret Mitchell (Central Scotland) (Con): Thank you for giving me the opportunity to make a few brief opening remarks about the Apologies (Scotland) Bill.

One of the main purposes of the bill is to address the apparently entrenched culture in Scotland, as one witness put it, to

"Never apologise—don't say sorry for anything." —[*Official Report, Justice Committee*, 9 June 2015; c 18.]

The bill is not intended, as some people mistakenly thought, to tackle any perceived increase in litigation, but rather to address the very real problem of a reluctance and failure to offer an apology for fear of litigation. The bill seeks to provide legal certainty that an apology cannot be used as evidence of liability in certain legal proceedings.

I first became aware of the existence of apology legislation when Professor Miller, the chair of the Scottish Human Rights Commission, spoke to the cross-party group on adult survivors of childhood sexual abuse way back in April 2010. He talked about how some Parliaments had passed laws to ensure that an apology could be given. I am heartened that he remains supportive of the bill. He is of the view that a generic apology in the context of historical child abuse should not be admissible, and that an apology law is an important element among a range of remedies to which—along with improved access to justice—survivors are entitled.

A meaningful apology includes recognition of what has gone wrong and an assurance that the circumstances will be reviewed. In the case of survivors of historical in-care abuse, it includes the state putting in place arrangements to ensure that the abuse is not repeated. With that in mind, I sought to provide the opportunity for the widest possible disclosure, so that victims of historical abuse and others would receive both an acknowledgement of the wrong done or bad outcome and the full explanation that they sought.

The application of the bill is not restricted; it is wide ranging. It applies to civil proceedings in the public, private, third and voluntary sectors. After much deliberation, I arrived at a definition of "apology" that contains protection for statements of fact and fault.

Evidence to the committee has focused on whether the effect of the bill could be, in certain circumstances, to prevent an individual from securing compensation, in particular when a statement of fact within an apology might be the only evidence available.

I am aware that there is a balance to be struck to ensure that there are no unintended consequences of injustice to pursuers. That has been a consistent concern of the minister, and I thank him for his willingness to engage and to remain open minded about the bill, which he supports in principle.

Having listened carefully to what witnesses and the minister have had to say, I am persuaded that the wording of section 3(b) on statements of fact could be omitted from the bill.

Stage 1 has provided an opportunity for the robust testing of the bill's provisions. There is a fear that an admission of fault can in some circumstances lead to litigation. Section 3(a) addresses that problem by removing the legal disincentives. However, I recognise that there may be risks in providing such protections. I also recognise that the minister is not currently persuaded that the harm prevented outweighs the potential risk of harm caused. I will be interested to hear the committee's views on that. In the end, the issue comes down to a policy decision, and it may well be that I have to accept that the minister remains of the view that inclusion of fault may be a step too far.

If enacted, the omission of sections 3(a) on fault and 3(b) on fact would bring the bill closer to the terms of section 2 of the Compensation Act 2006, which I believe the minister has confirmed that he would be content with. However, section 2 is a single provision within the broader 2006 act, and it does not contain a definition of an apology. My bill would still contain a definition and would provide the ability for the apologiser to indicate that a lessons-learned exercise would be carried out, which is what the pursuer generally seeks. The indication of a possible review would be protected, and that may help to give the apologiser confidence and encouragement to make the apology in the first place.

I confirm that I am keen to continue to engage in further dialogue with the minister on matters of detail in the bill, to which the minister referred during his evidence session last week, and to

consider amendments at stage 2 where there is a case to be made for further exceptions.

The Deputy Convener: Thank you for that helpful clarification of your views on how the bill might proceed.

I invite members to ask questions.

Alison McInnes (North East Scotland) (LD): Good morning, Ms Mitchell. When we had a round-table discussion, a number of representatives from the British Medical Association and the nursing profession expressed some concern about the impact that agreeing an apology might have on their professional bodies' code of conduct. Have you had an opportunity to discuss that with the General Medical Council or the Nursing and Midwifery Council?

Margaret Mitchell: Concerns were expressed during the committee's evidence session. I have been in contact with the GMC—in fact, the committee has had correspondence from the GMC this morning, which I think is helpful in clarifying the position. It is entirely proper that the GMC, under regulation 55 of "Good medical practice", which became effective on 22 April 2015, expects its registrants to apologise and to offer an explanation. If they fail to do so, there is at least a possibility that the regulator would investigate that as a conduct matter. That dovetails with the duty of candour that is already in operation in England and Wales.

However, I think that those who gave evidence at the session to which you referred were conflating the statutory protection of an apology and the statutory duty to provide an apology. The bill as drafted would not require professionals to apologise and would not place them in any greater peril from regulatory sanction than they already face. The GMC's letter very helpfully clarifies that point, and I hope that it gives the medical professionals who raised the issue some reassurance.

09:45

Alison McInnes: That is helpful.

You mentioned the duty of candour. The minister has argued that the scope of your bill could undermine that duty and suggested that it should be excluded from the scope of the bill. Do you have a view on that?

Margaret Mitchell: Yes. My fear is that if the apology was admissible, that would deter medical professionals and doctors from giving an apology in the first place. Charlie Irvine quoted some academics who said:

"Most experts continue to view the fear of liability as the primary barrier to the development of effective and wide-sweeping patient safety initiatives in hospitals."

If an apology is admissible despite all the protections around it, that could deter medical professionals and doctors from giving an apology.

Having said that, it will be up to the Government to decide its policy on the matter. The Government will have the power to vary the list of exceptions and to include others under section 2(3), which says:

"The Scottish Ministers may by regulations modify the list of exceptions in subsection (1)."

Alternatively, the issue could be dealt with by amendment at stage 2.

Roderick Campbell: I should refer to my entry in the register of interests, in which I state that I am a member of the Faculty of Advocates. I refer you to the evidence that Mr Stephenson of the Faculty of Advocates gave on 9 June. He said that, in the faculty's view,

"the purpose of the bill if enacted would be to take away from people rights that they currently have."—[*Official Report, Justice Committee*, 9 June 2015; c 8.]

Therefore, it might actually limit access to justice. Will you comment on that?

Margaret Mitchell: Perhaps you would like to expand on that.

Roderick Campbell: The fact—

Margaret Mitchell: Can I just answer the question more generally? In effect, the bill would clarify the current law and put things on a statutory footing, which would be helpful. Will you expand on your question?

Roderick Campbell: At present, an admission of liability can be used in evidence, especially an admission against interest. Ronnie Conway of the Association of Personal Injury Lawyers made that point. Under the terms of your bill, any such admission would not be admissible, which would be a limitation compared with the current position. In other words, the bill would not reinforce the current position.

Margaret Mitchell: What you have just said explains why we need the bill. We need it to tease out exactly what is an admission of liability. An admission of liability would certainly not be protected, but under the bill admissions of regret and sorrow, the taking of responsibility, offers of redress and offers to review circumstances would all be protected.

We are debating whether we can admit fault as well, given that an admission of fault is not an admission of liability. There is very useful case law on that point. The case of Hunter v Hanley 1955 gave three tests for establishing liability, which are

"that there is a usual and normal practice ... that the practice has not been adopted ... and that the course adopted was such that"

no one

"acting with ordinary care would have taken."

The Law Society goes a little bit further and explains that negligence is proved by proving that the duty of care has been breached and that loss or injury has been caused by that. That is a world away from saying, "I'm sorry—I made a mistake," or "That was my fault." Often, people do that when something is clearly not their fault.

To give a personal example, I was stationary on the M8 motorway and I had a sensation that my car was moving forward. My car went into the car in front, and I got out and said, "I'm really sorry about that; I've no idea what happened. That was my fault. Do you want my card? No damage has been done, but there it is if we need to pursue the matter further." Way down the line, I went to East Kilbride and parked at the public library. Someone got out and said, "I saw what happened on the motorway with that guy running into you. If you need a witness, let me know," yet I had got out of the car and said, "Sorry, it's my fault," even though it patently was not. That is the difficulty.

The fact that I intend to exclude statements of fact means that the facts can be looked at, but given the way case law is going, it is accepted that an admission of fault is not the same as an admission of liability.

Roderick Campbell: Would you agree that the test in Hunter v Hanley is a test for professional negligence—for want of a better word—and whether there has been a failure to exercise reasonable care and skill? That is not the same thing as in a motor accident, for example, where things are perhaps slightly more clear cut. It has been clearly established that, in a case of professional negligence, saying sorry is not the same as someone saying that they have failed to exercise the degree of care and skill to be expected of a reasonably competent professional. I think that we might be conflating the two things, but I am not giving evidence, so I should be careful with that point.

The faculty went on to say:

"If enacting the bill would disadvantage certain people, where is the balancing advantage and how confident can we be that there would be a benefit from depriving people of rights that they currently have?"—[*Official Report, Finance Committee*, 9 June 2015; c 8.]

It has considered empirical evidence from around the world and it cannot find any good evidence to suggest that such laws actually work. Where is the empirical evidence to support the bill?

Margaret Mitchell: Roddy Campbell is right: it is difficult to establish hard facts about how the bill would work. There are various apology laws, and in the United States, Australia and Canada such laws have been in place for 10 or 12 years and they have not been altered or found to be causing problems.

I can go further and mention the comment by Chris Wheeler, deputy ombudsman of New South Wales, who said:

"for several years, apologies legislation had been regularly reviewed in terms of case law, across Australia and Canada in particular, to see if there have been any unintended consequences, and search for media stories that might point to a downside. No evidence appears to have been found that the statutory protection for apologies has had any negative results."

I suppose that I am turning your point round and saying that there might not be hard and fast empirical evidence, but such laws have been in place for many years and seem to be unproblematic. Research has been carried out in New South Wales and no negative results have been found. I hope that that gives the committee some comfort.

John Finnie (Highlands and Islands) (Ind): I am inherently sympathetic to the approach in the bill. In your opening remarks, you mentioned an entrenched culture and a perception of increased litigation. I am wondering about the extent to which the position of insurance companies, for example, relates to that. Cover would normally be excluded if liability has been admitted, and that factor will go to create such a culture. What will be the implications of your proposed legislation on that?

Margaret Mitchell: I am very encouraged that the Association of British Insurers has chosen not to comment on the bill. That indicates that it is broadly content with the—

John Finnie: Is that a reasonable assumption?

Margaret Mitchell: I have spoken to the ABI over a period of time. I admit that I first came to the Parliament's non-Government bills unit about three years ago, waving the British Columbia one-page bill in front of them and saying, "This shouldn't take too long—it's relatively straightforward." Since then, however, there has been a lot of in-depth study and analysis to get to the point we are now at, and I assure Mr Finnie that I am encouraged by the fact that the ABI has chosen not to comment.

More than that, we know that, if "fault" and "fact" are taken out, the ABI will be perfectly happy with what remains, which it seems will be the essence of section 2 of the Compensation Act 2006. It is clear that that would not void any contracts. I am therefore encouraged that the position that we are in just now would not cause any problems with the insurance companies.

John Finnie: If the bill is passed as it stands, how do you envisage the promotion of the

legislation? Ultimately, that is how the culture would be changed in the longer term.

Margaret Mitchell: The fact that there was apology legislation at all would go a long way towards giving people confidence. It would be helpful for staff who were worried about the issue, despite all the training and assurances, to know that the law, legal certainty and the various ways in which evidence plays are all covered in the legislation. However, I envisage guidelines, a campaign to explain and highlight more, and other measures that will help to promote the bill, raise awareness of it and lead to better practice and better outcomes.

John Finnie: I may have missed this, but do you have a comment to make on the position of the Scottish Children's Reporter Administration regarding its exclusion?

Margaret Mitchell: I have met the SCRA. It will depend on the final format of the bill and whether we include "fault". It seems that, if "fault" was not included, an exclusion would be unnecessary—it would not apply and the SCRA would not need it. If "fault" is included, I am sympathetic to looking at the SCRA as an exception. I understand that the SCRA is concerned with establishing the main facts rather than looking at legal proceedings as such. I would be sympathetic to its being excluded.

Roderick Campbell: I have a supplementary question on the issue of insurance. Do you agree that it might be in the commercial interest of insurers for the bill to be passed? It would potentially restrict the rights of pursuers or plaintiffs to bring cases that they would otherwise be able to found on an admission or an apology. Given the terms of the legislation, it would not be possible to refer to that admission or apology in subsequent proceedings, which would generally be to the advantage of the defendant and insurer. Do you agree with that?

Margaret Mitchell: You gave a perfect example when you talked earlier about admissions of liability, which are of course admissible, and confused them with admissions of fault, regret and so on. All of that has been covered in evidence.

If pursuers are encouraged to go ahead by legal representatives—solicitors, the Faculty of Advocates or personal insurance lawyers—when they have been given an apology in those terms, they are going to be disappointed. They are going to incur legal costs that they should not have incurred and which will inevitably be there, despite the loser-pays rule.

At the end of the day, the bill could work very well to the benefit of those who are pursuing a claim, because the giving of an apology under these terms and the inadmissibility of it do not prevent their pursuing compensation if they are not satisfied that that is sufficient redress and if they feel that there is a case to answer. The only difference would be that they would be likely to keep more of the compensation payment instead of paying it out in unintended costs to legal representatives.

Christian Allard (North East Scotland) (SNP): I have a supplementary question on that issue. Do you think that there will be a conflict with the financial and insurance professional regulations because they are a reserved matter?

Margaret Mitchell: I can give Christian Allard some reassurance on that very point. The question of it being a reserved matter was looked at—in the policy memorandum, I think—according to the parliamentary rules, and the bill was ruled to be competent. Does that answer your question?

10:00

Christian Allard: It is difficult because we know how many reservations there are about the introduction of such legislation, and there could be a lot of difficulties with its implementation if the profession does not recognise that this Parliament has authority. If the matter is reserved, it could end up being debated in a Parliament other than this one.

Margaret Mitchell: I think that we might be confusing two things. The legislation is ruled to be competent under the Scotland Act 1998 in that it clarifies the law—it does not seek to change insurance policy, which, as you rightly say, is reserved.

You may be referring to a tribunal that might have a reserved aspect and a devolved aspect. Those are issues of detail that could be successfully teased out at stage 2. I will go back to the fact that, under section 2(3) of the bill, ministers have the right to make exemptions as we go along.

Christian Allard: The bill seems to be very complicated and there seem to be a lot of objections to it—some would say minor objections. However, my biggest issue is in relation to what you said earlier, when you were asked about empirical evidence that such legislation is working in other parts of the world. Your answer was that there was no evidence to the contrary—that when such legislation was introduced, there was no negative effect.

I have an objection to that. To my mind, introducing a law that has no positive effect—which only has no negative effect—is a law too many. It is difficult to understand what difference this law will make if there is no evidence. We worked very hard in this committee to find

evidence that such legislation would work, but we did not find any.

Margaret Mitchell: There are a lot of points in there that I will need to break down. On your point that there are no hard facts or empirical evidence, I note that there is some evidence in some parts of the US—that is the nearest that we get. There is some evidence from the US that, after apology legislation has been granted or passed, cases have gone up in the short term and then litigation has seemed to fall away.

However, as I said at the beginning, this is not a bill to address any perceived increase in litigation; it is a bill to address the fear of litigation, which is unfounded. As a member of the Scottish Parliament, I would be surprised if you, Mr Allard—and everyone else here—had not been in a situation in which someone came to you and said, "Such and such an event happened; all I want is an acknowledgement—an apology—and to make sure, above all, that it does not happen to anyone else." The bill gives legal certainty to the person from whom the apology is sought so that they can give that apology and explanation and try to make sure that it does not happen to anyone else.

The benefits from that certainty are absolutely huge. An apology brings closure. For years and years, people can hang on to an incident and keep going back over it because they never got an apology. In fact, that is why an apology law was introduced in Massachusetts in the first place, way back in 1986. A senator's daughter was killed in an accident and an apology was never given.

I think that we underestimate the power of an apology to make a difference. I suggest that, if you look at your glass as being half full rather than half empty, that would be a good way to look at the bill.

Christian Allard: It is very difficult to find any evidence and we tried very hard. That is the point.

You talked about the entrenched culture never to apologise. It does exist, but is it that entrenched when we know from the NMC and the GMC that a lot of things are happening to make sure that people and professionals will apologise more? It is not that nothing is happening; a lot of things are happening.

Would it not be better to incorporate the provisions into another bill, as happened in England and as the Scottish Government is thinking of doing with a duty of candour? Professional bodies seem to be a lot more receptive to that. They seem to prefer the approach in England and the idea in Scotland to include it in the bill that will introduce a duty of candour. Would that not be preferable?

Margaret Mitchell: No. I think that there is a misunderstanding in what you say. What found favour is not the fact that the measures were incorporated into another bill but the terms of the Compensation Act 2006. Sorrow, regret, taking responsibility and considering redress were all considered to be protected in an apology and, therefore, my bill says should that they should be inadmissible as evidence.

There is huge value in clarifying existing law and giving legal certainty in the bill so that people can have the confidence to apologise. That is the value of putting an apologies bill on the statute book: people will be able to have confidence and look to the apologies legislation. I hope that that would result in the fear being taken away and people being encouraged to make apologies. There is real value in having stand-alone legislation to promote that approach.

Christian Allard: There is not stand-alone legislation on the issue down south, and it would be incorporated in a duty of candour in Scotland. Might you think about delaying your bill until after you have seen how the introduction of a duty of candour changes the system?

Margaret Mitchell: I am genuinely puzzled about why we should put all our eggs in the one basket of medical provision under a duty of candour and not consider the much wider application of the Apologies (Scotland) Bill.

The Scottish Public Services Ombudsman has always been supportive of the bill because he knows that, the longer it takes to give an effective apology, to stop non-apologies such as, "I'm sorry if you felt—" being given, and to deal with the situation with which the complaint is concerned, the more the cost goes up and the more unsatisfactory it is for the people who seek the apology. I could give many examples of how, in the private sphere, an effective apology calms everything down and lets people get on with resolving the issue that needs to be examined. That is the real value of the bill.

The duty of candour could be considered at stage 2. The Government could choose to make an exception. The legislation in England and Wales is new. I think that part of it has still to be enacted and the main part was commenced in 2014, so we have a long way to go until we see how effective it is and how it plays out. Therefore, I see no logic in not proceeding with the bill because of the duty of candour.

Christian Allard: Do you see any logic in excluding the medical profession from your bill?

Margaret Mitchell: We should consider the circumstances. The GMC has expressed support for an apology being given and being inadmissible

as evidence in civil proceedings. That information came in this morning.

The detail of how the provisions play out could be considered at stage 2. We have the general comfort of what the bill will affect. No one is telling the medical profession that it must apologise as a result of the bill, but there are some provisions that would give the profession comfort. It is good that we have established this morning—and that the GMC has confirmed—that the bill would not interfere with its guidelines on the giving of apologies.

Gil Paterson (Clydebank and Milngavie) (SNP): The minister suggests that public inquiries, arbitrations and tribunals should be excluded from the bill. What is your view on that?

Margaret Mitchell: Again, I am quite relaxed about that and prepared to look at it at stage 2. It will be for the committee to decide whether the case has been made that there should be an exception.

I realise that what the minister suggests might not be a definitive list: that will depend on the final provisions of the bill. It might not be necessary to exclude those bodies if the bill drops "fault" and we are left with expressions of regret and offers of redress. In general, I am happy to look at the minister's suggestions for exceptions as the bill progresses.

Gil Paterson: I noted the answer that you gave to John Finnie on the Scottish Children's Reporter Administration and your sympathetic words about removing that body from the bill. If you were to make all those exclusions, would that not weaken the effect of what you are trying to achieve?

Margaret Mitchell: The case must be made robustly for each of the proposed exclusions, by teasing out why an exception is wanted. Each would have to be looked at in detail.

The general principle of the bill is to provide legal certainty about people being able to say sorry, express regret and take responsibility, and that is certainly not weakened. If anything, the provisions provide people with more assurance, especially in relation to the undertaking to look into the circumstances and see if any lessons can be learned. The detail will be a policy decision, but the wider principles of the bill and the provisions to deliver those are worthy of going ahead, regardless of any exceptions that might be incorporated.

Jayne Baxter (Mid Scotland and Fife) (Lab): What is your view of how the bill will interact with pre-action protocols?

Margaret Mitchell: Nothing in the bill should interfere with legal proceedings as they are at present. The bill would not affect legal proceedings that are already under way. If an apology is used in legal proceedings that are under way, the present law would apply. My bill would only affect situations in which legal proceedings were not under way and the apology was given without legal proceedings being considered.

Jayne Baxter: Do you think that that is clear from the way the bill is drafted?

Margaret Mitchell: If it is not clear, there is an opportunity to make it so as the bill progresses.

Jayne Baxter: Okay.

I have a further point of clarification, I heard you say in your statement that you are content to take out the reference to "fact", but I am not clear what you said about "fault". Are you still considering and talking to people about that?

Margaret Mitchell: It is clear that, at the moment, the minister considers that there is a possible risk of harm, which is not balanced by the possible benefits of the bill. That needs to be teased out. Already, we have heard admissions of liability being conflated with statements of fault, and there are various hurdles to go over before statements of fault could be considered statements of liability. I realise that the decision is not hard and fast or black and white. It will be a policy decision, and people will know from their own feelings and assessment on which side of the balance the inclusion of fault should fall.

10:15

If, having considered the matter of fault again, along with the consequences, the Government still feels that the balance is more against the pursuer, I will be happy to accept that and therefore to exclude fault. However, I hope that we can have a debate on the matter and that it is examined thoroughly, because it can make such a difference if people are able to say, "Sorry, I made a mistake"—whether they made a mistake or not, as my example proved—which encourages a fuller and more balanced apology.

Roderick Campbell: We have heard from the Government, but we have also heard from the Forum of Insurance Lawyers regarding section 2 of the Compensation Act 2006 in England. Mr Watson, one of those insurance lawyers, said:

> "straightforward legislation that made it clear that an act of apology, of itself, did not amount to an admission of liability would have great merit."—[*Official Report, Justice Committee*, 9 June 2015; c 6.]

I think that that view is shared by the Government. Could you recap why you think that it would be inappropriate to follow the example of England?

Margaret Mitchell: Sorry—I did not catch the end of what you said.

Roderick Campbell: Why do we not just run with something similar to section 2 of the Compensation Act 2006?

Margaret Mitchell: I would add to that quote the written submission from the Forum of Insurance Lawyers. It said that it would be happy with a provision along the lines of section 2 of the 2006 act, but it was also happy with the provisions in the bill. If we did not go with the 2006 act provision, it was content with all the provisions being included in the bill.

You are mainly asking what the added value is. The 2006 act does not give a definition of an apology. The bill is not prescriptive, but it shows what can be included, and what it helps to include, in an apology. That would be laid out in statute.

I return to the issues of sorrow, regret and the taking of responsibility—indeed, the acknowledgement that the thing has happened in the first place is pretty important for those who are seeking an apology. Certainly, to bring closure, the indication expressed in section 3(c) of the bill that the circumstances can be considered with a view to seeing whether any lessons can be learned is also of huge importance. None of that is really in the 2006 act.

I therefore think that there is huge added value in going beyond the 2006 act. The bill changes the law by ensuring that the apology is inadmissible—it has no legal effect and is not taken into evidence. That measure goes a little bit further than the 2006 act, which helps and encourages the principle and intent of the bill, which is to encourage apologies.

Christian Allard: I return to the General Medical Council's memorandum. I did not find anything in it that said that it supported the bill.

Margaret Mitchell: Are you referring to the letter that came through?

Christian Allard: Yes.

Margaret Mitchell: The GMC sent through a statement today, which is helpful. It says:

"We would support an apology being inadmissible of legal liability in civil proceedings."

It goes on to discuss apologies not being inadmissible in other circumstances—it mentions fitness to practise and so on. These are details that I can share with the committee and which can be teased out at stage 2. That statement certainly suggests that the GMC supports the inadmissibility of an apology as evidence of legal liability in civil proceedings, which is what the bill does.

Christian Allard: Right, but the GMC does not directly say whether it supports the bill as such.

Margaret Mitchell: Well—

Christian Allard: It is all right—that is fine. I just wanted to know.

The Deputy Convener: I have a wee technical point to raise. Ms Mitchell, you specifically exempt inquiries under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. As you know, the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill repeals that act. I just wonder whether there would be merit in having all the exemptions defined by Scottish ministers in the first place.

Margaret Mitchell: That might have some merit as a stage 2 amendment. It might be worthy of consideration at that point. It is a detail, but it is an important one.

The Deputy Convener: I thank Margaret Mitchell, Mary Dinsdale and Neil Ross for attending the committee. We will suspend for a couple of minutes to allow Margaret to resume her normal position at the table.

10:20

Meeting suspended.

10:21

On resuming—

European Union Priorities

The Deputy Convener: Item 6 is on European Union issues. Paper 5 invites the committee to note correspondence from the European and External Relations Committee on its work on migration, and from the Minister for Community Safety and Legal Affairs on migration and the Government's EU e-justice work. As he is our EU reporter, I invite Roderick Campbell to speak about the correspondence that we have received.

Roderick Campbell: I do not have much to add beyond what is in the paper, unless anyone has any specific questions.

John Finnie: I just want to say that what is happening in the Mediterranean, which the paper refers to, is a humanitarian disaster. There is a positive plan, and I commend the Scottish Government's approach because it is humanitarian, not punitive. I would like us to lend our support to that.

Christian Allard: I am particularly encouraged by the Scottish Government showing its understanding of the importance of European co-operation, and saying that co-operation, not isolation, is key.

Jayne Baxter: It is good to see the four positive steps for taking matters forward, and it is refreshing to see suggestions for what can be done. We sometimes spend time in here being bamboozled, so it is helpful that the EU is saying, "This is what we are going to do."

The Deputy Convener: Are members content to note the correspondence and to return to the issue after the summer recess, when we are likely to have received another update from the minister?

Members *indicated agreement.*

The Deputy Convener: Under item 1, we agreed to move into private session for the final item of business, which is consideration of our draft stage 1 report on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill.

10:22

Meeting continued in private until 11:38.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-78568-955-0

Revised e-format available
ISBN 978-1-78568-974-1

Printed in Scotland by APS Group Scotland