



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 9 May 2017

Session 5



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JUSTICE COMMITTEE

17th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)

*Mary Fee (West Scotland) (Lab)

*John Finnie (Highlands and Islands) (Green)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Ben Macpherson (Edinburgh Northern and Leith) (SNP)

*Liam McArthur (Orkney Islands) (LD)

*Oliver Mundell (Dumfriesshire) (Con)

*Douglas Ross (Highlands and Islands) (Con)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Patrick Down (Scottish Government)

Annabelle Ewing (Minister for Community Safety and Legal Affairs)

Philip Lamont (Scottish Government)

Elinor Owe (Scottish Government)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 9 May 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning. Welcome to the Justice Committee's 17th meeting in 2017. We have no apologies.

Agenda item 1 is a decision on taking business in private. The committee is invited to agree to take in private item 5, which is consideration of witnesses for our scrutiny of the Domestic Abuse (Scotland) Bill. Do we agree to do so?

Members *indicated agreement.*

Subordinate Legislation

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

10:01

The Convener: Agenda item 2 is consideration of an affirmative instrument. Before we begin, I voluntarily declare an interest: I was the member in charge of the bill that became the Apologies (Scotland) Act 2016.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): On that topic, it was helpful for members that you shared your personal correspondence with the minister and her response, particularly given how technical the area is. Should you—or other members—wish to do that again, I would encourage you to do so.

The Convener: I note what you say.

I welcome Annabelle Ewing, Minister for Community Safety and Legal Affairs, along with her Scottish Government officials: Elinor Owe, civil law policy manager, and Catriona Marshall from the directorate for legal services.

I remind members that officials are permitted to give evidence under item 2 but may not participate in the formal debate on the motion on the instrument at item 3. Item 2 is an opportunity for members to put to the minister and the officials any points seeking clarification on the instrument before the motion is formally disposed of.

I refer members to paper 1, which is a note by the clerk. We have received and circulated a number of submissions on the instrument.

I invite the minister to make a short opening statement.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): Thank you and good morning.

The regulations do two things in relation to the Apologies (Scotland) Act 2016: they make a small amendment to the existing exception for inquiries; and they add an exception for the fitness to practise proceedings of 10 professional regulators.

The 2016 act excepts inquiries that Scottish ministers cause, or jointly cause, to be held under the Inquiries Act 2005, but does not except inquiries that are held in Scotland solely at the insistence of United Kingdom ministers. Although such inquiries are likely to be rare, the change will provide consistency.

The second exception applies to the proceedings of 10 professional regulators—the regulator of the social services workforce, the

regulator of teachers in Scotland and eight health regulators. The need to make the exception has been clearly set out by the regulators themselves in their briefing papers to the committee. It is clear that the 2016 act could have negative unintended consequences for their fitness-to-practise proceedings. In particular, it would impact on their ability to establish facts and to make risk assessments.

With regard to the regulators' procedures, an apology can provide an important piece of the full evidential picture—not just the terms of the apology and any undertaking that was made, but the circumstances of the case. An apology can be used as evidence of the level of insight into wrongdoing that the professional had, which, in turn, can be an important part of an assessment of the risk that they may pose to the public in future.

The need for the exception was raised by the General Medical Council and the Nursing and Midwifery Council as early as stage 1 of the Apologies (Scotland) Bill, and the Justice Committee recognised their concerns in its stage 1 report. Continued work revealed that those concerns extended beyond the health regulators. The Scottish Social Services Council and the General Teaching Council for Scotland have made it clear that they share the concerns about the impact of the 2016 act on their proceedings.

I am keen for the Apologies (Scotland) Act 2016 to have as much benefit as possible, and I am grateful for the convener's input into the process to maintain the focus on that aim. The regulations except only the proceedings of professional regulatory bodies that have a shared rationale for the need for their proceedings to be excepted, which is, ultimately, to preserve their ability to protect the public.

The Convener: I thank the minister for that.

In the stage 3 proceedings on the Apologies (Scotland) Bill, the then Minister for Community Safety and Legal Affairs made it clear that the exemption would apply only to health professionals, because it was seen that the provisions in the bill and the provisions on the duty of candour—which the Government was going to introduce—could not co-exist. Under the provisions on the duty of candour, an apology must be made, and if an apology is made, it will be used in legal proceedings. That runs entirely counter to the provisions of section 1 of the Apologies (Scotland) Act 2016. Will the minister confirm that that was the case?

Annabelle Ewing: During the passage of the Apologies (Scotland) Bill, certain issues arose. One that arose in 2015 related to the position in the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill, which became the Health

(Tobacco, Nicotine etc and Care) (Scotland) Act 2016. That act introduced the organisational duty of candour, and there was on-going discussion about that during the passage of the Apologies (Scotland) Bill. It was also recognised that an exception was needed to take account of the concerns of regulators, including health regulators, about the way in which the bill could cut across their professional standards and regulatory processes. The duty of candour head of exception was not deemed sufficient, and that is why there were on-going discussions about adding an exception for those professional practice regulatory proceedings. I hope that that deals with the first point.

On the second point, during the work that officials undertook to scope out the drafting of the exception and the appropriate approach to take, discussions were held that extended beyond the GMC and the Nursing and Midwifery Council to other health regulators. In the context of that work, a health regulator flagged up the issue to the Scottish Social Services Council. With regard to the General Teaching Council for Scotland, the issue could have been flagged up through a similar route or as a result of direct discussions that officials held in good faith, exercising due diligence as they are required to do. That is how that came about. Where we are today is, in essence, a result of those 10 regulatory bodies making it clear that they share concern that the application of the 2016 act would impact negatively, by way of unintended consequences, on their fitness-to-practise processes and regulatory proceedings, which would limit their ability to protect the public.

The Convener: Could not every regulatory body put forward the same argument?

Annabelle Ewing: I do not think so. A number of regulatory bodies will not seek any particular exception—at this stage, we are aware that those include the Law Society of Scotland, the Faculty of Advocates, the Institute of Chartered Accountants of Scotland, the Institute and Faculty of Actuaries, the chartered banker professional standards board and the Civil Aviation Authority.

The nature of the fitness-to-practise proceedings of those eight health regulators, the SSSC and the GTCS is such that they share the same concern, based on the same rationale, that the Apologies (Scotland) Act 2016 would cut across their regulatory procedures negatively—they assume that that was unintended but is nonetheless the case—and would, in turn, impact negatively on their ability to protect the public and on the ability of the public to have confidence in the way in which those professional bodies regulate their professional members.

The Convener: We might set aside the eight health professional bodies, which we all accept will be exempted—from my point of view, because of the duty of candour provision—and concentrate on the GTCS and the SSSC. The minister says that they have the same concerns as the other bodies, but the previous minister accepted at stage 3 that the other eight will be exempt because of the duty of candour. Will you explain in what way the 2016 act could negatively impact the GTCS and the SSSC?

Annabelle Ewing: I will clarify the point. The other eight bodies are not being excepted on the basis of the duty of candour. As I tried to explain, during the passage of the Apologies (Scotland) Bill, it became clear early on that other legislation—specifically, the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill—would require a separate head of exception. That was agreed and was made clear.

Notwithstanding that discussion and agreement, it was also recognised that there would have to be yet another head of exception to cover the regulatory proceedings of—it was anticipated at that time—the health regulators. That did not relate to the duty of candour exception. It was clearly recognised that, notwithstanding that there was going to be a duty of candour exception in the bill, these regulatory processes would require an additional head of exception. Therefore it is not correct to say that the exception of the regulatory bodies was as a result of the duty of candour.

The Convener: Can I interrupt?

Annabelle Ewing: I was going to try to deal with the second point. The committee has—

The Convener: Before you leave that point, I say that what those eight bodies had in common was that they were all health professional bodies, such as the GMC. It was always accepted that the bodies involved came under the banner of health professionals.

Annabelle Ewing: They did at that time come under the banner of health professionals, but that did not relate to the duty of candour exception that had already been discussed. As I was trying to explain to the committee, in the due diligence work that we were required to do to come up with a Scottish statutory instrument, it became quite clear that the SSSC and the GTCS shared exactly the same concerns about how the 2016 act would cut across their professional regulatory processes to the extent that they would not be able to fulfil their duty of protecting the public in the way that they felt that they should. That is why the SSI has been drafted in the way that it has been—specifically to include these 10 regulatory bodies. I refer committee members to the detailed submissions of both the GTCS and the SSSC, which I am sure

members will have had a chance to read and which set out quite clearly why they share the same concerns as the health regulatory bodies.

The Convener: Why do you think that the GTCS and the SSSC would be negatively affected by the provisions of the Apologies (Scotland) Act 2016?

Annabelle Ewing: They make it quite clear that the 2016 act would cut across the processes that they have laid down, which are designed to ensure that the public is protected, just as—and the convener seems to accept this—it cuts across the processes of the eight health regulatory bodies.

The Convener: Can I stop you there? It was never accepted that the Apologies (Scotland) Bill would adversely affect health professionals and others, but it was accepted that the duty of candour provision, which expressly says that an apology must be admissible once it is given in civil proceedings, would, and that was the basis on which I agreed to the exception. Could you explain why you think that the GTC and the SSSC would be adversely affected by the act? Perhaps an example would help.

10:15

Annabelle Ewing: I certainly will do so in one second, but I just want to go back to the duty of candour. I want to make it clear that the exception for regulatory bodies is not to do with the duty of candour. There is an exception relating to the duty of candour already agreed in the act. It was recognised at the time of the passage of the Apologies (Scotland) Bill, which is now the act, that there would have to be a completely separate and additional head of exception to encompass these professional regulatory processes. In that regard, during the stage 1 debate, Alison McInnes said:

“On regulation of health professionals, the Nursing and Midwifery Council and the GMC both argue that the bill would have serious unintended consequences ... The warnings that we have heard from those bodies must be heeded—the regulation of our health professionals is an important safeguard and we should do nothing that impacts on the regulators’ ability to bring a fitness-to-practice case.”—[*Official Report*, 27 October 2015; c 50.]

The Convener: Can I stop you there, minister? Health professionals are not at dispute today; what are at dispute are the GTC and the SSSC.

Annabelle Ewing: Yes, but it is exactly the same rationale.

The Convener: Well, could you explain what the rationale is for including the GTC and the SSSC?

Annabelle Ewing: They have set that forth clearly in the position papers that they submitted to the committee.

The Convener: Would you explain it to the committee?

Annabelle Ewing: The Scottish Social Services Council, for example, explains why the exception is required. It explains the nature of its process and how each part of that interlinks to the others. The council also says that, if the act was to cut across the processes that it has laid down, there could be significant implications for their coherence because, in a certain part of the process the act would apply and the apology would not be part of the evidence that it would look at, which would include insight, risk assessment and so forth, but it could be part of subsequent processes. There would therefore be a complete incoherence and inconsistency, which would affect the council's ability to carry out its processes in a coherent manner.

For example, the council says:

"an apology by a worker does not necessarily mean that the worker is admitting liability. However the terms of the apology and the circumstances around which it is made may be relevant to the factual consideration."

It continues:

"we highlight the importance of a worker making an apology when something goes wrong. This is an important part of a worker showing they have learned from what went wrong and helps show that the worker has insight. We believe that a panel should remove social service workers who persistently fail to show a lack of insight into the seriousness of their misconduct. It may substantially prejudice the worker if there were practical difficulties in a panel being able to take a worker's apology into account."

That is the position of the Scottish Social Services Council.

The Convener: I will refer the minister to the definition of "apology" and, perhaps once I have done that, she could give me an example of where the act would adversely affect anyone in the GTC or the SSSC. Under section 3,

"an apology means any statement made by or on behalf of a person which indicates that"—

this is quite precise—

"the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence."

As the minister will know, for survivors of sexual abuse who have been abused in an institutional situation—very often by people who would come under the SSSC—or in a boarding school or school environment, the acknowledgement that that has taken place is huge in itself and the expression of regret goes a long way to helping

their recovery, but the undertaking to ensure that it does not happen to anyone else by looking at the circumstances is also huge. In discussing the Limitation (Childhood Abuse) (Scotland) Bill, we have heard that a lot of survivors do not want to and will not go down the route of formal trial and compensation, but an apology could be just what they need. Can the minister set out a circumstance where section 3 of the act would be to the detriment of anyone because they were not exempted through the GTC and SSSC?

Annabelle Ewing: Just to clarify—as indeed I sought to do in my most recent letter to the member—I point out that the excepted proceedings that are set out in this SSI in no way cut across the opportunity for institutions such as schools to issue an apology. Given the very important subject matter that the member has raised, it is important to put on record that this does not cut across that in the slightest.

The Convener: On that specific point about institutions, bricks and mortar do not give an apology; a person does, and that person might well be giving the apology as a third person on behalf of someone else, saying, "I acknowledge that this happened. I am sorry, and I will do everything I can to look into the circumstances and make sure that it does not happen again." That person could be a member of the GTCS or the SSSC, and the exemption would—almost certainly, I would say—stop them giving that apology.

Annabelle Ewing: No. I think that—

The Convener: Please let me finish, minister. It would stop them giving that apology, as it would adversely affect them. That is what the whole apologies legislation is about—it has put into an act what is already the law in civil proceedings.

Annabelle Ewing: It is important to understand that two key but different points are being made here. An institution or a third party responding with an apology on behalf of that institution is an entirely different set of circumstances from an individual apologising for an action that they have taken themselves. I reiterate for the record that this SSI will not cut across the first set of circumstances in the slightest.

As for the second set of circumstances, if an individual is apologising directly for actions that they have taken themselves at some point in the past, two issues arise. First, if they come within the domain of one of these regulatory bodies and they are still on the register of that professional body, fitness-to-practise proceedings will most likely arise. Of course, in looking at the circumstances, the regulatory body will also take into account the gravity of the relevant incident. Secondly, the Apologies (Scotland) Act 2016 has

no impact on the criminal law. As a result, if an individual were apologising for actions that they themselves had taken, what we would see—and, I think, what we would all expect to see—would be the criminal authorities embarking on an investigation thereafter.

Those are two different circumstances. It is correct to say that this SSI does not cut across the conclusions of the interaction process, which is something I know the member followed carefully. In such cases, institutions such as schools and local authorities should have the facility to issue an apology without the worry of facing civil proceedings, and that is something that this SSI absolutely respects.

On the member's point about the definition of "apology", I note that section 1(b) of the 2016 act makes it clear that

"an apology made ... cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made."

The point that these regulators, including the SSSC and the GTCS, are making is that, notwithstanding the general approach that apologies are to be welcomed and so forth, there could conceivably be circumstances in which an apology could, after all the other evidence has been taken into account, be used to the detriment of the person concerned, and they need to have that facility to retain the coherence of their regulatory proceedings, which are, at the end of the day, designed to ensure that the public are protected.

The Convener: I am going to let other members come in at this point, but all I will say is that statements of fact are not protected. In such circumstances, we would be talking about criminal proceedings, and the apology would be admissible. We are looking specifically at the definition, which is merely an acknowledgement, an expression of regret and an undertaking to look into the matter and see whether anything can be done.

The point that the minister does not take is that, if someone is apologising on behalf of someone else, there is the potential, as the Former Boys and Girls Abused in Quarriers Homes submission points out, for the question of that professional's duty of care to be raised and for that professional to be adversely affected. If that is the case, they will not apologise, and the closure that the survivors seek will not be available to them.

Other members will have questions.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, minister. As someone who was not involved in the passage of the bill, I find it quite a lot to take in. Can you clarify my understanding? If the GTC and SSSC were not to

be exempted, it would impinge on their ability to exercise professional judgment on whether someone is fit to practise or teach and it would hamper the framework in which they have been working to ensure best practice and protect the public. Is that the nub of why they want to be excepted?

Annabelle Ewing: That is absolutely right. It boils down to the need to protect the coherence of the regulatory processes, in order that the organisations can fulfil their mission, which, at the end of the day, is to protect the public. It is correct to say that the genesis of this SSI was Mr Wheelhouse's contribution in the stage 3 debate, in which he stated quite clearly that, in due course, the Government would bring forward an SSI to deal with the cases that he was aware of at that point, which concerned the coherence of these professional regulatory processes. It is fair to say, as the convener has, that the reference at that time was specifically to health professional regulators, such as the GMC and the Nursing and Midwifery Council. However, in subsequent discussions that officials were required to carry out in the interests of due diligence and the exercise of good governance, it became quite clear that the two additional non-health professional regulatory bodies shared exactly the same concerns with regard to the nature of their proceedings and the role that an apology could or could not play in those proceedings. They were concerned that, if they were not also excepted, it would impinge on their ability to police their profession and ensure that the public are protected.

Stewart Stevenson: I was here when the bill went through Parliament, but I confess not to have paid close attention to it. It is clearly quite a technical area. I have tried, in my mind, to come up with an example that touches precisely on the part of the 2016 act to which the minister referred: section 1(b), which says that

"an apology made ... cannot be used in any other way to the prejudice of the person".

The example in my mind, which would not be caught by the criminal law, concerns a teacher who has taken a strong dislike to a particular pupil in a school. When that pupil is making choices about what courses to take, the teacher excludes them from a course for which 35 people have applied, perhaps because the course has equipment or space for only 30 people. One of the five is excluded simply because the teacher dislikes them. Professionally, that would be quite improper and it would be a matter that the GTC should properly get involved in.

I am asking for an opinion, as distinct from a legal opinion, because of course the courts would decide a legal opinion. In terms of section 1(b), if an apology were made in that instance, would it

carry the risk that the GTC would not be able to deal with the matter that was raised by the apology in their professional standards? Is that an example of the sort of difficulty that we would get into? Are there better ones?

Annabelle Ewing: The member captures the kind of difficulties that could be faced. The point is that, although the apology cannot be used to the detriment of the person, it has been clearly explained by the various regulators in their submissions to the committee that, in some circumstances, it could be. In the context of when the apology was made or not made, and the context of the other incident case evidence before the regulatory body—each case will turn on its own facts and circumstances—and if the apology could be used to the detriment of somebody and is not ab initio to be excluded under the 2016 act, it cannot be ruled out that it would cut across the proceedings of, in this case, the GTC, to the detriment of the coherence of the proceedings and the detriment of the public. The proceedings are there to ensure that we all have confidence in, in this case, the teaching profession.

10:30

Stewart Stevenson: I assume that, when the teacher's relationship with the pupil has been an inappropriate sexual relationship, that will be a matter for criminal law and an apology made under the 2016 act would not inhibit the GTC or the courts from taking such action. Therefore, whether there is any such inhibition relates entirely to what is being apologised for. In cases of sexual offending, the 2016 act does not create an inhibition relating to the individual who has been involved in the inappropriate behaviour.

Annabelle Ewing: It is correct to say that the Apologies (Scotland) Act 2016 has no impact on the criminal law of Scotland, and any allegation against someone in one of these professions—or anywhere—involving inappropriate sexual conduct would be passed on to the criminal law authorities, which would mount an investigation. I think that we can all recall past cases in which, under such circumstances in the teaching profession, for example, the teacher's ability to teach has been suspended pending further investigation. It is important to bear in mind that the act does not cut across the criminal law.

Notwithstanding that, through their submissions to the committee, the regulatory bodies have made clear their concern about their ability to ensure that those for whom they are responsible are meeting the professional standards required and their having the appropriate authority to tackle such circumstances, which we know are very much the exception rather than the rule in these professions, in which everybody does their best.

The regulatory authorities must retain the ability to investigate in a way that is appropriate for their professions.

The Convener: Let us take Stewart Stevenson's example, in which a teacher dislikes a pupil and excludes them from a course. Surely a complaint will be raised—there is not going to be an apology out of the blue—the facts will be looked at and the case will be proven or not. If an apology is given, it will be to the effect that the authority regrets that the complainer feels there has been an omission and that the pupil has been excluded and says that it will look into the circumstances.

Annabelle Ewing: Yes. Absolutely, and each case will depend on the facts and circumstances. However, it is important to remember what the definition of an apology is under the 2016 act. It includes an element of no detriment to the individual, which is where it cuts across the 10 regulators. There could conceivably be circumstances in which an apology is part of the proceedings—

The Convener: Can we stick to the example that I gave, minister? How is it to the detriment of the individual if a teacher or someone on behalf of the teacher gives that apology? How is that a detriment to anyone? Is that not only to the good of the person who is seeking an explanation?

Annabelle Ewing: One would need to look at all the facts and circumstances of each case. What I am trying to explain is that, given that the definition of an apology includes an element of no detriment, the regulators are saying that that cuts across their processes and that, if they are not exempted from the provisions of the 2016 act, their ability to protect the public will be diminished.

The Convener: I refer you again to what the definition is, which will be the same in every single case.

Annabelle Ewing: The provision is in section 1(b) of the 2016 act.

The Convener: Section 3?

Annabelle Ewing: Section 1(b) contains the no-detriment provision.

The Convener: Does anyone else want to come in?

John Finnie (Highlands and Islands) (Green): Good morning, minister. You touched on the consultation. I understand that the issue was discussed with the UK Government. Did it express a view?

Annabelle Ewing: Do you mean on the Inquiries Act 2005?

John Finnie: Did it express a view on the specifics of the measure that we are discussing at the moment.

Elinor Owe (Scottish Government): The discussion with the UK Government was about the inquiries exception.

John Finnie: What view was expressed?

Annabelle Ewing: It seems that, as the result of an oversight, the inquiries exception was framed to include 2005 act inquiries that are initiated by the Scottish Government, inquiries that are initiated jointly by the Scottish Government and the UK Government or, conceivably, inquiries that are initiated by one of the other devolved Administrations, but not inquiries that are instigated solely at the behest of the UK Government. Although such inquiries would be rare in Scotland—we cannot easily imagine such circumstances—it was felt that, in order to ensure consistency, such circumstances should be included in the exception. The proposal has received no opposition from the UK Government, as you can imagine.

John Finnie: Thank you. You laid out a list of the other regulators that were contacted. Did any of them say why they are not concerned about the provision?

Elinor Owe: Yes. For example, the Law Society of Scotland said that apologies do not feature in its proceedings: apologies are not useful evidence in its proceedings.

John Finnie: Did any respondents suggest that they would adapt their processes to incorporate the provision? One can imagine that when a law is passed bodies respond by looking at their procedures and the implications for them.

Annabelle Ewing: That is a good question and it is something about which we would be happy to write to the bodies that we know are not concerned about not being part of the exception. Those that I have listed include the Institute of Chartered Accountants of Scotland, the Faculty of Advocates, the Law Society of Scotland, the Institute and Faculty of Actuaries, the chartered banker professional standards board, and the Civil Aviation Authority. I would be happy to write to those bodies to ask what account they intend to take of the legislation—assuming that the regulations come into force.

John Finnie: You also mentioned “shared rationale” between the GTC and the SSSC; indeed, that has manifested itself in astonishing similarity between their submissions, some sections of which are verbatim the same. Is there a perception that people are getting together to try to avoid application of a measure that has been commended by Parliament?

Annabelle Ewing: I hope not, and I do not believe that to be the case. Not all bodies are equally good at keeping track of legislation. The issue came to the fore during the passage of the bill because the GMC and the Nursing and Midwifery Council were very much on the case. They had discussions—as did we—with other health regulators, and found that the shared rationale stems from their proceedings being essentially similar rather than from there being an attempt to gang up to defeat the act. Their proceedings are similar, as was recognised in the stage 1 report.

We have added the extra two non-health regulators because they also have put it to the Government that they are, essentially, in the same position and share the concern that their not being excepted from the Apologies (Scotland) Act 2016 will cut across the coherence of their regulatory practice processes, which would mean, in turn, that they would feel that their ability to protect the public was diminished.

John Finnie: Do you envisage any other organisations coming forward if the regulations pass?

Annabelle Ewing: I cannot rule that out, at this stage. However, no other organisation has done so to date, although they have had the opportunity. We can therefore reasonably conclude that there will not be any great clamour. Obviously, if that were to happen, we would have to look at the facts and circumstances to see whether there is evidence to back up an attempt to have more bodies excepted. Exceptions are based on evidence, as per the submissions from the regulatory bodies.

John Finnie: Finally, we have a written submission from the Former Boys and Girls Abused in Quarriers homes that expresses concern about the regulations. I and the convener were involved with the bill during the previous parliamentary session and the legislation was seen as a tremendous addition to the range of options. The Scottish Human Rights Commission has been at the heart of progressing issues of historical child abuse. Has it expressed a view?

Annabelle Ewing: I and officials met representatives of the Scottish Human Rights Commission a couple of weeks ago and a number of issues were raised. I raised the issue that we are discussing: the SHRC made no comment at that time, and no comments have been received from it since that meeting.

John Finnie: Thank you.

The Convener: Reference has been made to the Law Society and the Scottish Human Rights Commission. The minister will recall that, at stage 1, evidence was taken to the effect that, in their

experience, an apology is not prejudicial to pursuers because, in most cases, there would be no apology forthcoming if it was admissible in civil proceedings.

Fulton MacGregor (Coatbridge and Chryston) (SNP): There seems to be a general consensus that there should be an exception for the health agencies. Did the SSSC or the GTCS have a view on the fact that many of their members are health professionals or are involved in health settings? That particularly applies to SSSC members, a significant portion—if not a majority—of whom are health professionals, which means that the issues that apply to the health agencies would apply to them. That might be less the case with the GTCS, although there is teaching in health settings. Did that come up in any of the discussions?

Annabelle Ewing: It did not come up, per se, although given the nature of the professions, there may be similarities in their work that would lead to similarities in their fitness-to-practise proceedings. Nevertheless, it is clear from the submissions that the bodies all share the concern that if the act were applied to them without exception, it would cut across their proceedings, which they say would diminish their ability to protect the public.

Liam McArthur (Orkney Islands) (LD): The minister quoted Alison McInnes. I share Alison's concerns and would not want to distance myself from somebody who has been immersed in the detail of the issue rather more than I have been.

I want to follow on from John Finnie's questions. The minister talked about insight, the regulatory bodies' determination to address future risk and the need to maintain the coherence of the regulatory process—which she has referred to on a number of occasions. It strikes me as odd that the Law Society, ICAS and a number of other bodies do not see themselves as being affected by the regulations. One can imagine a law firm issuing an apology on behalf of one of its solicitors, in much the same way that a school might issue an apology for something that has happened and through which it subsequently find itself in a disciplinary process in respect of an individual teacher. Like John Finnie, I struggle to understand why the Law Society and so on are any different from the bodies that are listed in the SSI.

Annabelle Ewing: As Elinor Owe said, the Law Society has told us that it does not use apologies, as such, in its processes, and that the regulations are therefore not an issue for it. We understand that other similar bodies have not sought exceptions. John Finnie made the very good suggestion that we follow up to see how those bodies intend to factor the act into their processes; we would be happy to do that. I cannot give the

member a definitive response, because the other bodies have not told us why they do not share the concerns of the health regulatory bodies and so on. The only exception, as I have said, is the Law Society.

Liam McArthur: Using that rationale, the risk is that either the act will be deemed not to apply to those regulatory bodies or that they will simply seek an exception under the act. The convener alluded earlier to that calling into question the extent to which the act will be allowed to bite.

Annabelle Ewing: With regard to the bodies that have not sought that their exception be listed in the SSI, one would need to know the detail of their individual processes. The bodies that have expressly asked for an exception to be made—the eight health regulators, the General Teaching Council for Scotland and the Scottish Social Services Council—have explained their need to ensure coherence and to maintain their flexibility to consider apologies in different ways depending on the context of all the evidence before them in a case. That is why they have shared with us their concern that if the act were to apply to them without exception, it would impair their ability to police their profession, which would, in turn, diminish their ability to protect the public.

10:45

Liam McArthur: If the regulatory bodies that appear to be unconcerned take that view for the same reason as the Law Society—that apologies do not currently form part of their regulatory process—I cannot see what effect the Apologies (Scotland) Act 2016 will have when, for reasons that I entirely understand, all the bodies that it might touch upon seek an exception. In a sense, that appears to drive a coach and horses through the rationale for the 2016 act in the first place.

Annabelle Ewing: With regard to the bodies that we are dealing with today, which have stated in some detail their reasons for asking for an exception, the issue of the unintended consequences of the 2016 act was recognised as early as stage 1 of the passage of the bill. It was acknowledged in the stage 1 report—and by Liam McArthur's former colleague—and it was accepted that work would need to be done to pave the way for an exception for those bodies. The SSI will do that very thing.

The list of 10 bodies includes the Scottish Social Services Council and the General Teaching Council for Scotland on the basis that the grounds for exception for the eight health regulators are the same as their grounds for exception. It is in the interests of good governance; it would be very difficult to argue that we could allow eight exceptions according to a rationale, but reject two

on the same rationale. That would not seem to be a coherent way to deal with the situation.

We have no indication that there will, after the SSI is approved, be a clamour for more exceptions. I cannot rule that out because I do not have a crystal ball, but we have been working on the matter for some time and nobody else has come forward, so I hope that today progress can be made and the 10 bodies that are mentioned in the SSI, which have all expressed concerns based on the same grounds, will be treated as having the same concern. That is—as I have said—ultimately to ensure that they can police their professions.

Liam McArthur: I will leave it there, but I think that the committee might want to pursue the issue proactively with the other regulatory bodies and the Scottish Human Rights Commission to establish their position.

The Convener: I believe that Fulton MacGregor has a declaration.

Fulton MacGregor: I am sorry convener—it dawned on me after I asked my question that I should probably have referred members to my register of interests, as I am a member of the Scottish Social Services Council. I apologise for not having done so.

The Convener: That is now duly noted.

In response to the point about the Law Society, I believe that the idea that an apology is good evidence of fault is not one that it accepts. Its view is that apologies are not reliable indicators of wrongdoing—and certainly not under the terms of the definition in the 2016 act. I do not know whether that helps Liam McArthur.

Oliver Mundell (Dumfriesshire) (Con): Does not the minister think that it is concerning that the 2016 act has become almost an opt-out piece of legislation for organisations? Rather than Parliament deciding whom the act applies to, it depends on whether organisations get in touch to say whether they would like it to apply to them.

Annabelle Ewing: I do not think that that is a fair description of the process, which I have tried to explain. As I say, it was recognised in the stage 1 report on the bill that work would need to be done to reflect the unintended consequences that would arise for the two health regulators—the GMC and the NMC—that had flagged up the issue at the time. Other health regulators that shared essentially the same concern in respect of what are essentially the same procedures, made their views known in the context of the work to develop a statutory instrument that Paul Wheelhouse—my predecessor in this post—had already flagged up in the stage 3 debate. The situation was made clear during that stage 3 debate.

As part of the further work that was done to develop the best approach to drafting the SSI, the GTCS and the SSSC made known their views. On the basis that they expressed the same concerns about essentially similar procedures, it was deemed to be appropriate, in the interests of legal coherence, to accept the same rationale for proceeding with an exemption as was accepted for the eight health regulators. The process has moved forward in that way.

Oliver Mundell: The 2016 act has not yet come into force. Has any thought been given to the idea that it would have been better to test it and see how it developed over time rather than exempting everyone before proceedings even started?

Annabelle Ewing: As I said, the previous Minister for Community Safety and Legal Affairs gave on the record during the stage 3 debate on the Apologies (Scotland) Bill an undertaking that an SSI would be worked up, further to the section 2 provisions in the bill that became the 2016 act. We have done that, and we are here today to seek the committee's approval for the SSI.

The Convener: On that point, I will read out exactly what the previous minister said in the chamber. He said:

"I mentioned earlier concerns that were raised at stage 1 regarding the effect of the bill on regulators of health professionals such as the General Medical Council and the Nursing and Midwifery Council ... My officials have been working closely with the NMC and the GMC to find a solution to their concerns. It is clear from those discussions that an exception for civil proceedings undertaken by health professional regulatory bodies is needed."

I emphasise the term "health professional regulatory bodies" in the last sentence. The minister went on to say:

"However, more work is still required to establish exactly what form such an exception should take. I would therefore like to take this opportunity to state my intention to use the powers of the Scottish ministers as outlined in section 2(3) of the bill to add an exception for proceedings held by health professional regulators once that additional work has been concluded."—[*Official Report*, 19 January 2016; c 17.]

It is quite clear that the minister, having gone through all the evidence at stage 1, the stage 1 debate, amendments at stage 2 and the stage 3 debate—during which the subject was debated ad infinitum—had reached that conclusion and made that undertaking.

I refer the current minister to the submission from Former Boys and Girls Abused in Quarriers Homes, which says that that was "agreed", and that survivors knew what they were getting. You are now going back on that, minister.

Annabelle Ewing: First, the SSSC and the GTCS are now in the frame because they came forward to say that they have essentially the same concerns and that the rationale for excepting

health regulators applies equally to them. That is entirely in keeping with the due diligence obligations that the Government is required to discharge in framing its legislation.

On the second issue, I reiterate for the record, because I want people to be very clear about this, that the exception of those 10 regulatory bodies—they are not institutions or individuals, but regulatory bodies—in respect of their fitness-to-practise proceedings in no way cuts across the interaction process or the ethos of the 2016 act and what it could mean for survivors. I reiterate: it does not cut across that in the slightest. It is important for us to reassure survivors that the Government is absolutely determined to do everything that we possibly can to ensure that they receive the acknowledgement and justice that they deserve.

The Convener: The regulatory bodies are looking at apologies from individuals or from someone on behalf of other individuals. Referring to regulatory bodies is a smokescreen. That brings us back to the point about an apology that is made by an individual under the definition in the 2016 act: there is nothing in such an apology that proves fault or liability, or any wrongdoing whatsoever, but it acknowledges that something happened and expresses regret, and it gives an undertaking to look into the circumstances.

Annabelle Ewing: Nothing whatsoever, further to the SSI, will prevent institutions from proceeding with an apology. Fitness-to-practise proceedings can be brought only against somebody who is a registered member of the relevant body. The bodies have no jurisdiction to deal with people who are not members of the relevant profession or registered with them. It is important to ensure that there is no confusion on that point.

To repeat, this SSI does not cut across in the slightest the ability to make an apology, further to the Apologies (Scotland) Act 2016. That act was a result of the interaction process that took place to ensure that if that was the route that institutions wished to go down, their doing so should be facilitated. Nothing in this SSI will make that more difficult.

Oliver Mundell: I have a few further points. What discussions has the Scottish Government had with the two organisations in question around the possibility of them changing their procedures to incorporate the Apologies (Scotland) Act 2016?

Annabelle Ewing: I am not sure that, in relation to the work that we have done here, it is for Government to go to any of those regulatory bodies—whether it be the GMC, the General Dental Council, the NMC, the Scottish Social Services Council or the General Teaching Council for Scotland—to say that they must change their

processes. I do not think that doing so was part of the due diligence that we had to undertake. If the member feels that those bodies should have a different approach, he would probably have to ask his Westminster colleagues to pursue the matter, because the regulation of much of this area—certainly when it comes to the health bodies—comes from London.

It was not part of our due diligence obligations to tell those bodies that they must change their procedures; rather, we have to deal with the reality of the situation as we find it. What we currently find is that we have been advised by those 10 bodies that the application of the Apologies (Scotland) Act 2016 would cut across the coherence of their fitness-to-practise proceedings, which would in turn impair their ability to police their profession, which would in turn limit their ability to protect the public.

Oliver Mundell: Have you not had any detailed discussions with them beyond their submissions? Have you just taken those submissions at face value and not made any further inquiries around what—

Annabelle Ewing: Are you suggesting that the submissions that were made by the General Teaching Council for Scotland and the Scottish Social Services Council are not factual?

Oliver Mundell: I am not suggesting that they are not factual; I am suggesting that if particular organisations have a problem with a piece of legislation, the Government that is coming before this committee to ask for a change to the legislation to make an exemption for those organisations might have had further discussions with them to try to work out whether a change to the law was needed.

Annabelle Ewing: I have explained the way in which this happened. During the stage 1 debate, those bodies that had fitness-to-practise proceedings had concerns that the Apologies (Scotland) Bill—now the 2016 act—could have the unintended consequence of cutting across them in a way that would impair their ability as regulators. In the context of that debate, as I have explained to the member, other health regulators came forward to say that they were in exactly the same position. Then those additional two bodies came through to say that—

Oliver Mundell: Much later.

Annabelle Ewing: It was an on-going process, and there was a clear undertaking, as the convener has just read out, from my predecessor Mr Wheelhouse—

Oliver Mundell: To look at health bodies only.

Annabelle Ewing: —to bring forward an SSI, which is what we are doing today. I would simply

refer the member to the detailed written submissions of the regulators that made them, in particular those from the General Teaching Council for Scotland and the Scottish Social Services Council.

Those are their procedures as they currently stand; and we are talking about introducing an SSI now. That is the reality of the situation that we have to look at. If the member is interested in pursuing matters by suggesting mandatory legislative changes to the procedures of regulatory bodies, I am sure that he can pursue that.

Oliver Mundell: For absolute clarity: you have not had any discussion with either of those two bodies ahead of introducing this SSI?

Annabelle Ewing: Officials have put into discussions.

Elinor Owe: We have had discussions, but the bodies have presented the evidence on how they use apologies in their proceedings and have presented the case that apologies are a useful bit of evidence about what happens in someone's mind when something goes wrong—an insight into how much it was their fault and those kinds of issues. We have taken that evidence from the bodies about the value of an apology in their proceedings.

Oliver Mundell: You did not ask them at that point any questions at all about whether they felt that it was possible to change their processes?

Annabelle Ewing: To be fair, I do not think that it would be for officials to do that. The issue here is that an undertaking was given to proceed with an SSI that would reflect the unintended consequences of applying the Apologies (Scotland) Bill, now act, to particular kinds of regulatory processes. The regulators that were identified at the time were the health regulators, but it became clear that two others, as they have said, are in exactly the same position and share the same concerns. That is why we have framed the draft SSI as it is before the committee today.

11:00

Oliver Mundell: My point is that the SSI is not the only way to deal with unintended consequences and that it is possible to look at other parts of the regulatory process for that. It seems odd that the SSI is being presented as the only way to get round some of the hurdles.

Annabelle Ewing: Again, I refer the member to the undertaking given at stage 3 of the Apologies (Scotland) Bill that we would proceed with an SSI in the context of the due diligence obligation on the Government to proceed with drafting legislation in a coherent manner. In the context of that work, it became clear that two other regulators

were, in essence, in the same position as the others listed and hence that the rationale for excluding them would not be evident, so the list set forth in the draft SSI has those 10 regulators.

The Convener: I am a little concerned that there has been a suggestion that an apology establishes the extent of fault. An apology does not establish fault, certainly not under section 3 of the 2016 act; it would need to be given that precise definition under section 3 for the 2016 act to cover that.

Minister, perhaps it would help to cut through this—before I bring in Mary Fee—to refer to the example that you gave in your letter to me, which states:

“In a scenario where an individual teacher or social worker comes forward and apologises for past sexual abuse of a child, I would be alarmed if questions were not asked about their suitability to continue to practice their profession and the GTCS or the SSSC were unable to have access to relevant evidence”.

However, if they came forward and apologised for past abuse, there would be a criminal offence and the 2016 act would not apply. Can you give me another example of where the GTCS would be disadvantaged by not being exempted?

Annabelle Ewing: It would perhaps be useful for the record to say that the point that I was making in my letter was in direct response to a letter, dated 3 May, that I received from you, convener, where you raised that specific issue—so I was responding to the specific issue that you raised. I hope that that is clear. What I am trying to—

The Convener: Can you be more precise?

Annabelle Ewing: If you want me to read out your letter as part of my response, I am happy to do that.

The Convener: If you do it just on the point that you are responding to, that would be helpful, minister.

Annabelle Ewing: You wrote a letter, dated 3 May, wherein you suggested that the SSI would, in effect, cut across the Limitation (Childhood Abuse) (Scotland) Bill, in circumstances

“where the abuse occurred in settings including boarding schools, other private schools and other institutional settings where social services were involved in the child's case.”

What I have been trying to say is that the interaction process was the genesis of the 2016 act, although the act is not simply concerned with survivors, and that it was about facilitating institutions to be able to apologise without fear of civil litigation. This SSI does not cut across that in the slightest, because it is concerned with individuals who are members of the relevant

professions listed in the SSI and with the fitness-to-practise proceedings that could be conducted against them. It is important to state that again for the record, because this SSI does not cut across the ethos of the interaction process in the slightest.

The Convener: The bit of my letter that you are referring to begins:

“However, it has only now occurred to me, as I receive more and more correspondence”.

I have received some pretty horrendous stuff regarding a boarding school, which, if you exempt the GTCS, will never see the light of day.

Annabelle Ewing: If I may say so, I think that that is a bit strong.

The Convener: You have had an opportunity to respond, minister, and I have listened very patiently.

My letter to you stated that I had received correspondence

“from survivors of childhood sexual abuse regarding the current Limitation (Scotland) Bill, that exempting these two bodies will seriously disadvantage survivors who are seeking an apology for childhood sexual abuse.”

Former Boys and Girls Abused in Quarriers Homes says:

“The exemptions of the GTC and Social Work would create classes of discrimination whereby some survivors may receive an apology but others do not.”

The crucial point that it makes is that there

“were serious failings by both these organisations in their duties of care in the past to victims of historical abuse”.

This is about the duty of care, not the direct responsibility of the person who says, “I was involved in child abuse”—that would be a criminal matter. This is about the third-party apology and the duty of care. Former Boys and Girls Abused in Quarriers Homes states:

“There were serious failings by both these organisations in their duties of care in the past to victims of historical abuse and the Scottish Government is compounding this now by these exemptions.”

I will bring in Mary Fee, and then I think that we should wind this up.

Annabelle Ewing: Do you want me to reply to that?

The Convener: Yes, please.

Annabelle Ewing: I hear what the member says. I think that there are a number of important issues to address here. First, the SSI applies to the 10 regulatory bodies and, within that, to fitness-to-practise proceedings. That is the scope of the exception. It does not cut across the ability of the institution concerned to apologise, be it a

school, a local authority or whatever. I think that that has to be made very clear again.

The Limitation (Childhood Abuse) (Scotland) Bill has no impact whatsoever here. It sits within the general civil law of Scotland and seeks to lift the three-year time bar in the circumstances that are described in the bill. We have debated that at some length both in committee and, recently, in the chamber on 27 April. There is no cut-across whatsoever with that bill.

The idea that the GTCS would somehow be complicit in a suggestion that past behaviour should go unchecked, or whatever the suggestion was—I may have picked up the member incorrectly—is unfair. We should recall that we are looking at regulatory fitness-to-practise proceedings conducted by the 10 bodies and not at anything wider than that.

For the record, and to assure survivors, I say again that the ability, as foreseen in the interaction process, to make it easier for institutions to apologise and to acknowledge what happened under their watch and their duty of care is not impinged on or cut across in the slightest by the SSI. I want to provide that reassurance again to survivors who may be watching this morning.

Mary Fee (West Scotland) (Lab): I absolutely understand the rationale behind the exemption for health organisations and the duty of candour. That was accepted as the Apologies (Scotland) Bill progressed through Parliament in the previous session. However, I think that the inclusion of two further regulatory bodies moves away from the general principles of the bill.

I have a particular concern in relation to the Scottish Social Services Council. If we think about the importance and relevance of the Apologies (Scotland) Act 2016, I do not think that anyone round the table underestimates the impact that an apology can have on a survivor’s wellbeing and mental health, or the importance that they place on the 2016 act.

Perhaps the minister can reassure me, because I am concerned about the inclusion of the Scottish Social Services Council. I would have a huge concern if a regulatory body could use the legislation to prevent itself from giving a survivor an apology, or if a survivor could look at the legislation, see that the Scottish Social Services Council and the GTCS are exempt and think, “I can’t get an apology because this organisation is exempt.” If that happens and we fail one survivor, we will fail every survivor.

Annabelle Ewing: I understand where the member is coming from and I wish to provide the reassurance that she is seeking.

If we look back to the passage of the Apologies (Scotland) Bill and consider the basis for even talking about excepting the fitness-to-practise proceedings of the General Medical Council and the Nursing and Midwifery Council, we see that it was to do not with the duty of candour, which was already the subject of a separate head of exception by way of the exception that was framed in the bill; it was because it was seen at the time that, as an additional head of exception, we would need something that dealt with fitness-to-practise proceedings, because, otherwise, there would be an unintended consequence in terms of cut-across. That is how it came about.

On the specific concerns that the member has raised about the Scottish Social Services Council and so on, such bodies encourage apologies to be made. All that they are saying is that they have a problem with the way in which an apology is defined in the 2016 act, because, under the terms of that act—and unless they are excepted—the apology cannot be used in their proceedings, to the detriment of the individual. It is not ruled out in certain circumstances, such as in a situation in which an apology has been made and an undertaking has been given to do X, Y and Z to remediate the situation, but that remediation has not taken place. Therefore, there are circumstances in which an apology could be used as part of the evidence before the body in an individual case in a way that the act would not allow it to be used. The bodies are saying that if the act applies to their processes, it will cut across those processes. However, that does not mean that individuals cannot apologise.

Near the start of our deliberations this morning, the convener or another member queried the idea that, if you were in one of those professions and subsequently apologised for abuse that had taken place, certain severe consequences would not immediately be in train as far as the individual perpetrator is concerned, but I think that we all accept that there would be fairly immediate and significant consequences for the individual perpetrator. Where I can give the member the assurance that she quite rightly seeks is in saying that that does not cut across the ability of the institution—be it a school, a local authority, a social services department or whatever—to issue an apology without fear of reprisals under the civil law. That is where, perhaps, some confusion has arisen. I hope that I have been able to offer some assurance to the member.

Oliver Mundell: If the change is not made, what will take precedence—the organisations' regulations or the relevant sections of the act?

Annabelle Ewing: Therein lies the difficulty, because an undertaking was given on the floor of

the Parliament's chamber, which the convener has read out, so, obviously, we would need to reflect—

Oliver Mundell: That concerns health organisations—I think that we have made that quite clear.

Annabelle Ewing: Actually, the undertaking encompassed the health regulators that were anticipated at the time, so question marks would arise about the other health regulators, I guess—that is one possibility.

We would need to reflect further, because undertakings were given in the chamber to third-party organisations in Scotland and, as a Government exercising reasonable governance in good faith, we would have to consider where we went next with this. However, I hope that, having heard the responses to the questions today, members will feel that I have managed to address the concerns that have, quite rightly, been raised this morning.

Oliver Mundell: So you do not know whether the act would apply.

Annabelle Ewing: We would have to take stock and consider what we do next. However, the situation is difficult, given the undertaking that was given to the chamber—and therefore to the country—during stage 3 of the bill. That undertaking was accepted, given that the bill was passed—I think—unanimously.

Oliver Mundell: Have you taken any legal advice on that point?

Annabelle Ewing: Obviously, we always act within our legal advice and we will continue to do so. As a Government minister, by convention I am not allowed to go into any particular legal advice. I am sure that the member is aware of that.

Oliver Mundell: I know that. That is not what I was asking. I was asking you to confirm whether you had taken legal advice on this point.

Annabelle Ewing: On which point?

Oliver Mundell: On whether the act would apply to those organisations.

Annabelle Ewing: I think that we should see what happens. I am constrained in explaining the substance of advice and also whether advice has been taken—I think that that is the convention that applies to ministers; if that is not the correct application of the code, I am prepared to stand corrected.

We would have to reflect on where we would go, because those organisations have dealt with the Government in good faith. If the view was that some were to be excepted but not others that have put forward exactly the same rationale, we would get into a difficult position.

Oliver Mundell: Yes, but surely you would accept that the rationale is different for non-health organisations.

Annabelle Ewing: No; it is essentially the same rationale as regards fitness-to-practise proceedings. That is what I have been trying to explain to the committee this morning.

The Convener: I think that we have gone as far as we can go with the discussion. Do you want to make any closing comments, minister?

Annabelle Ewing: No. I hope that I have addressed the issues that have been raised.

11:15

The Convener: In that case, we move to agenda item 3, which is formal consideration of the motion that the affirmative instrument be approved. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and had no comment to make on it. I invite the minister to move motion S5M-05334.

Motion moved,

That the Justice Committee recommends that the Apologies (Scotland) Act 2016 (Excepted Proceedings) Regulations 2017 [draft] be approved.—[*Annabelle Ewing*]

The Convener: Would any members like to speak in the debate on the motion?

John Finnie: Convener, you and I were involved in the process of developing the legislation right from the outset, and we know that difficulties were identified. As has been mentioned, in the discussions at stage 3 of the Apologies (Scotland) Bill, an undertaking was given that the matter would be examined.

Whatever reservations I might have about the presentation of the evidence of the two organisations in question, it would clearly have been wrong to ignore what was emerging information, and that is why we are here now. I am very concerned about the perception of dilution, but it is important that people understand—from what I have heard, it is not necessarily apparent that they do—the purpose of the Apologies (Scotland) Act 2016. No one can be compelled to make an apology; it is very much an individual thing. To the extent that they can, I believe that many institutions should continue to make apologies.

I have represented police officers at various forums, and in one instance—entirely in an individual capacity—I represented a social worker at a hearing. Therefore, I am familiar with some of the machinations that go on and how they can affect the way in which things end up being presented.

I am disappointed—although I am reassured that the minister will come back to us on the matter—that we do not know whether institutions have reviewed their processes in the light of the information that has come forward because, in my view, a responsible organisation would be aware of the legislation and would respond accordingly.

The suggestion is that there could be “substantial prejudice” if we were not to agree to the motion to approve the regulations. We want to have the highest standards for public sector workers. I am concerned about any possible detriment to workers that could arise as a result of our not agreeing to the motion. For that reason—and with some reluctance—I intend to support the motion.

Stewart Stevenson: I want to put on the record a couple of things that I have taken from the discussion. I now have a substantially greater understanding of the background to the present situation. I take great comfort from the fact that institutions such as schools and councils are in no way deprived of the opportunity to make apologies and to be free of consequences of doing so under the provisions of the convener’s act, and I hope that those institutions will take close notice of what has been said at today’s meeting and will continue to look for opportunities to make apologies where that is appropriate.

The input to the discussion of Former Boys and Girls Abused in Quarriers Homes has focused largely on institutions. Of course, individuals implement institutions’ positions, but institutions must continue to look seriously at making appropriate apologies. It is clear that the regulations that are before us will leave untouched the ability to make such apologies, free from legal retribution as a result of having done so, and that they will therefore leave the core of the convener’s very welcome act untouched, albeit that in relation to individuals who are otherwise governed by regulatory bodies we are striking a balance that I think is entirely appropriate.

Mary Fee: I just want to echo Liam McArthur’s point about the Scottish Human Rights Commission. I would have been more content to accept the Government’s position if we had had a view from the SHRC on the impact of the regulations. I cannot say that I am confident about the inclusion of the additional organisations over and above the health organisations.

Liam McArthur: I echo what Stewart Stevenson and John Finnie said about the value of this morning’s exchanges, and I reiterate what I said previously. I know that the minister has given a commitment to engage with some of the other regulatory bodies, but I think that it would be a helpful exercise for the committee to do that itself or to monitor closely the responses that the

Government receives, because it appears that understanding of the effect of the 2016 act might not be as clear and uniform across the board as it could be. We probably have a useful role to play in spreading that understanding.

The Convener: The 2016 act came about as a result of Professor Miller coming to talk to the cross-party group on adult survivors of childhood sexual abuse. He explained that other countries had apologies legislation and that such a move could be very welcome and very valuable in giving survivors closure by acknowledging that abuse had happened and, crucially, by looking, perhaps, to ensure that the same thing did not happen to others. That is the act's *raison d'être*.

During the passage of the Apologies (Scotland) Bill, it became clear that the Government was seeking to introduce a duty of candour for health professionals, under which it would be expected that the professionals concerned would apologise and that that apology would be admissible in civil proceedings. However, again during the passage of the bill, it became obvious that the duty of candour provisions and the provisions in the bill could not co-exist. On that basis, health professionals were exempted, and it is taken as read that eight of the bodies listed in our papers relate to health professions.

As the minister has said, the Limitation (Childhood Abuse) (Scotland) Bill removes a barrier—a time barrier—for survivors. It has also been recognised that a lot of people will not and have no wish to go down the legal route; all they want is to get an acknowledgement and an expression of regret and, if possible, to make sure that the same thing does not happen to anyone else. That is what the 2016 act does. I again refer the minister to the submission from Former Boys and Girls Abused in Quarriers Homes, which goes so far as to say,

“It would appear to the Survivor Community that the Scottish Government had broken an agreed commitment-promise to implement ... the elements of the Interaction plan.”

Again and again, the 2016 act is seen as an effective alternative for these people.

I reiterate to the minister that with regard to the GTC and the SSSC the Government is not only going back on what it previously said about excepting only health professionals because of the duty of candour, but is again discriminating against survivors by creating two classes in this respect. In the first, an apology can be given, but in the second—and this relates to the GTC and the SSSC—it cannot. Stewart Stevenson might agree with the minister and say that he is comforted that institutions and schools can give an apology, but the fact is that bricks and mortar cannot. A person gives an apology, and under the provisions in the

SSI, the minister is deterring people from coming forward with that apology because they might possibly be deemed as having a duty of care that they had not exercised. If there is any possibility that such a move will be to their detriment—which is what section 1 of the 2016 act is all about—they will not come forward with that apology. I also point out that the definition of an apology in section 3 of the 2016 act in no way mentions fact or talks about fault; in other words, any apology under that definition is not an admission of fault.

If no one else wishes to speak, I now invite the minister to wind up.

Annabelle Ewing: I appreciate that time is marching on and that the committee has the rest of its work to do. Many members have made very trenchant points that I have listened to very carefully. Finally, though, I think it is important for survivors who might be listening to this meeting or who might in due course read the *Official Report* that I say, again, that this SSI does not in any way, shape or form cut across the ability of institutions to apologise. Institutions are indeed bricks and mortar, but it would be a person who would take up that opportunity on behalf of an institution.

The instrument is not concerned with that; rather, it is concerned with fitness-to-practise proceedings, and the only circumstance that that would encompass is where the individual was the perpetrator. Of course, if the individual were the perpetrator, there would be other consequences, which we recognise would kick in fairly quickly.

The instrument does not impact on institutions taking up the facility in the Apologies (Scotland) Act 2016 to apologise. Indeed, I would encourage their doing that in the interests of the survivors receiving the acknowledgement and the justice that they deserve. I will end my comments there, convener.

The Convener: The question is, that motion S5M-05334, in the name of Annabelle Ewing be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Evans, Mairi (Angus North and Mearns) (SNP)
 Finnie, John (Highlands and Islands) (Green)
 MacGregor, Fulton (Coatbridge and Chryston) (SNP)
 Mackay, Rona (Strathkelvin and Bearsden) (SNP)
 Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
 McArthur, Liam (Orkney Islands) (LD)
 Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Against

Fee, Mary (West Scotland) (Lab)
 Mitchell, Margaret (Central Scotland) (Con)
 Mundell, Oliver (Dumfriesshire) (Con)
 Ross, Douglas (Highlands and Islands) (Con)

The Convener: The result of the division is: For 7, Against 4, Abstentions 0.

Motion agreed to,

That the Justice Committee recommends that the Apologies (Scotland) Act 2016 (Excepted Proceedings) Regulations 2017 [draft] be approved.

The Convener: That concludes consideration of the affirmative instrument. The committee's report will note and confirm the debate's outcome. The committee has until 23 May to report to the Parliament.

Given the long debate and my personal interest in the topic, I propose that the draft report be passed to all members for their approval. Do members agree to that approach?

Members indicated agreement.

The Convener: I thank the minister for attending. I suspend the meeting briefly to allow the minister and her officials to leave.

11:26

Meeting suspended.

11:27

On resuming—

Domestic Abuse (Scotland) Bill: Stage 1

The Convener: Agenda item 4 is our opening evidence session on the Domestic Abuse (Scotland) Bill, with the Scottish Government's bill team. I welcome Phil Lamont, bill team leader; Kevin Philpott and Patrick Down, bill team members; and Catherine Scott from the directorate for legal services.

I refer members to paper 2, which is a note by the clerk, and paper 3, which is a Scottish Parliament information centre briefing. I remind members that the officials are here to explain policy, not to defend it.

I invite questions from members.

Mairi Evans (Angus North and Mearns) (SNP): I want to raise a few issues today, the first of which concerns non-harassment orders. When we held our inquiry into the Crown Office and Procurator Fiscal Service, we heard direct evidence from victims of domestic abuse. We have also received written evidence on the matter following our call for evidence on the bill. People have requested that non-harassment orders should be not only considered but imposed in all such cases.

What is your response to the evidence that we have received and the request that non-harassment orders be imposed in all cases?

11:30

Philip Lamont (Scottish Government): It might be helpful if I confirm what we are doing in the bill. The bill will change the current general provision on non-harassment orders. At the moment, where any offence involves misconduct towards another person, the court has the ability to impose a non-harassment order to protect that person from the perpetrator. An application by the prosecutor is required; the court at its own hand cannot impose such an order, as it must have the application first.

The bill will change that general provision. If the bill is approved by Parliament, an application by the prosecutor will not be required for the new domestic abuse offence and the existing domestic abuse aggravation that was created last year in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and the court will have to consider whether to impose an order.

We are aware that some stakeholders consider that the bill should go further and say that the court should not only consider but impose an order

in all situations. We understand where that desire comes from, but we think—given how we have approached the issue in the bill—that the correct approach is to leave discretion with the court, not least because there may be cases involving domestic abuse in which the circumstances are such that, for a variety of reasons, a non-harassment order may not be the right approach. We think that discretion should always lie with the court to understand the facts and circumstances of the case and make the decision. The bill says that the prosecutor no longer has to bring the matter to the court's attention; the courts can make that decision, because it is a domestic abuse case.

Mairi Evans: The written evidence that was supplied to the committee was concerning because, of 502 cases, only 33 non-harassment orders were issued—Hamilton sheriff court is mentioned. We heard of the experience of victims who had to take the process to the civil courts, which is a much more expensive route. There is concern that very few orders have been issued so far. If the bill does not go any further and it is left to the discretion of the courts, we could still see relatively few non-harassment orders being issued.

Philip Lamont: There is a question about what proportion you would expect in domestic abuse cases; there are arguments about that, and you will probably hear evidence from stakeholders in due course. In the bill, we give what I suggest is a heavy hint to the courts about how to approach non-harassment orders in the context of domestic abuse cases. I accept that that does not go as far as some stakeholders might like on requiring the courts to impose orders, but it moves on from the current position in which the court cannot do anything until the prosecutor applies—that will no longer be the case.

Mairi Evans: In other evidence that we received, Children 1st talked about going a step further to extend non-harassment orders to include children. What is your view on that evidence?

Philip Lamont: I think that that is a reference to the way in which the bill is drafted. The provision that relates to non-harassment orders links back to the existing provision in the Criminal Procedure (Scotland) Act 1995, which refers to a non-harassment order being available where a victim is subject to misconduct. In a case a couple of years ago, a court ordered a non-harassment order for a partner who had been abused and also their children, but that was overturned on appeal because it was found that the court had gone too far in interpreting existing law.

The Domestic Abuse (Scotland) Bill still limits the order to the partner or ex-partner as the direct victim of the abuse. Children 1st and one or two other stakeholders have suggested that, because

we have child aggravation in the bill, the policy could go further so that where a domestic abuse offence is proven and a child was involved in that abuse, a non-harassment order should be available for those children. We are happy to consider the views of members and stakeholders during stage 1 scrutiny on whether the provision in that area can go a bit further.

Mairi Evans: We will have to explore that as we go through.

Another point that has been raised is about the training of police forces. In England and Wales, eight out of 22 forces have not charged a single person with the offence, according to a freedom of information request. Nine forces, which are listed in our papers, have made two or fewer charges since the new law came into effect in England and Wales in December 2015. There is a concern that relatively few cases have been taken forward since the introduction of the offence.

What are the panel's views on that? If the bill progresses and Scottish legislation is passed, how can we ensure that adequate training is in place for all police officers and that there is greater public awareness of the changes?

Philip Lamont: That is a fair point. I do not want to speak for Police Scotland, which I am sure will give evidence in due course and explain its approach to ensuring that officers on the ground are aware of what is contained in the new offence if the bill is approved by Parliament.

We have worked with Police Scotland, among others, in developing the offence, so it is certainly very well aware of the new offence that is contained in the bill. It also assisted us in the development of the financial memorandum that includes estimates for costings for training police officers. If Parliament approves the new offence, we will not rush its introduction.

The reference to England and Wales is to the coercive control offence; I would not want to comment on what has happened down there on that. As far as working with key stakeholders in Scotland is concerned, we would make sure that, as much as possible, Police Scotland is made entirely aware of the timeline such that it can prepare the training of its officers so that those who deal with domestic abuse on the ground are aware of how the new offence works and what new factors they need to look for in its investigation.

The Crown Office and the Lord Advocate will give guidance to Police Scotland about the investigation of such cases, and I am sure that the committee will want to explore that with the Crown Office when it gives evidence.

We are working closely with those partners so that they are aware of and are very clear about what is in the bill as it stands, and we will see how it goes through parliamentary scrutiny. The risk that Mairi Evans raises about what appears to have happened down south is one that we are very well aware of and which we want to avoid as much as possible.

Mairi Evans: A few written submissions mentioned that the law should comply with the Istanbul convention. If the legislation is passed, will it do so?

Philip Lamont: Part of the Istanbul convention contains a provision that requires extraterritorial jurisdiction in relation to certain offences. The convention was agreed a few years ago, so this offence postdates it. If Parliament were to agree to the new offence, there would be a question on whether it should carry extraterritorial jurisdiction. For example, if incidents of domestic abuse take place in this country, but the couple involved travel to another country—perhaps on holiday—could other incidents there also be included, so that a Scottish court could hear a prosecution of the totality of the abuse?

We will be happy to hear in due course the committee's views on the suggestion that the bill could be extended in that way. Extraterritorial jurisdiction is an exception to the normal approach in criminal law matters, but it currently affects certain offences. The context of the Istanbul convention and the UK Government's consideration of whether to ratify it are very relevant factors that I am sure the committee will want to consider in due course.

Mairi Evans: Thank you.

Rona Mackay: I want to pick up on part of Mairi Evans's question about the effect of domestic abuse on children. The offence is restricted to abuse by partners and ex-partners. There have been concerns from a number of children's charities that the effect on children has perhaps not been sufficiently recognised. The Government has sought to address that by providing that an offence will be considered to be aggravated where it involves a child. Is that strong enough? Does adding an aggravator sufficiently address the effect on children, given that we all know the damage that domestic abuse does to them?

Patrick Down (Scottish Government): The Scottish Government recognises that growing up in an environment in which domestic abuse takes place can harm children. The aggravation is intended to go some way towards ensuring that children who are either involved in the abuse, towards whom behaviour is directed in the course of it, who are present when the abuse takes place

or who saw or heard it are formally recognised by the criminal law.

On how it might go further, it is of course worth remembering that there are criminal offences of child abuse and neglect that will continue to apply whether they occur in the context of someone abusing their partner and those children or someone abusing just the children. I am aware that some of the children's stakeholders think that there is a need to update or reform the law to reflect what is almost domestic abuse of a child and to create an offence in that regard. On whether that could be included in the bill, our concern is that the definition of abuse that we have come up with is focused on behaviour that is abusive when directed by someone towards their partner or ex-partner. To extend that to the parent-child relationship or the relationship between the partner of a parent and a child without further consultation and without perhaps adjusting the definition to take account of the very different nature of that relationship would not be appropriate and would risk criminalising behaviour that should not be criminal.

Philip Lamont: It is perhaps worth saying that the first of the two previous consultations that the Scottish Government carried out on the issue was on the general principle of having an offence, and one of the questions that we asked was about what relationships should be covered. Although views were offered that we should go beyond the relationship that has ended up in the bill, there was strong support for an offence that relates to partners and ex-partners, because there is such a particular dynamic to that type of abuse. Clearly, that is what we have provided in the bill.

In addition to what Patrick Down said, it is worth drawing the committee's attention to the statement that the Minister for Childcare and Early Years made at the start of March in Parliament on the child protection improvement programme. One element of that statement was to set out that we will look at the section 12 offence in the Children and Young Persons (Scotland) Act 1937, which children's stakeholders and others consider needs to be updated to reflect, among other things, our understanding of the modern experience of abuse of a child. That commitment has been given. To pick up on Patrick Down's point about the difficulties of adapting our bill, there is a process under way for the Scottish Government to look at that area.

Rona Mackay: Given that, would you consider clarifying the policy that you are taking in the bill? You could set out what you have told us here, just to allay some of the concerns of charities that the measure has been put in the bill as an afterthought.

Philip Lamont: I certainly would not suggest that it has been. The aggravation in section 4 is an important provision that specifically tries to acknowledge the harm that domestic abuse can cause to a child. To pick up on Patrick Down's point, direct abuse of a child can already be prosecuted under different laws. However, the aggravation is a clear statement that, if a perpetrator commits the new offence of domestic abuse and if, in committing that offence, they use a child in some way—by directing behaviour at the child to get at their partner or by committing abuse in such a way that the child is present or is aware that it is taking place—that can be harmful. If the aggravation is proven, the court will be required to consider whether the sentence that would otherwise be imposed should be enhanced. We think that that is an appropriate way of acknowledging the harm that such abuse can do to a child.

Rona Mackay: I totally understand what you are saying. I just wonder whether we could strengthen the wording a wee bit.

The Convener: We have a supplementary on that point from Mary Fee.

Mary Fee: Mr Lamont briefly mentioned the issue that I was going to ask about, which was raised as a concern during our preliminary evidence sessions. It is about coercively using a child in a relationship to cause harm to a partner. Will the bill cover that and will it explicitly state that that is deemed as domestic abuse?

Philip Lamont: Patrick Down might want to pick up on that, but I will mention it briefly without getting into the technicalities of the bill. Section 2 gives a definition of abusive behaviour, which is one of the essential elements of the offence. Under section 2(2)(b), the definition of abusive behaviour includes “behaviour directed at B”—that is, the partner or ex-partner—or

“at a child of B or at another person”.

The inclusion of the words “at a child of B” is an attempt to be clear that we are aware that one of the most common ways that abuse can be perpetrated, if it is not directly at the partner or ex-partner, is through the child or children of that person. Those words appear because, strictly speaking, it could be argued that “another person” covers children. We specifically inserted that phrase to give a clear signal, under the law, of our understanding that one of the most common ways that abuse can be perpetrated is through a third party. We wanted that to be in the bill.

11:45

Liam McArthur: I know that the Serious Crime Act 2015 applies more generally. I am also aware

that the two consultations that have taken place on the domestic abuse legislation have come to a different view, but I am unclear why that is the case. Is it because, were there to be a broader definition of abuse in a domestic setting that could involve not only children but elder abuse—a coercive or controlling relationship with a parent or a grandparent in a household? Was it considered that, by including such scenarios, the impact of the bill or its ability to strike at instances of abuse of a partner or an ex-partner would somehow be diluted? What was the rationale?

Patrick Down: As you say, the Serious Crime Act 2015 has a wider application and it applies not only to partners and to ex-partners, but to other members of the same family living in the same household. Therefore, it would potentially cover the abuse of a grandparent or even abuse between adult siblings.

We have taken the approach in the bill because, based on stakeholders' evidence during the two consultations, abuse of partners takes a different form from other types of abuse. Furthermore, our approach keeps the definition of abuse in line with the Scottish Government's wider definition of domestic abuse.

I think that it is reasonable to say that the types of coercive control that can happen between people who are—or who have been—in an intimate relationship tend to be different from abuse between adult family members.

Liam McArthur: I appreciate that there is a distinction but I am not clear why, in draft legislation that covers both those areas of law—areas that are provided for in law, but which the bill seeks to extend—the opportunity has not been taken to broaden the definition to cover those examples. Those cases may be fewer in number and different in nature; nevertheless, by any definition, they could be described as abuse in a domestic context.

Philip Lamont: I will pick up on Patrick Down's comments. We followed, to a certain extent, the views that were offered in the consultation. There was relatively strong support—it was not universal—for restricting the bill to partners and to ex-partners. Our approach is to have, in section 2, what we call the list of effects. In the same way that we do not think that that could be adapted easily to the context of the abuse of a child, it would need some work were we to broaden the definition. That is not to say that it would not be possible to do that. However, we are aware that, more generally, the offence is quite novel—I am sure that certain elements of it will be scrutinised closely in the coming weeks. Ministers were keen to focus on the established understanding of domestic abuse in the context of partners and ex-partners.

Liam McArthur: I take what you are saying; I understand your explanation. The consultation responses have clearly steered you and ministers in a particular direction. I suppose that the risk is that there may be those who argue a different case. Age Concern is an obvious example—there may be others—whose voice on the issue is not necessarily as clear. The numbers articulating that position are perhaps not as numerous; nevertheless, on the opportunity that the bill presents, their arguments are pretty compelling. However, they are being set aside at this stage because of the overwhelming numbers that argue for a more targeted approach. That seems to be, at best, a missed opportunity. It possibly also leaves older people who find themselves in a domestic abuse situation at heightened risk because—for understandable reasons—our focus is on partners and ex-partners. While we focus on that, inevitably, we will not focus our attention on other areas.

Philip Lamont: I would not necessarily disagree with anything that you have said. Coming back to the offence being relatively novel, if the bill is passed by Parliament, perhaps part of the task will be to see how it works in practice so that the lessons can be applied to different situations—for example, to different relationships. That will probably cover looking at domestic abuse of children, siblings, elders or other vulnerable people who are living with parents. There are potential lessons to be learned.

As you suggest, we have been guided by the general view from stakeholders to focus on the established definition of domestic abuse; that is why this is an offence of domestic abuse. However, although I do not want to speak for ministers—you will, no doubt, explore the issues with the cabinet secretary in due course—it is not about closing the door in terms of what we are doing in the bill.

Liam McArthur: I want to touch briefly on one of the other distinctions between the Serious Crime Act 2015 and the approach that is being taken in the bill in relation to behaviour that does not cause a partner or ex-partner to suffer “physical or psychological harm”. The Serious Crime Act 2015 requires that such harm was committed. Can you explain the rationale for having a crime in which the harm has not yet been committed? To the layperson, the former would probably seem to be the logical approach.

Patrick Down: Sure. The test in the bill is whether the accused’s behaviour was such that a reasonable person would think it likely to have caused the victim to suffer physical or psychological harm. In a sense, it is an objective test that focuses the court on what the accused did. If the accused’s behaviour was such that it

was very likely to have caused the victim to suffer harm, the fact that the victim was especially stoical and unexpectedly was not harmed by the behaviour would not prevent a conviction. Equally, the provision ensures that there is not as much risk of—for want of a better word—re-victimising the victim by forcing them to come to court and explain exactly how their partner’s behaviour had harmed them either physically or psychologically, in order to ensure a conviction. I imagine that, in many cases, the evidence that is led will include such an explanation, but the test ensures that that is not necessary in all cases in order to secure a conviction.

Liam McArthur: Is there a risk either that that sets the bar too low or that a case can be brought as part of an exercise in exacting some kind of retribution within a relationship that is not functioning as it should, and in which the abuse is not solely in one direction? It strikes me as being a slightly unusual provision for a situation in which demonstrable harm has not been caused.

Patrick Down: It might be helpful if I run through exactly how the offence can be committed. Three tests have to be met. The first test is that

“the person (‘A’) engages in a course of behaviour which is abusive of A’s partner or ex-partner (‘B’)”.

The second test is that the court is satisfied that the course of behaviour is

“likely to cause B to suffer physical or psychological harm”.

The third test is that the accused must either “intend” to cause that harm or be “reckless” as to whether harm is likely to result.

There is the possible defence that the accused’s behaviour was, in the particular circumstances of the case, “reasonable”. You mentioned a problem with counterallegations—of somebody who is accused of abuse saying that they, too, were being abused. I do not deny that that is a possibility. If you were to speak to the police or prosecutors, they would say that counterallegations are a feature of domestic abuse cases, as things stand; that is not a situation with which the police and prosecutors are unfamiliar. They will have ways of dealing with that—for identifying where there is merit in allegations and where allegations are being made maliciously and there is no good evidence that the person is a victim of abuse.

John Finnie: I want to pick up on that point. There will always be challenges around definitions. In relation to the defence of behaviour that was reasonable in all the circumstances, Scottish Women’s Aid’s position is that that might risk providing legal cover for coercive behaviour under the guise of reasonableness. What are your thoughts on that challenge? I know that everything

is about interpretation, but this seems to be at the nub of it.

Patrick Down: As you suggest, exact definitions of, and meanings for, individual words is a tough area. We need to ensure that behaviour that should not be classed as criminal is not inadvertently criminalised, which is part of the purpose of the reasonableness defence. There will always be cases in which a person who is actually abusing somebody will try to make the case that their behaviour was reasonable, so it will be for prosecutors to disprove that and to show that the claim that the accused's behaviour was reasonable is not valid.

John Finnie: The committee recently did some work on sexual abuse, during which we did private interviews with survivors, who gave quite harrowing testimony. I and others who interviewed one particular gentleman were struck that some of the things that we found pretty horrendous were normal for that person, so the individual did not see them as being abusive. Are you confident that such matters will be picked up through the process, as it is laid out? I know that that is a big ask, but I am asking anyway.

Patrick Down: In some ways, the biggest barrier is a victim not recognising that what they are suffering is not normal. A public awareness effort might therefore be required if and when the new offence comes into law.

Police and prosecutors being aware is perhaps less of a problem; they will be much more aware that abusive behaviour that a victim might have been conditioned to see as normal will not seem to be normal to everyone else. The biggest barrier will be in encouraging initial reporting to the police so that abuse can be identified and prosecuted.

Philip Lamont: One of the legislation's policy goals is to reflect in the offence our modern understanding of what constitutes domestic abuse. At the moment, incidents of domestic abuse have to be prosecuted individually. They can be prosecuted at the same time, but are separate charges under general legislation.

We have included in section 2 the relevant effects that behaviour can have on the partner or ex-partner. One of the benefits of that is that it will help people to understand that they are being abused. I know that people will probably not study the words on the page, but organisations such as Scottish Women's Aid and others can help to show them that the criminal law reflects the fact that they are being abused in a way that they may not, at the moment, recognise as abuse. They might even recognise it as abuse, but think that the justice system will not respond appropriately. That is one of the aims of trying to capture within

the offence the totality of what constitutes domestic abuse.

John Finnie: Police Scotland has done tremendous work with serial offenders and abusers who have abused a series of partners over prolonged periods. Could any element of the bill, particularly with regard to coercive behaviour, have a retrospective application?

Patrick Down: The short answer is no. As a general principle, we cannot criminalise behaviour that was not criminal when it took place. Behaviour that occurred before the offence comes into law would have to be prosecuted using the law that was in force at the time. You might want to ask the prosecutors, if you take evidence from them later, whether they think that there will be any scope to label behaviour that would clearly be criminal under any law using this single offence. I think, however, that they would be reluctant to do so. The law will always be the law that was in force when the behaviour is alleged to have taken place.

John Finnie: Thank you.

12:00

Stewart Stevenson: To follow up on John Finnie's point about the definition of normal behaviour, there is perhaps a distinction to be made between what is normal and what is normalised. In other words, someone outside a relationship might regard the behaviour in it as being overwhelmingly abnormal, but the nature of the relationship could mean that that behaviour has become normalised and seems to be normal within it. Would the process of normalising behaviour that people outside the relationship would regard as abnormal be, in and of itself, potential evidence of the relationship's abusive nature? That is a bit Sir Humphrey-ish, but I hope that you get my point.

Philip Lamont: Raising awareness is important not only among people who might be affected by abuse, but among people—family, friends and so on—who may see, as Stewart Stevenson has suggested, something that the person who is at the centre of the relationship cannot see.

If the offence is included in the bill, we think that the question of what domestic abuse is will become much clearer in criminal law, which should be an advantage. At present, of course, there is nothing to prevent a person from going to the authorities to raise concerns; it would be for the police to respond appropriately and look into the matter. I do not disagree with what Stewart Stevenson said.

Stewart Stevenson: To close off my point, is the policy intention of the bill partly to empower those who observe a relationship from outside to

intervene in some way in order to protect a person in the relationship who does not realise the extent to which they are being abused?

Philip Lamont: The bill does not do that explicitly, but it seeks to raise awareness of what domestic abuse is, which we hope will be beneficial.

Stewart Stevenson: To be clear, I was asking whether that was the policy intention.

Philip Lamont: It is certainly the policy intention for potential victims themselves and for those who may know potential victims.

The Convener: The Law Society of Scotland, the Glasgow Bar Association, the Scottish Police Federation and Andrew Tickell, who is an academic, have all expressed uncertainty about the bill. One reason for that concern is what they perceive to be a lack of evidence that there is a gap in the law that requires to be closed. Can you comment on that?

Patrick Down: Sure. The background is that, in a speech in 2014, the then Solicitor General for Scotland highlighted concerns about what she saw as a gap in the law in relation to domestic abuse, and in the ability of prosecutors to prosecute the type of abuse that may involve long-term coercive conduct.

As a result, in 2015 the Scottish Government consulted stakeholders on whether they thought that there was a gap in the law. A couple of messages came back from that consultation. First, the responses reflected the Solicitor General's concerns about the problems of prosecuting long-term coercive conduct and domestic abuse, given the current law's focus on individual incidents, such as incidents of assault or of threatening and abusive behaviour. Secondly, there was concern that, although it is reasonably easy to prosecute physical assault or overtly threatening behaviour using the existing law, it is much more difficult to prosecute the kind of insidious, coercive and controlling behaviour that constitutes psychological abuse. It was suggested that only a change in the law would make it practical to do that, because it could not easily be done using the existing law.

The Convener: That is more or less spelling it out.

Patrick Down: Yes.

The Convener: In relation to the accused's state of mind, the bill provides—as some members have mentioned—that the offence may be committed intentionally or recklessly. Can you expand on what that would mean in practice?

Patrick Down: The reason why we included a mens rea element—to use the legal term—of

intention or recklessness is to some extent twofold. First, it may be difficult to prove that an accused person intended to cause harm to the other person. The accused will always be able to turn round and say that they did not mean to harm anyone, and it might be very difficult to disprove that claim.

Secondly, if a reasonable person would think that such harm was always going to be the likely result of the accused's behaviour, it is almost irrelevant whether or not they intended to cause that harm. If they knew, or ought to have known, that such harm was likely, it is reasonable that the criminal law should apply regardless of whether that was actually the intent behind their behaviour. I suspect that a lot of perpetrators of that kind of long-term abuse might, in their own minds, see their behaviour as being perfectly reasonable.

The Convener: It is good to get that on the record.

I have one last question. Section 8 provides for a maximum custodial sentence of 12 months under summary procedure and 14 years under solemn procedure. Will that apply to coercive behaviour that does not have a physical abuse element?

Philip Lamont: Yes. The maximum penalty will be 14 years if a case is prosecuted in the High Court—obviously imposing such a penalty would need to be done in the highest level of court. The penalty could be for an offence in which there was no physical element to the course of conduct or behaviour. It would be for the court to determine, but that is what we had in mind when setting the maximum penalty at 14 years. That is an increase on what we consulted on, which was a maximum of 10 years. There were a number of views on that. Some people suggested that it was about right, some suggested that it should be lowered, and quite a few suggested that it should be increased.

What we have in mind is a course of conduct that might have gone on for years in a relationship. It might include physical abuse, psychological abuse or a mix of the two. Where, in effect, someone has been living in that situation for year upon year, we want to ensure that the court has sufficient power to sentence appropriately, which is why we determined that the maximum penalty should be 14 years.

The maximum penalty is reserved for the most serious offences. In answer to your question, that could include an offence in which the course of conduct is entirely one of psychological abuse. I would add that it is sometimes quite difficult to distinguish between physical and psychological abuse; there can on occasion be quite a lot of overlap.

The Convener: Stewart Stevenson has a supplementary question.

Stewart Stevenson: It is a tiny wee question. I take it that if a case does not start as a solemn case and it becomes clear as the facts emerge that a sentence of one year will not be sufficient, sentencing can be referred upwards.

Philip Lamont: It could not, in the scenario that you suggest. The summary court sits without a jury, so cases cannot be remitted upwards. That can happen only if a case starts in a solemn sheriff court. Those courts' jurisdictional limit is a maximum penalty of five years. If, in a case that starts in front of a jury in a sheriff court, a person is convicted and the sheriff considers that enhanced sentencing is needed, the sheriff can remit the case up to the High Court. However, if a case begins in summary court, that is where it ends.

Stewart Stevenson: So, there is a substantial obligation on prosecutors to ensure that a case goes in at the right level.

Philip Lamont: Absolutely.

Liam McArthur: You explained well the rationale for why you have got to where you have got to with the 14-year maximum. I do not want to appear to draw too many simplistic parallels with the Serious Crime Act 2015, but I have been told that the maximum custodial sentence in that act is five years, which seems to be quite a significant discrepancy. Is that because the 2015 act is not picking up on the kind of pattern of behaviour over multiple years that you have talked about?

Philip Lamont: I would not want to say why the limit was set at five years down south. Patrick Down will keep me right, but I think that the offence in the 2015 act is one of only coercive control; it does not include physical elements. In the answer that I gave I said that, in our offence, the course of conduct could be one of entirely psychological abuse or psychological harm, although perhaps a more realistic example might include a mix of the two, in which very serious violent abuse and psychological abuse are wrapped up together in one course of conduct. We came to the view that a maximum five-year sentence was insufficient. We consulted on 10 years, but we determined to increase the maximum to 14 years in the bill as introduced.

Liam McArthur: I take your point about the ways in which the types of abuse can become conflated, but it is not beyond the realms of possibility that in a case that involves only psychological abuse the penalty could be up around the maximum, depending on the specific circumstances.

Philip Lamont: Obviously, the sentence is for the court to decide in any case. We want to ensure

that the court has what we consider to be appropriate power to sentence; that is where the 14-years maximum came from.

The Convener: That concludes our questioning. I thank the bill team for providing evidence that has informed the committee and helped us to understand the bill.

The next meeting will take place on Tuesday 16 May.

12:09

Meeting continued in private until 12:29.

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