POLICY NOTE

THE APOLOGIES (SCOTLAND) ACT 2016 (EXCEPTED PROCEEDINGS) REGULATIONS 2016

SSI 2016/xxx

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

Policy Objectives

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

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

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

Inquiries

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

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

Professional regulatory proceedings

7. Regulation 2(2)(c) creates a further exception in section 2 of the 2016 Act for proceedings brought by professional regulatory bodies. The need for making this further exception was identified at Stage 1 of the Bill's passage through Parliament. Evidence was provided by the General Medical Council (GMC) and the Nursing and Midwifery Council (NMC) about the potential impact of the Bill on their proceedings. These professional regulatory bodies expressed concern about the potential unintended consequences of preventing apologies from being used as evidence in their fitness to practise proceedings, in particular where an apology is a relevant factor in determining facts as well as professionals' insight, which may impact on the ability to assess the risk that a doctor, nurse or midwife may pose to the public in future. The Justice Committee's Stage 1 report stated: *"The Committee notes the concerns of health professionals regarding the interaction between the Bill and their UK-wide professional standards. We further note the member's view that this issue can be considered at Stage 2"* (p. 19).

8. Other health professional regulators also expressed their views supporting the GMC's and NMC's position. Moreover, it subsequently became clear that the issues identified were likely to apply to other professional regulatory bodies, not just those in health, and the work on this exception was not complete by Stage 3 of the Bill. The Minister for Community Safety and Legal Affairs therefore made a commitment in the Stage 3 debate to add an exception to the Bill for proceedings held by professional regulatory bodies.

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

10. As with the other exceptions in the Act, the provision covers any ancillary proceedings that arise and any appeal proceedings whether from a first instance proceeding or an appeal or challenge against a regulatory decision or action.

Consultation

11. The amendment of the inquiry exception has been discussed with the UK Government. The exception in relation to professional regulatory bodies has been developed through informal consultation with professional regulatory bodies, in particular the NMC and GMC who initially raised the concerns with the application of the legislation to their professional regulatory proceedings. Draft provisions were shared and revised in light of comments from these regulatory bodies.

Impact Assessments

12. An Equality Impact Assessment was not carried out. These changes to the exceptions in section 2(1) of the Act 2016 maintain the status quo for these type of proceedings and do not have differential effect on the basis of the protected characteristics.

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

Scottish Government
Learning and Justice Directorate
September 2016