



Apologies (Scotland) Bill

A PROPOSAL FOR A BILL TO PROVIDE THAT AN EXPRESSION OF APOLOGY DOES NOT AMOUNT TO AN ADMISSION OF LIABILITY AND IS INADMISSIBLE AS EVIDENCE, FOR THE PURPOSES OF CERTAIN LEGAL PROCEEDINGS.



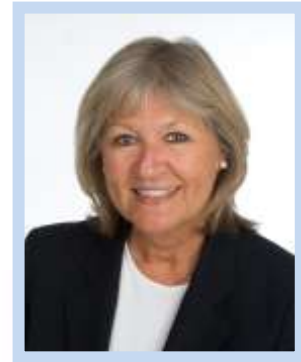
**Consultation by Margaret Mitchell MSP
Member for the Central Scotland Region
29th June 2012**



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FOREWORD



Background

“Sorry seems to be the hardest word”. This 1976 song title neatly sums up the culture which has grown up in Scotland, and other jurisdictions, where in our public services, business or personal relationships there is, at best, a reluctance, and at worst, a refusal to apologise in response to some wrong doing or bad outcome.

The reasons for this are varied and complex. Despite being encouraged, as children, to admit mistakes and to make amends by apologising, as adults, an apology is either regarded as a form of weakness in an age where winning is perceived as being all important, or there is a fear that to apologise and acknowledge “mistakes” will lead to litigation.

Experience

Yet the experience of those who regularly deal with members of the public who have a grievance is that, in the vast majority of cases, what the complainer seeks above all else, is an apology where the bad outcome is acknowledged and an assurance given that the same thing will not happen to anyone else.

The Proposed Bill

The purpose of the proposed Apologies Bill is to provide legal certainty that an apology (as defined under the terms of the Bill) cannot be used as evidence in civil proceedings.

Hiding Behind the Legislation

It is important to stress that the protection the proposed Bill would provide for an apology would not preclude the recipient of that apology from going on to pursue legal redress. In other words, it will not be possible for those complained against to “hide behind” the proposed Bill’s provisions.

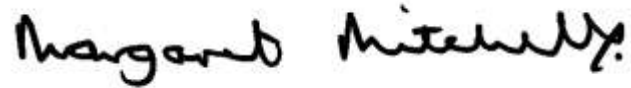
Acknowledgements and Thanks

There has been extensive research carried out in collating, assessing and analysing the information necessary to compile this consultation.

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I am extremely grateful to the various individuals, academics, representatives of public organisations and the business world, all of whom have so willingly assisted me in the compilation of the consultation.

In particular my thanks to Mary Dinsdale and Andrew Mylne from the Scottish Parliament's Non-Executive Bills Unit for their sage and invaluable advice and to my Parliamentary Researchers Kathryn Wane and Greig Lamont for their thorough and unstinting research work.



Margaret Mitchell

HOW THE CONSULTATION PROCESS WORKS

This consultation is being launched in connection with a draft proposal which I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

A minimum 12 week consultation period is required, following which responses will be analysed. Thereafter, I would expect to lodge a final proposal in the Parliament along with a summary of the consultation responses. If that final proposal secures the support of at least 18 other MSPs from two or more political parties, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

At this stage, therefore, there is no Bill, only a draft proposal for the legislation.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, identifying equalities issues, suggesting improvements, considering financial implications and, in general, assisting in ensuring that the resulting legislation is fit for purpose.

The consultation process is being supported by the Scottish Parliament's Non-Executive Bills Unit (NEBU) and will therefore comply with the Unit's good practice criteria. The Non-Executive Bills Unit will also analyse and provide an impartial summary of the responses received.

Details on how to respond to this consultation are provided at the end of the document. Additional copies of this paper can be requested by contacting me at:

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Enquiries about the consultation in any language other than English or in alternative formats should also be sent to me.

An on-line copy is available on the Scottish Parliament's website under Parliamentary Business/Bills/Proposals for Members' Bills/Session 4 Proposals

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/12419.aspx>

AIM OF THE PROPOSED BILL

SECTION 1: BACKGROUND

[Section \(1a\) - Why do we need an Apologies Bill?](#)

Almost every elected member, those who work in customer services, human resources or the NHS, for example, will have experience of an individual coming to them with an issue where there has been a problem or something has gone wrong and all the individual wants is, quite simply, an apology:

- To acknowledge the problem or bad outcome and
- To ensure the same thing doesn't happen to anyone else.

An example of the need for an apology was highlighted in the Citizens Advice Scotland 2008 Independent Advice and Support Service report which stated:

"It's noteworthy that for those dealing with a recent bereavement (partner had died) or disabling illness as a result of an NHS related incident, getting an apology (and not financial compensation) was uppermost in their minds."¹

Furthermore the 2004-05 Scottish Public Services Ombudsman (SPSO) Annual Report states that:

"Failure to take complaints seriously, to give complainants the information they request or an explanation of what went wrong and why can also add to what is a negative or frustrating experience.

Our work also shows that many people simply want an apology for what has gone wrong and an assurance that changes have been made to help prevent the same thing happening to others."²

And again from the same SPSO Report:

"There is evidence to demonstrate that failure to give an apology when things have gone wrong can in itself contribute to the escalation of a complaint and can increase the

¹ Evaluation of IASS Final Report October 2008, p. 15.

² SPSO Annual Report 2004-05, at p.7.

likelihood that the complainant will consider pursuing a legal remedy to their complaint.”³

In his article *Go Ahead, Say You're Sorry* the Psychiatrist Aaron Lazare states:

“I am perpetually amazed by how many of my friends and patients ... regardless of ethnicity or social class ... have long-standing grudges that have cut a destructive swath through their own lives and the lives of their family and friends.

So many of their grudges could have been avoided altogether or been reconciled with a genuine apology.”⁴

Conclusion

Clearly, there is a need for apologies but they are not widely used. The reasons for this are complex and the following sections of this consultation analyse the legal, social and cultural reasons why this is the case and in doing so confirm the need for an Apologies Bill.

³ *ibid.* n.2.

⁴ Available at: <http://www.psychologytoday.com/articles/200909/go-ahead-say-youre-sorry>

Section (1b) -The Importance of Apologies

Again in Aaron Lazare’s article *Go Ahead, Say You’re Sorry* it is noted that:

“A genuine apology offered and accepted is one of the most profound interactions of civilized people. It has the power to restore damaged relationships, be they on a small scale, between two people, such as intimates, or on a grand scale, between groups of people even nations.

If done correctly, an apology can heal humiliation and generate forgiveness.”⁵

And according to the then SPSO, Alice Brown, when she gave evidence to the Local Government and Transport Committee at its meeting on 22 November 2005:

“A body can get things right in the first instance when a complaint arises after something has gone wrong by seeing that it has done something, apologising and demonstrating how it will put the problem right.

That is usually the end of the matter. Most reasonable members of the public want an honest response; they want to understand what and why something happened and what has been done about it.”⁶

Conclusion

In other words, an apology, in addition to acknowledging that something has gone wrong and undertaking to address it, can be cathartic and give closure to the recipient.

⁵ *Ibid.* n.4.

⁶ Official Report of the Local Government and Transport Committee, Tuesday 22 November 2005.

Section (1c) - The Current Legal Situation

At present, Scotland does not have a statutory framework that deals specifically with the effect of apologies on civil or criminal liability.

This contrasts with the “apology laws” adopted in some other jurisdictions, with the aim of creating a protected legal space for the making of apologies [see Section 2].

It is notable that in England and Wales there is a degree of apology coverage under Section 2 of the Compensation Act 2006 which states:

“An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.”⁷

In Scotland, an apology made by a defender in an action for reparation under the law of delict or an accused person in criminal proceedings would usually fall to be considered as an evidential matter in those proceedings. In any such case, questions of legal liability would fall to be determined by the court involved, based on an assessment of proven facts and the applicable law.

In a strict sense, an apology is unlikely to determine liability on its own but can be of relevance as evidence in some cases.

Examples of apologies being admitted as evidence can be found in the cases of:

Lockhart Bryson v BT Rolatruc Limited (9 October 1998, Court of Session Outer House), a personal injury action; and

Lauchlan v Hamilton (1993 S.C.C.R. 1055) where an apology proved a significant admission in respect of theft charges.

There is already some precedent for legislation relating to apologies in Scotland.

For example, in the consumer complaints context, an apology is one type of redress that may be given further to an approved redress scheme under Parts 2 and 3 of the Consumers, Estate Agents, and Redress Act 2007⁸. This is mainly in connection with consumer complaints made against electricity and gas suppliers, and estate agents.

⁷ http://www.legislation.gov.uk/ukpga/2006/29/pdfs/ukpga_20060029_en.pdf

⁸ <http://www.legislation.gov.uk/ukpga/2007/17/contents>

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Furthermore, apologies are also mentioned as one way to make amends for an alleged defamatory statement under the Defamation Act 1996⁹.

Legislative Competence

The making of apologies is not the subject of any express reservation in terms of the Scotland Act 1998, nor is there any other reason to think that the Scottish Parliament would be unable to legislate in this area.

However, the subject of insurance is reserved, and so the extent to which the proposed Bill could legislate with regard to insurance matters is restricted.

⁹ <http://www.legislation.gov.uk/ukpga/1996/31/section/1>

Section (1d) - The Barriers to Apologies

Over the years there have been various barriers, both real and perceived, social and cultural and, perhaps even more frequently, legal, to the issuing of an apology.

Social and Cultural

In *Go Ahead, Say You're Sorry* Aaron Lazare noted that:

“We tend to view apologies as a sign of a weak character. But in fact they require great strength.”¹⁰

In the same article, however, he points out that:

“Despite its importance apologising is antithetical to the ever-persuasive values of winning, success and perfection.

The successful apology requires empathy and the security and strength to admit fault, failure and weakness.

But we are so busy winning that we can't concede our own mistakes.”¹¹

And the SPSO in her evidence to the Local Government and Transport Committee at its meeting on 22 November 2005 argued for a change in the culture of apologising in Scotland:

“Particularly in the health service, there is a resistance to saying sorry when things have gone wrong.

That is a great barrier.

Making a mistake is not the same as being negligent and, in the real world, people make mistakes. What is important is what we do about these mistakes and what we learn from them.”¹²

¹⁰ *Ibid.* n.4.

¹¹ *Ibid.* n.4.

¹² *Ibid.* n.6.

Legal

The fear of legal liability resulting from an apology is well documented. This is borne out by the 2004-05 and the later 2006-07 SPSO's Reports which noted respectively that:

"A key barrier to saying 'sorry' and providing an apology is often fear of litigation"¹³

and

"Evidence shows that the fear of litigation acts as a barrier to giving apologies."¹⁴

And in his 2001-02 Report, the Australian Commissioner for Complaints, Rob Knowles stated that:

"It is clear that the fear of litigation often produces a defensive unhelpful response to complainants...which leaves complainants with an even deeper sense of grievance and distrust."¹⁵

Prue Vines, Visiting Professor in Law at the University of Strathclyde, has highlighted this point:

"Lawyers have traditionally advised their clients not to apologise because they fear the apology will be used as an admission of liability.

This is compounded by the use of admissions and compromise clauses in insurance contracts."¹⁶

According to the Medical Protection Society which is the leading provider of comprehensive professional indemnity and expert advice to doctors, dentists and other health professionals around the world:

"We have long advised members to be open and honest with patients when something has gone wrong but many doctors feel constrained by the culture and processes of the organisations in which they work."

And in terms of the proposed Apologies Bill, the Medical Protection Society stated:

¹³ *Ibid.* n.2.

¹⁴ SPSO Annual Report 2006-07, at p.10

¹⁵ <http://www.mddus.com/media/23258/06SpringF12-13-SayingSorry.pdf>

¹⁶ P Vines, *The Power of Apology* [2007] UNSWLRS 30, at p,20 (available at: <http://law.bepress.com/unswwps/flrps/art30/>).

“We feel this would remove one of the barriers to achieving greater openness about mistakes in healthcare.”¹⁷

Conclusion

There are various barriers to the making of an apology. Legislation in the form of the proposed Apologies Bill aims to provide certainty as to the effect of an apology on legal liability, and so to remove one of the main barriers.

Furthermore, the need for apology legislation has been recognised in other jurisdictions.

Q1. Do you agree that legislation is a necessary and appropriate means of addressing the issues identified?

Q2. Have you ever experienced any barriers to making or receiving an apology? If so, please expand upon this. Where you have received (or made) an apology, or felt an apology should have been received (or made) but was not, please provide details of what difference the apology (or lack of it) made to how you feel.

¹⁷ Letter from Dr. R. A. Hendry, Deputy Medical Director at the Medical Protection Society to Margaret Mitchell MSP, dated 11 May 2012.

SECTION 2 – THE PICTURE ELSEWHERE

Australia

Perceived or real legal barriers to apology-making can be seen as key drivers in legislation in other jurisdictions such as, for example, Australia where eight territories have some form of apology legislation. Here the medical indemnity crisis, where there was a large-scale media campaign with regards to the worryingly high levels of civil litigation, played a significant role in the tort¹⁸ reform agenda which included apology legislation.¹⁹

Six out of eight territories have apology legislation which applies to all civil actions except defamation, intentional torts, sexual assaults, or breach of certain statutory duties. Legislation in South Australia applies to any matter in tort, and Victoria's provisions apply to any matter.

In New South Wales and the Australian Central Territory, apologies are defined as including those which have an explicit or implicit admission of fault or liability but even so these cannot be used as evidence.

However, in the remaining six jurisdictions 'apology' does not include fault. For example, the Western Australia Civil Liability Act 2002 defines an apology as:

“an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.”²⁰

The United States

In the United States 36 out of the 52 states have introduced apologies legislation.

The first was enacted in Massachusetts in 1986 and states that:

“Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident

¹⁸ *Tort*: 'a civil wrong arising from an act or failure to act, independently of any contract for which an action for personal injury or property damages may be brought.' Collins English Dictionary.

¹⁹ P Chasman, 'Tort Reform and the Medical Indemnity "Crisis"' (2002) 8(2) *UNSW Law Journal Forum: Reform of the Law of Negligence: balancing costs and community expectations* 51

²⁰ Civil Liability Act 2002:

http://www.austlii.edu.au/au/legis/wa/consol_act/cla2002161/s5af.html

and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.”²¹

This provision applies across all industries and most forms of civil actions involving accidents and is the same in seven other states. The remaining 28 states have more specific apology laws which apply only to healthcare and protect statements of apology made by healthcare providers.²²

Canada

In Canada, apology legislation is not uncommon and is already in existence in five Canadian provinces.

British Columbia’s Apology Act of 2006 is the broadest of all apology acts. It is wide-ranging, both in terms of its remit and its definition of ‘apology’ which is as follows:

“an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate.”²³

Speaking during the second reading of Canada’s first Apology Act in the British Columbia Legislative Assembly in March 2006, the then Attorney General of British Columbia, The Hon. Wally Oppal, made his case for why apology legislation was required:

“This bill is designed to promote the early and effective resolution of disputes by removing concerns about the legal impact of an apology.

It has long been uncertain in the legal field as to what the legal effects of an apology are or have been ... Courts have been somewhat inconsistent and uncertain as to how evidence of apologies ought to be interpreted, and this bill clarifies that.”²⁴

²¹ Massachusetts General Laws Title II Chapter 233, section 23D:

<http://www.malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter233/Section23D>.

²² The other seven states are: Massachusetts, Texas, California, Florida, Tennessee, Missouri, and Hawaii.

²³ British Columbia Apology Act 2006:

http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_06019_01

²⁴ <http://www.leg.bc.ca/hansard/38th2nd/h60329p.htm#3456>

Conclusion

The proposed Apologies Bill has the same aim as those already enacted in other jurisdictions – namely to clarify how apologies should be treated in law and to promote the use of apologies. The British Columbia Act has been adopted as the principal model for the proposed Bill, although there will be some differences.

Appendix A provides examples of US, Australian and Canadian Apologies Legislation.

Q3. Do you have any experience of the effect that apology legislation can make? Would you be more likely either to expect an apology, or to apologise yourself, if there was apology legislation in Scotland?

DETAIL OF THE PROPOSED BILL

SECTION 3: WHAT THE PROPOSED BILL SEEKS TO ACHIEVE

The proposed Bill will seek to encourage the use of apologies by aiming to provide legal certainty that certain kinds of apology cannot be admitted into evidence in civil proceedings to be used prejudicially against an apologist.

Therefore, by providing expressly that certain forms of apologies cannot be admitted as evidence to establish legal liability or fault in certain civil matters the Bill will seek to establish legal certainty which is essential to promoting a culture of apologising.

It must be stressed that the recipient of an apology under the terms of the proposed Bill is not precluded from going on to take legal action.

Q4. Do you support the general aim of the proposed Bill?

Please indicate “yes/no/undecided” and explain the reasons for your response.

Definition of Apology

The following is a suggested, provisional definition of an apology for the purposes of the proposed Bill. On this definition, one person (A) apologises to another (B) if:

- A acknowledges that there has been a bad outcome for B
- A conveys regret, sorrow or sympathy for that bad outcome, and
- A recognises direct or indirect responsibility for that bad outcome.

In order for an apology to be effective, it has been suggested that the proposed definition include a fourth key element, namely ‘an undertaking, where appropriate, to review the circumstances which led to the bad outcome with a view to making, if possible, improvements and or learning lessons.’

Such an undertaking would not be appropriate in all situations or even, in some instances, possible. However, it has been suggested that a definition of an apology that does not include an undertaking to review does not constitute the effective apology that people desire and the culture change which the Bill seeks to promote.

Having established such a definition, the Bill would go on to provide legal certainty and protection that an apology, as so defined, would not be used as evidence of liability in civil proceedings.

Q5: Do you consider the proposed definition adequate? What elements should be included in the definition in order to achieve the aims of the Bill? Should it include an undertaking to review? Do you think an undertaking to review is necessary for an apology to be effective? Please give your reasons.

It's recognised that there are various levels of apology from limited to comprehensive.

Limited Apology

An apology which contains some but not all of the elements identified above would not qualify as an apology under the proposed Bill. For example, if A merely expresses regret at what has happened to B, this would be so limited in its extent there would be no need for legislation.

A Comprehensive Apology

As already noted, the best and most effective apologies are liable to contain additional elements over and above the key elements identified in the above definition.

From the research and evidence reviewed it is considered that a comprehensive apology will contain the following additional elements:

- An expression of empathy and/or concern for B
- An explanation of what occurred.

Whilst you cannot legislate to make people empathise it is hoped that the proposed Bill will provide an essential first step to changing the present prevalent culture of refusing to apologise, for fear of litigation, to one of greater openness and transparency. This in turn would include, where appropriate, offering an explanation and, crucially, undertaking that, there will be a review of proceedings and procedures in an effort to ensure the same bad outcome does not occur again in the future.

Q6: Referring to the features listed, or others, what do you consider to be the key features of an effective or meaningful apology?

It must be for the recipient to decide whether an apology which only includes the three or four essential elements in the provisional definition would be sufficient to satisfy them. The evidence cited in this consultation clearly illustrates that there are different levels of apology and the one the Bill would hope to encourage would be a 'comprehensive' apology.

The proposed Bill will afford protection to a wide range of apologies, including those limited to the essential elements identified above. Such an apology may fall short of the ideal, but it is still something that should be encouraged, when the alternative may be no apology at all. By adopting this approach, the proposed Bill does not preclude the possibility of an admission of a mistake.

However, as previously mentioned in Section 1(d) above, the former SPSO Alice Brown made clear in her evidence that making a mistake is not always the same as being negligent. By apologising, A could, in effect, be saying “Yes, I made a mistake, but it was the sort of mistake that everyone can be expected to make from time to time,” and in some circumstances this will not constitute a failure to exercise a reasonable duty of care.

Liability (levels of liability and fault)

Admissions of Fault

In terms of the range of apologies that will be covered by its provisions, it is the intention that the proposed Bill will be framed in such a way as to ensure that it is not open to abuse by being used by individuals and institutions to protect themselves from being held legally liable for damage and harm they have caused.

Consequently, it is proposed that the Bill will not protect apologies in so far as they include admissions of legal fault, culpability, or liability and will be limited in its application to civil proceedings.

The provisions should, however, allow for the acknowledgement that “things could or should have been done better” or differently and this will be taken on board for the future.

It is the intention that the proposed Bill should allow that where someone makes an admission of fault, in the context of an apology, it should still be possible to construe those statements as implying legal liability.

Q7. Should the definition of an apology in the context of the proposal include admissions or statements of fault, or should they be excluded from the Bill’s protections?

Statements of Fact

The Bill would provide legal protection to an apology but not to statements of fact made in the context of the apology which could be used to determine fault or wrongdoing, and so secure redress for the person who has suffered the bad outcome.

Q8. How do you think the Bill should deal with statements of fact included with apologies?

[In what circumstances will apologies be protected?](#)

It is intended that the Bill will be limited in its effect to civil matters, including litigation concerning, for example, personal injury and medical malpractice.

To use examples of situations in which apologies have been made (provided by the SPSO) the proposed Bill would cover:

Education

- Mr. A complained that the university had failed to follow their own procedure for classification of his degree. The university acknowledged that the handbook explanation of the calculation of final degree awards was unclear and this was revised for the follow year. Although his result was not amended, an apology was made to Mr. A by the University for the delay in handling his appeal.

Health

- An apology was made by an NHS Board to Miss C after she raised concerns about the treatment of her late father in hospital, in particular his pain management. The board apologised to Miss C for their failure to fully address her father's pain issues.
- An apology was made by a Health Board to a family who lost an elderly couple within four days of each other as a result of the winter vomiting bug. The Board issued a written apology, which included an offer for the family to come in to work with the health authority to improve the service provided to others, by working in connection with the staff. The family accepted this offer.

The examples merely serve as illustrations of situations or organisations which could be covered by the proposed Bill. There are many different areas of civil matters which may be covered under the Bill and your comments on this are invited via the questions below.

Q9. In relation to non-criminal matters, should the Bill apply generally to all types of legal proceedings, or only to some? Please give examples of particular types of proceedings that you think it should cover, and any it should not, along with your reasons for their inclusion/exclusion. Should the Bill also extend to some less formal proceedings (e.g. certain complaints procedures)?

Q10. While it is the intention that the proposal will apply to civil matters only, do you think that there are any areas of criminal law to which it should apply?

[What format of apologies will the Bill apply to?](#)

The proposed Bill will take account of the *format* as well as the *kind* of apologies. It is intended that the Bill's provisions will apply to *all* forms of apology, from the spontaneous apology to the more considered apology of an individual or institution in response to a complaint, anticipated litigation or historic wrongdoing. Hence it would apply to both written and oral apologies.

It is hoped that by giving a degree of legal certainty to the status of an apology, the Bill will in turn encourage a more forgiving culture to emerge from the knowledge that apologies can be made without fear of adverse social or legal consequences.

So it is intended that the provisions of the Bill will apply to any uttered apology regardless of its format and therefore will not restrict the situations in which an apology can function as a vehicle by which social justice can be achieved.

[Who can rely on the terms of the Bill?](#)

The Bill will also make provision for the legal entities which can rely on its provisions. It is intended that the Bill's application shall be unlimited in its application in terms of who can invoke its provisions in civil cases.

Therefore, governmental organisations, public authorities, commercial bodies, and private individuals will be able to rely on the Bill if they issue an apology covered by its terms. The value of an apology and the positive benefits of it can work on the relationship between two parties exists regardless of the legal status of one, or both, of the parties. Given this, there seems to be little reason to *limit the scope of the proposed Bill to operating only between specified legal entities*.

Appendix B provides further examples of previous apologies that have been made and discussion of the nature of these apologies.

SECTION 4: BENEFITS OF THE APOLOGIES BILL

Legal Certainty

The proposed Apologies Bill would help facilitate a culture shift away from the current reluctance to give a merited apology towards a willingness to do so, in circumstances where something has gone wrong, by:

- clarifying the law with the aim of providing legal certainty;
- removing the barriers, perceived or real, to making an apology.

Acknowledgement, Re-Assurance, Closure

In doing so, the Bill seeks to make it possible for apologies to be made which acknowledge the harm done, provide an explanation of what happened and an assurance that the event or circumstances being apologised for will not happen again, realising closure for the injured party and providing a vehicle for social justice to be achieved and a more forgiving culture to be promoted.

Reduction in Complaints/Civil Proceedings

It has been suggested that a greater use of apologies could result in lower complaint and litigation levels as, in a significant number of instances, the complainant desires an apology above all else.²⁵

In 2009 a short-life working group, the *No Fault Compensation Review Group* was established to explore the potential benefits of a no-fault compensation scheme – a scheme suggested for inclusion in the Patient Rights (Scotland) Bill.

The Review Group's subsequent report stated that:

“Patients expect a meaningful apology, an explanation and assurance that measures will be implemented to prevent the error from recurring. And that to a much lesser extent, injured patients wanted financial compensation.”²⁶

²⁵ See Appendix C.

²⁶ No Fault Compensation Review Group Report and Recommendations Volume 1, p. 50. The group, chaired by Sheila McLean, Director of the Institute of Law and Ethics in Medicine at Glasgow University was asked to consider the potential benefits of no-fault compensation scheme for patients and whether such a scheme could be introduced alongside the existing clinical negligence arrangements. The review included examination of the cost implications; the consequences for healthcare staff; and the quality and
(footnote continued)

Further, in the 2006-07 SPSO Annual Report, it was considered that the majority of people do not wish to take the matter to court but that, in the absence of an apology, are more likely to consider and take up this option.²⁷

Evidence suggests that complaints are on the increase in Scotland.

According to, for example, the SPSO 3,489 complaints were registered in 2010/11, an increase of 946 from 2006/07.²⁸

In addition, when giving evidence to the Local Government and Regeneration Committee in March 2012, the SPSO, Jim Martin, reported that:

“In January last year, we took in 257 cases to look at. This year, we took in 358. That is an increase of almost 40 per cent. In February, we took in even more—376.”²⁹

Furthermore, despite a relatively stable number of complaints received for NHS Hospital and Community Health Services, last year the median time taken to handle complaints increased to 19 working days, up from 17 in 2009/10.³⁰

Conclusion

The proposed Bill has the potential to dramatically reduce the number of complaints to public authorities and other organisations.³¹

Preventative Spend

Complaints and litigation are expensive and time-consuming.

The issuing of a comprehensive apology as previously defined and including elements such as an explanation, together with an assurance that the wrong will be addressed, has the potential to significantly reduce not only complaints and civil actions but the

safety of care. It was also important that it took account of the wider implications for the system of justice and personal injury liability and examined the evidence on how no-fault compensation was operated in other countries.

²⁷ *Ibid.* n.14, at p.10.

²⁸ SPSO Annual Report. 2010-11, at p.9.

²⁹ Official Report of the Local Government and Regeneration Committee,, Wednesday 14th March 2012.

³⁰ NHS Complaints Statistics 2010/11 p. 4 <http://www.isdscotland.org/Health-Topics/Quality-Improvement/Publications/2011-10-25/2011-10-25-Complaints-Report.pdf>

³¹ See Appendix C for academic research into the beneficial effects of apology legislation.

associated financial expense and the time spent on pursuing the issue by both parties. In other words, improved communication between both parties helps to form a constructive, quick resolution, with potentially lower financial costs.

In addition to benefiting the two parties involved in the dispute there is also a potential benefit to a number of other organisations, businesses and indemnity companies and to the efficient operation of the Scottish Courts.

Moreover, anecdotal evidence suggests that apology legislation is beneficial to business. In a press release in September 2011 the Canadian Law Firm Borden Ladner Gervais LLP (BLG) stated that apology laws help businesses manage financial and reputational risk:

”Not only does this [apology] legislation allow businesses to express empathy for those impacted by a situation, but there is growing evidence that apology laws reduce the number of lawsuits and the time required to settle them.”³²

Conclusion

It is important to stress that the proposed Apologies Bill would not prevent any individual or organisation from taking forward a complaint or civil litigation if they wish, for example, to pursue financial compensation.

Receiving an apology under the proposed Bill would not prohibit anyone from pursuing further action; however, for those whom an apology in itself is the desired outcome, they will be spared the trials of complaints procedures or litigation.

Ultimately, complaints and litigation should be the last resort but at present these are often perceived as the only options available for those who want an apology. By clarifying the legal status of apologies the Bill aims to encourage their use at an earlier stage, thus making it less likely that people will feel the need to resort to litigation. .

Arguably the social barriers to making apologies cannot be remedied through legislation alone; however, what legislation *can* do is help to change the culture of apologising and, therefore, effect a change in attitudes towards apologies and what their usage entails both socially and morally.

The guiding principle behind such legislation is that if individuals, corporations, or institutions can make apologies, without fear of apologies being taken into account in

³²<http://www.businesswire.com/news/home/20110928006099/en/Businesses-provinces-stand-benefit-%E2%80%9CWe%E2%80%99re-sorry%E2%80%9D>

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any subsequent legal proceedings, they will be much more likely to actually make apologies to those who seek such a remedy. Therefore all the benefits of encouraging apologising in a society can be reaped.



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QUESTIONS

(Questions 1 – 10 appear in the body of the text of the consultation; questions 11 and 12 are additional to these.)

Q1: Do you agree that legislation is a necessary and appropriate means of addressing the issues identified?

Q2: Have you ever experienced any barriers to making or receiving an apology? If so, please expand upon this. Where you have received (or made) an apology, or felt an apology should have been received (or made) but was not, please provide details of what difference the apology (or lack of it) made to how you feel.

Q3. Do you have any experience of the effect that apology legislation can make? Would you be more likely either to expect an apology, or to apologise yourself, if there was apology legislation in Scotland?

Q4. Do you support the general aim of the proposed Bill? Please indicate “yes/no/undecided” and explain the reasons for your response.

Q5: Do you consider the proposed definition adequate? What elements should be included in the definition in order to achieve the aims of the Bill? Should it include an undertaking to review? Do you think an undertaking to review is necessary for an apology to be effective? Please give your reasons.

Q6. Referring to the features listed, or others, what do you consider to be the key features of an effective or meaningful apology?

Q7. Should the definition of an apology in the context of the proposal include admissions or statements of fault, or should they be excluded from the Bill’s protections?

Q8. How do you think the Bill should deal with statements of fact included with apologies?

Q9. In relation to non-criminal matters, should the Bill apply generally to all types of legal proceedings, or only to some? Please give examples of particular types of proceedings that you think it should cover, and any it should not, along with your reasons for their inclusion/exclusion. Should the Bill also extend to some less formal proceedings (e.g. certain complaints procedures)?

Q10. While it is the intention that the proposal will apply to civil matters only, do you think that there are any areas of criminal law to which it should apply?

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GENERAL

Q11. What is your assessment of the likely financial implications (if any) of the proposed Bill to you or your organisation? What (if any) other significant financial implications are likely to arise?

Q12. Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

Appendix A – Examples of Apologies Legislation from Canada, Australia and the US

British Columbia – The Apology Act 2006

Contents:

1. Definitions
2. Effect of apology on liability
3. Commencement

Definitions

1. In this Act:

"apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate;

"court" includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.

Effect of apology on liability

2. (1) An apology made by or on behalf of a person in connection with any matter

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,

(b) does not constitute a confirmation of a cause of action in relation to that matter for the purposes of section 5 of the Limitation Act,

(c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and

(d) must not be taken into account in any determination of fault or liability in connection with that matter.

(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

Commencement

3. This Act comes into force on the date of Royal Assent.

Western Australia Civil Liability Act 2002, Part 1E

In this Part —

apology means an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.

Application of this Part

(1) Subject to sections 3A and 4A, this Part applies to civil liability of any kind unless this section states otherwise.

(2) This Part extends to a claim even if the damages are sought to be recovered in an action for breach of contract or any other action.

(3) This Part does not apply unless the civil liability giving rise to the claim arises out of an incident happening on or after the commencement day.

(4) If in a claim for damages —
(a) it cannot be ascertained whether or not the incident out of which the personal injury arises happened on or after the commencement day; and
(b) the symptoms of the injury first appeared on or after the commencement day,

the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

(5) In this section —
commencement day means the day on which the [Civil Liability Amendment Act 2003 section 8 comes into operation](#).

Effect of apology on liability

(1) An apology made by or on behalf of a person in connection with any incident giving rise to a claim for damages —

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and

(b) is not relevant to the determination of fault or liability in connection with that incident.

(2) Evidence of an apology made by or on behalf of a person in connection with any incident alleged to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident

District of Columbia Medical Malpractice Proceedings Act of 2006

CHAPTER 28
MEDICAL MALPRACTICE
SUBCHAPTER III
EVIDENCE

16-2841. Inadmissibility of benevolent gestures

For the purpose of any civil action or administrative proceeding alleging medical malpractice against a healthcare provider, an expression of sympathy or regret made in writing, orally, or by conduct made by or on behalf of the healthcare provider to a victim of the alleged medical malpractice, any member of the victim's family, or any individual who claims damages by or through that victim, is inadmissible as an admission of liability. Nothing herein shall preclude the court from permitting the introduction of an admission of liability into evidence

Appendix B - Examples of Apologies Made

1) In November 2011 NHS Highland apologised to a dead patient's family for the delay in diagnosing his cancer. Although the SPSO, who investigated the case, stated that the delay was unlikely to have affected the patient's survival, the ombudsman considered that it would have added distress to the patient and his family.

NHS Highland's chief executive Elaine Mead apologised to the family of the patient and said subsequently:

"On behalf of NHS Highland, I am really sorry that we were not able to get everything right for this patient.

"We welcome the independent review by the ombudsman's office and I have written to the family to personally update them on the actions that have already been taken.

"We have shared the ombudsman's report with colleagues involved in the case.

"It was a complex case but it is really important we all reflect and learn from the distressing consequences for individuals and families when we don't get everything right."

More details at: <http://www.bbc.co.uk/news/uk-scotland-highlands-islands-17841538>³³

2) In January 2012 the Royal Canadian Mounted Police (RCMP) made an apology admitting the department could have done more to stop the murderer Robert Pickton.

In his statement to the press Assistant Commissioner Craig Callens said:

"I would like to be very clear this morning. As the commanding officer of the RCMP in British Columbia, I believe that, in part, with the benefit of hindsight, and when measured against today's current investigative standards and practices, the RCMP could have done more."³⁴

This apology was important for the families of Robert Pickton's victims to hear and was able to be made without any legal repercussion to the RCMP.

³³ It is notable that in Canada, at the 141st Annual Meeting of the Canadian Medical Association in 2008, a resolution was passed stating that the CMA and provincial/territorial medical associations would lobby the government for appropriate 'Apology' legislation in all Canadian jurisdictions.

³⁴ http://www.ctvbc.ctv.ca/servlet/an/local/CTVNews/20120127/bc_rcmp_pickton_apology_120127?hub=BritishColumbiaHome

3) New South Wales Health Department:

“We had 11 patients in our unit who were given a contaminated solution that we inject into the heart to stop it while we operate. Five of those patients were to go on and to die. There was an error somewhere in the system; ...

“But long before we knew what had happened, one of my senior colleagues called all the families together and he and I sat down with the 11 families and said, ‘This is a terrible thing that has happened. It is awful. We are truly sorry that this has happened. We are not going to do another operation until we have got these patients out of the ward’. And we did not. We said, ‘We are going to leave no stone unturned until we find out what the cause was’. We knew it was an infection; we knew it had occurred somewhere in the processing of that solution, which was beyond our control as individual clinicians. But we said sorry. None of those patients took legal action...

“Not only did none of those patients take legal action ... two of them came back to the same hospital and the same surgeons to have repeat surgery many years later because they had confidence that the clinicians were actually on their side and were empathic with them. And surely, in this day and age we can allow our clinicians to be empathic with the people that, after all, they went to work to help.”

4) President Bill Clinton on behalf of the US (The White House, 1997):

“No power on earth can give you back lives lost, the pain suffered, the years of internal torment and anguish. What was done cannot be undone. But we end the silence. We can stop turning our heads away. We can look you in the eye and finally say on behalf of the American people, what the US government did was shameful and I am sorry. To our African American citizens, I am sorry that your federal government orchestrated a study so clearly racist. This can never be allowed to happen again.”³⁵

³⁵ The syphilis study at Tuskegee took place over forty years and involved hundreds of poor African-American men who were used in research without their knowledge and consent. The men believed they had found hope when they were offered free medical care by the United States Public Health Service. <http://www.cdc.gov/tuskegee/clintonp.htm>

In addition to the above specific examples, there are numerous illustrations of high-profile apologies that are instructive in this area.

Effective Apologies

Aaron Lazare, for example, has described FW de Klerk's apology to all South Africans for his party's imposition of apartheid as "one of the world's greatest apologies".

In apologizing de Klerk acknowledged that apartheid led to forced removals of people from their homes, restrictions on their freedom and jobs, and attacks on their dignity, and he expressed that the party "deeply regret[ted]" those outcomes. On regret he said:

"Deep regret goes further than just saying you are sorry. Deep regret says that if I could turn the clock back, and if I could do anything about it, I would have liked to have avoided it." De Klerk's apology is just one of a number of examples of high-profile, large-scale public apologies that have been made within recent years.

Nelson Mandela apologised for atrocities committed by the African National Congress in fighting against apartheid; Exxon for the Valdez spill; Pope John Paul II for abuses committed by Christian colonizers against Indian peoples; former Japanese Prime Minister Morihiro Hosokawa for Japanese aggression during World War II; and Russian President Boris Yeltsin apologized for the massacre of 15,000 Polish army officers by Soviet forces during World War II.

In contrast to the aforementioned, Lazare, again, draws attention to a pair of high-profile apologies that have been far from successful.

Ineffective Apologies

The first refers to President Richard Nixon's resignation speech in which he stated:

"I regret deeply any injuries that may have been done in the course of events that have led to this decision. I would say only that if some of my judgments were wrong, and some were wrong, they were made in what I believed at the time to be in the best interest of the nation".

Nixon fails to recognize the wrong he committed, the norm he violated, and in doing so fails to accept responsibility for his own wrongdoing.

Likewise is Senator Bob Packwood's attempt at an apology in 1994 when he said was:

"I'm apologising for the conduct that it was alleged that I did."

Appendix C – Academic Studies

There have been numerous academic studies into the benefits of apologies.

In their study, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, Ho and Liu concluded not only that apology laws resulted in a reduction in the amount of time taken to reach a settlement, leading in the short term to a greater number of resolved cases, but that the evidence also suggested a long term reduction in the overall number of cases brought in the first place.³⁶

Research conducted by the University of Illinois showed that if no apology was received 43% of those surveyed were inclined to pursue litigation; an apology in terms of: 'we are sorry if that happened' resulted in 65% considering litigation and a full apology led to only 13-14% considering litigation.³⁷ This demonstrates a dramatic reduction in the willingness of pursuers to litigate if they receive an apology.

In addition in September 2004 the Chief Justice of New South Wales noted that:

'Filings in the District Court have fallen from about 20,000 in calendar year 2001, to 13,000 in 2002 and to 8,000 in 2003. The reduced rate of filings is continuing this year. It is reasonably clear that something dramatic has happened to civil litigation in New South Wales.

Similar effects are seen in other states.

What these figures reveal is a dramatic change in the practical operation of the law of negligence in Australia over a few years. This is the result of two factors. First there has been a substantial shift in judicial attitudes at an appellate level, led by the High Court of Australia. Secondly, there have been major changes in the law of negligence implemented by statute.³⁸

³⁶ Ho, B., & Liu, E., (December 1, 2010), 'Does Sorry Work? The Impact of Apology Laws on Medical Malpractice' in *Johnson School Research Paper Series* No. 04-2011, p. 26

³⁷ NSW Ombudsman, *Apologies: a practical guide*, 2009, citing Robbennolt, Jennifer K, "Apologies and Legal Settlement: an empirical examination" (2003) *Michigan Law Review*, Vol, 102, no. 460.

³⁸ http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_140904

HOW TO RESPOND TO THIS CONSULTATION

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Responses should be submitted by **Friday 28th September 2012** and sent to:

Margaret Mitchell MSP
Room M2.09
Scottish Parliament
Edinburgh
EH99 1SP

Tel: 0131 348 5639

Fax: 0131 348 6483

E-mail: margaret.mitchell.msp@scottish.parliament.uk

Please indicate whether you are a private individual or an organisation

Respondents are also encouraged to begin their submission with a short paragraph outlining briefly who they are, and who they represent (which may include, for example, an explanation of how the view expressed was consulted on with their members).

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that the normal practice is to make responses public – by posting them on my website www.margaretmitchellmsp.com and in hard copy in the Scottish Parliament's Information Centre (SPICE).

Therefore, if you wish your response, or any part of it, to be treated as anonymous, please state this clearly along with the reasons for this. If I accept the reasons, I will publish it as "anonymous response". If I do not accept the reasons, I will let you know and give you the option of withdrawing it or submitting it on the normal attributable basis. If your response is accepted as anonymous, it is your responsibility to ensure that the content of does not allow you to be identified.

If you wish your response, or any part of it, to be treated as confidential, please state this clearly and give reasons. If I accept the reasons, I will not publish it (or publish only the non-confidential parts). However, I am obliged to provide a (full) copy of the response to the Parliament's Non-Executive Bills Unit when lodging my final proposal. As the Parliament is subject to the Freedom of Information (Scotland) Act (FOISA), it is possible that requests may be made to see your response (or the confidential parts of it)

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and the Parliament may be legally obliged to release that information. Further details of the FOISA are provided below.

NEBU may be responsible for summarising and analysing the results of this consultation and will normally aim to reflect the general content of any confidential response in that summary, but in such a way as to preserve the confidentiality involved. You should also note that members of the committee which considers the proposal and subsequent Bill may have access to the full text of your response even if it has not been published in full.

There are a few situations where not all responses will be published. This may be for practical reasons: for example, where the number of submissions we receive does not make this possible or where a large number of submissions are in very similar terms. In the latter case, only a list of the names of people and one response who have submitted such responses would normally be published.

In addition, there may be a few situations where I may not choose to publish your evidence or have to edit it before publication for legal reasons. This will include any submission which contains defamatory statements or material. If I think your response potentially contains such material, usually, this will be returned to you with an invitation to substantiate the comments or remove them. In these circumstances, if the response is returned to me and it still contains material which I consider may be defamatory, it may not be considered and it may have to be destroyed.

Data Protection Act 1998

As an MSP, I must comply with the requirements of the Data Protection Act 1998 which places certain obligations on me when I process personal data. Normally I will publish all the information you provide (including your name) in line with Parliamentary practice unless you indicate otherwise. However, I will not publish your signature or personal contact information (including, for example, your home telephone number and home address details, or any other information which could identify you and be defined as personal data).

I may also edit any information which I think could identify any third parties unless that person has provided consent for me to publish it. If you specifically wish me to publish information involving third parties you must obtain their consent first and this should be included in writing with your submission.

If you consider that your response may raise any other issues concerning the Data Protection Act and wish to discuss this further, please contact me before you submit your response.

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Further information about the Data Protection Act can be found at:

www.ico.gov.uk

Freedom of Information (Scotland) Act 2002

As indicated above, once your response is received by NEBU or is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees, it is considered to be held by the Parliament and is subject to the requirements of the Freedom of Information (Scotland) Act 2002 (FOI(S)A). So if the information you send me is requested by third parties the Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, even if I have agreed to treat all or part of the information in confidence and to publish it anonymously. I cannot therefore guarantee that any other information you send me will not be made public should it be requested under FOI.

Further information about Freedom of Information can be found at:

www.itspublicknowledge.info