

# **APOLOGIES (SCOTLAND) BILL**

## **MEMORANDUM BY THE SCOTTISH GOVERNMENT TO THE JUSTICE COMMITTEE**

### **Introduction**

1. This memorandum has been prepared by the Scottish Government to assist consideration by the Justice Committee of the Apologies (Scotland) Bill (“the Bill”), which was introduced by Margaret Mitchell MSP on 3 March 2015.

### **Background**

2. The aim of the Bill is to provide that an expression of apology, including an expression of sympathy or regret and any statements of fact, does not amount to an admission of liability, and is inadmissible as evidence for the purposes of civil legal proceedings. The Bill does not extend to criminal proceedings.

3. In particular the Bill makes provision for the effect that an apology would have on legal proceedings - that it is not admissible as evidence and cannot be used in any other way to prejudice the apology maker; it defines the legal proceedings covered; it defines what it meant by an apology and has no retrospective effect.

### **Discussion**

4. Throughout 2013 and 2014, the Scottish Human Rights Commission facilitated an InterAction process to produce an Action Plan on Justice for Victims of Historic Child Abuse of Children in Care. Although the report recommended full consideration of the merits of an Apology law, it noted that it required to be “*carefully thought through in order to ensure that it is meaningful and effective, benefiting the survivor, increasing public awareness and improving future practice*”. In their response to the Action Plan, the Scottish Government undertook to continue working constructively with Ms Mitchell as her proposals for a member’s bill on Apology Law were developed.

5. A number of jurisdictions already have some form of apology legislation. The definition of apology in the Bill is predominantly based on the equivalent New South Wales legislation - the New South Wales (NSW), Civil Liability Act 2002. The NSW jurisdiction, like many jurisdictions with such apology laws, has largely replaced the common law of negligence with statutory no-fault compensation schemes. In this context, when fault is not in question, apologising has limited effect. In our largely common law based, adversarial system, making apologies inadmissible as evidence has a greater impact on the rights of the victim and the person who injured them and makes it more difficult for the victim to pursue and vindicate those rights. That is exacerbated where, as in this Bill, the “apology” includes express admissions of fault.

6. It also of note that, the NSW legislation is much narrower in its application. It does not extend to civil liability for some workplace injuries, intentional acts done with intent to cause personal injury, including sexual assault or unlawful sexual conduct and road traffic accidents. As the majority of personal injury actions in

Scotland relate to road traffic accidents, the Bill has a much wider application than the NSW model on which it is based.

#### *Potential injustice to pursuers*

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

8. An example would arise, in terms of claims against private individuals, if the person who caused a road traffic accident immediately apologises and admits fault. Should the victim of the accident subsequently seek compensation in court, they could not rely on the apology (including the admission of guilt) to establish that the person was at fault. If there is no other evidence available, it will not be possible to show that the person was at fault, resulting in injustice to the victim.

9. There would be similar difficulties in terms of claims against public bodies, *where* a survivor of child abuse or someone aggrieved by the actions of a health board or local authority might well benefit from hearing an apology. However, should that survivor or aggrieved person later decide to seek damages in court for the harm which was the subject of the apology, they too could not rely on the apology but would have to find other evidence to support their claim. We know that survivors of historic abuse can face significant evidential hurdles when seeking to progress a court action. Protecting an apology in the way proposed could add to their evidential difficulties.

10. Although the Bill states that an apology as defined in clause 3 is not admissible as evidence, an admission of fault or statement of fact would be very close to an express admission. It is foreseeable that one party may seek to sever the admission or the statement of fact from the expression of regret in the courts.

#### *Types of legal proceedings*

11. There are concerns that there does not appear to have been consideration given to the exclusion of public inquiries under the Inquiries (Scotland) Act 2005 in the legislation. The policy reasons for excluding Fatal Accident Inquiries would equally apply to public inquiries.

12. The Bill would also apply to arbitration proceedings which can generally admit any evidence and take a case by case approach to whether to do so. Restricting that freedom in any way could lessen the effectiveness of arbitration, consideration therefore needs to be given the impact the Bill will have of this type of proceedings.

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

consideration therefore needs to be given the impact the Bill will have of this type of proceedings.

14. Consideration also needs to be given to the fact that this Bill is only intended to apply to devolved tribunals but a tribunal case may move from a reserved tribunal on appeal to the Upper Tribunal (Court of Session). In this case, an apology given under the terms of the Bill would not apply in the reserved tribunal but would apply in the Upper Tribunal.

#### *Insurance law*

15. The Scottish Government is content that the proposed Bill would not affect how insurance law is provided, who provides and their regulation or to whom it is provided. However, it remains unclear how the insurance industry would interpret this legislation in their contracts, and the implications for insurance cover.

#### **Other relevant Scottish Government legislative proposals**

16. Consideration also needs to be given to work ongoing elsewhere. The Scottish Government's 2014-15 legislative programme includes a Public Health Bill which will contain provisions to impose a duty of candour on organisations providing health and social care - that duty will arise where there have been incidents involving harm that have occurred in the course of provision of a health or social care service. The procedure to be followed in fulfilling that duty will include a requirement to apologise, but that apology of itself would not amount to an admission of negligence or a breach of duty. Consideration will therefore need to be given to how the Apologies Bill deals with apologies made under the Public Health Bill so as not to undermine the policy aim of the duty of candour.

17. Many of the references and examples given in the papers associated with this bill relate to health situations. Within health there are already various pieces of legislation and guidance which encourage a change in culture and include advice in relation to apology. Similarly, exploration of what a no-fault system might look like is still on-going and this will no doubt include advice/guidance on apology. All of this would suggest that the policy justification for an Apologies Bill may have been superseded.

#### **Financial Implications**

18. There are no direct costs associated with the implementation of this legislation. The Financial Memorandum sets out that the only costs which would fall to the Scottish Administration would be the costs of producing guidance related to the legislation but that this would be *de minimis*. Should the Scottish Government decide to issue guidance, we agree with this financial assessment.

19. Otherwise, the Financial Memorandum which accompanies the Bill sets out the potential for savings based on the Bill likely leading to fewer people pursuing legal claims. No forecast savings figures are included however, on the basis that it is not possible to accurately estimate the actual reduction in personal injury cases.

## **Consultation**

20. Margaret Mitchell MSP consulted on these proposals between 29 June 2012 and 28 September 2012. The consultation received 62 responses. Of the 22 respondents who answered the question about the general aims of the proposed Bill, 86% were supportive. Of the 32 respondents who answered the question relating to whether legislation was the appropriate mechanism for addressing the issues identified in the consultation, 56% expressed support.

21. The particular issues on which there was no clear support were around:-

- the adequacy of the definition of an apology (27 respondents with 26% of those agreeing that it was adequate);
- the inclusion of admissions or statements of fault in the definition of apology (25 respondents with 28% in favour of their inclusion); and
- the treatment of statements of fact included with apologies (24 respondents with 25% of those agreeing they should be protected).

## **Scottish Government Position**

22. The Scottish Government supports the aim of the proposal which is to encourage and protect the giving of apologies by private and public bodies to achieve a better outcome for victims and to reduce the number of cases which result in litigation. We consider that the definition of apology needs some further consideration in order to ensure that it does not create any inadvertent injustice; that the application of the Bill to certain legal proceedings requires further consideration; and that the implications for insurance cover have been fully taken into account. Further consideration of the interaction with the provisions contained in the Health, Smoking and Electronic Cigarettes etc. (Scotland) Bill also needs to be made. Ministers intend to work with the member in charge and the Committee to propose amendments to these aspects of the Bill, ensuring that the Bill enables apologies to be made which are meaningful and effective without any unintended consequences. Given the concerns with the proposed legislation, the Scottish Government maintain a neutral position on this legislation at this time.