

Justice Committee
Apologies (Scotland) Bill

Written submission from the Forum of Insurance Lawyers

The Forum of Insurance Lawyers (FOIL) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This response has been drafted by Graeme Watson of Simpson Marwick, following consultation with the membership.

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Question 1 - Is there merit in providing legal protection to an expression of apology as set out in the Bill?

1. FOIL supports the aim of the Bill in providing legal protection to an expression of apology. The Compensation Act 2006 provides similar legal protection in England and Wales. The policy memorandum states that the Bill aims to encourage the use of apologies by providing that they are inadmissible in certain civil proceedings and that the Bill is thereby intended to encourage a change in social and cultural attitudes towards apologising. It is a moot point as to whether such social and cultural change will be engendered. However, it is well recognised that a timely apology – usually accompanied by an explanation – may meet the needs of the complainant.

2. The Scottish Government recently consulted on proposals to introduce a statutory duty of candour for health and social care services. That consultation stated:

6.5 The notification that is to be made [that is, notification of an adverse event resulting in harm] to the relevant person should be given personally by a suitably trained representative of the organisation and should include an account of all the facts known at the time of the disclosure and the plans for the event to be reviewed.

6.7 The organisation must provide an apology and must confirm all of the actions taken in a written record.

3. A significant impediment to the duty of candour is the lack of legal protection for an expression of apology. We therefore welcome the aim of providing such protection.

4. The Scottish Public Services Ombudsman may also recommend that an organisation issues an apology. The SPSO follows up their recommendations to ensure compliance. If an organisation fails to comply, the SPSO may lay a special report before the Scottish Parliament. It is invidious that an organisation may be required to apologise, without the legal protection now proposed.

Question 2 - Do you agree with the legal proceedings covered under Section 2 of the Bill and the exceptions for fatal accident inquiries and defamation proceedings?

5. We agree that it is appropriate to exclude defamation proceedings. The policy memorandum refers to the offer to make amends procedure contained within the Defamation Act 1996. We agree that defamation proceedings should be excluded in order to avoid any potential conflict in the legislation.

6. We do not consider that there should be an exception for fatal accident inquiries. An inquiry will frequently precede any action for negligence or breach of statutory duty. The making of an apology is not relevant to any aspect of the sheriff's determination under section 6(1) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. Further, under section 6(3) the determination of the sheriff is not to be admissible in evidence or founded on any judicial proceedings arising out of the death or any accident from which the death resulted. It is an unnecessary and invidious complication to legislate for an apology being admissible in one forum and not in another.

7. We are content that the Bill excludes criminal proceedings.

Question 3 - Do you agree with the definition of apology in section 3 of the Bill?

8. We consider that the definition of apology in section 3 is too wide-ranging and is unnecessary in its scope. Apology is an ordinary English word and its definition ought to be construed according to the usual canons of construction. This definition raises the possibility that rather than attempting to construe the word "*apology*", the courts will instead require to construe the words "*sorry*" and "*regret*". We consider that no specific definition is necessary.

9. We note that there is no definition of apology in the Compensation Act 2006. We are not aware that the lack of definition has caused any difficulty or confusion.

10. If the definition section is retained, we consider that it is helpful for it to specify that an apology includes those parts of the statement set out in sub-sections (a) to (c).

Question 4 - Do you agree that the Bill will facilitate wider cultural and social change as far as perceptions of apologies are concerned?

11. We are not persuaded that the Bill will result in such cultural and social changes. However it will not hinder them and the utility of the Bill should not be judged on this aspect alone.

12. We note that the Medical Protection Society, responding to the draft proposal of Margaret Mitchell MSP in September 2012, stated that they have “*long supported and advised members to be open with patients when something has gone wrong.*” The Medical Defence Union stated that they have been encouraging clinicians to offer patients an explanation and a sincere apology for over fifty years. The SPSO has issued guidance on apologies to NHS Scotland. Healthcare professionals should already provide apologies where appropriate. We are doubtful that legislation will have any significant effect on altering perceptions of apologies, either within the medical profession or amongst complainants.

Question 5 - Are there any lessons that can be learned from how apologies legislation works in practice in other legislatures?

13. Section 2 of the Compensation Act 2006 is commendably brief and direct:

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

14. We consider that there is much merit in the simplicity of this approach. It does not prevent an apology being admissible as evidence: it does prevent it amounting to an admission of negligence or breach of statutory duty.

Forum of Insurance Lawyers
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