

Justice Committee

Apologies (Scotland) Bill

Written submission from Charlie Irvine, Senior Teaching Fellow, University of Strathclyde

The Apologies (Scotland) Bill, introduced to the Scottish Parliament on 3 March, 2015, proposes to limit the legal effect of apologies. If the Bill becomes law, apologies will no longer be admissible as evidence in civil proceedings nor be usable 'in any other way to the prejudice' of the person apologising.

The consultation poses five questions, below.

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

I believe there is merit in protecting apologies. In a previous article on the matter I outlined the risks of such protection.¹ These include the possibility of formulaic apologies with the express purposes of heading off litigation and the risk that a partial or botched apology will exacerbate rather than reduce anger. A third risk may arise from the very protection that apologies acts provide: by removing potential consequences, might apologies be robbed of their genuineness? In other words, could the Bill engender a degree of cynicism among members of the public that, because people and organisations can apologise with impunity, apologies are less valuable?

I noted one other risk: that apologies, whether protected or not, will be interpreted differently by lawyers and lay people. Lawyers' response to apologies may be to sue for more, not less: *"In contrast to laypeople, who show a tendency to be more amenable to settlement following an apology, attorneys set their aspirations higher and expect more as a fair settlement when an apology is offered."*²

Only time will tell whether any of these fears is justified. We can, however, look at the effect of apologies acts in other jurisdictions. Empirical data are scarce, but one study of US states³ reached useful conclusions:

- a) total compensation payments tend to go up in the aftermath of apologies legislation, both in frequency (14-15%) and amount (20-27%)
- b) this effect diminishes over time so that the final net effect of apologies acts on compensation is close to zero or slightly negative
- c) for severe injuries there is a greater likelihood of settlement (19% in any given year) and a reduction in amount (14-17%); there was an overall decrease in the number of court cases involving less severe injuries

¹ C Irvine, 'The Apologies Act for Scotland: Good Intentions with Unforeseeable Consequences' (2013) *Edinburgh Law Review*, Vol. 17, 84-90

² Irvine, 2013, 87, citing J K Robbenolt, 'Attorneys, Apologies and Settlement Negotiations' (2008) *Harvard Negotiation Law Review*, Vol. 13 (2)

³ B Ho and E Liu, 'Does sorry work? The impact of apology laws on medical malpractice' (2011) *Journal of Risk and Uncertainty*, Vol 43, 141-167. The study uses a model from the field of economics known as 'difference in differences estimation'.

The authors reach the following conclusion: *“We find that in the short run the law increases the number of resolved cases, while decreasing the average settlement payment for cases involving more significant and permanent injuries.”*⁴

Australian experience is not uniformly encouraging. Writing in 2013, Vines describes limited awareness of apologies protection among lawyers and the general population.⁵ She claims that legal advice against apologising continued to be given years after the legislation. On a more positive note, her prescription for improvement tends to support the approach taken by the present Bill:

- a) protect full apologies, including statements of fault
- b) provide a definition of apology
- c) include (almost) all areas of civil liability
- d) do so in a single piece of legislation

While the financial and legal benefits of the Bill may be difficult to quantify, the message it sends is a positive one. Apologies can be significant both to the giver and receiver and can play a role remedying harm. (See below for the wider social implications.)

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?

No comment.

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

The key elements in apology can be expressed as:

- recognition that something bad has happened
- expression of regret for what has occurred
- admission of fault or responsibility
- an undertaking to put things right (the remedial dimension).

In my previous article I set out the dilemma for the Bill:

- *“if it does not protect admissions of fault, apologies are likely to be expressed in bland, general terms that are more insulting than healing;*
- *if it does protect such admissions and thus provides complete insulation from legal consequences, even apologies that acknowledge fault may be devalued in the eyes of the recipients.”*⁶

The drafters have chosen to protect all the elements of a full apology rather than confining the protection to expressions of regret (as has been done in some jurisdictions.⁷) I believe this is wise. We know apologising is difficult and challenging. The broad definition has the virtue of allowing people to apologise for something

⁴ Ibid, 163

⁵ P Vines, ‘The Apology in Civil Liability: Underused and Undervalued?’ (2013) *Precedent Issue* 115, 28-31

⁶ Irvine, 2013, 88

⁷ For a list of jurisdictions and the extent of the protection, see Ho and Liu, 2011, 145

without wondering ‘Is this type of apology protected?’ Such thinking is likely to chill the climate for apologies by reducing the spontaneity and genuineness essential to their credibility.

4. Do you agree that the Bill will facilitate wider cultural and social change as far as perceptions of apologies are concerned, as suggested in the Policy Memorandum on the Bill?

Taking the above comments into account and considering my personal experience of apologies offered and accepted in mediation, I agree that the goal of changing the culture is a worthy one. Even with evidentiary protection, the act of apologising will remain extremely challenging for most people and organisations. And yet a well-timed, well-delivered and genuine apology can transform a dispute.⁸

The risks of apologies leading to liability may be exaggerated; insurance companies may continue to advise against apologising; solicitors may continue to view apologies instrumentally; but legislation does more than create legal rules. It also takes a lead in laying down societal norms. It seems likely that the Act will do so, legitimising the giving of apologies and reducing the perceived fear that inhibits them.

However, Ms Mitchell’s goal of reductions in stress, time and costs is more likely to be achieved if the Bill is accompanied by other practical steps:

- a commitment to end ‘deny and defend’ practices in the health sector
- best practice guidance for insurers and their advisors
- humane, practical guidance about apologies (as envisaged by the Policy Memorandum on the Bill)
- it would also be helpful to promote greater understanding by the courts that mediation provides a useful setting for an apology to take place. This should be undergirded by robust judicial affirmation of mediation’s confidentiality. The privacy of that setting may help guard against the cynicism that often accompanies apologies delivered in public.

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

See comments and citations above. See also Robyn Carroll’s recent review of apologies legislation in other jurisdictions.⁹

Charlie Irvine
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⁸ See <http://kluwermediationblog.com/2014/08/12/the-physical-dimension-of-mediation-lessons-from-africa/>

⁹ Robyn Carroll, ‘When “Sorry” is the Hardest Word to Say, How Might Apology Legislation Assist?’ (2014) *Hong Kong Law Journal* Vol. 44 (2) 491; also available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512657