

Justice Committee
Apologies (Scotland) Bill

Written submission from the Scottish Human Rights Commission

Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit comments to the Justice Committee on the Apologies (Scotland) Bill. The Commission broadly welcomes the Bill as an important step, but it believes the present Bill should be one of a number of measures to ensure effective remedy for survivors of historic child abuse in Scotland.

The Commission recommends that the Justice Committee consider whether the definition of apology (sec 3) fully reflects international human rights standards, and particularly practice around the world in this area. So, it provides sufficient basis on which to take steps to ensure the criminal justice system works effectively for survivors and most importantly prevents a recurrence of harm.

As the Committee is aware the Commission has been working since 2009 to promote effective access to justice and remedies for survivors of historic child abuse. The Commission developed a Human Rights Framework in 2012 and held a number of Interactions to support the development of an Action Plan on Justice and Remedies with the Centre for Excellence in Looked After Children in Scotland (CELCIS). During the InterActions survivors raised a number of concerns in relation to pursuing an apology law.

In the second part of this response the Commission further considers some of the issues raised by survivors during the InterActions. The Commission hopes those issues inform any steps taken by the Government and Parliament in this area.

The definition of Apology and human rights practice (sec 3).

An official apology is also often an element of satisfaction. Under human rights law, satisfaction relates to declaratory forms of reparation, whereby a public record of the truth or acknowledgement of suffering is made (e.g. an effective apology). While an official or institutional apology is a positive outcome it is not usually a sufficient remedy. Ordinarily an apology should be accompanied by acceptance of responsibility by the state, whether for its own action or failures to prevent/offer redress for acts of others.

The Inter-American Court has produced probably the most in depth guidance on the use, purpose and form of apology.¹ The purpose of the reparation requiring that the State carry out a public act of acknowledgment of its responsibility and a public apology is “to repair the damage to the reputation and honour the victims and their

¹ See 2009 University of Texas. COLLECTIVE AND MORAL REPARATIONS IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS
https://www.utexas.edu/law/clinics/humanrights/work/HRC_F09_CollectiveReparations.pdf

next of kin, and in order to avoid a repetition of acts such as those [in the case where reparations are ordered].”²

Much research on the elements of meaningful apologies suggests the following as crucial:³

- An acknowledgement of the wrong done. This is the naming of the offence. Whether or not it was intentional, an apology must correctly describe the offending action or behaviour. The description must be specific in order to demonstrate an understanding of the offence. It must also acknowledge the resulting impact on the aggrieved.
- Accepting responsibility for the offence and the harm done. This includes identifying who was responsible for the offence.
- A clear explanation as to why the offence happened. This should show that the offence was not intentional or personal. Although most people will want or need an explanation, it should be recognised that this is not always the case. Also, if there is no valid explanation, then one should not be offered. The offender may wish to say that there is no excuse for the offending behaviour.
- Expressing sincere regret. This demonstrates that the offender recognises the suffering of the aggrieved and is remorseful. It can be difficult to communicate sincere regret in writing. The nature of the harm done and needs of the aggrieved will determine whether the expression of regret should be made in person as well as being reinforced in writing.
- An assurance that the offence will not be repeated. This may include a statement of the steps that have or will be taken to address the complaint and, wherever possible, to prevent a reoccurrence of the harm.
- Actual and real reparations (or redress).

International human rights law places a number of specific obligations on States to safeguard the rights of victims of crime, including investigation, prosecution and remedy. International human rights standards on the right to an effective remedy clarify that that right extends to access to justice, investigations and reparations. Reparations should include opportunities for restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴

² *Merchants v. Colombia*.

³ See Scottish Public Services Ombudsman, Advice Leaflet 2, Guidance on Apology, www.spsso.org.uk

⁴ UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, ‘*Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*’, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-fifth session, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993 at 56.

i) Restitution of rights

Restitution of rights means restoring victims to their original situation where this is possible. This may include supporting victims to realise their rights which have been violated and affected by the crime or human rights violation.

ii) Adequate compensation

Compensation is one of the principal forms of reparation and often an essential part of a victim's remedy. The Commission therefore agrees that Courts should be required to consider the issue in all cases where an identifiable victim has suffered injury, loss or distress. Compensation should be available for human rights violations, not only criminal conduct, particularly where restitution is not possible. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Compensation does not have to be linked to prosecution or legal procedures and separate mechanisms can be created to receive, adjudicate and respond to claims for compensation.

iii) Rehabilitation

Rehabilitation measures such as therapy, counselling, education and training should also be provided where appropriate. Other forms of rehabilitation may also be appropriate.

iv) Satisfaction

Satisfaction relates to declaratory forms of reparation, whereby a public record of the truth or acknowledgement of suffering is made (e.g. an **effective apology**). While having the ability to tell one's story publicly or attribute blame for a violation of rights is a positive outcome it is not usually a sufficient remedy in Convention terms.

v) Guarantees of non-repetition

The right to guarantees of non-repetition is not only in relation to the violation against the individual, but of that type of violation, including through changes in law and practice.⁵

InterActions

In December 2011 Scottish Ministers agreed to engage with an InterAction process (a facilitated negotiation within a human rights framework) to develop an Action Plan to implement the recommendations in the SHRC Framework (2010). An Action Plan for Justice for Victims of Historic abuse of children in care was the result of those InterActions with survivors, which were held in 2013. A specific commitment to the Action Plan, was to ensure that "*barriers to effective apologies from those with historic responsibility for child care in Scotland are increasingly removed, including through a full consideration of the merits of an Apology Law.*"

The key findings are:

- In the course of the InterActions, participants broadly agreed on the merits of pursuing an Apology Law. However, this must be carefully thought through in

⁵ UN Human Rights Committee, General Comment no. 31, para. 17.

order to ensure that it is meaningful and effective, benefiting the survivor, increasing public awareness and improving future practice.

- There was a strong recognition that an effective apology can be an important part of a remedy.
- An apology is essentially a symbolic measure which needs to be given substance by effective measures of reparation and policy changes to ensure that there are reduced chances of the activity which requires an apology being repeated. Without such substantive measures, apologies run the risk of seeming hollow or insincere and not being accepted as genuine.
- Discussion focused on what form an effective apology should take (i.e. acknowledging responsibility for the harm that was done) and what barriers exist and should be removed to achieve an effective apology.
- Other forms of acknowledgement were also discussed-e.g. the value of commemorations and memorials and the role that Reparation can play as a form of apology.
- The role of the National Confidential Forum (NCF) was acknowledged but it was strongly emphasised that other steps should be taken alongside NCF to ensure survivors have real and effective choice.
- Dumfries and Galloway Local Authority cited as a model of good practice: Apology was considered to be heartfelt and sincere.
- Older members should have an apology from Westminster.

SHRC
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