PROPOSED APOLOGIES (SCOTLAND) BILL

MARGARET MITCHELL MSP

SUMMARY OF CONSULTATION RESPONSES

This document summarises and analyses the responses to a consultation exercise carried out on the above proposal.

The background to the proposal is set out in section 1, while section 2 gives an overview of the results. A detailed analysis of the responses to the consultation questions is given in section 3. These three sections have been prepared by the Scottish Parliament's Non-Government Bills Unit (NGBU). Section 4 has been prepared by Margaret Mitchell MSP and includes her commentary on the results of the consultation.

Where respondents have requested that certain information be treated as confidential, or that the response remain anonymous, these requests have been respected in this summary.

In some places, the summary includes quantitative data about responses, including numbers and proportions of respondents who have indicated support for, or opposition to, the proposal (or particular aspects of it). In interpreting this data, it should be borne in mind that respondents are self-selecting and it should not be assumed that their individual or collective views are representative of wider stakeholder or public opinion. The principal aim of the document is to identify the main points made by respondents, giving weight in particular to those supported by arguments and evidence and those from respondents with relevant experience and expertise. A consultation is not an opinion poll, and the best arguments may not be those that obtain majority support.

Copies of the individual responses are available on the following website http://www.margaretmitchellmsp.org/parliament-home/

Lists of respondents (alphabetical and numbered as received) are set out in the Annexes A and B.

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SECTION 1

INTRODUCTION AND BACKGROUND

Margaret Mitchell's draft proposal, lodged on 29 June 2012, is 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.

The proposal was accompanied by a consultation document, prepared with the assistance of NGBU. This document was published on the Parliament's website, from where it remains accessible:

http://www.scottish.parliament.uk/parliamentarybusiness/Bills/29731.aspx.

The consultation period ran from 29 June to 28 September 2012.

NGBU understands that around 243 organisations and individuals were sent copies of the consultation document or links to it, including:

- 75 public sector organisations;
- 58 representative organisations;
- 28 parliamentary cross-party groups;
- 27 private sector organisations;
- 16 charities/campaign organisations;
- 15 legislatures;
- 10 further education institutions;
- 14 individuals.

The following actions were also taken to publicise the consultation: press releases were issued when the consultation was published and when the BSL video of the consultation was available. Reference was also made to the consultation on the member's MSP website, Facebook page and in her summer MSP newsletter.

The consultation exercise was run by Margaret Mitchell's parliamentary office.

The consultation process is part of the procedure that MSPs must follow in order to obtain the right to introduce a Member's Bill. Further information about the procedure can be found in the Parliament's standing orders (see Rule 9.14) and in the *Guidance on Public Bills*, both of which are available on the Parliament's website:

- Standing orders (Chapter 9):
  http://www.scottish.parliament.uk/parliamentarybusiness/26514.aspx
- Guidance (Part 3):
  http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25690.aspx

SECTION 2

OVERVIEW OF RESPONSES

In total, 62 responses were received.

The responses can be categorised as follows:

- 21 (34%) from representative organisations (including medical and legal sectors);
- 17 (27%) from public sector organisations (including health boards and local authorities);
- 4 (6%) from further education institutions;
- 3 (5%) from private sector organisations;
- 6 (10%) from charity/campaign organisations;
- 2 (3%) from other legislatures;
- 9 (15%) from individuals.

Three individual respondents wished their responses to remain confidential and not be published. There were six late responses which were accepted.

General

Of the 22 respondents who answered the question about the general aims of the proposed Bill, a significant majority (86%) were supportive, and were from a broad range of sectors, including local authorities, health boards, and representative organisations of the medical and legal professions.

Where respondents expressed a view on whether legislation was the appropriate mechanism for addressing the issues identified in the consultation, there was less of a clear majority, with 56 per cent of the 32 respondents to the relevant question expressing support. Those in favour highlighted issues such as legislation providing a framework for practitioners to use to assist in prompt resolution to complaints. Those opposed argued that existing and proposed guidance, model procedures and legislation would provide adequate means for dealing with apologies. Alternative suggested models included the “no fault compensation” scheme in the NHS being considered by the Scottish Government, or legislation similar to the relevant provisions of the Compensation Act 2006 which operated in England and Wales.

A strong theme from a range of respondents was that social and cultural change within organisations should be considered along with, or instead of, the proposed legislation and suggestions for how this might be addressed were provided.

In terms of the reference to other countries, responses from two other legislatures highlighted that apologies legislation had been introduced in those countries, and referred to some of the reasons for this. Other respondents sounded caution about adopting models from other jurisdictions, or queried the extent to which the references in the consultation supported the contention that legislation would have the desired effect.

In the context of the key features of an effective apology, a number of respondents highlighted an additional element as the importance of timing in providing an apology as close to an incident as possible.

In terms of the proposed possible definition (acknowledgement; regret, sorrow or sympathy; recognition of direct/indirect responsibility; and possibly an undertaking to review and make improvements) there was a mixed response, with a range of comments on the proposed criteria, and some respondents arguing against a prescriptive definition and favouring a broader approach.

In relation to the application of the proposed legislation, a majority of respondents felt that it should apply to all civil proceedings. Suggested exclusions were for Fatal Accident Inquiries and the law of defamation. Similarly, there was a clear majority in agreement that criminal law should not be covered by the proposal.

SECTION 3

CONSULTATION QUESTIONS

The need for legislation

Question One

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

Thirty-two respondents answered this question with 18 (56%) being supportive of legislation as the appropriate mechanism for addressing the issues identified in the consultation; 12 (38%) respondents were opposed, and two (6%) were undecided.

Some respondents, while being opposed to or uncertain about the appropriateness of legislating in this context, were nonetheless supportive of the general aims of the proposed Bill (see Question Four below).

Arguments in favour of legislation as the mechanism to take forward the principles behind the draft proposal included—

- It would provide a framework for practitioners to use in responding promptly.
- It could provide space where communication could be protected and help towards culture change.
- Guidelines would not have the same impact as legislation as they were discretionary.
- There was evidence that legal uncertainties inhibited apologies and "there would be multiple benefits as a result of the legislation: to the public who use the health service; to those delivering public services; and to the public purse (through reduced litigation and the cost of other dispute resolution mechanisms)". (The Royal College of Physicians of Edinburgh)

Commenting on the perceived impact of formal procedures, the Humanist Society Scotland stated that: "We live in an "overcooked" society – where law and formal processes seem to have become the first port of call, rather than the last resort. Simply introducing a Bill that humanises relationships between individuals and institutions will help cool this down."

Some respondents had mixed views on the need for legislation: for example, the Scottish Mediation Network felt that:

> "From the perspective of mediators, the power of an apology relies in large measure on qualities such as spontaneity, sincerity, believability and timing. All of these are hard to legislate for. On the other hand, we do not believe that an Apologies Act would in itself undermine the efficacy of apologies where these qualities are present. … In summary, while we think that legislation is, broadly speaking, a good idea it is important to recognise the risks: apologies which are poorly executed or rejected, the perception that apologies are not

genuine and the possibility that the legal profession will view them instrumentally".

NHS Dumfries and Galloway expressed the view that: "Some clinical staff feel that it is unnecessary while others feel that it will make it 'safer to say sorry' without worrying about legal action being taken. Often people want an apology and/or explanation without being directed down a formal complaint route".

Those arguing against a legislative requirement highlighted issues such as—

- There was a risk that a mandatory approach could render apologies meaningless and fail to ensure organisations learnt lessons.
- It might be unhelpful where an apology was rejected.
- It was already open to anyone to express regret and that expression need not be construed as an admission of liability.
- Mechanisms to render apologies inadmissible as evidence already existed – for example, apologies in correspondence about settlement of a dispute and marked "without prejudice" might be protected by legal privilege.
- There was a risk that it would add unnecessary complexity to the litigation process – for example, determining the meaning of an apology and whether or not it was statutorily protected might require evidence about the apology and its context before it was decided whether or not it was inadmissible.
- The usefulness of such legislation was doubtful in the absence of provisions in relation to insurers and the fact that this matter was reserved.

Further views against legislation

The Faculty of Advocates referred to Scottish Government research which suggested that the dissatisfaction of patients with the NHS complaints system was not in respect of apologies *per se*, but a need for an adequate explanation coupled with an acceptance of a degree of responsibility. They referred to recent public inquiries (the Penrose Inquiry and the Vale of Leven Hospital Inquiry) where it appeared that the desire for an explanation rather than apologies was a major factor in the establishment of such inquiries.

The Faculty of Advocates also felt that: "…determining the meaning of an apology and whether or not it was statutorily protected might require evidence about the apology and its context to be led before it could be decided whether or not the evidence was inadmissible. It appears to us that it would only be where an apology was offered solely in writing, that the scope for such argument would be avoided. There is therefore a real risk that legislation of the type proposed would add unnecessary complexity to the conduct of litigation".

The Association of Personal Injury Lawyers drew an analogy with the criminal justice system and felt that the proposed legislation "risks turning the Scottish civil justice system into a second rate system, compared to the criminal justice system, and could potentially obstruct access to justice. In the criminal justice system … society

would never tolerate (an) apology not being used as evidence of wrongdoing … It would be absurd if the same apology could not be used as evidence where someone is injured through negligence."

Existing guidance and model procedures

A number of respondents cited existing or forthcoming guidance/legislation for the NHS, local authorities and higher education institutions which, they believed, encouraged apologies and would establish better complaint handling procedures. These included—

- The Patients' Rights Act 2011, which included independent support for patients;
- The General Medical Council's *Good Medical Practice Guidance*;
- No-fault compensation within the NHS being considered by the Scottish Government: *A Public Consultation on Recommendations for No-Fault Compensation in Scotland for Injuries Resulting from Clinical Treatment;*
- *Can I Help You? Guidance on handling and learning from feedback, comments or concerns about NHS Health Care Services* issued by Scottish Government;
- *Flying Start NHS* – the staff development programme for every newly qualified nurse, midwife and Allied Health Professionals in Scotland;
- Scottish Public Services Ombudsman (SPSO) *Local Authorities Model Complaints Handling Procedure*;
- Model complaints legislation for higher education.

Alternatives to the proposed legislation

A number of respondents from a range of sectors suggested other mechanisms by which the aims of the proposal, or other objectives, could be taken forward; these included—

- The Royal College of Nursing felt that, for the NHS, guidance on apologies and liability should be issued by the Scottish Government under the framework of no-fault compensation. The British Medical Association (BMA) also favoured the no-fault compensation scheme and felt that this should be the legislation which should be progressed.
- Introducing legislation similar to the relevant provisions of the Compensation Act 2006, section 2 (which provided that: "An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty").
- Integrity4Scotland was of the view that, instead of apologies legislation, the aim should be to "tackle the root cause of our public service bodies' culture of

blame-denial" and ensure that existing legislation "designed to reduce the need for public service body apologies is being effective."

Need for cultural change

A strong theme which featured in a number of responses was that social and cultural change should be considered (analysis of Question Three also refers). Comments on how to address this issue included that: to address professional, societal and cultural barriers, staff needed the power to disclose information and make apologies, where appropriate; and training and education were the key rather than further legislation.

South Lanarkshire Council highlighted that, while apologies legislation was designed to empower people to apologise for their actions, "attitudinal shifts (would) not be sudden as the professional, social and cultural barriers and beliefs will take time to change".

Comparative studies and the Scottish context

Concerns about potential comparisons with apologies laws in other countries included—

- The University of Edinburgh sounded a note of caution about the need for "a detailed consideration of the institutional and procedural background into which the apology fits" before lifting models from other jurisdictions, and cited the example of apologies laws enacted in Australia. It was suggested that the future for any such legislation in Scotland might usefully be considered against the background of likely reforms of the civil justice system.

- The Faculty of Advocates did not feel that the references in the consultation to other jurisdictions with apologies legislation were "clearly supportive of the contention that *legislation* protecting apologies from being founded upon in civil proceedings has, or is likely to have, the desired effect".

Further detail of this issue is also provided in the analysis of Question Three.

Effect of the proposed legislation outside Scotland

A further point raised was a query about the extent to which the legislation would cover apologies issued in Scotland, but used as an admission of liability in court in another jurisdiction – for example, if a service was delivered to a location where apologies were not protected.

Barriers to apologies

Question Two

Have you ever experienced any barriers to making or receiving an apology? If so, please expand on 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.

Perceived barriers

The following examples were provided from organisations of potential barriers to making or receiving apologies—

- Staff might be afraid to apologise for fear of repercussions or litigation.
- Hesitation from some legal practitioners in making an apology for fear of legal consequences.
- Insurance contracts could specify that the insured party did not admit liability or apologise without the consent of the insurers.
- A consultant forensic psychiatrist referred to professional barriers to apologising in dealing with patients detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 – "where a patient disagreed with a diagnosis or [had] a different recollection of events (such as in the case of a delusional recollection) there [was] difficulty in being able to offer a response that is seen by the patient as a true apology".
- The Scottish Public Services Ombudsman identified key barriers as—
    - an unwillingness to accept fault;
    - a complete breakdown in the relationship;
    - a desire to protect staff.

Organisational experience/examples of dealing with apologies

Some organisational respondents indicated that they were not in a position to provide specific examples, but types of examples included—

- The Royal College of Physicians Edinburgh believed there had been examples where, if an apology had been made early on when a problem arose, then a complaint would not have escalated.
- The Scottish Public Services Ombudsman referred to their own experience of making apologies and following their own guidance. They also stated that: "It is notable that we sometimes find a body very happy to accept recommendations that they make significant changes to the way they operate and yet they struggle to fulfil the recommendation on apology. In some cases, we have had to push very hard for an apology. In others we have had to

refuse to accept a clearly sub-standard apology and have to ask for a second apology to be issued. This clearly undermines the apology given".

- Scottish Independent Advocacy Services referred to two examples where they had provided support to individuals to make complaints about hospital services, apologies had been issued, and both cases had positive outcomes for the complainants.

Responses from those in the field of mediation highlighted a number of relevant issues, including that—

- Mediation practice provided for confidentiality, allowing for the conversation to be conducted on a "without prejudice" basis, and could not be used in subsequent court proceedings.

- Core Solutions Group also highlighted that, with the protection of confidentiality and support, parties reluctant to give an apology could overcome that reluctance.

- Scottish Mediation Network believed that: "With this reassurance in place apologies are not uncommon, and there are no examples, to date, of the Scottish courts attempting to look behind mediation's veil of confidentiality. There are undoubtedly some limitations on mediation's absolute confidentiality but these are likely to apply equally to any legislative protection for apologies".

In terms of the proposed Bill, it was suggested that consideration should be given to whether an apology given in the course of mediation required any special protection, and it was suggested that it would seem sensible for the Bill to provide a statutory underpinning to the existing contractual basis for mediation confidentiality.

The effect of apologies legislation

Question Three

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 an apology legislation in Scotland?

International studies

The following information was included from respondents in terms of international evidence/studies which they had encountered—

- Scottish Mediation Network referred to a study of international evidence which found that apologies were significant to those making complaints against health professionals, with 88% of medical negligence plaintiffs seeking an apology. It was also highlighted, however, that an even higher percentage (94%) wanted an admission of fault.

- Scottish Mediation Network also referred to evidence from the USA of significant savings once a less defensive approach to medical negligence claims was adopted. Apologies "were only one element in a wider transformation of the previous "deny and defend" approach. There are lessons for Scotland here, in that the health providers … took a proactive approach to adverse medical events … This suggests that an Apologies Act will have limited impact if it is not accompanied by a broader review of the culture of defensiveness and minimal information which appears to have grown up around the failings of public bodies".

Other points

- The Association of Personal Injury Lawyers believed that it was important to understand other issues in other jurisdictions which have contributed to falling level of personal injury claims. In New South Wales "the real reason why there has been a fall in the number of personal injury claims … is because in 2002 changes were introduced to deny compensation for pain and suffering for a large number of victims of needless injury. Unless an injury is currently worth more than $75,075, compensation cannot be claimed for pain and suffering …".

- The British Psychological Society referred to examples of "collective apologies" and commented that: "So far, the evidence suggests that, by themselves, collective apologies do not necessarily result in higher levels of forgiveness by 'victim' groups. They may be more 'satisfied' to receive an apology (than to not receive one), but the process of reconciliation seems to require additional action from the 'perpetrator' group".

Other legislatures

A response from the Tasmanian Government referred to the Tasmanian Civil Liability Act 2002 which was "based on national model legislation arising from recommendations made in a review of the law of negligence in Australian … which identified that many people who are injured as a result of medical negligence were simply seeking an apology and an explanation of what happened, rather than monetary compensation, but doctors were instructed not to apologise or provide information to patients because of insurance implications. … In addition to the legislative provision, the Australian Health Ministers' Advisory Council established a project to develop a system of open disclosure in medical cases".

A submission from the British Columbia Government indicated that apology legislation was now widespread in Canada. In 2007, the Uniform Law Conference of Canada had adopted a Uniform Apology Act identical to the British Columbia statute and recommended its enactment in Canadian provinces and territories. In addition to the five provinces noted in the consultation (Alberta, British Columbia, Manitoba, Nova Scotia and Ontario), Saskatchewan had apology provisions in its Evidence Act.

Compensation Act 2006

The Association of British Insurers (ABI) referred to their experience of the Compensation Act 2006 in England and Wales and suggested to them that in

practice apology legislation in Scotland might have little impact on the conduct of their members in liability claims.

Section 2 of the Act stated that: “An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty”. While section 2 protected the position that an apology would not amount to an admission of negligence, the ABI was of the view that it did not go as far as the proposed legislation in preventing an apology from being admitted as evidence of liability. The ABI accepted that this might be part of the reason why section 2 had not had an impact on the conduct of insurers in liability claims.

The ABI indicated that in other areas of liability, guidance had been issued encouraging apologies to be made. It believed that “In order to encourage insurers to approve the issuing of apologies and combat the fear of legal liability the legislation would need to provide absolute legal certainty that apologies (or certain types of apology) would be inadmissible in civil proceedings”.

The Faculty of Advocates further noted that, in relation to the matter of insurance “Policies of indemnity insurance … usually include a contractual stipulation that fault is not to be admitted by the policyholder, and provide that if they do the insurer may decline indemnity. We note that Section 2(1)(c) of the British Columbia, The Apology Act 2006 … recognises this and makes provision to deal with it. The Scottish Parliament could not legislate in similar fashion as insurance law is not a devolved matter. We are unclear how, if at all, the consultation paper envisages dealing with this difficulty”.

The possible effect of apology legislation in Scotland

In relation to the effect of apology legislation in Scotland, the following arguments were amongst those cited as possible benefits—

- It might be that employers would be more relaxed about letting junior staff deal with a complaint (thereby improving customer service) as there would be less risk of creating a legal problem by admitting fault.

- Public sector bodies might be more likely to offer an apology knowing that it would have some protection under the apology legislation.

- Legislation could contribute to changing the culture, behaviour and attitudes in relation to apologising in some circumstances: institutions might be less resistant to giving an apology if the legal position was clarified.

Other views

Other views included that the existence of legislation should make no difference to the willingness and ability of an organisation to offer an apology, with the more significant influence coming from the organisation’s culture (NHS Lanarkshire), while the Humanist Society Scotland thought that people would be no more likely to expect them, and more likely to give them, under the proposal.

Aim of the proposed Bill

Question Four

Do you support the general aim of the proposed Bill?

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

There was general support for the aim of the proposed Bill, with 19 of the 22 (86%) respondents who specifically answered the question agreeing, and three (14%) being undecided. A further 17 respondents expressed indirect support by way, for example, of a covering letter.

Some of the respondents referred to the detail of their responses to Question One, so only a flavour of points made is provided here—

- It was considered that apologies could be very helpful in resolving some complaints.
- The aim of the Bill was to remove unnecessary barriers to apologies, and this was likely to be a helpful building block in resolving conflict.
- It could allow organisations to respond to complainants in a more sincere way, in certain circumstances, than if they might do if their position in subsequent litigation was prejudiced.

Proposed definition

The provisional proposed definition of "apology" in the proposed Bill would include the following elements: acknowledgement; regret, sorrow or sympathy; and recognition of direct/indirect responsibility. A fourth possible element would be "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".

Question Five

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.

There was a general overlap with responses received to this question and Question Six; therefore, the analysis of these questions should be taken together.

Twenty-seven respondents specifically answered this, or parts of this question. While seven (26%) expressly indicated that, as a whole, the proposed definition was adequate, two (7%) indicated that it was not sufficiently specific and two (7%) were

undecided, it is difficult to provide a further detailed breakdown. However, a number of the comments in each area are highlighted below.

Other respondents commented on certain aspects of the definition, including negative comments regarding having a prescriptive definition. It was not always clear whether respondents felt that the definition should include an undertaking to review the circumstances which led to the apology being required.

Respondents who indicated that they thought the definition was too specific or narrow and favoured a much broader definition argued that—

- By rendering only certain apologies protected, the proposed Bill might have the unintended effect of delaying apologies or getting in the way of the natural, direct and open dialogue which was likely to be most beneficial for all parties.

- The features of an apology should not be defined and a broad definition should be maintained, with it being for individual stakeholders to issue specific guidance detailing what an effective and comprehensive apology would consist of.

- It could be counter-productive for the legislation to be so restrictive that the person apologising was dissuaded from making an apology that he or she considered would satisfy the recipient, because the form or content of that apology would be outside the protection offered by the legislation.

Other comments included—

- There was a risk that defining an apology and setting strict parameters could undermine the value of a genuine, meaningful apology and might encourage a rigid, template approach to apologies.

- It could be argued that the response to the complaint (i.e. how it was dealt with) should be more important than defining the content of an apology.

- Each case should be considered on the relevant facts and circumstances.

Other suggested models

Other suggested models included the definition in the British Columbia legislation, and section 2 of the Compensation Act 2006 which referred to “an apology, an offer of treatment or other redress”.

In terms of the specified possible features within a definition, the following are some of the points made—

Acknowledgement

Beginning the definition of an apology with the acknowledgement of a bad outcome might lead staff to be wary of apologising when they knew something had gone wrong but were uncertain of the impact.

Regret, sorrow or sympathy

One respondent felt that “regret” might not be appropriate in the context of an apology and suggested it should be deleted from the definition.

Recognition of direct or indirect responsibility

Points made on this part of the definition included—

- Inclusion might seem to contradict the overall intent of the proposed legislation as it could be interpreted as an admission of liability.
- There might be the prospect that a recognition of direct responsibility for a “bad outcome” could be argued to be an admission of fault, potentially falling outwith the protection of the proposed legislation.

An undertaking to review with a view to making, if possible, improvements and or learning lessons

Twelve respondents made a reference to the inclusion of a review, with an equal number (six) being supportive and opposed. (It should be borne in mind that where the view was supportive of a review being carried out, it was not always clear whether this was to be considered as part of the legal definition, or just as good practice. In addition, some of the supportive expressions were subject to the qualification that it would not be appropriate in all cases.).

Comments supportive of a reference to incorporating an undertaking to review included—

- A review and lessons learned approach was good practice and was currently used in a range of similar processes.
- An undertaking to review was essential to demonstrate that the individual/organisation was attempting to prevent any recurrence. It was unlikely that the apology would feel satisfactory unless this was included.
- It could be useful as a strong motive for people in making complaints and ultimately in taking legal action.
- A commitment to review where appropriate should be in good practice guidance already and should be part of quality improvement efforts.

Respondents who were opposed to adding such a criterion to the definition argued that—

- Review requirements could undermine what was understood to be the spirit of the proposed legislation (i.e. that an apology could be given sincerely where appropriate without any concern for admission of civil liability).
- Any undertaking to review should be at the discretion of the public body concerned.

- Such a requirement might give rise to disproportionate costs and administration.

The Faculty of Advocates highlighted potential difficulties in implementation—

> Would the party who gave the undertaking let the other party know the result of the review? If the person to whom the apology was made discovered that there had in fact been no review, or took the view that there been an inadequate review, what effect would that have on the apology? … If loss of protection from admission of an apology was possible due to future non-compliance with an undertaking to review this might be a substantial disincentive to the change in practice the consultation paper hopes to achieve.

Another view was that, while a laudable concept, the practice of a review should depend on circumstances, would not always be required and therefore might not need to be mandatory. The Care Inspectorate commented that such "circumstances might be addressed … by requiring an undertaking to review "where appropriate" – but that may generate disputes as to whether an undertaking should have been given in cases where the party apologising regarded it as "not appropriate" to do so…".

Additional elements to definition of apology

A **limited apology**, for the purposes of the proposed Bill, would contain some but not all of the three (or possibly four) of the key elements listed above for the proposed definition, and would not qualify as an apology.

A **comprehensive apology** would contain additional elements to those in the proposed definition: an expression of empathy or concern; and an explanation of what had occurred.

Question Six

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

Many of the responses to this question were covered by the issues raised in Question Five. The following paragraphs set out a number of individual views on what should be included in the definition of an apology; the significance of timing in making an apology; and comments on the term "bad outcome".

Comprehensive apology

Four respondents explicitly agreed that the description of a "comprehensive apology" as defined in the consultation was adequate.

Responses which set out individual views on what should be covered in the definition included—

- Core Solutions Group felt that an effective apology might include one or more of the following—

    - an expression of regret and/or an acknowledgement that something had happened which should not have happened;
    - an expression of sorrow or concern;
    - recognition of the impact on the affected party;
    - acceptance or recognition of a degree of responsibility and/or wrongdoing;
    - acceptance of recognition that a mistake had been made;
    - an undertaking or reassurance that steps would be taken to review the matter and, where possible, steps taken to ensure that the situation was not repeated; an explanation, where appropriate, of what had occurred and why.

- Scottish Mediation Network was of the view that the definition provided was not sufficient and was missing two key elements of credible apologies—

    - an admission of fault or responsibility for what had happened;
    - what the person apologising was going to do to remedy the situation.

- The Humanist Society Scotland favoured the following sequence of features—

    - acknowledgement that A had caused a problem for B;
    - recognition of responsibility* by A for so doing;
    - expression by A of sorrow or sympathy for B's plight;
    - explanation of how the problem occurred provided by A to B (and usually made public);
    - a commitment by A to act to prevent its reoccurrence.
      (*In causing or failing to prevent the problem, directly or indirectly).

- Epilepsy Scotland's views on the key features were—

    - empathy over what had happened;
    - a clear explanation of what had occurred, an outline of what should have happened based on current policies/guidelines;
    - an agreement to review existing procedures to ensure that the same bad outcome would not repeat itself in the future;
    - an invitation to the recipient, where possible, to meaningfully contribute to and comment on the review of proceedings.

Timing

A number of respondents felt that the timing of an apology could be important, and the most effective apologies were those that were delivered as close to the event as possible. The SPSO also felt that "… (an) apology can still be effective even when it has not been delivered early in the process. We have seen some excellent practice recently by a Health Board, who when asked by us to apologise will regularly ask the person to come in to discuss and work with staff to prevent a recurrence."

Terminology

Two respondents felt that the use of the term “bad outcome” was not helpful and made an assumption about the event in question.

Statements of fault, culpability or liability

It is proposed that the Bill would not protect apologies insofar as they included admissions of legal fault, culpability or liability and would 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. 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, in terms of the proposed Bill.

Question Seven

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?

Twenty-five consultees responded to this question, with 11 (44%) agreeing that these elements should be excluded from protection, seven (28%) arguing for inclusion, and the remaining seven (28%) not expressing a view one way or another or making other comments.

Arguments against inclusion of statements of fault within the boundaries of protection included—

- If included, such statements might mean that public bodies would be obliged to make an admission within the apology which could lead to an increased risk of legal liability.
- The purpose of the apology was to allow the injured party to move on and including such admissions might be unhelpful in this context.

Arguments in favour of including such statements within the protection of the proposed Bill included—

- A concern that exclusion might lead to further litigation to ascertain the meaning and effect of particular words, or parties taking so much care about words used that the effect of the proposed legislation might be nullified.
- Apologies that omitted admissions of fault might not be recognised as apologies at all.
- In some instances it might be necessary to acknowledge fault in the apology for it to make sense.
- Apologies which expressed regret but made no reference to responsibility could erode rather than enhance trust.

In addition to arguments for or against the exclusion, some respondents also provided other comments/views such as—

- Protection in this way would not prevent a party from proving, as now, fault or other breach.

- Admissions or statements of fault were already, in some circumstances, privileged.

- Uncertainty as to the difference between recognition of responsibility and admission of fault.

- A preference for the introduction of a system of no-fault compensation.

Given that the provisional definition of a qualifying apology required the person apologising to recognise direct or indirect responsibility for a bad outcome, and that the intention was that "the proposed Bill does not preclude the possibility of an admission of a mistake," the Medical and Dental Defence Union of Scotland was unclear as to the benefits of specifically excluding any apology which included an admission of fault from the definition of an apology.

Statements of fact

The proposed 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.

Question Eight

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

There was a range of views from the 24 respondents who answered this question: seven (29%) felt that statements of fact should not be protected; six (25%) that they should be; one (4%) felt that they should be protected when within the context of mediation and treated as "without prejudice", but otherwise not; and the remaining ten (42%) either expressed other comments/views or were undecided.

Respondents who felt that legal protection should not be provided to statements of fact argued that—

- Specifically protecting facts would lead to the assumption that some facts should not normally be released because they needed protecting.

- The Faculty of Advocates felt that: "…it might become difficult in practice to disentangle the admissible factual statements from the non-admissible elements of an apology. We are unclear how in practice this separation could be achieved …"

Respondents who felt that legal protection should be provided argued that—

- If statements of fact were not protected, it could result in encouraging minimum, bare apologies, making more apologies meaningless to the recipient, because the person apologising would be wary of giving any details

along with the apology.

- If statements of fact were not protected, the anticipated effectiveness of the proposals of encouraging a culture change could be limited.

- The opportunity to provide an explanation could be compromised, along with information about any review or lessons learned.

Other comments and views on the matter included—

- Any explanation (i.e. statement of facts) might be made a highly desirable, rather than a necessary, element of the apology.

- To avoid unintended consequences it might be preferable for the Bill to remain silent on this matter and to focus on an appropriate definition of what would receive evidential protection, rather than seek to define what would not.

- Where the statements acknowledged a shortfall in service, it could be productive to offer those receiving the apology an opportunity to discuss how the service would approach similar situations in future. Discussion with staff might also allow the complainer to understand some of the constraints in how the service was delivered.

The Faculty of Advocates referred to the Bryson case quoted in the consultation paper and stated that "The apology, if given, was verbal and brief but the witnesses could not agree on its terms. In all cases except where the apology is made solely in writing there is likely to be scope for dispute as to its exact content".

Application of the proposed Bill

It is intended that the proposed Bill would be limited in its effect to civil matters, including litigation concerning, for example, personal injury and medical malpractice. The proposed Bill would cover areas such as education and health.

Question Nine

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)?

There was some overlap between the responses to this question and Question Ten (application to criminal law), and the summary should therefore be read in the context of both questions. Of the 23 responses, 13 (56%) agreed that the proposed legislation should apply to all types of civil matters. Other respondents either felt that there should be some exclusions, made other comments, or had no view.

In terms of exclusions, respondents who identified the following exceptions otherwise favoured the application to all other areas—

- The Crown Office and Procurator Fiscal Service identified Fatal Accident Inquiries, which were held by the Crown in the public interest and "it is appropriate that all relevant evidence is led before the Court to ensure that the Court can make proper findings in terms of section 6 of the Fatal Accident Inquiry (Scotland) Act 1976 … Such Inquiries cannot determine liability nor can evidence that is led in the Inquiry – including an apology – be founded upon in other proceedings. The exclusion of such inquiries from the definition of civil proceedings is therefore not inconsistent with the aims of the Bill".

- The Faculty of Advocates felt that careful consideration would need to be given to the law and practice of defamation in this context.

One respondent recommended that the proposed Bill should apply to all cases of negligence or breach of statutory duty to avoid discrepancy between different categories, but should not be applied across all civil litigation.

In relation to less formal proceedings, the following were examples of the particular types of processes which, it was suggested, should be covered—

- Complaints procedures;
- Non-judicial agencies, such as the Ombudsman;
- Employment Tribunals.

The Scottish Public Services Ombudsman argued against the protection of complaints proceedings on the basis that such processes did not establish negligence or legal liability so the risk the proposed Bill was seeking to protect organisations from did not arise. The most common cause of complaint received was about communication and "It is important that, in assessing these issues we can assess all the communication that occurred … We regularly issue recommendations for apologies and also provide good practice guidance. We see the complaints process as a route for encouraging good and best practice in this area and excluding apology from this would prevent us from commenting on those conversations where we could provide most assistance and help to secure improvements".

The Faculty of Advocates felt that "… it is our view that individual bodies responsible for devising and implementing complaints procedures should not be compelled to adopt such an evidential exclusionary rule".

Application to criminal law

Question Ten

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?

Of the 17 respondents to this question, ten (59%) were of the view that the proposed legislation should apply to civil matters only and not be extended to any areas of

criminal law, five (29%) either had no view, were not in a position to comment, or had other views, and two (12%) felt that criminal law should be included.

There was therefore very little support for the extension of the proposed legislation to criminal law. Arguments in this vein were voiced in particular by—

- The Faculty of Advocates, who stated that; "In criminal practice it is unusual for there to be evidence of an apology. In the event that an apology was made to the victim or the relative, then that can be founded upon. Equally an apology may provide evidence of remorse and contrition, and may be taken into account in the sentencing process. We see no reason why this situation should be changed.".

- The Crown Office and Procurator Fiscal Service who did not consider that "… there is a case for extending the proposed Bill to cover criminal proceedings. There are existing evidential rules covering what might amount to apologies and admissions and the use to which they can be put in criminal proceedings. It is important that the Crown can consider and use any relevant evidence in the trial process to establish guilt including apologies. It is always a matter for the judge or jury to consider what weight such evidence may have".

Financial implications

Question Eleven

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?

Comments on the potential financial implications of the proposed legislation tended to focus on the potential benefit/savings to public bodies and included the following—

- Costs of litigation and in the costs of tribunals.

- A reduction in complaints and resulting financial benefits.

- Improved communications between parties could help form constructive, quicker resolution with lower financial costs.

- Savings in the costs (direct and in staff time) of formal complaints and legal proceedings; but account needs to be taken of the cost of complementary action required to effect cultural change.

The Royal College of Physicians of Edinburgh felt that the financial implications should be positive in terms of saving organisations costs in terms of formal complaints and legal proceedings "… Research evidence from other countries with apology legislation indicates that the costs of litigation and other forms of dispute resolution are likely to decrease. Further, the legislation has resulted in a change of culture which has helped prevent complaints from arising and escalating in the first instance – thus providing another source of cost saving".

In terms of potential costs which might be incurred, the following points were made—

- Account should be taken of the cost of complementary action required to effect cultural change.

- Costs of dealing effectively with complaints could increase in the short term, with some organisations possibly incurring additional training costs.

- If mediation emerged as one of the most helpful settings for the giving of apologies, it might lead to a greater demand for such services; if this was the case, it was recommended that the Scottish Legal Aid Board consider creating a simplified route to enable clients to be legally aided for mediation without having to go through a solicitor (thus incurring further costs).

Implications for equality

Question Twelve

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?

Of the 21 responses, 10 (47%) felt that there were unlikely to any substantive positive or negative implications for their interests, six (29%) made specific comments, and five (24%) indicated that they had no view or were not aware of what the implications might be.

The potential positive impacts of the proposed legislation included—

- Benefitting those who were less affluent and might not have the financial resources available to take legal proceedings as a means of trying to achieve an apology; they might not have to face this hurdle if there was the possibility of receiving an apology through resolution rather than the courts.

- Possibly balancing out the inequality between private individuals and institutions where an individual might feel intimidated by the institutional power of a large organisation.

Other comments included—

- Planning should be built in to support systems so that patients with limited access were able to take part and feel that they could ask for an apology, when appropriate.

- If mediation was seen as being particularly appropriate in the giving of apologies, this could be restricted by low income, geographical location or disability.

- The British Psychological Society commented on the complexities of the wider social consequences of apologies, particularly in the context of collective apologies and referred to studies in relation to the "mistreatment of Indigenous Peoples in Canada and Australia, war crimes committed in the Second World War and in Afghanistan, industrial 'accidents', and our ongoing work (as yet unpublished) in Bosnia Herzegovina on intergroup

reconciliation…". It was felt that "victim" groups might view apologies with some scepticism, "suspecting that they may be being offered only to 'save face' or to 'close the chapter' on some uncomfortable historical episode. For the 'victim' groups, apologies may be regarded as a *first* step in rebuilding a more just and equal society; for those offering the apology it may be seen as the *last* step in the process. This divergence of views sometimes does not augur well for the effectiveness of apologies in improving social relationships".

SECTION 4

MEMBER'S COMMENTARY

I would like to thank all those charities, representative organisations, councils, NHS boards and individuals who took the time to respond to the consultation. It was however disappointing that there were not more respondents given the number of consultation documents distributed and the efforts made to make the consultation as accessible as possible.

Having said that I am, nevertheless, pleased that a significant majority (86%) of those who replied were supportive of the general aims of the Bill. As ever, however the task will be to get to grips with the detail of the Bill. So I very much appreciate the efforts of respondents who examined the possible provisions of the Bill and, in particular, the definition of an apology.

The Apologies (Scotland) Bill is intended as a piece of general legislation that would cover all of the public sector and the private sector including the retail sector. At the very outset of the proposal I understood that its provisions would not meet everyone's approval and this was clear when reading through the consultation responses.

For example, there was some criticism from organisations, primarily in the healthcare sector, to the effect that the Bill was either unnecessary or would not be effective. In relation to healthcare in particular, the no-fault compensation scheme for injuries resulting from clinical treatment, proposed by a Scottish Government Review Group[1], was highlighted as the way forward. So it is important to stress again that the Apologies Bill is not designed to cover healthcare alone but has a much wider application which I believe is the real value of the legislation.

What was evident from reading the responses was a consensus about the need for a change of culture regarding apologies. While some were of the opinion that legislation would enable this culture to develop, others felt that the legislation would need to go hand in hand with a change in culture, or indeed the culture would have to change first before any legislation could be effective.

This appears to be a 'chicken and egg' situation but the main point is that legislation could be the catalyst needed to change the way people and organisations handle complaints. It could also make local authorities, businesses, and a whole host of other organisations more willing to give an apology, and confident about doing so.

[1] The Review Group report and a subsequent Scottish Government consultation are available on the Scottish Government website: http://www.scotland.gov.uk/Topics/Health/Policy/No-Fault-Compensation

The point has often been made that apologies need to be timely, appropriate, meaningful and sincere. Therefore, there has been much discussion about the need for accompanying guidance with the Bill in order to help promote the making of effective apologies and also to acknowledge that an apology in law and in society can be two different things. It is hoped that such guidance can be produced.

However, my proposal has developed significantly since the consultation thanks to the responses contained here, the assistance of New South Wales Deputy Chris Wheeler and the willingness of relevant stakeholders to engage on the issue.

During the consultation process it was noted that other legislatures have passed apologies legislation which include provisions that statements including admissions of fault in the context of an apology are inadmissible as evidence in certain legal proceedings. A similar approach was advocated by a number of respondents to the consultation.

The draft proposal for the Bill was modelled on the legislation from British Columbia, where admissions of fault are covered and it is explicitly stated that giving such an apology does not: '*void, impair or otherwise affect any insurance coverage.'*

It was recognised that if the Bill were to include any specific statements in relation to insurance, the Bill could then fall outside the limits of legislative competence under the Scotland Act 1998. However, I am confident that including reference to fault within the definition of an apology that cannot be admitted as evidence of liability would not mean that the Bill "relates to a reserved matter"; it would simply clarify a principle of private law and create a new rule of evidence in Scots law. I have therefore decided to include fault in the definition of apology.

Again, under the draft proposal it was considered that while the Bill would provide legal protection to an apology it would not protect any statements of fact made in the context of giving the apology which could be used to determine fault or wrongdoing.

Yet, after some discussion and some very helpful information from New South Wales, I have concluded that an apology that did not include an explanation of the cause(s) of the event, which may include facts relating to the incident, would not be sufficient in most cases for the intended recipient.

Therefore, under the final proposal any factual information conveyed in the apology will not be admissible in the proceedings covered by the Bill. However, this will not prevent the information contained in an apology being used subsequently to obtain factual information in an alternative and admissible form (i.e. if the facts can be established by means other than the apology) for use in court proceedings.

I firmly believe the Bill will represent an important first step to changing attitudes towards apologising and achieving a less adversarial society and one where individuals and organisations are more co-operative, open, frank and prepared to learn from incidents.

Neither the legislation nor apologies offered under it will satisfy everyone and that being the case they will simply choose to pursue their issue or grievance in other ways. It is important to highlight that the legislation would not impede any further course of action being taken.

Furthermore I believe it has tremendous potential in terms of reducing complaints; bringing closure and facilitating preventative spend.

However, the real value of the Bill lies in its tremendous potential to give complainants closure with the reductions in stress, time and costs that apologies will bring to the individual, the person or organisation against whom a complaint is made as well as society in general.

ANNEXE A

List of responses - numbered as received

1	HM Inspectorate of Constabulary for Scotland
2	Diamond, Ian, Professor, Principal and Vice Chancellor, University of Aberdeen
3	British Medical Association Scotland
4	Federation of Small Businesses
5	British Hospitality Association, Scotland
6	British Insurance Brokers Association
7	North Lanarkshire Council
8	NHS Lanarkshire
9	Humanist Society Scotland
10	Medical Defence Union
11	NHS Dumfries and Galloway
12	Scottish Mediation Network
13	NHS Tayside
14	Integrity4Scotland
15	Former Boys and Girls Abused in Quarriers Homes (FBGA)
16	Scottish Chiropractic Association
17	Scottish Legal Complaints Commission
18	Association of Personal Injury Lawyers
19	British Psychological Society
20	Accountability Scotland
21	Orkney Islands Council
22	Royal College of Physicians of Edinburgh
23	Network Rail
24	Royal College of Nursing Scotland
25	Scottish Independent Advocacy Alliance
26	Scottish Public Services Ombudsman (SPSO)
27	ABTA The Travel Association
28	Scottish Legal Aid Board
29	Police Complaints Commissioner for Scotland (PCCS)
30	Faculty of Advocates
31	Epilepsy Scotland
32	Society of Chief Trading Standards Officers in Scotland (SCOT(S))
33	Royal College of General Practitioners
34	University of Edinburgh
35	Fife Council
36	Clackmannanshire Council
37	Moray Council
38	Medical Protection Society
39	Association of British Insurers

40	BUPA
41	Action Against Medical Accidents
42	Care Inspectorate
43	Core Solutions
44	South Lanarkshire Council
45	Medical and Dental Defence Union of Scotland (MDDUS)
46	Scotland Patients Association (SPA)
47	Kleefeld, John, Assistant Professor, University of Saskatchewan College of Law
48	Law Society of Scotland
49	British Columbia, Ministry of Justice, Civil Policy and Legislation Office
50	Tasmanian Government
51	Mental Welfare Commission for Scotland
52	Crown Office and Procurator Fiscal Service
53	Queen Margaret University
*Individual responses**	
Ind1	Heather Muldoon
Ind2	Jan Ooms
Ind3	Ken MacLennan
Ind4	Jim Walker
Ind5	Carol Hirst, Hirstworks
Ind6	Fiona Collie

*3 further individual responses were received which were confidential and not for publication.

ANNEXE B

Alphabetical list of responses

ABTA The Travel Association	27
Accountability Scotland	20
Action Against Medical Accidents	41
Association of British Insurers	39
Association of Personal Injury Lawyers	18
British Columbia, Ministry of Justice, Civil Policy and Legislation Office	49
British Hospitality Association, Scotland	5
British Insurance Brokers Association	6
British Medical Association Scotland	3
British Psychological Society	19
BUPA	40
Care Inspectorate	42
Clackmannanshire Council	36
Core Solutions	43
Crown Office and Procurator Fiscal Service	52
Diamond, Ian, Professor, Principal and Vice Chancellor, University of Aberdeen	2
Epilepsy Scotland	31
Faculty of Advocates	30
Federation of Small Businesses	4
Fife Council	35
Former Boys and Girls Abused in Quarriers Homes (FBGA)	15
HM Inspectorate of Constabulary for Scotland	1
Humanist Society Scotland	9
Integrity4Scotland	14
Kleefeld, John, Assistant Professor, University of Saskatchewan College of Law	47
Law Society of Scotland	48
Medical and Dental Defence Union of Scotland (MDDUS)	45
Medical Defence Union	10
Medical Protection Society	38
Mental Welfare Commission for Scotland	51
Moray Council	37
Network Rail	23
NHS Dumfries and Galloway	11
NHS Lanarkshire	8
NHS Tayside	13
North Lanarkshire Council	7
Orkney Islands Council	21
Police Complaints Commissioner for Scotland (PCCS)	29

Queen Margaret University	53
Royal College of General Practitioners	33
Royal College of Nursing Scotland	24
Royal College of Physicians of Edinburgh	22
Scotland Patients Association (SPA)	46
Scottish Chiropractic Association	16
Scottish Independent Advocacy Alliance	25
Scottish Legal Aid Board	28
Scottish Legal Complaints Commission	17
Scottish Mediation Network	12
Scottish Public Services Ombudsman (SPSO)	26
Society of Chief Trading Standards Officers in Scotland (SCOT(S))	32
South Lanarkshire Council	44
Tasmanian Government	50
University of Edinburgh	34
*Individual responses**	
Collie, Fiona	Ind6
Hirst, Carol, Hirstworks	Ind5
MacLennan, Ken	Ind3
Muldoon, Heather	Ind1
Ooms, Jan	Ind2
Walker, Jim	Ind4

*3 further individual responses were received which were confidential and not for publication.