

APOLOGIES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Apologies (Scotland) Bill introduced in the Scottish Parliament on 3 March 2015. It has been prepared by the Non-Government Bills Unit (NGBU) on behalf of Margaret Mitchell MSP, the member who introduced the Bill, in accordance with Rule 9.3.3A of the Parliament’s Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 60–EN.

POLICY OBJECTIVES OF THE BILL

2. The Apologies (Scotland) Bill (“the Bill”) aims to encourage the use of apologies by providing that an apology (as defined in terms of the Bill) is inadmissible in certain civil proceedings as evidence of anything relevant to the determination of liability, and cannot otherwise be used to the prejudice of the person making the apology (or on whose behalf it is made). The Bill is intended to encourage a change in social and cultural attitudes towards apologising.

BACKGROUND

3. There appears to be an entrenched culture in Scotland and elsewhere that offering an apology when something has gone wrong is perceived as a sign of weakness. There is also a fear that an acknowledgement of fault can, in some circumstances, lead to litigation. At the same time, however, it has been found that, in many cases, what a complainer most wants is an apology, recognition of the situation, and an assurance that the circumstances leading to the situation will be reviewed and improved. The Bill seeks to address this situation by legislating to remove the possibility of an apology being used as evidence of liability in certain civil legal proceedings.

4. The Bill is to have general application, covering both the public and private sectors. It has two main purposes—

- The primary purpose is to provide legal protection to an expression of apology, so that it cannot be admitted as evidence of liability (or anything relevant to the determination of liability) or used in any other way to the prejudice of the apologising person, in certain civil proceedings.

- Secondly, it is intended that the legislation will serve as a vehicle to facilitate wider cultural and social change as far as perceptions of apologies are concerned, countering popular misconceptions about apologies – namely, that, by apologising, a person is more likely to face litigation; and, at a social level, that the making of an apology could be viewed unfavourably, perhaps suggesting weakness of character on the part of the apology maker. In providing legal protection to an expression of apology, it is envisaged that the Bill will reduce the inhibitions about apologising that many people currently feel.

5. A change in approach of this nature, over time, should create a less adversarial climate and promote co-operation and openness, along with a greater willingness to learn from previous incidents. It is anticipated that it will lead to a reduction in the number of potential pursuers inclined to litigate, where an effective/sufficient apology has been provided, and bring closure to complainants. The Bill will not, however, prevent anyone from pursuing litigation or seeking redress by other routes.

MEANING OF APOLOGY

6. In terms of the Bill, an apology is a statement that someone is sorry about or regrets something (whether that is an act, omission or outcome). Where the statement includes an admission of fault, statements of fact or an undertaking to look at the circumstances with a view to preventing a recurrence, any or all of these three elements qualify as part of the apology itself. The most effective apologies are likely to include at least some of these additional elements, but the Bill will apply also to simpler apologies that do not include any of them.

APPLICATION OF THE BILL

7. The provisions of the Bill are to apply to all forms of apology, whether written or oral, formal or informal, whether made by individuals or organisations, and whether made immediately and spontaneously, or only after careful deliberation. Most civil proceedings are covered, including inquiries, arbitrations and tribunal proceedings – although there are exceptions for fatal accident inquiries and defamation proceedings. Within these limits, therefore, where a party seeks to establish civil liability for something for which a person has apologised, that apology cannot be used as evidence of liability (or as evidence of anything else that might be used to determine liability). Nor can the apology be used in any other way to prejudice the position, in the relevant proceedings, of the person who made the apology (or on whose behalf it was made). This is the position where the apology was made prior to (or separately from) the proceedings themselves. The provisions of the Bill do not apply to an apology which is made in the course of legal proceedings, where it would be for the court or tribunal in those circumstances to determine what inference should be taken from the apology. This reflects the policy to encourage the making of an apology at an early stage before any court proceedings have begun.

8. The legislation should not impede any further course of action being taken where an apology has been given. In particular, in providing legal protection to an expression of apology, the Bill does not preclude the recipient of an apology from pursuing compensation or legal redress by alternative means, for example by relying (in the same proceedings, or otherwise) on

information provided from other sources. It does not, therefore, provide a “get-out” solution for those complained against.

EXCEPTIONS TO THE BILL

9. While the effect of the Bill (that an expression of apology is inadmissible as evidence and cannot be used in other ways to the prejudice of the apologising party) applies in most civil proceedings, there are two exceptions - namely, fatal accident inquiries and defamation proceedings.

Fatal accident inquiries

10. There is an exception for fatal accident inquiries¹ to take account of the public interest in ensuring that all relevant evidence may be led and hence that the sheriff’s determination can set out fully the circumstances of the death, in particular where and when it took place, the cause of death, precautions which might have avoided death, defects in any system of working which contributed to death, and any other facts relevant to the circumstances of the death. The member recognises the importance and sensitivity of the fatal accidents inquiries system, and has been persuaded by consultees that the Bill should not interfere with the way that system currently operates.

Defamation proceedings

11. The member felt that defamation proceedings should also not fall within the scope of the Bill for similar reasons. The Defamation Act 1996² contains an “offer to make amends” procedure, whereby a person who has published a statement alleged to be defamatory of another can offer to make amends involving a “suitable correction of the statement complained of and a sufficient apology to the aggrieved party”. The making of an offer of amends can be relevant to subsequent court proceedings – in particular, in certain circumstances, it can be relied upon in a defence to defamation proceedings, and may also be relevant to the amount of any award of damages. Although the Bill does not refer specifically to the Defamation Act 1996 itself, it excepts defamation proceedings generally.

GUIDANCE

12. Given its subject matter, the Bill is drafted in very general terms and so has potentially significant implications in a wide range of circumstances. It is, therefore, likely that affected parties, including those who make or receive apologies, and those who apply or interpret the law, may find it of assistance to be provided with guidance on how to use and respond to the legislation. The advantage of guidance is that it is flexible and can be easily adapted as circumstances change and as relevant case law develops. While the provision of guidance is not set out on the face of the Bill, it is anticipated that the Scottish Ministers will wish to issue guidance both internally (i.e. to departments and agencies in the Scottish Administration) and externally (to assist and inform other organisations and individuals). This could, in particular, explain the benefits of apologising early and fully when mistakes are made, and give examples

¹ Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 available at: <http://www.legislation.gov.uk/ukpga/1976/14/contents>

² Defamation Act 1996 available at: <http://www.legislation.gov.uk/ukpga/1996/31/contents>

of apologies that have delivered a satisfactory outcome for both parties, helping them to achieve a resolution without recourse to litigation, together perhaps with examples of where an inadequate apology can fail to achieve those results. Ministers should have time to prepare and issue at least a first version of such guidance by the time the Act comes into force, six months after Royal Assent.

ALTERNATIVE APPROACHES

13. Various alternative approaches were considered by the member.

14. The draft proposal was 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”,

while the final proposal was for a Bill—

“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 certain non-criminal legal proceedings”.

15. In the final proposal, the reference to an expression of apology was expanded to include “an expression of sympathy or regret and any statements of fact”. The revised approach reflects further assessment by the member, during the consultation process, of apologies legislation already in place in other jurisdictions – in particular, the New South Wales Civil Liability Act 2002 (“the NSW Act”). Section 68 of the NSW Act defines an apology as—

“an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter”.

16. The member, therefore, wished to include provision to the effect that statements, including admissions of fault in the context of an apology, are inadmissible in certain legal proceedings.

17. In relation to alternative approaches which were raised in the responses to her consultation, some respondents felt that guidance on apologies and liability should be issued by the Scottish Ministers under the framework of no-fault compensation, or that guidance or legislation already existed which encouraged apologies and would establish better complaint handling procedures. Other respondents felt that there was a fundamental need to address social and cultural barriers to the making of apologies.

18. There is currently no statutory framework in Scotland dealing specifically with the effect of apologies on civil (or criminal) liability. While the member recognises that the alternative approaches proposed are all part and parcel of encouraging the making of apologies, she nonetheless believes that primary legislation which deals specifically with the effect of apologies on certain civil liability will reduce the current climate of fear about liability and the “blame culture” which currently inhibits the making of apologies. The Bill aims to promote the early and effective resolution of disputes by removing concerns about the legal impact of an apology and clarify for the courts how evidence of apologies in the relevant matters should be interpreted.

CONSULTATION

19. The member lodged a draft proposal and issued her consultation³ on 29 June 2012. The consultation period closed on 28 September 2012 and 62 responses were received. NGBU prepared a summary⁴ of the responses.

20. There was a significant majority of support from respondents to the consultation for the general aims of the proposed Bill from a broad range of sectors, including local authorities, health boards, and representative organisations of the medical and legal professions. But respondents were more divided on whether new legislation was necessary to address the issues identified in the consultation, with those in favour arguing that legislation would provide a framework for practitioners seeking to resolve complaints, while those opposed, particularly from organisations representing the medical profession, argued that existing and proposed guidance, model procedures and legislation already provided adequate means for dealing with apologies. A strong theme was that social and cultural change within organisations was as important as legislative change. The member believes that legislation will provide the catalyst needed to change the way people and organisations handle complaints and make them more willing to give an apology.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

21. The Bill may assist with the balancing out of inequality between private individuals and institutions, where an individual might feel intimidated by the institutional power of a large organisation and may lack the financial resources to take legal proceedings. Such individuals would benefit from a change of culture which made it more likely that the organisation would apologise without first being threatened with legal action.

22. An issue was raised in relation to any complainant being offered an inadequate apology which, it was suggested, could allow an individual or organisation to close down its complaint without resolving the underlying problem. The argument put forward was that this could potentially leave the individual/organisation worse off than before and there may be a perception that this could be a particular issue for members of vulnerable groups. The member acknowledges this concern and in response has undertaken further analysis. Following consultation, she is satisfied that no such injustice would prevail; instead the situation would be a neutral one. In other words, it would leave the individual no better or worse off than they had been prior to the Bill coming into force.

³ Apologies (Scotland) Bill - Margaret Mitchell MSP - consultation document. Available at: http://www.scottish.parliament.uk/S4_MembersBills/Apologies_Consultation.pdf

⁴ Apologies (Scotland) Bill – Margaret Mitchell MSP - Summary of consultation responses. Available at: http://www.scottish.parliament.uk/S4_MembersBills/Apologies_summary_final.pdf

Human rights

23. An assessment of the effects of the Bill on human rights has been made. No incompatibility with any of the rights under the European Convention on Human Rights (“Convention rights”) has been identified. Consideration was given to Article 6, which concerns the right to a fair hearing, since the Bill relates to the admissibility of an apology as evidence in certain legal proceedings. Established legal systems do, routinely, set out rules about what evidence can, and cannot, be admitted. They might, for example, exclude potentially relevant evidence on account of broader reasons of fairness and public policy. There is nothing in this Bill relating to the admissibility of evidence which could be considered to raise concerns about fairness, or which would render proceedings unfair, such that any of its provisions could be considered to be incompatible with the Article 6 Convention right.

Island communities

24. The Bill is designed to benefit the population of Scotland as a whole and does not have any specific implications for those living in island communities.

Local government

25. The Bill has no specific impact on local authorities, but they, like other public sector bodies, will be expected to take appropriate action to encourage wider cultural and social change so far as perceptions of apologies are concerned.

Sustainable development

26. The Bill impacts on a range of areas of sustainable development, particularly in relation to a number of the principles in the UK Shared Framework for Sustainable Development which was adopted by the Scottish Government in 2005—

- “Ensuring a Strong, Healthy and Just Society – meeting the diverse needs of all people in existing and future communities, promoting well-being, social cohesion and creating equal opportunity for all”. The Bill aims to develop social harmony by encouraging people to apologise to those who have suffered injury. This conciliatory approach may allow the victim to feel forgiveness and obtain resolution. This relates to the aim of promoting personal well-being, and social cohesion and inclusion. The member, in her consultation⁵, stated that her Bill “would help facilitate a culture shift away from the current reluctance to give a merited apology towards a willingness to do so, in circumstances where things have gone wrong”. Litigation can be protracted and stressful for the parties involved. It is hoped that a wider effect of the Bill will be to encourage mediation and early settlement with a satisfactory outcome for the

⁵ Apologies (Scotland) Bill - Margaret Mitchell MSP - consultation document. Available at: http://www.scottish.parliament.uk/S4_MembersBills/Apologies_Consultation.pdf

injured/wronged party rather than him/her or the family having to enter into a long drawn out litigation process.

- “Achieving a Sustainable Economy – Building a strong, stable and sustainable economy which provides prosperity and opportunities for all, and in which environmental and social costs fall on those who impose them (Polluter Pays), and efficient recourse use is incentivised”. The Bill seeks to encourage communication as opposed to litigation. The Financial Memorandum refers to the amount of expenditure arising from compensation claims (in which there are inevitably also litigation costs) for organisations such as the National Health Service.
- “Promoting Good Governance – Actively promoting effective, participative systems of governance in all levels of society – engaging people’s creativity, energy and diversity”. The Bill aims to provide a positive impact on the culture of ‘deny and defend’. The Christie Commission Report⁶ closely reflects the sustainable development aim of actively promoting effective, participative systems of governance on all levels. One of the four key objectives of the 2011 Christie Commission on the future delivery of public service was that “all public services constantly seek to improve performance and reduce costs, and are open, transparent and accountable”. The aims of the Bill echo that objective by aiming to promote openness and transparency for all public sector organisations in the way that they handle complaints from the public by enabling them to move away from a culture of ‘deny and defend’ towards one of mediation and review.

⁶ Commission on the Future Delivery of Public Services
<http://www.scotland.gov.uk/Resource/Doc/352649/0118638.pdf>

This document relates to the Apologies (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 3 March 2015

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