These documents relate to the Apologies (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 3 March 2015

APOLOGIES (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Apologies (Scotland) Bill introduced in the Scottish Parliament on 3 March 2015:

- Explanatory Notes;
- a Financial Memorandum;
- Margaret Mitchell’s statement on legislative competence; and
- the Presiding Officer’s statement on legislative competence.

A Policy Memorandum is published separately as SP Bill 60–PM.
EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Non-Government Bills Unit on behalf of Margaret Mitchell MSP, the member who introduced the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

THE BILL

3. The Apologies (Scotland) Bill (“the Bill”) gives legal protection to an expression of apology, in certain circumstances. It provides 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 has the broader purpose of encouraging a cultural and social change in attitudes towards apologising.

COMMENTARY ON SECTIONS

The structure of the Bill

4. Sections 1 to 3 comprise the main provisions of the Bill. In turn, those provisions deal with the effect of an apology in legal proceedings, then set out the proceedings which are covered, and provide a definition of an apology for the purpose of the Bill. Section 4 provides that the Bill only applies to apologies made after the Bill has come into force, and only in relation to legal proceedings begun after that time. Section 5 deals with commencement and section 6 sets out the short title of the Bill.

Section 1 – Effect of apology in legal proceedings

5. Section 1 sets out the effect in relevant civil legal proceedings (that is, those proceedings referred to in section 2) of an apology made outside those proceedings. The effect is defined in terms of limits on the extent to which a court can consider or rely on the apology in deciding questions of liability. In the context of such proceedings, paragraph (a) provides that an apology made in connection with any matter is not admissible as evidence of anything relevant to determining liability. Paragraph (b) is in more general terms, and provides that such an apology cannot be used to the prejudice of the person making it.

Section 2 – Legal proceedings covered

6. Section 2 sets out the legal proceedings which are covered by the Bill.

7. Under subsection (1) all civil proceedings are covered, with the exception of fatal accident inquiries and defamation proceedings. Those exceptions represent areas for which there
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is existing legislative provision (see in particular the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and the Defamation Act 1996), with which the Bill does not interfere.

8. While the Bill applies to most civil proceedings, it does not cover criminal proceedings and this is confirmed within subsection (2).

9. Subsection (3) enables the Scottish Ministers, by subordinate legislation, to revise the list of exceptions in subsection (1). Regulations made under subsection (3) are subject to the affirmative procedure (subsection (4)), that is, any such regulations require the approval of the Parliament by resolution.

Section 3 – Definition of apology

10. Section 3 sets out what is meant by “apology” for the purposes of the Bill.

11. This provides that an apology is a statement (which could be written or oral) made either by the person who is apologising (whether a natural person, or a legal person such as a company), or by someone else on their behalf (e.g. a spokesperson or agent). The core element is an indication that the person is sorry about, or regrets, an act, omission or outcome. Where the statement includes an admission of fault, statement of fact, or an undertaking to look at the circumstances with a view to preventing a recurrence, these qualify as part of the apology itself.

Section 4 – No retrospective effect

12. Section 4 ensures that the Bill only applies to apologies made after the Act has come into force, and only in relation to legal proceedings begun after that time (even if the matters apologised for took place earlier). As such, the Bill will have no retrospective application.

Section 5 – Commencement

13. Section 5 provides for the main provisions of the Bill to come into force six months after Royal Assent. This is intended to allow time for preparation by the Scottish Ministers of any publicity and guidance which they consider necessary.
FINANCIAL MEMORANDUM

INTRODUCTION

1. This Financial Memorandum has been prepared by the Non-Government Bills Unit on behalf of Margaret Mitchell MSP, the member who introduced the Bill, to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

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.

3. This Memorandum is concerned with the financial impact of implementing the Bill, but does not attempt to quantify the potential additional costs which may be incurred if bodies were, for example, prompted by the Bill to initiate a training programme for employees on the subject of making appropriate apologies.

4. Although the Bill should lead to fewer people taking legal action against those who they believe owe them an apology, it does not prevent anyone from pursuing such claims in the future. As a result, it is not possible to forecast with any certainty what the cost implications of the Bill might be. Overall, it is anticipated that any detrimental financial impact arising from the provisions of the Bill will be minimal, and likely to be more than balanced out by potential savings in the longer term.

5. These savings may include—

   • Reduced costs incurred by injured parties, and by individuals and organisations held liable for those injuries, in pursuing or defending their claims (including lawyers’ fees, court costs etc.).
   • A reduction in complaints made against public and other bodies, easier complaint resolution, and consequent savings in dealing with complaints arising from staff time and processes.

6. These potential benefits were captured by the Royal College of Physicians of Edinburgh, which highlighted that “… 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”.¹

7. In view of the conceptual nature of the provisions of the Bill, it is not possible to quantify with any degree of certainty the exact extent of costs or savings. However, there is evidence to illustrate the effectiveness of the success of the use of apologies measures along with the significant costs of litigation and compensation which will be reduced with the Bill’s implementation. Perhaps the most notable of these is the University of Michigan Health Service’s (UMHS) “Michigan Model” which has been introduced in a number of hospitals in the USA since 2001.

The Michigan Model

8. The Michigan Model demonstrates the success of a measure which promotes the use of apologies in reducing costs in compensation claims and increasing early resolution. In 2012, seven hospitals in Massachusetts implemented an “I’m sorry” policy to improve transparency and reduce medical liability lawsuits. In 2014, the Michigan approach was cited by the UK Health Secretary as an “interesting example of how being open and saying sorry could slash [the] litigation bill”.

9. In 2006, Richard C. Boothman, Chief Risk Officer, UMHS, gave evidence to a United States Senate Committee on how the model had benefitted both patients and UMHS: “… what started as a focussed effort to reduce claim costs at the University of Michigan has evolved to reveal the roles that inadequate commitment to patient safety and unmindful patient communication play in the stubborn problem which has plagued the medical community for decades”. The programme resulted in a general fall in the number of new claims over the first eight year period: 1999 – 136, 2000 – 122, 2001 – 121, 2002 – 88, 2003 – 81, 2004 – 91, 2005 – 85, 2006 – 61.

10. An article for the Journal of Empirical Legal Studies states that:

“Apology laws work by reducing the expected damage award that doctors face if the case goes to court. The reduced expected damage award leads to a lower expected settlement payment, which leads to monetary costs faced by doctors if they decide to apologize. Therefore, the law makes it more likely for doctors to apologize. The frequency and severity of malpractice claims are reduced, then, through two channels. Patients are less likely to sue and will demand lower payments both because their likelihood of winning a

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2 University of Michigan Health System: Available at: The Michigan Model: Medical Malpractice and Patient Safety at UMHS | University of Michigan Health System summary.
7 Journal of Empirical Legal Studies, Judgement by the Numbers: Converting Qualitative to Quantitative Judgements in Law, Volume 8, Special Issue 1, December 2011, page 182 – Benjamin Ho and Elaine Liu.
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lawsuit is reduced, and because of the increased likelihood that a doctor improved the doctor-patient relationship using an apology".8

Potential reduction in number of claims

11. The Bill is likely to lead to fewer people pursuing legal claims (e.g. for personal injury) against those who (in their view) owe them an apology. Currently, all personal injury claims for £5,000 or more are heard at the Court of Session; however, as a result of the Courts Reform (Scotland) Act 2014 this threshold rises to £100,000. On the basis of the relevant provisions in that Act coming into force soon, it is likely that, by the time the Bill is enacted, then a large percentage of personal injury claims will be heard in sheriff courts rather than in the Court of Session. According to the Scottish Government consultation paper on the Courts Reform (Scotland) Bill, the cost of a three-day civil proof in a sheriff court can be in the region of £7,000 to £10,0009. This cost would normally be borne by the losing party, although if the losing party is the pursuer (the injured party), it is likely in practice to be borne by the Scottish Legal Aid Board (SLAB) or by their solicitor (if the case was taken on a “no win, no fee” basis).

12. In 2012-13 there were a total of 3,240 personal injury cases initiated in the sheriff courts10, costing the parties involved (including, in some cases, SLAB or solicitors) around £22-32 million in total. While it is not possible to estimate accurately what the actual reduction in the number of cases would be, it seems fair to say that there would be a reduction as a result of the Bill. If the Michigan experience is indicative of the scale of reductions to be achieved, this could suggest a reduction in cases of around 50% in eight years.

COSTS ON THE SCOTTISH ADMINISTRATION

13. While the Bill itself does not include provisions for the preparation of guidance, in view of the potentially significant implications of the Bill in a wide range of circumstances, it is anticipated that the Scottish Ministers will wish to issue guidance in early course to clarify what is to represent an effective apology. It is anticipated that the main cost involved would relate to staff time in drawing up the guidance. The cost of issuing such guidance would be minimal, extending to printing, mailing and electronic publication, and it is anticipated that these costs would be absorbed within the appropriate existing departmental budget. There would also be the option for the Scottish Government to promote the policy more widely to private sector bodies and the public, by means of a publicity campaign.

Scottish Court Service

14. The Bill is expected to reduce the number of compensation claims being pursued in cases where the most important element being sought by a complainer is an apology. Many such claims are personal injury claims. The expectation is that there will be fewer such cases, so the

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8 Journal of Empirical Legal Studies, Judgement by the Numbers: Converting Qualitative to Quantitative Judgments in Law, Volume 8, Special Issue 1, December 2011, page 182, – Benjamin Ho and Elaine Liu.
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Scottish Court Service should see savings, although this may be balanced out by a reduction in fee income.

15. While the most significant impact of the Bill is expected to be a reduction in the number of cases reaching the courts, it is recognised that, in any cases which do reach the courts, some additional time may be required to decide the question of whether an apology falls within the scope of the legislation.

COSTS ON LOCAL AUTHORITIES

16. In terms of local authorities, a Freedom of Information (FOI) request revealed that a total of more than £33m was paid out by 25 Scottish councils in settling 13,000 compensation claims between the years 2007 and 2012.11 Assuming these 25 councils are representative, that suggests an average annual bill for all 32 councils of around £8.5 million. A reduction in the number of cases pursued against local authorities, as a result of the Bill, has the potential significantly to reduce this figure.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

17. A reduction in the number of compensation claims would have a negative financial impact on businesses such as compensation management companies and lawyers. Otherwise, there are not expected to be cost implications for other bodies, individuals and businesses.

NHS Scotland

18. Clinical negligence is one significant area where costs should be reduced. A response to a Parliamentary Question revealed the total sum spent by NHS Scotland on settling clinical negligence claims in 2013-14 amounted to £36.7 million.12 The opportunity for bodies such as NHS Scotland to be able to make any savings in connection with compensation payments can only benefit its patients/customers in the long run as monies saved could be re-invested back into the services provided.

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MEMBER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 26 February 2015, the member who introduced the Bill (Margaret Mitchell MSP) made the following statement:

“In my view, the provisions of the Apologies (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 3 March 2015, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Apologies (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
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