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SPICe Briefing
Apologies (Scotland) Bill

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This briefing outlines the key proposals in the Apologies (Scotland) Bill. The Bill is intended to stop apologies being used as evidence of liability in most civil legal proceedings in Scotland, with the aim of bringing about social and cultural change in relation to apologising.

The Scottish Parliament
Pàrlamaid na h-Alba

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EXECUTIVE SUMMARY

The Bill is intended to stop apologies being used as evidence of liability in most civil legal proceedings in Scotland, with the aim of bringing about social and cultural change in relation to apologising.

The key points are as follows:

- The Bill makes apologies inadmissible as evidence of liability in certain civil proceedings and prohibits them being used, "to the prejudice of the person by or on behalf of whom the apology was made" (section 1).

- The Bill follows similar legislation adopted in certain other common law jurisdictions – primarily the USA, Canada and Australia, where research has been carried out into potential benefits and risks (for details see below).

- The rules only apply to apologies, "made (outside the proceedings)". Apologies made in the course of legal proceedings themselves are not covered (section 1).

- The Bill applies to all civil legal proceedings (including inquiries, arbitrations and tribunal proceedings) in both the public and private sector, except Fatal Accident Inquiries and defamation proceedings. Criminal proceedings are not covered (section 2).

- The definition of 'apology' in the Bill is a wide one (section 3). It goes beyond simple apologies and also covers apologies which contain admissions of fault, factual statements, or undertakings taken to prevent problems recurring. Such statements/undertakings would, therefore, also be covered by the protection envisaged by the Bill.

- The Policy Memorandum emphasises that the Bill is drafted in very general terms and suggests that separate Scottish Government guidance on the use of the legislation would be beneficial.

- The Financial Memorandum stresses that it is not possible to quantify with any certainty the exact extent of costs or savings. It does, however, indicate that there is evidence from other jurisdictions which illustrates the effectiveness of apologies legislation in reducing the costs of litigation.

INTRODUCTION

The Apologies (Scotland) Bill (the Bill) is a Member's Bill which was introduced in the Scottish Parliament on 3 March 2015 by Margaret Mitchell MSP. The Bill is accompanied by a Policy Memorandum, Explanatory Notes and a Financial Memorandum. It follows a consultation and draft proposal (Margaret Mitchell 2012) which was lodged on 29 June 2012 in accordance with the Scottish Parliament's Standing Orders on Members' Bills (Chapter 9, Rule 9.14) and a final proposal lodged on 2 April 2014.

The Bill's aim is to legislate so that apologies cannot be used as evidence of liability in most civil legal proceedings in Scotland and to facilitate social and cultural change in relation to apologising. It follows similar legislation adopted in certain other jurisdictions (see below) and to a degree would seem to be inspired by such legislation.[1]

The Scottish Parliament's Justice Committee has been designated as the lead committee at Stage 1 and issued a Call for Evidence, which closed on Friday 8 May. The Finance Committee also issued a Call for Evidence on the Bill's financial implications, which closed on Friday 8 May.

THE BILL

POLICY OBJECTIVES

The Policy Memorandum argues that, in many cases, people who are complaining about a particular situation simply want an apology and an assurance that the situation will be improved in future (para. 3).

The Policy Memorandum is, however, of the view that obstacles exist to apologising in Scotland. It argues that there is:

- "an entrenched culture in Scotland and elsewhere that offering an apology when something has gone wrong is perceived as a sign of weakness"; and
- "also a fear that an acknowledgment of fault can … lead to litigation" (para. 3).

The consultation notes that an apology is unlikely to determine liability on its own, but indicates that it can be of relevance in evidence, referring to two Scottish cases – Bryson v BT Rolatruc Ltd[2] and Lauchlan v Hamilton.[3]

In order to address the situation identified, the Bill proposes legislation which would stop apologies from being used as evidence of liability in most civil legal proceedings in Scotland (for example damages actions).

Stopping apologies from being used as evidence in litigation is the Bill's primary objective (Policy Memorandum, para. 4). However, the Bill also has a secondary, connected aim of encouraging a change in people's attitudes. In this regard the Policy Memorandum indicates that:

[1] See Scottish Conservative and Unionist Party (2015) which includes an article at page 38 on possible apologies legislation referring to comparative research
[2] [1998] Scot CS 22
[3] [1991] S.C.C.R. 1055

- "it is intended that the legislation will … facilitate wider cultural and social change as far as perceptions of apologies are concerned"; and that

- "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" (para. 4)

The Policy Memorandum argues that, over time, this approach should, "create a less adversarial climate and promote co-operation and openness, along with a greater willingness to learn from previous incidents". It also argues that this should lead to a reduction in litigation and bring closure to complainants (para 5), noting that removing concerns about the legal impact of an apology will promote the, "early and effective resolution of disputes" (para 18).

The Policy Memorandum stresses that the proposals will not prevent anyone from pursuing litigation or seeking redress by other routes (para 5). It explains that it does not provide a "get-out solution" for those complained against and that the recipients of apologies can still pursue redress or compensation by using information other than the apology in question (para. 8).

MAIN PROVISIONS OF THE BILL

Section 1 – effect of apologies in legal proceedings

Section 1 restricts the use of apologies in legal proceedings (defined by the Bill) by:

1. making apologies inadmissible as evidence "of anything relevant to the determination of liability" – in essence stopping them from being used in evidence when establishing liability (section 1(a)); and

2. prohibiting them more generally from being used in any other way in legal proceedings "to the prejudice of the person by or on behalf of whom the apology was made" (section 1(b))

It is important to note that section 1 only applies to, "an apology made (outside the proceedings)." The provisions of the Bill would not therefore apply to an apology made in the course of the legal proceedings themselves. The Policy Memorandum explains that this, "reflects the policy to encourage the making of an apology at an early stage before any court proceedings have begun." It also notes that, "it would be for the court or tribunal in those circumstances to determine what inference should be taken from the apology" (para. 7).

Section 2 – legal proceedings covered

All civil proceedings covered except for defamation and fatal accident inquiries

Under section 2(1) the Bill applies to all civil legal proceedings (including inquiries, arbitrations and tribunal proceedings) in both the public and private sector, except:

- Fatal Accident Inquiries under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976; and

- defamation proceedings.[4]

According to the Policy Memorandum, the exception for fatal accident inquiries is designed to take account of the public interest in ensuring that all relevant evidence is led at such inquiries

[4] In simple terms, defamation occurs when a person communicates something which contains a damaging and untrue imputation against the reputation of another person. See Scottish Government 2011 (chapter 2)

and that the sheriff's determination is able to set out in full the circumstances of the death. In this regard the Policy Memorandum notes that,

> "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." (para. 10)

The Policy Memorandum explains that defamation proceedings are not covered so as not to threaten the, "offer to make amends procedure" in the Defamation Act 1996. This allows someone who has published a defamatory statement to make, "a suitable correction of the statement complained of and a sufficient apology to the aggrieved party". According to the Policy Memorandum, the making of an offer of amends can be relevant to court proceedings as it can be used as a defence to an accusation of defamation and can be taken into account when awarding damages (para. 11).

The Bill allows the Scottish Ministers to modify the list of exceptions in section 2(1) by regulations. These would be subject to the affirmative procedure (sections 2(3) and (4)).

Criminal proceedings not covered

The Bill does not apply to criminal proceedings (section 2(2)). The consultation did raise the question of whether criminal proceedings should be covered (Margaret Mitchell 2012, page 20). However, the summary of consultation responses notes that, "there was … very little support for the extension of the proposed legislation to criminal law," with the Crown Office and Procurator Fiscal Service indicating, in particular, that it is important that any relevant evidence can be used in the trial process to establish guilt (Margaret Mitchell 2014 page 23).

Apologies made in the course of legal proceedings not covered

As explained above in relation to section 1, the Bill does not cover apologies made in the course of legal proceedings. Consequently, even if the civil proceedings themselves fall within the scope of the Bill, any apologies made in the course of these proceedings would not be granted the protection envisaged by the Bill.

Section 3 – definition of 'apology'

Section 3 defines an apology as follows:

> "any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains–
>
> (a) an express or implied admission of fault in relation to the act, omission or outcome,
>
> (b) a statement of fact in relation to the act, omission or outcome, or
>
> (c) an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence."

The Policy Memorandum explains further that the Bill applies:

> "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" (para. 6)

The definition, therefore, goes beyond simple apologies and also covers those statements which contain admissions of fault, factual statements, or undertakings taken to prevent the problem recurring. This is a change from the draft Bill proposal whose scope was limited to apologies themselves.

According to the Policy Memorandum (para. 15), the decision to include statements of fact and admissions of liability in the Bill's definition of an apology was based on assessing legislation in other jurisdictions during the consultation – in particular the New South Wales Civil Liability Act 2002 (NSW Act), which covers admissions of fault. In this regard, The Member's Commentary to the Summary of Consultation Responses notes that:

> "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." (page 27)

Section 4 – no retrospective effect

Section 4 clarifies that the Bill does not have retrospective effect and that it only applies to apologies if:

> "(a) the apology is made after the time when section 1 comes into force, and
>
> (b) the legal proceedings referred to in that section have not begun before that time."

Section 5 – commencement

Section 5 clarifies that the substantive provisions of the Bill come into force at the, "end of the period of 6 months beginning with the day of Royal Assent."

Guidance from the Scottish Ministers

The Policy Memorandum emphasises that the Bill is drafted in very general terms and so has implications in a wide range of circumstances (para. 12).

It therefore suggests that separate guidance on the use of the legislation would be beneficial to affected parties and indicates that the Scottish Ministers could issue this both internally (i.e. to government departments and agencies) and externally (to assist and inform other organisations and individuals).

According to the Policy Memorandum, such guidance could be used to explain the benefits of apologising early and in full when mistakes are made and could include examples of satisfactory and unsatisfactory apologies.

The Policy Memorandum suggests that a first version of such guidance could be prepared in the six months following Royal Assent before the legislation comes into force.

FINANCIAL MEMORANDUM

The Financial Memorandum stresses that it is not possible to quantify with any certainty the exact extent of costs or savings due to what it calls, "the conceptual nature of the Bill" (para. 7). It also explains that, although the Bill should lead to fewer people taking legal action, the potential costs cannot be forecast with any certainty since no-one will be prevented from pursuing legal claims.

The Financial Memorandum does, however, take the view that, "any detrimental financial impact" would be minimal, and would likely, "be more than balanced out by potential savings in the longer term" (para. 4). It indicates that 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 against public and other bodies, easier complaint resolution, and consequent savings in dealing with complaints arising from staff time and processes (para. 5).

It also indicates that there is evidence from other jurisdictions which illustrates the effectiveness of apologies legislation in reducing the costs of litigation, referring to:

- The University of Michigan Health Service's (UMHS) "Michigan Model" which the Financial Memorandum claims has led to a more than 50% fall in malpractice claims in the UMHS in the eight years since its introduction.[5]

- An article by Benjamin Ho and Elaine Lu in the Journal of Empirical Legal Studies which states that, "apology laws work by reducing the expected damage award that doctors face if the case goes to court" (for details see para 10 of the Financial Memorandum).

The Financial Memorandum makes the point, in relation to Scottish legal costs, that, as a result of the reforms in the Courts Reform (Scotland) Act 2014 a large percentage of personal injury cases will be heard in the sheriff courts rather than the Court of Session. It also notes that in 2012-13 there were 3,240 such cases in the sheriff courts, costing the parties involved (including, in some cases, SLAB or solicitors) around £22-32 million in total (para. 12).[6] The Financial Memorandum therefore concludes, in relation to future personal injury cases that:

> "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." (para. 12)

The Financial Memorandum makes the following additional arguments:

- Any costs of the Scottish Ministers issuing guidance will be minimal and could be absorbed within existing departmental budgets (para. 13).

- As the expectation is that there will be fewer personal injury cases there should be savings for the Scottish Courts Service, although these may be balanced out by a reduction in fee income (para. 14).

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[5] See para. 9 and footnotes 5 and 6 of the Financial Memorandum for the evidence relied on for this argument

[6] It appears that this £22-32 million figure is derived from the estimated cost of a three-day civil proof in the sheriff court mentioned at paragraph 11 of the Financial Memorandum – (i.e. 3,240 cases multiplied by £7,000–£10,000)

- There is the potential for significant savings for local authorities who, it is argued, will have to deal with fewer compensation claims (para. 16).

- NHS Scotland is likely to make savings due to reduced compensation payments (para. 18).

RULES IN OTHER JURSIDICTIONS

GENERAL

In recent times, various jurisdictions around the world have enacted legislation preventing apologies from being used as evidence of liability in civil proceedings.

According to Professor Prue Vines, who carried out a comparative study of apologies law in 2007, the first jurisdiction to enact such laws (in 1986) was the US state of Massachusetts whose legislation states that:

> "Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action."[7] (Vines 2007, page 2)

This was followed by various other common law jurisdictions (primarily in the USA, Canada and Australia) but also in England and Wales whose Compensation Act 2006 (section 2) states 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".[8]

According to Professor Prue Vines, such laws are based on the following underlying assumptions:

1. That the development of a culture of blame, in which people no longer take responsibility for their actions, has led to a dramatic increase in litigation increasing costs and damaging the insurance industry.

2. That apologies may amount to admissions of liability in the courts as a result of which insurers will have to pay claims.

3. That apologies may breach an admission clause or a compromise clause in an insurance contract, making it void, with the result that the defendant will be liable but will have no recourse against the insurers.

4. That apologies are so prejudicial that they automatically tend to attract liability.

5. That these factors lead to lawyers advising clients not to apologise[9] (Vines 2007, page 4).

In this regard, Professor Robyn Carroll explains more generally that:

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[7] Massachusetts General Laws Tit II Ch 233, s 23D.

[8] The scope of this provision is arguably more limited than the proposal in the Bill as it: does not expressly cover admissions of fault, is limited to negligence or breaches of statutory duty and does not prevent apologies from being admissible in evidence

[9] Professor Vines devotes much of her article to examining these assumptions (Vines 2007)

> "The aim of apology legislation, in general terms, is to encourage apologies by removing legal disincentives to apologising. Other aims of encouraging apologies referred to in parliamentary debates and by commentators are to promote the settlement and resolution of disputes and to reduce litigation." (Carroll 2014, page 4)

It is important to note that there is a considerable variation in the scope of apologies legislation worldwide, For example, in certain jurisdictions legislation covers what is known as "full apologies" – in other words apologies which include both expressions of regret and an admission of fault whereas, in others, only expressions of regret – known as "partial apologies" – are covered (Vines 2008, page 9). In addition, in some jurisdictions the legislation applies to all civil matters, whereas in others the scope is limited to a medical setting (Carroll 2014, page 5)

For a list of relevant jurisdictions which have apologies legislation (which is not exhaustive) see Vines 2008, page 12. For further comparative information see, for example, Robbennolt 2009, page 87 and Carroll 2014, page 4.

RESEARCH

There is a range of research into the role and impact of apologies and the extent to which apologies legislation may or may not achieve its stated aims.

Although this should by no means be seen as an exhaustive overview, general issues raised by such research, and in debates about the desirability and effectiveness of apologies legislation, include:

- The degree to which there is sufficient empirical evidence to back up the stated aims of apologies legislation.
- The degree to which courts do or do not treat apologies as relevant evidence in civil liability actions – i.e. is the threat of litigation the real reason why apologies are not made?
- The impact which apologies (and apologies legislation) can have in reducing antagonism between the parties and/or encouraging early settlements instead of full litigation.
- Whether full apologies have different impacts on recipients than partial apologies and the extent to which this should be reflected in any legislation.
- Whether there is a possibility that apologies legislation could lead to organisations apologising for purely strategic purposes (i.e. to reduce legal risks).
- Whether there is a risk that apologies which are given in the knowledge that there will be no legal impact will lack meaning and will be viewed as insincere, thus having negative consequences.
- Whether there is a risk that apologies legislation could deny litigants a justifiable legal remedy by making it more difficult for them to bring legal actions.

A variety of views exist in relation to these issues. While in reality the situation is much more nuanced, in very simple terms two broad camps could perhaps be said to exist. On the one hand there is a view that, although there are risks, there is evidence that some types of apologies legislation can be beneficial. On the other hand, there is a view that any benefits are illusory/uncertain and are outweighed by risks.

The views of the first camp are captured well in the work of Professor Prue Vines. She accepts that most legislatures have based their apologies legislation on purely anecdotal evidence (Vines 2007, page 9). However, she argues, referring to the work of Robbennolt (Robbennolt 2006) that there is evidence, particularly in relation to personal injury cases, that protecting full apologies may lead to an increase in settlement rates (Vines 2007, page 11, see also Vines 2015). She also argues in favour of the protection of full apologies, noting that, "the restricted or partial apology does not seem to be very effective, and indeed at times it seems counter-productive" (Vines 2007, page 11; see also Vines 2011)

Her conclusion is that:

> "There is a risk that protecting apologies with legislation may cause them to seem as of no value – as no more than a cynical form of words. However, this depends on people knowing the law and being unable to detect the difference between a sincere apology and one which is insincere. The empirical evidence suggests that people really do look for the difference and that they do not regard an apology as real unless it includes an admission of fault …. If, however, apologies are to be protected for the purpose of making them more common, it is preferable that the legislation should make it clear that an apology can include an admission of fault" (Vines 2007 page 12)

To a degree, similar views can be found in the work of Professor Robyn Carroll. She indicates that there is a "paucity" of empirical research into the effectiveness of apologies legislation (Carroll 2014, page 8 and page 13), but argues that the evidence which there is suggests that any legislation should seek to protect full apologies (Caroll 2014, page 20). She also notes that further research is needed. She argues that, based on the Australian experience, other things need to be in place for legislation to work, for example education on the, "purpose and effect of apology legislation" (Caroll 2014, page 19).[10]

The views of the second camp are more negative about the need for legislative measures to protect apologies. They stress that legislating in this field can lead to apologies which are potentially insincere and hence counter-productive. For example, in an article published in 2000, Lee Taft, of Harvard Divinity School emphasises the need for apologies to have a moral purpose. He argues that, "when an apology is cast into the legal arena, its fundamental moral character is dramatically, if not irrevocably, altered" (Taft 2000). More recently, the US businessmen and writer Dov Seidman has argued that insincere apologies have become the norm in virtually every aspect of public life. In this regard he notes that:

> "In 1976, Elton John sang the memorable phrase "Sorry seems to be the hardest word." Well, "sorry" has become one of the easiest and most convenient — and therefore least meaningful — words there is." (Seidman 2014)

Seidman further argues that this development is undesirable since such apologies lead to little in the way of organisational change or true contrition. His view is, therefore, that there is a need for more authentic apologies which can be measured against future actions.

Arguments against apologies legislation have also been made in the field of healthcare. Professors Lucinda Jesson and Peter Knapp have analysed Minnesota's health care system, which it is suggested has low rates of malpractice litigation despite apologies being admissible in evidence. They conclude that there are two broad arguments against exempting medical apologies from litigation, namely that:

1. To do so would "rob apologies of their moral content".

[10] See also Vines 2013 for a critical analysis of the workings of Australian apologies legislation

2. Doctors are reluctant to apologise due to deep cultural reasons, not as a result of fear of litigation (hence simply changing the law will not solve the problem) (Jesson and Knapp 2009, pages 30–38).

They further argue that legislating in this field leads to lawyers having too much involvement in the apologies process, resulting in:

1. Delays in the making of apologies.
2. Unnecessary legalisation of doctor-patient communication.
3. The tailoring of the wording of apologies so as to fit into legal exclusions – thus impacting on open communication (Jesson and Knapp 2009, pages 41–46).

The authors therefore conclude that, in the healthcare field, cultural rather than legal changes are needed, arguing that:

> "In the end, we believe that states that hope to improve the communication between doctors and their patients should turn their attention to changing medical culture rather than evidentiary rules. It is, no doubt, easier to draft evidentiary rules, but Minnesota's experience demonstrates that more profound change will come from focusing on what happens in hospitals rather than what happens in courtrooms." (Jesson and Knapp 2009, pages 46)

For a summary of some of the above arguments from a Scottish perspective see Irvine 2013.

COMMENTS ON THE BILL

A range of public and private bodies responded to the consultation (for a summary see Mitchell 2014)[11] and to the calls for evidence issued by the Justice Committee and the Finance Committee (see Scottish Parliament, Justice Committee (2015) and Scottish Parliament, Finance Committee (2015)).

GENERAL COMMENTS

It is not the purpose of this briefing to provide a comprehensive overview of the content of responses to the consultation/call for evidence. However, in summary, general arguments made in favour of the Bill include:

- The potential which the Bill has to lead to a change in culture in organisations (SPSO 2015, Core Solutions 2015, Irvine 2015).
- The potential which the Bill has to reduce the fear of apologising (SPSO 2015, Irvine 2015) and the 'chilling effect' which legislation can have on apologising (Vines 2015).
- The broad scope of the Bill's provisions and the fact that full apologies will be covered – it is argued that this will reduce the risk of people not apologising through fear that their apologies will not be covered by the rules (SPSO 2015, Irvine 2015, Vines 2015).
- Evidence from other jurisdictions that apologies legislation, when coupled with a more open culture, can lead to a reduction in medical negligence claims (Scottish Mediation Network 2012, Vines 2015).
- Evidence that early apologies and open communication can reduce complaints and litigation costs (Medical Protection Society 2012, Vines 2015).
- Suggestions that the likely costs in the Financial Memorandum are reasonable (NHS Ayrshire & Arran).

[11] The full consultation responses can be viewed online on the website of Margaret Mitchell MSP

In contrast, general arguments criticising provisions in the Bill include:

- Lack of evidence that apologies are widely used in civil litigation (APIL 2015) and a suggestion that barriers to apologising are more cultural than legal (South Lanarkshire Council 2012).
- Lack of evidence of a "compensation culture" in Scotland combined with evidence of a decline in litigation generally (APIL 2015).
- Lack of good empirical evidence that the advent of apologies legislation in other jurisdictions has led to a decrease in litigation (Faculty of Advocates 2015).
- Lack of focus on the potential impact of the Bill on areas other than personal injury, e.g., family law, the law of contract, debt actions, commercial litigation, administrative law, etc. (Faculty of Advocates 2015).
- Suggestions that the potential savings noted in the Financial Memorandum are not reliable and are unlikely to occur in practice (Faculty of Advocates 2015) or are too subjective (North Ayrshire Council 2015).
- The possibility that the provisions in the Bill could risk denying injured people access to justice (APIL 2015).

HEALTH CARE

A number of responses to the consultation and call for evidence were in the field of health care. While this is a mere snapshot of the evidence, specific issues raised include the need to consider:

- How legislation will interact with the General Medical Council's professional rules (British Medical Association 2015).
- How the Scottish Government's proposed duty of candour in the NHS[12] (see below) will interact with the provisions in the Bill (British Medical Association 2015).
- The relationship between the Bill and existing NHS guidelines on openness and the Patient Rights (Scotland) Act 2011 (Law Society of Scotland 2015, RCGP 2012).

OTHER COMMENTS

The Scottish Children's Reporter Administration has also argued that court proceedings under the Children's Hearings (Scotland) Act 2011 should be added to the list of excluded actions in section 2(1) of the Bill (for details see SCRA 2015).

Certain respondents have also argued that the Bill needs to take into account "pre-action protocols" which are designed to allow parties to find agreement on issues before taking court action (see Faculty of Advocates 2015 and APIL 2015). According to the Faculty of Advocates:

> "Where an unequivocal admission of fault has been made the Bill, if passed, would seem to prevent a party from founding upon the admission … attempts to encourage the adoption of pre-action protocols might be undermined. Any negative impact upon the effective use of existing personal injury pre-action protocols would in our view be counter-productive." (Faculty of Advocates 2015, para. 9)

The Scottish Human Rights Commission has also argued that effective apologies legislation is important in relation to historic child abuse, noting that it believes, "the present Bill should be one of a number of measures to ensure effective remedy for survivors of historic child abuse in Scotland." (SHRC 2015)

[12] This is a statutory duty on healthcare organisations to have effective arrangements to disclose instances of physical or psychological harm (for details see Scottish Government 2014)

SCOTTISH GOVERNMENT MEMORANDUM

The Scottish Government has prepared a memorandum to assist the Justice Committee's consideration of the Bill (Scottish Government 2015). It notes that, in the Scottish Government's view, the Bill is predominantly based on equivalent New South Wales legislation - the New South Wales (NSW), Civil Liability Act 2002. However it explains that:

> "the NSW legislation is much narrower in its application. It does not extend to civil liability for some workplace injuries, intentional acts done with intent to cause personal injury, including sexual assault or unlawful sexual conduct and road traffic accidents. As the majority of personal injury actions in Scotland relate to road traffic accidents, the Bill has a much wider application than the NSW model on which it is based." (para. 6)

The memorandum also includes the following additional arguments:

- **Potential injustice** – That there will be a need to examine whether the Bill could lead to potential injustice as it could reduce the evidence base which someone bringing a claim could use. The examples given mention apologies made to road traffic accident victims and to survivors of child abuse (paras 7–10).
- **Public Inquiries** – That the policy reasons for excluding Fatal Accident Inquiries also apply to public inquiries (para. 11).
- **Arbitration** – That it will be necessary to examine the impact of the Bill on arbitration proceedings. The memorandum indicates that arbitration proceedings can generally admit any evidence and that, "restricting that freedom in any way could lessen the effectiveness of arbitration" (para. 12).
- **Tribunals** – That consideration needs to be given to how the Bill impacts on tribunals. According to the Scottish Government, there is a risk that the Bill could limit tribunals' powers to consider all the relevant facts. It also notes that consideration needs to be given to the fact that tribunal cases may be appealed from a reserved tribunal (where the Bill would not apply) to the Upper Tribunal (Court of Session) where it would (and where apologies would not be admissible evidence) (paras 13–14).
- **Insurance law** – That the Bill will not affect how insurance is provided, who provides it and regulation (i.e. potentially reserved matters) but that it is unclear how the insurance industry will interpret the proposed legislation in their contracts, and what the implications for insurance cover will be (para 15).
- **Healthcare** – That consideration will need to be given to how the Bill deals with apologies made under the forthcoming Public Health Bill so as not to undermine the policy aim of the duty of candour which will be imposed on organisations providing health and social care. The memorandum also notes that there are now various other elements of legislation and guidance in relation to apologising in a health care setting and argues that, "the policy justification for an Apologies Bill may have been superseded" (para. 17).

The Scottish Government memorandum therefore concludes by noting that the Scottish Government:

> "supports the aim of the proposal …. We consider that the definition of apology needs some further consideration in order to ensure that it does not create any inadvertent injustice; that the application of the Bill to certain legal proceedings requires further consideration; and that the implications for insurance cover have been fully taken into account. Further consideration of the interaction with the provisions contained in the Health, Smoking and Electronic Cigarettes etc. (Scotland) Bill also needs to be made. Ministers intend to work with the member in charge and the Committee to propose amendments to these aspects of the Bill ... Given the concerns with the proposed legislation, the Scottish Government maintain a neutral position on this legislation at this

time.” (para. 22)

SOURCES

Association of Personal Injury Lawyers. (2015) *Justice Committee Apologies (Scotland) Bill Written submission from the Association of Personal Injury Lawyers*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A5._APIL.pdf

British Medical Association. (2015) *Justice Committee Apologies (Scotland) Bill Written submission from the British Medical Association Scotland*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A2._BMA_Scotland.pdf

Carroll, R. (2014) *When "Sorry" is the Hardest Word to Say, How Might Apology Legislation Assist?* University of Western Australia-Faculty of Law Research Paper No. 2014-43. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512657

Core Solutions. (2015) *Justice Committee Apologies (Scotland) Bill Written submission from Core Solutions*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A13._Core_Solutions.pdf

Faculty of Advocates (2015) *Justice Committee Apologies (Scotland) Bill Written submission from the Faculty of Advocates*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A6._Faculty_of_Advocates.pdf

Irvine, C. (2013) *The Proposed Apologies Act for Scotland: Good Intentions With Unforeseeable Consequences*. EdinLR Vol 17 84. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2267145

Irvine, C. (2015) *Justice Committee Apologies (Scotland) Bill Written submission from Charlie Irvine, Senior Teaching Fellow, University of Strathclyde*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A12._Charlie_Irvine.pdf

Jesson, L and Knapp, P. (2009) *My Lawyer Told me to Say I'm Sorry: Lawyers, Doctors and Medical Apologies.* William Mitchell Law Review, Vol. 35, No. 2, 2009. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417484

Law Society of Scotland. (2015) *Justice Committee Apologies (Scotland) Bill Written submission from the Law Society of Scotland*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A1._Law_Society_of_Scotland.pdf

Medical Protection Society. (2012) *Apologies (Scotland) Bill*. Available at: http://www.margaretmitchellmsp.org/wp-content/uploads/2012/10/Medical-Protection-Society-MPS.pdf

Mitchell, M. (2012) *Apologies (Scotland) Bill – a proposal 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.* Available at: http://www.scottish.parliament.uk/S4_MembersBills/20120708_Apologies_Consultation_corrected.pdf

Mitchell, M. (2014) *Proposed Apologies (Scotland) Bill Margaret Mitchell MSP Summary of Consultation Responses*. Available at: http://www.scottish.parliament.uk/S4_MembersBills/Apologies_summary_final.pdf

NHS Ayrshire & Arran. (2015) *Re – Call for Evidence Apologies (Scotland) Bill Financial Memorandum*. Available at: http://www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/Ayrshire_and_Arran(1).pdf

North Ayrshire Council. (2015) *Apologies (Scotland) Bill Written Submission from North Ayrshire* Council. Available at: http://www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/North_Ayrshire_Council(8).pdf

Robbennolt, J. K. (2006) *Apologies and Settlement Levers*. Journal of Empirical Legal Studies Volume 3, Issue 2, 333–373, July 2006. Available at: https://www.law.ucla.edu/~/media/Assets/Negotiation%20and%20Conflict%20Resolution/Documents/Spring%202014%20Colloquium/01-23-2014%20Robbennolt%20Apologies%20and%20Settlement%20Levers.ashx

Robbennolt, J.K. (2009) *Apologies and Settlement.* The Journal of the American Judges Association.Paper 296. Available at: http://digitalcommons.unl.edu/ajacourtreview/296

Royal College of General Practitioners (RCGP). (2012) *Apologies Bill Response from RCGP Scotland.* Available at: http://www.margaretmitchellmsp.org/wp-content/uploads/2012/10/Royal-College-of-General-Practitioners.pdf

Scottish Children's Reporter Administration (SCRA). (2015) *Justice Committee Apologies (Scotland) Bill Written submission from the Scottish Children's Reporter Administration*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A3._SCRA.pdf

Scottish Conservative and Unionist Party. (2015) *Justice Matters – Essays on Improving Scotland's Justice System*. Available at: http://www.scottishconservatives.com/wordpress/wp-content/uploads/2015/01/Justice-Matters-Final.pdf

Scottish Government. (2011) *Death of a Good Name - Defamation and the Deceased: A Consultation Paper*. Available at: http://www.gov.scot/Publications/2011/01/11092246/0

Scottish Government. (2014) *Consultation on Proposals to Introduce a Statutory Duty of Candour for Health and Social Care Services*. Available at: http://www.gov.scot/Resource/0046/00460832.pdf

Scottish Government. (2015) *Apologies (Scotland) Bill Memorandum by the Scottish Government to the Justice Committee*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20150501_SG_Memorandum.pdf

Scottish Human Rights Commission (SHRC) (2015) *Justice Committee Apologies (Scotland) Bill. Written submission form the* Scottish Human Rights Commission. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A15._SHRC.pdf

Scottish Mediation Network (2012). *Apologies (Scotland) Bill Consultation*. Available at: http://www.margaretmitchellmsp.org/wp-content/uploads/2012/10/Scottish-Mediation-Network-SMN.pdf

Scottish Parliament, Finance Committee (2015) *Submissions received on the Apologies (Scotland) Bill*. Available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/87890.aspx

Scottish Parliament, Justice Committee (2015) *Submissions received on the Apologies (Scotland) Bill*. Available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/89281.aspx

Scottish Public Service Ombudsman (SPSO) (2015) *Justice Committee Apologies (Scotland) Bill Written submission from the Scottish Public Services Ombudsman*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A9._SPSO.pdf

Seidman, D (2014) *Calling for an Apology Cease-fire*. New York Times, February 3 2014. Available at: http://dealbook.nytimes.com/2014/02/03/calling-for-an-apology-cease-fire/

South Lanarkshire Council (2012) *Consultation Questions and responses by South Lanarkshire Council.* Available at: http://www.margaretmitchellmsp.org/wp-content/uploads/2012/10/South-Lanarkshire-Council.pdf

Taft, L (2000) *Apology subverted: the commodification of apology* (2000) 109 Yale LJ 1135 AT 1136

Vines, P. (2007) *Apologies and civil liability in the UK: a view from elsewhere*. UNSW Law Research Paper No. 2007-61. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366505##

Vines, P (2011). *Sorry saga of apologies*. Available at: https://www.mja.com.au/insight/2011/46/prue-vines-sorry-saga-apologies

Vines, P. (2013) *The Apology in Civil Liability: Underused and Undervalued.* (2013) 115 Precedent 28-31. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2275208

Vines, P. (2015) *Justice Committee Apologies (Scotland) Bill Written submission from Professor Prue Vines, University of New South Wales.* Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A16._Professor_Prue_Vines.pdf

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