

27 September 2012

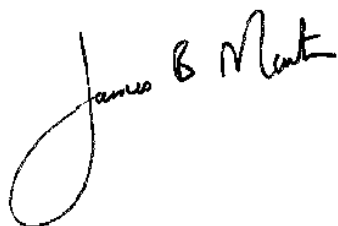
Margaret Mitchell MSP  
Room M2.09  
Scottish Parliament  
Edinburgh  
EH99 1SP  
Scotland

Dear Ms Mitchell

**Proposal for an Apologies (Scotland) Bill**

I attach a copy of our response to your proposal for an Apologies Bill. I am content for it to be made public in the usual way.

Yours sincerely,

A handwritten signature in black ink that reads "James B Martin". The signature is written in a cursive style with a large initial 'J'.

Jim Martin  
Ombudsman

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**Scottish Public Services Ombudsman Response to: 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.**

**Background**

The Scottish Public Services Ombudsman (SPSO) provides a 'one-stop-shop' for members of the public making complaints about organisations providing public services in Scotland.

This includes, amongst others: local government, housing associations, the National Health Service, Prisons, NDPBs and higher and further education bodies.

The SPSO has recently taken on a new statutory function, empowered by the Public Services Reform (Scotland) Act 2010, to improve complaints handling in bodies under our jurisdiction. To deliver this function we have created the Complaints Standards Authority (CSA), an internal unit within the SPSO. The CSA has now taken the lead in the development of simplified and standardised complaints procedures across the Scottish public sector. Standardised procedures have been introduced in the local government and housing sectors and are currently being implemented across Scotland.

**Introduction**

2012 sees the 10<sup>th</sup> anniversary of the SPSO. In those 10 years our work has extended and developed, however, one constant aspect of our experience has been the need to find ways to repair the trust and relationship between a citizen and a public body who has let them down. Apology is a key part of this process and we welcome the opportunity to respond to this consultation.

As can be seen from the consultation document, the SPSO has long been interested in apology. The first Scottish Public Services Ombudsman Alice Brown publicly campaigned for such a bill. The consultation draws on much of the available research about the possible benefits and sets out the different international models. We felt it would be of most benefit in our response if we did not repeat the points you have made in the consultation. Instead, in responding to this consultation we have concentrated on our experience in Scotland. We have not responded to question 3 because of this and also to question 10 as we have no role in criminal matters and no experience, therefore, to draw on.

**Q1. Do you agree that legislation is a necessary and appropriate means of addressing the issues identified?**

As legislation may have unintended consequences it is a generally good principle that it should only be used where there is a clear need.

Apologies are about relationships and rebuilding relationships and trust where that has been broken. The key to this is culture change. A change is needed to allow staff in all our public bodies to be able to respond in an instinctive and human fashion to those to whom they are providing a service. To achieve this individual members of staff need to feel they have the power to disclose information and make apologies where they feel it is appropriate and to the extent that they feel it is appropriate. They should also feel that not only can do so without fear of criticism or discipline by those senior to them but that they will be fully and openly supported.

Given the key aim must be to impact on attitudes and relationships, it may seem counter-intuitive to support legislation. However, despite attempts by ourselves and others to support apologies and to ensure that as many people as possible are aware that even in current law only limited use is likely to be used of this in court, the fear of litigation is real. Legislation could, if carefully worded, create a space where conversations whether in person or in writing

can be protected. It is this protection which would help facilitate the culture change. More work would still need to be done to ensure not only that staff were aware of this protection but that they were actively encouraged to use this. It would though be a useful first step and, for that reason, we would support legislation.

**Q2. Have you ever experienced any barriers to making or receiving an apology? If so, please expand upon 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.**

In our role, our most common experience of apology is when we recommend that an apology is made.

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.

In considering why bodies, at times, find apology so difficult we have identified some key barriers:

- An unwillingness to accept fault. This is the most significant barrier. In fairness, a full apology is only appropriate if it is accepted there has been a failing and there are cases where bodies genuinely do not accept there has been a failing. In this context, it is important to note that a failing or fault which is identified in a complaints context is not the same as a finding of negligence which may lead to an establishment of liability. Things can and do go wrong which do not meet the test of negligence. There is a range of failings which start from those which could not have been avoided -- known complications of procedures; actions which were based on the best available facts at the time but which with hindsight were not the best decisions, to genuine errors and mistakes which can occur within the standards of the actions of a reasonable professional through to fault and failings which reach the standard of maladministration or service failure. It is only the final failings about which we would be critical that they occurred. We would though be critical about a failure to acknowledge or deal with the other failings appropriately as part of the relationship between the body and citizen.
- A complete breakdown in the relationship. Where, for whatever reason, that relationship has become difficult and fractured, bodies may feel it is hard to apologise to someone they feel has behaved badly towards staff.
- A desire to protect staff. The professional reputation of staff is important and bodies can sometimes struggle with their dual responsibility to protect staff but also to respond appropriately to a member of the public. Sometimes, we find that the more powerful a staff member is the more reluctant a body is to apologise. For example, in our experience, NHS boards at times find it easier to apologise for nursing failings than for problems at consultant level.

When these barriers are considered together, it seems clear that there is an implicit fear that by apologising the body is being put or is putting their staff in some position of vulnerability with which they are uncomfortable. As we have said above the way to change this is through a broader culture change is required. This should recognise the not only needs to ensure that apologies are seen as a normal part of our experience, that mistakes will happen and that the best way to avoid them is to be open about them and to seek to learn from them.

In terms of our own experience of making apologies, like any organisation who has a responsibility to the public, we set high standards. We have to accept that these may not always be achieved. We follow our own guidance<sup>1</sup> and do make apologies when we have not achieved those standards and have let people down. Apologies are supported and staff are encouraged to apologise. However, the timing of an apology does go a long way to determine the effectiveness of an apology.

**Q4. Do you support the general aim of the proposed Bill? Please indicate “yes/no/undecided” and explain the reasons for your response.**

Yes, for the reasons set out in details under our answer to the other questions.

**Q5: 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.**

The definition of apology is one that should be drafted with care. The aim of the Bill must be to ensure that certain conversations<sup>2</sup> are protected to allow for full, open and honest discussion. Setting out too many requirements for what an apology should be may mean that staff are actually inhibited when talking to the public as they try to remember what aspects they need to include to ensure that they are protected. It should be noted that there is a difference between what would be good or excellent practice and should be encouraged – this would include all four elements including review -- and what should be protected to encourage the culture change to allow for more open discussion. If, in order to be protected, certain conversations had to achieve specific standards, those conversations, whether orally or in writing may become tick box exercises seeking to achieve those standards. The definition should therefore be broad.

We consider that the current definition may be too narrow. For example, it may be difficult in the moment an incident is occurring to be clear that there is or will be a bad outcome. Sometimes mistakes and errors happen and it may be some time to know what the outcome will be. Limiting the definition of an apology to begin with the acknowledgement of a bad outcome, may lead staff to be wary of apologising when they know something has gone wrong but are uncertain of the impact.

On balance, we would support the broadest possible definition and consider the definition in the British Columbia legislation to be the most useful model.

**Q6: Referring to the features listed, or others, what do you consider to be the key features of an effective or meaningful apology?**

The most effective apologies tend to be the ones that are given closest to the incident and which express real, genuine regret. They are the ones which allow for the most human interaction. They are usually delivered orally by those directly involved. They are not defensive and may reflect uncertainty where appropriate. They are not likely to be one-off events but may be part of wider support and discussion which will allow the person receiving the person to understand the incident. They involve the person affected in the process of seeking to work out what went wrong and how to prevent it happening again.

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<sup>1</sup> We have produced a guidance leaflet to help bodies make meaningful apologies and use this guidance for any apology we need to make. The guidance is here:

[http://www.spsa.org.uk/files/2011\\_March\\_SPSO%20Guidance%20on%20Apology.pdf](http://www.spsa.org.uk/files/2011_March_SPSO%20Guidance%20on%20Apology.pdf)

<sup>2</sup> Throughout when we refer to conversations, these should be taken as meaning in writing or orally. Writing will extend to all forms of electronic communication.

In our experience, 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. However, the timing of an apology does go a long way to determine its effectiveness.

**Q7. 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?**

As we have said above, the definition should be as wide as possible. Otherwise the legislation may have the unintended consequence of preventing some of the good practice we see at the moment by encouraging people to apologise only to the limit of the definition. In particular, apologies which are merely statements of regret do not fit broadly accepted definitions of apology. We find that people who receive such statements which express regret but no responsibility can be more rather than less upset. This can erode rather than enhance trust, particularly in situations where it does seem clear an error has happened.

**Q8. How do you think the Bill should deal with statements of fact included with apologies?**

For the Bill to achieve its main aim which is supporting a culture change, the definition should be clear and simple. It should cover the apology which may include an admission of fault. The provision of information and facts may be part of this conversation but we do not think they require specific protection. Specifically protecting facts will lead to the assumption that some facts should not normally be released because they need protecting. The key elements to protect are the statement itself and any assessments or admissions of fault, these are the parts which a court or compensation claim process should have the ability to determine from new without taking the apology into account. There should be no need to hide facts.

**Q9. 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)?**

We generally support the broadest possible protection, it should be clear that an apology would not be used in a disciplinary hearing against a member of staff for example. Staff may also be reluctant to apologise if they felt it would be used in a fitness to practice context. As facts would not be covered by the definition, this should not cause any matters of concern being raised fully in those contexts. The staff member may also feel that they would like to allow the apology to be considered because it would be an example of good practice so they should be able to waive this exclusion.

While we support a broad exclusion, we would strongly resist any attempt to extend this protection to complaints proceedings. The complaints process does not establish negligence or legal liability so the risk or perceived risk which the Bill is seeking to protect organisations from does not arise.

It should be noted that the most common cause of the complaint we receive are issues with communication. It is important that, in assessing these issues we can assess all the communication that occurred. It would be highly artificial to exclude certain conversations, particularly when those conversations were the ones designed to restore the relationship.

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.

#### **GENERAL**

**Q11. 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?**

Good, timely apologies do reduce the number or escalated complaints. If encouraged and supported throughout the public sector, it is possible that we may see a reduction in complaints and some financial benefit from this Bill. We do not anticipate that there would be any negative financial impact.

**Q12. 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?**

We do not consider there are any specific equality implications.

#### **Other comments**

Since the launch of this consultation, the Scottish Government has also launched a consultation on a possible no-fault compensation scheme for injuries resulting from clinical treatment. We intend to respond to that consultation separately but thought it may be useful to note that we do not think the no-fault compensation scheme and an apology bill are incompatible and may be complementary.