

8 May 2015

Christine Grahame MSP
Convener
Justice Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Convener,

Apologies (Scotland) Bill

I am writing in response to your call for written evidence on the Apologies (Scotland) Bill.

The SPSO has long been interested in apologies. The first Scottish Public Services Ombudsman, Alice Brown, publicly campaigned for such a bill. We have produced guidance¹ on making good apologies for public organisations and also include information about apology in the training we provide on complaint handling.

This response is based on our experience in Scotland as a champion for apologies in the public sector. As such, it does not deal with the implications for the private sector. I set out below the reasons why I think legislation is a good idea; the benefits of a broad definition of apology and my views on the coverage of the bill.

The argument for legislation

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. All staff in all our public organisations should feel 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.

Given the way to achieve this is about 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 if any is likely to be used of an apology in court, the fear of litigation remains. Front-line staff still tell us at training sessions that they are scared to apologise because of this risk or even, that they have been advised not to apologise by more senior staff. Legislation would help to allay these fears and

¹ 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.spsso.org.uk/files/2011_March_SPSO%20Guidance%20on%20Apology.pdf

help support an open and transparent culture. It would also be in line with other initiatives in the public sector which are encouraging all types of feedback and an open response to that.²

The benefits of a broad definition of apology

I was very pleased to see that the definition of apology in the Bill is broad and open ended. As I explained in response to a consultation on the bill when the definition was narrower, a narrow definition could lead to staff being concerned about fitting in the definition rather than supporting them to be open. It is also good that the definition does not seek to set a standard for an apology. There is a difference between what would be good or excellent practice and should be encouraged as part of an apology and what should be protected from civil liability 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.

In our previous response to a consultation on the Bill, I was concerned about protecting factual statements and whether that was appropriate. However, on reflection, I think it is difficult to extract facts from other parts of the statement. Facts can also be separately established so including them in this protected conversation does not mean they will not be available in other areas.

The coverage of the Bill

Civil liability is a significant concern amongst those who are wary of apologising and, while legally it is not strictly the case that an apology is an admission of liability, this perception remains a significant issue. It is though important that safeguards remain for the public. This is why, while such conversations are excluded from civil proceedings, it is to be welcomed that the particular role of Fatal Accident Inquiries is recognised by providing them with a specific exclusion. It is also important to note that the Bill does not cover complaints procedures. It will still be possible for an individual who is concerned about what was said to them by a member of staff to a public organisation to raise that concern as a complaint with that organisation and then to an independent organisation (most likely the SPSO). This means a member of the public will still have a forum in which they can raise any unhappiness or dissatisfaction they may about how they were dealt with and about the conversations they have had. The most common cause of the complaints we receive are issues with communication. Nothing in this legislation prevents us, when assessing these issues, of considering all the communication that occurred including communication that would be protected from civil liability by this Bill.

In closing, I would like to say something about what a good apology looks like. 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 apology to understand the incident. Good practice would also involve the person affected in the process of seeking to work out what went wrong and how to prevent it happening again. I hope this Bill will help to support those types of processes. It could certainly send a helpful message to front-line staff that openness will be supported and not end up with them in court.

Yours sincerely

Jim Martin
Ombudsman

² To give only a few examples: the adoption of the SPSO model complaints handling procedures across the public sector; the use of Patient Opinion in the health service; and the development of a duty of candour.