

**NORTH LANARKSHIRE COUNCIL**

**REPORT**

To: CORPORATE SERVICES COMMITTEE		Subject: APOLOGIES (SCOTLAND) BILL	
From: HEAD OF LEGAL SERVICES			
Date: 15 August 2012	Ref: JM/tb		

**1. PURPOSE OF REPORT/INTRODUCTION**

1.1. The purpose of this report is to seek the approval of Committee for the Council's response to the Consultation Paper on the Apologies (Scotland) Bill, which has been issued for comment as a proposed Private Member's Bill by Margaret Mitchell MSP.

A copy of the Paper is in the Members' Library.

1.2. The closing date for responses to the Paper is Friday 28 September 2012.

**2. BACKGROUND**

At present, Scotland does not have a statutory framework that deals specifically with the effect of apologies on civil or criminal liability. It is notable that in England and Wales there is a degree of apology coverage under Section 2 of the Compensation Act 2006 which states: "An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty."

In Scotland, an apology made by a defender in an action for reparation under the law of delict or an accused person in criminal proceedings would usually fall to be considered as an evidential matter in those proceedings. In any such case, questions of legal liability would fall to be determined by the court involved, based on an assessment of proven facts and the applicable law. In a strict sense, an apology is unlikely to determine liability on its own but can be of relevance as evidence in some cases.

This consultation is built on the proposition that a failure to give an apology when things have gone wrong can contribute to / cause the escalation of a complaint and can increase the likelihood that the complainant will consider pursuing a legal remedy for their complaint; and that a key barrier to providing an apology is often fear of litigation. The view is expressed that the fear of litigation often produces a defensive unhelpful response to complaints which leaves complainants with an even deeper sense of grievance and distrust.

A mistake being made is not the same as negligence. It is agreed that it is important for public bodies to learn from mistakes and to acknowledge a problem or a bad outcome and to take steps to try to ensure the same or similar mistake is not repeated.

### **3. PROPOSALS/CONSIDERATION**

The proposed Bill will seek to encourage the use of apologies by aiming to provide legal certainty that certain kinds of apology cannot be admitted into evidence in civil proceedings to be used prejudicially against an apologist. Therefore, by providing expressly that certain forms of apologies cannot be admitted as evidence to establish legal liability or fault in certain civil matters the Bill will seek to establish legal certainty which is essential to promoting a culture of apologising. It must be stressed that the recipient of an apology under the terms of the proposed Bill is not precluded from going on to take legal action.

It is proposed that for the purposes of the proposed Bill, one person (A) apologises to another (B) if:

A acknowledges that there has been a bad outcome for B  
A conveys regret, sorrow or sympathy for that bad outcome,  
A recognises direct or indirect responsibility for that bad outcome (see *Comment below*).

In order for an apology to be effective, it is suggested that the proposed definition include a fourth key element, namely 'an undertaking, where appropriate, to review the circumstances which led to the bad outcome with a view to making, if possible, improvements and or learning lessons.' (see *Comment below*).

*(Comment : The requirement that A recognises responsibility and the proposition that to make an apology effective a key element would include an undertaking where appropriate to review the circumstances seem to contradict the spirit and intent of the proposed legislation. This is addressed in the proposed response to the consultation questionnaire at question 5).*

It is proposed that the Bill will not protect apologies in so far as they include admissions of legal fault, culpability, or liability and will be limited in its application to civil proceedings. The provisions might allow for the acknowledgement that "things could or should have been done better" or differently and this will be taken on board for the future.

### **4. SUMMARY OF THE COUNCIL'S RESPONSE TO THE CONSULTATION PAPER**

See appendix A.

### **5. CORPORATE CONSIDERATIONS**

The consultation suggests that a greater use of apologies by public bodies could result in lower complaint and litigation levels as, in a significant number

of instances, the complainant desires an apology above all else . This is not the Council's experience in litigation and so it is not agreed that the Bill has the potential to dramatically reduce the number of court actions against the Council.

However, the Bill seeks to make it possible for apologies to be made which acknowledge harm done, provide an explanation of what happened and an assurance that the event or circumstances being apologised for will not happen again. It is agreed that this might bring closure for the injured party and provide a vehicle for social justice to be achieved and promote a more forgiving culture.

## **6. RECOMMENDATIONS**

- 6.1. The Committee is asked to approve the report and the Council's draft response, as detailed in Appendix A to this report.



Head of Legal Services

**For further information on this report please contact June Murray on telephone 01698 302295**

## Appendix A

**Question 1: Do you agree that legislation is a necessary and appropriate means of addressing the issue identified.**

It is agreed that legislation is an appropriate means of addressing reluctance or refusal on the part of a public body to apologise because of the fear of litigation. However, some of the proposed drafting appears to contradict the spirit and intent of the proposed legislation (see answer to question 5 below). This should be addressed. There is little, if any evidence, that the Bill is necessary but in principle such legislation is desirable because it could improve relationships between the public and public bodies. Such legislation would give public bodies comfort that they can issue an apology where they wish to do so without increasing the risk of litigation.

**Question 2: 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.**

On a very limited number of occasions, a barrier that the Council has experienced is whether to issue an apology or not because the issuing an apology could have left the Council with a higher risk of litigation.

**Question 3: Do you have any experience of the effect that apology legislation can make? Would you be more likely either to expect an apology, or to apologise yourself, if there was apology legislation in Scotland.**

The Council has no experience of the effect that apology legislation can make. If there was apology legislation in Scotland in appropriate circumstances the Council would be more likely to offer an apology knowing that it would have some protection under the apology legislation. See comments at 11 below.

**Question 4: Do you support the general aim of the proposed Bill. Please indicate "yes/no/undecided" and explain the reasons for your response.**

The Council supports the general aim of the proposed Bill. The general intent of the legislation proposed by the Bill should permit the Council to respond in a more sincere way, in certain circumstances, than it might do if its position in a subsequent litigation was prejudiced.

**Question 5: Do you consider the proposed definition adequate? What elements should be included in the definition 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.**

Points 1 and 2 of the proposed definition seem adequate. However point 3 'direct or indirect responsibility' seems to contradict the overall intent of the proposed legislation as it could be interpreted as an admission of liability. The legislation should not include any requirement for undertaking to review policies etc. This should be at the discretion of the public body concerned. Review requirements could undermine what is understood to be the spirit of the proposed legislation i.e. that an apology can be given sincerely where appropriate without any concern for admission of civil liability.

**Question 6: Referring to the features listed, or others, what do consider to be the key features of an effective and meaningful apology.**

An effective and meaningful apology would be given as soon as the harm comes to light. The detail of the composition or content of an apology should not be prescribed by legislation.

**Question 7: 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 protection.**

Admissions or statements of fault should be excluded from the Bill / legislation. If they were to be included within the context of an apology public bodies would be obliged to make such an admission within the apology and this would increase the risk of legal liability. It might also negate the intended impact of the proposed legislation.

**Question 8: How do you think the bill should deal with statements of fact included with apologies?**

Statements of fact should either enjoy protection under the proposed legislation or alternatively public bodies should not be obliged to address fact in any apologies they issue pursuant to the legislation.

**Question 9: In relation to non-criminal matters, should the Bill apply 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 exclusion/exclusion. Should the bill also extend to some less formal proceedings (e.g. certain complaint procedures)?**

It should be for the public body to decide when to issue an apology. Therefore the Bill / legislation should apply to all civil proceedings and also circumstances which might entitle complaints to non judicial agencies e.g. the Ombudsman.

**Question 10: While it is the intention that the proposal will apply to civil matters only, do you think that there are any areas of criminal law to which it should apply.**

The Council is not in a position to comment.

**Question 11: 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?**

The possible financial implications to the Council of the proposed Bill might be that there is a reduction in spending through a reduction in litigation. However, given the nature of the litigation in which the Council is involved, this is unlikely. We cannot identify any current litigation which might have been avoided by the issue of an apology on behalf of the Council.

**Question 12: Is the proposed Bill likely to have any substantial positive or negative implication for equality? If it is likely to have substantial negative implication, how might this be minimised or avoided.**

There is no evidence that the Bill will have any substantial positive or negative implications for equality.