



7 October 2015

From: The Chief Executive

By email

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Chairman
Committee for Finance and Personnel
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Dear 

**RE: POINTS ARISING FROM SOCIETY'S EVIDENCE BEFORE COMMITTEE 30
SEPTEMBER 2015**

I write further to the Society's recent appearance at the Committee to contribute to the ongoing scrutiny of the Draft Legal Complaints and Regulation Bill. We are grateful for the opportunity to assist the Committee and you will recall I said that I would write to you in relation to two issues which arose at the meeting.

The first issue relates to our call for an insertion into the Bill of a clause to address the impact of an apology issued by a legal practitioner to a complainant. Clause 19 (2) (a) of the Draft Bill empowers the new Solicitors Complaints Committee to direct that a practitioner make an apology to the complainant where this is appropriate.

The Society is supportive of creating a context in which apologies are offered to complainants in appropriate circumstances and subject to appropriate safeguards. Accordingly, the removal of the ability for such apologies to be used as evidence of liability in civil proceedings is an important element in achieving this and would strengthen the Bill's aim to provide effective redress to complainants.

There are a number of benefits which would flow from making such provision, including the promotion of earlier resolution of complaints without recourse to costly litigation and improved relationships between professionals and clients. Similar clauses have been introduced in jurisdictions as diverse as the USA, Canada and Australia in attempts to tackle a culture of defensiveness in relation to the provision of apologies. (See appendix to this letter for some examples).

The Scottish Parliament is currently considering an overarching piece of legislation, the Apologies (Scotland) Bill, which includes a provision making apologies inadmissible as evidence of liability in a wide range of civil proceedings. It is the Society's view that the overall aims and spirit of the Bill would be promoted by the inclusion of a similar clause. (The Scottish provisions are included within the appendix). This would not prevent a client from taking such proceedings, but would help to remove barriers to issuing apologies in the first instance, making the Bill more effective.

The second issue mentioned above is in relation to the inclusion within the Bill of a statutory obligation for the new Legal Services Oversight Commissioner to consult the Society on his/her business plan on an annual basis. There is scope for such a provision in the Bill, either within the opening sections or in Schedule 3.

Again, we consider such an amendment would promote the spirit of the Bill, by providing for a constructive dialogue between the profession and the Commissioner on business priorities. The profession will be responsible for costs and it makes sense for the profession to be first consulted on plans, so as to be in a position to plan for and secure the necessary funding.

The Society has similar duties to consult with the Commissioner across a number of areas under the Bill. Such a clause would not provide the Society with a power of veto or direction, which we do not consider to be appropriate. Rather, it would help to develop a relationship of dialogue which could assess trends in terms of complaints handling, costs, client satisfaction over time and the appropriate use of resources.

These issues were amongst a range of points made at the meeting and I am happy to expand on any of the issues raised above or generally. Should the Committee find this useful, please do not hesitate to contact me.

Yours



ALAN HUNTER
Chief Executive

Apology Act 2006 (British Columbia)

Definitions

1 In this Act:

"apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate;

"court" includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.

Effect of apology on liability

2 (1) An apology made by or on behalf of a person in connection with any matter

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,

(b) does not constitute an acknowledgment of liability in relation to that matter for the purposes of section 24 of the *Limitation Act*,

(c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and

(d) must not be taken into account in any determination of fault or liability in connection with that matter.

Apology Act 2006 (British Columbia)

(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

Civil Liability Act 2002 (New South Wales, Australia)

67 Application of Part

- (1) This Part applies to civil liability of any kind.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B or civil liability for defamation.

Note : Section 20 of the *Defamation Act 2005* makes similar provision to this Part about the effect of apologies in defamation proceedings.

68 Definition

In this Part:

"**apology**" means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.

69 Effect of apology on liability

- (1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:
 - (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
 - (b) is not relevant to the determination of fault or liability in connection with that matter.
- (2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

Apologies (Scotland) Bill 2015

1. Effect of apology in legal proceedings

In any legal proceedings to which this Act applies, an apology made (outside the proceedings) in connection with any matter—

(a) is not admissible as evidence of anything relevant to the determination of liability in connection with that matter, and

(b) cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made.

2. Legal proceedings covered

(1) This Act applies to all civil proceedings (including inquiries, arbitrations and proceedings before tribunals) except—

(a) inquiries under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, and

(b) defamation proceedings.

(2) This Act does not apply to criminal proceedings.

(3) The Scottish Ministers may by regulations modify the list of exceptions in subsection (1).

(4) Regulations under subsection (3) are subject to the affirmative procedure.

3. Definition of apology

In this Act an apology means 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.