

Apologies Bill Consultation: response from Mental Welfare Commission for Scotland

Thank you for asking the Mental Welfare Commission for Scotland to comment on the proposed Apologies (Scotland) Bill. We have read the proposal carefully and will confine our comments to those aspects of the proposal which fall within our statutory role.

We are an independent statutory body, established by an Act of Parliament. We put individuals with mental illness, learning disability and related conditions at the heart of all we do: promoting their welfare and safeguarding their rights.

Much of our work is at the complex interface between the individual's rights, the law and ethics and the care the person is receiving. We work across the continuum of health and social care.

We should make it clear that The Commission plays no role in either the NHS or the Local Authority complaints process. We have no authority to pursue a complaint against other organisations and advise individuals who contact us to take up their complaint with the relevant organisation. We are however, interested to hear from people who feel that their rights have not been respected.

If we are very concerned about an individual's care and treatment and think that their case highlights wider concerns within the health, social care or justice system we may decide to investigate further. Following such an investigation, carried out under Section 11 of the Mental Health Care and Treatment (Scotland) Act 2003, a report will be published and sent to the organisations that we think need to review and respond to our recommendations. Occasionally these recommendations will include the need to offer an apology such as, for example, in the case of our investigation into the care of Mr and Mrs D:

http://www.mwscot.org.uk/media/56140/powers_of_attorney_and_their_safeguards.pdf

We recommended that the local authority make an apology to the couple, which it did.

The proposed Bill has laudable aims and we fully acknowledge the importance and power of a genuine apology to an individual who has suffered through an error of whatever nature. In this we support the view expressed by the SPSO .

However, we are not convinced for the need for additional legislation to address the predominantly cultural and social reluctance on the part of individuals and public bodies to make a full and meaningful apology.

There may indeed be a misperception amongst health care professionals that making an apology can lead to litigation, but again, we can find no evidence to substantiate this belief. We note that Section 2 of the 2006 Compensation Act stipulates that '*an apology, offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty*'. It could be that a relatively simple solution would be to extend the territorial extent of the provisions in section 2 to include Scotland, but we are not constitutional lawyers and are cautious about expressing an opinion on such matters.

NHS Boards already provide apologies and it is our understanding that in the Law Society's view, these apologies are not regarded as admissions of civil liability. Indeed the NHS complaints policy explicitly states:

"Even prima facie evidence of negligence should not delay a full explanation of events and, if appropriate an apology: an apology is not an admission of liability."

For over 50 years the Medical Defence Union has advised its members to apologise if something goes wrong. Doctors have an ethical obligation to offer an apology and an explanation if something has gone wrong and it is the MDU understanding (which we share) that there is no legal reason not to do so.

While we welcome the spirit of the proposed legislation, in our view the social and cultural reluctance to make an apology may be better addressed by:

- 1) extension of education and training to all NHS staff on the nature and value of apology and understanding the NHS complaints policy, for example as exemplified in Flying Start NHS, the staff developmental programme for every newly qualified nurse, midwife and AHP in Scotland <http://www.flyingstart.scot.nhs.uk/learning-programmes/safe-practice/complaints.aspx>
- 2) a greater investment in training in complaints handling in public bodies
- 3) implementation of the Patients Rights Act passed last year
- 4) improving the patient's experience and communication with carers and families

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Mental Welfare Commission for Scotland