



The Scottish Parliament
Pàrlamaid na h-Alba

Paul Wheelhouse MSP
Minister for Community Safety and
Legal Affairs
St Andrew's House
Regent Road
Edinburgh EH1 3DG

Room M2.09
Scottish Parliament
Edinburgh EH99 1SP
Tel 0131 348 5639

Email:
Margaret.Mitchell.MSP@scottish.parliament.uk

22 October 2015

Dear Paul,

Apologies (Scotland) Bill

I am writing further to our helpful meeting on 8 October, where you expressed the Scottish Government's support for the aims of my Bill, but explained your continuing reservations, including the possibility of unintended prejudice to pursuers. At the end of that meeting, I said that I wished to consider the points made and to consult, in particular, Professor Alan Miller, chair of the Scottish Human Rights Commission. I also committed to updating you on my thinking in advance of the Stage 1 debate.

Accordingly, I e-mailed Professor Miller to seek his further input. In my e-mail, I began by outlining what I understood the Scottish Government's position to be, in particular your preference for section 1 to be limited to a clarification of the common law position, along the lines of section 2 of the Compensation Act 2006.

My e-mail went on:

"There are various opinions, therefore, I'm thinking perhaps of a possible third way, namely taking out health and possibly personal injury claims and then leaving the full protection of an apology, which would involve regret, acknowledgment, empathy and an undertaking to look into the outcome or circumstances. The minister at the outset today acknowledged that the Bill has a wider application. So, in effect, my third way would be ensuring that there was proper protection for apologies issued from public and private sector bodies, other than the health service and anything involving a personal injury claim.

"Would this way forward give the survivors of sexual abuse any comfort or even ensure they could take advantage of the legislation?"

Professor Miller has now replied (to a follow-up e-mail of yesterday's date) in the terms attached.

As you will see, he strongly supports the retention of the provision (in section 1) that ensures that an apology (as defined in section 3), in any legal proceedings to which

the Bill applies (as defined in section 2), “is not admissible as evidence of anything relevant to the determination of liability”. He also does not support the exemption of personal injury actions, arguing that this would “remove the intended positive impact on survivors of historic child abuse”.

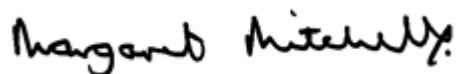
Having reflected further since our meeting, and informed in particular by Professor Miller’s letter, I cannot agree at this stage that the direction of travel should be towards amending section 1 of the Bill along the lines of section 2 of the 2006 Act. I remain concerned that such an amendment would compromise the Bill’s ability to effect the culture change that we have agreed is required. This is also the view of Professor Prue Vines, who remains decidedly of the opinion, on the basis of international evidence, that making apologies inadmissible as evidence is key to the effectiveness of apologies legislation (including legislation on the same model as your proposed “duty of candour”).

However, I do appreciate the need to make compromises and to take on board the concerns that have been expressed (including in evidence to the Justice Committee). I have already indicated some changes I would be prepared to make, and I remain committed to continuing to engaging constructively and with an open mind as to the best way forward. I am very conscious that, in the present political context, a Member’s Bill can only become law with the support of your party – and, equally importantly, could only be successfully implemented with the active engagement of Scottish Government – so it is clearly important that we work together to shape legislation in which we can jointly have confidence.

The first step is to secure the Parliament’s backing for its general principles on Tuesday to allow the Bill to move forward to the amending stages. I would hope we could then reach agreement on amendments that we can both support, but if that does not prove possible, you have the reassurance of knowing that the voting strength of your party would allow your view to prevail, at Stage 3, if need be.

I am copying this letter, as a courtesy, to Christine Grahame, as convener of the Justice Committee, whose Stage 1 report will of course shape the debate on the Bill on Tuesday.

Yours sincerely,

A handwritten signature in black ink, reading "Margaret Mitchell". The signature is written in a cursive, slightly slanted style.

Margaret Mitchell MSP

Annexe: Letter from Professor Alan Miller

Scottish Human Rights Commission
4 Melville Street
Edinburgh
EH3 7NS

22 October 2015

Dear Margaret

Apologies (Scotland) Bill

I write further to your email dated 21 October 2015. I would like to begin by thanking you for the valuable work you have done, and continue to do, in this important area. The Commission also welcomes the support the Scottish Government has shown to the overall aims and objectives of the Bill.

I now turn to the substance of your email and to your specific questions. It is the Commission's view that adopting a similar model to that of the Compensation Act 2006 would not achieve the aims of the Bill and would not meet the expectations of survivors of historic child abuse in Scotland. The main reason for this is that, although an apology under this model would not constitute an admission of negligence, apologies could still be admissible as evidence in legal proceedings. The Commission believes that this would essentially preserve the status quo, with individuals or organisations unwilling to apologise for fear this would be later used against them in court.

The Commission is also of the view that a long list of exceptions would be unhelpful as this could create confusion, in turn discouraging full apologies within the spirit of the Bill. For example, it would not be acceptable to remove personal injury actions from the scope of the Bill. Historic child abuse, when it is the subject of civil proceedings, would usually be pursued as a personal injury action. Therefore, the Commission's view is that removing this from the scope of the Bill would, in particular, remove the intended positive impact on survivors of historic child abuse.

It appears that the fundamental concern with the Bill, as currently drafted, is that individuals would somehow be prejudiced if apologies were made inadmissible in civil proceedings. While fully respecting the rights of individuals to pursue claims in the civil courts – indeed, that is an aspect of an effective remedy – the Commission does not agree with this assessment.

Firstly, this assessment places too much emphasis on the assumption that the majority of those individuals who have suffered a wrong automatically wish to pursue their claim in court; for a number of people, this may not be the case. Secondly, those individuals who do wish to pursue their case will not be “prejudiced” by the fact that an apology is inadmissible in court as in the vast majority of cases, an apology would not be forthcoming if it could be relied on as evidence in a later civil claim. That is to say that, in most cases, it is the fact that the apology will be inadmissible in court that will allow the apology to be made – if apologies are admissible in civil proceedings, experience tells us that they will not be offered. Under the current Apologies (Scotland) Bill, a pursuer would benefit from the personal comfort or closure that an apology offers. If they later chose to pursue a civil claim, with effective legal explanation, they would be able to reconcile themselves with the fact that the apology is not of legal value. The psychological and emotional value of an apology should not, however, be underestimated.

The Apologies (Scotland) Bill represents a significant opportunity to ensure effective remedies for survivors of historic child abuse and many others in Scotland and the Commission would be very disappointed were this opportunity to be missed. As you know, there are a number of other common law jurisdictions (such as Canada and Australia) where apology laws have operated effectively for some time. The Commission would be interested to know to what extent the Scottish Government has scrutinised those international examples and what specifically differentiates circumstances in those countries from the situation in Scotland.

Thank you again for your work in this area.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Miller', written in a cursive style.

Prof. Alan Miller

Chair

Scottish Human Rights Commission