

APOLOGIES (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

The structure of the Act

4. **Sections 1 to 3** comprise the main provisions of the Act. In turn, those provisions deal with the effect of an apology in legal proceedings, then set out the proceedings which are covered, and provide a definition of an apology for the purpose of the Act. Section 4 provides that the Act only applies to apologies made after section 1 of the Act has come into force, and only in relation to legal proceedings begun after that time. Section 5 deals with commencement and section 6 sets out the short title of the Act.

Section 1 – Effect of apology in legal proceedings

5. **Section 1** sets out the effect of an apology made outside the legal proceedings to which the Act applies (namely, the proceedings referred to in section 2). An apology, as defined in section 3 of the Act, is not admissible as evidence of anything relevant to the determination of liability and cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made. Section 1(b) would not prevent an apology being used as evidence where to do so would have a favourable effect on the person making such an apology.

Section 2 – Legal proceedings covered

6. **Section 2** sets out the legal proceedings which are covered by the Act.
7. Under subsection (1) all civil proceedings are covered, with the exception of certain types of inquiry under the Inquiries Act 2005, proceedings under the Children's Hearings (Scotland) Act 2011, fatal accident inquiries (FAIs) or other inquiries under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, and defamation proceedings.
8. The exception of inquiries (including joint inquiries) which the Scottish Ministers cause to be held under section 1 of the Inquiries Act 2005, or which they convert (under section 15 of that Act) into inquiries under that Act, means that an apology will continue to be admissible as evidence in these proceedings.
9. The exception of proceedings under the Children's Hearings (Scotland) Act 2011 means that an apology will continue to be admissible in, and capable of being relied on as evidence in, proceedings (under that Act) before a children's hearing, a pre-hearing panel or a court.
10. Under subsection (2) a further exception applies to apologies made in the context of the duty of candour procedure set out in Part 2 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill, introduced on 4 June 2015 and, at the time these Notes were published, still before the Scottish Parliament (SP Bill 73, Session 4 (2015)). Under Part 2 of that Bill, an apology made in the context of the duty of candour procedure does not of itself amount to an admission of negligence or a breach of a statutory duty. The

*These notes relate to the Apologies (Scotland) Act 2016
(asp 5) which received Royal Assent on 23 February 2016*

inclusion of this exception avoids any overlap between this procedure and the Act in terms of how apologies made in the context of the duty of candour procedure are treated.

11. While the Act applies to most civil proceedings, it does not cover criminal proceedings and this is confirmed by subsection (3).
12. Subsection (4) enables the Scottish Ministers, by regulations, to modify the exceptions in subsections (1) and (2). The power can be used to add an exception, vary the description of an exception or remove an exception.
13. Regulations made under subsection (4) are subject to the affirmative procedure (subsection (5)): that is, any such regulations require the approval of the Parliament by resolution.
14. By virtue of subsection (6), those regulations can include transitional, transitory or saving provision.

Section 3 – Definition of apology

15. **Section 3** sets out what is meant by “apology” for the purposes of the Act.
16. This provides that an apology is a statement (which could be written or oral) made either by the person who is apologising (whether a natural person, or a legal person such as a company), or by someone else on their behalf (e.g. a spokesperson or agent). The core element is an indication that the person is sorry about, or regrets, an act, omission or outcome. Where the statement includes an undertaking to look at the circumstances with a view to preventing a recurrence, that qualifies as part of the apology itself. The definition of apology for the purpose of the Act does not include statements of fact or admissions of fault. In any statement that includes both an apology and a statement of fact and/or admission of fault, only the apology is inadmissible as evidence of liability.

Section 4 – No retrospective effect

17. **Section 4** provides that the Act only applies to apologies made after section 1 of the Act comes into force, and only to legal proceedings which began after section 1 was commenced (even if the matters apologised for took place earlier). As such, the Act will have no retrospective application.

Section 5 – Commencement

18. **Section 5** provides that it and section 6 come into force on the day after Royal Assent. The Scottish Ministers may make commencement regulations bringing the remaining provisions of the Act into force on a day or days they specify in the regulations. Commencement regulations may include transitional, transitory or saving provision and may appoint different days for different purposes.