The Forum of Complex Injury Solicitors' response to

The Ministry of Justice's Consultation:

"Reforming the law of apologies

in civil proceedings"

About Us

FOCIS members act for seriously injured claimants with complex personal injury and clinical negligence claims, including group actions. Some of our members also act as deputies principally for those who lack capacity to manage their own finances and affairs. The objectives of FOCIS are to:-

1. Promote high standards of representation of claimant personal injury and medical negligence clients,
2. Share knowledge and information among members of the forum,
3. Further better understanding in the wider community of issues which arise for those who suffer serious injury,
4. Use members' expertise to promote improvements to the legal process and to inform debate,
5. Develop fellowship among members.

See further www.focis.org.uk.

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 24 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Eight of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Ashtons Legal	JMW
Balfour + Manson	Irwin Mitchell
Bolt Burdon Kemp	Leigh Day
Dean Wilson	Moore Barlow
Digby Brown	Osbornes Law
Fieldfisher	Serious Law
Fletchers	Slater and Gordon
Freeths	Stewarts
Hodge Jones & Allen	Switalskis
	Thompsons NI

FOCIS has been the name since 2007 of the organisation formerly known as the Richard Grand Society (founded in 1997 based on the concept of the American 'Inner Circle of Advocates' which had been formed in 1972 by Arizona and San Francisco Attorney Richard Grand).

FOCIS members act for seriously injured claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures. We will defer to others to respond on the impact relating to other classes of case.

Introduction

We welcome the opportunity to respond to this consultation.

A sincere apology given by the right person at the right time can have a transformative effect on the lives of those who have been seriously harmed or wronged. It can aid their psychological recovery and take away understandable feelings of animosity and bitterness a client may have towards their wrong-doer. Apologies can have a positive effect in framing "the dialogue" around compensation, or "the space" in which that happens. It can foster better relations between the individuals involved (and their lawyers), leading to more constructive negotiations and better outcomes for all involved. Used in the right way they are then a force for good.

However, in our members' experience, sincere apologies are seldom volunteered, and if they happen at all they are often given grudgingly, or too late, or by the wrong person. An insincere or incomplete apology given years after the event can have the opposite effect to that intended – entrenching positions and fostering a heightened adversarial approach to litigation.

Anything that can be done to use apologies as a force for good is to be applauded but we believe it will prove difficult to legislate to make that happen.

Q1: Do you consider that there would be merit in the Government introducing primary legislation to reform the law on apologies in civil proceedings? Please provide reasons for your answer.

Yes. The provisions in the Compensation Act are under-used and any measure to promote the giving of sincere apologies is desirable. Its value as a statutory provision is in allowing discussions to be framed without the risk that someone apologising could jeopardise their insurance cover or unwittingly become liable for compensation, when that is not what is intended.

Q2: Do you agree that this legislation should broadly reflect the approach taken in the Scotland Apologies Act 2016? Please provide reasons for your answer.

The Scottish legislation appears to be clearer and more definitive. However anecdotal evidence from our members in Scotland suggests that apologies are seldom given in that jurisdiction either.

Q3: What do you believe the impacts and potential consequences would be on claimants or defendants should a Scottish style Apologies Act be introduced in England and Wales?

We had hoped that adopting the Scottish model would promote a greater use of apologies. After all, an early sincere apology from the right person can make all the difference. However it is clear that legislation needs to go further than the Scottish Apologies Act in order to promote a greater use of apologies. To make the legislation that is proposed effective it must contain appropriate provisions on compliance, regulation and enforcement.

Q4: Should the legislation provide a definition of an apology? Please provide reasons for your answer.

Yes this clarifies the legislation. We would advocate for a statutory obligation to apologise as already applies to NHS Trusts and other bodies regulated by the CQC. However, this duty would need to be enforced as in our experience it is not currently complied with properly

by trusts/care homes and is not regulated or enforced sufficiently to make it effective. We would also suggest that it should be extended to all state bodies, healthcare leaders (not just those working in a NHS Trust) and the civil service, as recently advanced by Sir Brian Langstaff, Chair of the Infected Blood Inquiry (see for example Infected blood scandal: inquiry chair Sir Brian Langstaff demands statutory duty of candour | Law Gazette).

Q5: Should the legislation apply to all types of civil proceeding, apart from defamation and public inquiries? If not, what other types of civil proceeding should be excluded? Please provide reasons for your answer.

Yes and whilst we are not defamation specialists we cannot see why such cases would also not benefit from a sincere apology albeit without an admission of harm done.

Q6: Would there be any merit in the legislation making specific reference to vicarious liability (on the basis it would clarify the position on apologies in historic child sexual abuse claims)?

Yes definitely, again for the purposes of clarification. Maybe – akin to employment cases – parties could have a without prejudice exchange or 'protected conversation' in order to provide a statutory apology without admission. For example a defendant which is vicariously liable in a child abuse case may want to acknowledge the hurt/ harm done by the perpetrator but may want to hold back arguments on limitation, their liability for the tort allegedly committed and causation. As above the giving of a sincere apology frames the discussion in a more civilised and less adversarial way and may help with healing the wounds inflicted.

We also take the view that employers should be encouraged to make early apologies to their employees in the wider context of serious injuries sustained in accidents at work. The experience of our members is that rarely happens. That is unhelpful when there is a long standing and enduring relationship between employer and employee and on occasions may even sour relations is a way that is non-conducive to the potential for the employee to ultimately return to work.

Q7: Should the legislation be clear that it would not be retrospective?

Yes

Q8: Are there any non-legislative steps, e.g., Pre-Action Protocols, that the Government should take to improve awareness of the law in this area? If so, what should these be, and should they be instead of – or in addition to – primary legislation?

Primary legislation is the key here providing the ability to make a statutory apology with its own set of criteria and its effect confined by Act of Parliament. The legislation need not be long or complicated. Guidance given in pre-action protocols would increase awareness amongst lawyers, but not necessarily amongst other parties and will only take effect once a letter before claim has been sent and therefore will already be within the context of a litigated outcome. We believe potential defendants may want the freedom to make a statutory apology even before litigation is contemplated.

We are clear that a pre-action protocol on apologies or amendments to the current protocols without legislation would not be sufficient, in main because we cannot see how it would be regulated or enforced. In our members' experience the various existing pre-action protocols are often not complied with, without any sanction imposed on the defendant to the litigation even if the case reaches court.

Q9: Do you have any evidence or data to support how widely the existing legislative provisions in the Compensation Act are used?

Our members rarely see apologies being made in practice, although in the clinical negligence sphere they are now offered more often than they used to be, albeit late.

In our experience, apologies made are only proffered once the claimant has obtained evidence to prove their claim, i.e. once the litigation process had begun, and the defendant has realised it will be liable to pay compensation. Such apologies are too late to appear sincere and make a meaningful difference to the claimant and their decision whether to proceed with litigation.

This remains the case in clinical negligence claims where the duty of candour applies. The experience of our members is that - despite the statutory duty and professional duty of candour applying to healthcare providers - the reality is that far too often the injured and/ or bereaved claimants we advise are not notified of an incident, not involved in any investigation and not offered a timely apology. Apologies (often qualified ones at that) are only given when, as a result legal investigations into liability, it becomes obvious to the defendant that they cannot avoid doing so.

Q10: What is your assessment of the likely financial implications (if any) of the proposals to you or your organisation?

None because it is not felt that the giving of a statutory apology would mean that compensation claims would not be pursued. Our members deal with the most serious of personal injuries. Clients like ours have no choice to pursue claims where their injuries are literally life-changing and often life-limiting; their future needs must be funded to allow them to live their best lives, however altered their circumstances. However an apology may assist a claimant's rehabilitation/ healing process and by framing the discussion within the terms of an apology this may remove much of the bitterness which characterises some negotiations.

That said, in fatal cases where bereavement damages are low and there is no ongoing need for money, litigation could, in some cases, be avoided altogether with a well-timed and sincere apology.

Q11: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.

We do not consider that the options for reform suggested will have any specific negative impact on those with protected characteristics.

If reform leads to further apologies being made it may be that people with disabilities will benefit particularly, in that of those bringing claims for compensation for personal injury and/or clinical negligence, many are left disabled.

Q12: Do you agree that we have correctly identified the range and extent of the equalities impacts under each of these proposals set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

Yes, we cannot identify any other equalities impacts.

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FOCIS

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