



Informing Progress - Shaping the Future

Apologies and Duties of Candour

Law Reform

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Apologies

**Ministry of Justice
Consultation,
Reforming the Law of
Apologies in Civil
Proceedings in England
& Wales (April 2024)**

#SORRY

NOT SORRY

Apologies

Options for Reform?

- Retain Compensation Act 2006, section 2
- The Apologies (Scotland) Act 2016
- Adopt the Hong Kong approach: an apology will not constitute an admission of fault or liability even if it includes such an admission; any statement of fact will, in most cases, be inadmissible in evidence
- Make legislative reference to VL to clarify the position on apologies in historic child sexual abuse claims
- Better guidance

Apologies

Government Response (February 2025)

- Use of apologies in civil litigation is intrinsically a good thing + brings potential benefits.
- General support for (1) additional guidance and communications on the use of apologies; (2) more being done via pre-action PAPs and ADR
- Majority support for some amendment to the Compensation Act 2006 (e.g., bringing VL within scope)
- Mixed views about the Scottish approach but broad support for a definition of 'apology'

Apologies

Government – Next Steps:

1. Amending the law will provide additional clarity that offering an apology does not represent admitting liability
2. A clear definition of an apology will reduce uncertainty over the distinction between an apology and admission of liability
3. Vicarious liability will be brought in scope
4. Issue further guidance + work on the use of apologies in PAPs



Hillsborough Law

The Case for Reform?

- Legislative action required to prevent a lack of candour

vs

- Existing legislative action has not changed behaviours > what is required is a change of organisational culture, not the imposition of additional/parallel duties
- Legal vs professional duties on public officials



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Duties of Candour & Apologies – the Link?

- Similar core aims – to improve openness and transparency
- Difference between the legal impact of apologies on civil claims vs a mechanism for imposing criminal duties and sanctions on individuals/bodies for a failure to be candid and transparent



Public Office (Accountability) Bill

Part 1: Implementing a duty of candour

- **Purpose:** To ensure Public Authorities (PA)/Public Officials (PO) perform their functions with candour, transparency and frankness, and in the public interest (C1(a))
- Schedule 2: Meaning of Public Authority/Official:
 - A body may be considered a PA if it performs functions of a public nature, provided it is not an excluded body
- Bill has UK wide application save for Chapter 3 of Part 2 and Parts 3 and 4 which extend to England and Wales only

Public Office (Accountability) Bill

Part 2

- **Chapter 1: Inquiries and Investigations**

- imposing a duty on PA/PO to act with candour, transparency and frankness in their dealings with inquiries and investigations and imposing criminal liability for breach of that duty (a **duty of candour and assistance**)
- Content of duty (C2(4)): *must provide all such assistance as they can reasonably give to assist ...*
- PA must supply a position statement
- C4: **Extension of duty to other persons with public responsibilities**
- C5: Offence of failing to comply with duty

Public Office (Accountability) Bill

Part 2 Chapter 2: Standards of Ethical Conduct

- Requiring PA to promote and take steps to maintain ethical conduct, candour, transparency and frankness
- Ethical principles include selflessness...
- Issue of codes and guidance



Public Office (Accountability) Bill

Part 2: Chapter 3 - Offence of Misleading the Public

- Clause 11: PA or PO commits an offence if, in their capacity as such an authority or official (a) they **act with the intention of misleading the public or are reckless as to whether their act will do so**, and (b) **they know, or ought to know, that their act is seriously improper**
- **Seriously improper =**
 - (a) it meets the condition in subsection (3), and (b) a reasonable person would consider it to be seriously improper, taking account of all the circumstances of the case
 - **Subsection 3(3):** the act (a) involved **dishonesty that was significant or repeated** (whether by means of falsehood, concealment, obfuscation or otherwise) in respect of matters of **significant concern to the public**, (b) **caused, or contributed to causing, harm to one or more other persons, or had the potential to do so**, and (c) **departed significantly from what is to be expected in the proper exercise of the person's functions as a PA/PO**

Public Office (Accountability) Bill

Offence of Misleading the Public

- Defences include *to show that they otherwise had a reasonable excuse for their act* (c11(6))
- The references to 'acts' includes 'omissions'
- Nothing in C11 applies to an act done for the purposes of journalism!
- Either way offence
- DPP consent for C11 prosecution
- Explanatory notes:
 - offence does not apply to individual interactions
 - not intended to apply to instances of accidental or inadvertent misleading

Public Office (Accountability) Bill

- **Part 3: Misconduct in Public Office**

- Imposing criminal liability for seriously improper acts by individuals holding public office and for breaches of duties to prevent death or serious injury (**replacing/supplementing the common law offence of misconduct in public office**)

- **Part 4: Participation of Persons at Inquiries/ Investigations**

- Provision for parity in representation where a PA is a participant or interested person
 - Necessity + proportionality in legal representation for a PA
 - Non means tested LA funding for inquests estimated to cost between £65-180m per annum, with a further estimated cost of up to £3.1m per annum of operational costs to the Legal Aid Agency

Public officials and human rights?

- Do the new offences infringe the rights of officials under the common law or Article 6 ECHR (e.g., the right against self-incrimination and/or to remain silent)?
- Imposing duties of candour on individuals **require support** to be fair and effective to the duty holder



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Public officials and human rights?

Will the **reasonable excuse defence** and the **partial reverse burden of proof** in Clause 11 offer sufficient protection for officials?

- The common law right/privilege against self-incrimination already involves a balancing exercise - *Akcinė Bendrovė Bankas Snoras v Antonov and another* [2013] EWHC 131 (Comm)
- The duty at Clause 2 and the offence at Clause 5 reduce rights in the context of relevant inquiries/investigations
- Officials already subject to the general criminal law governing **perjury/fraudulent statements** and **Nolan obligations** under the Civil Service Code (now Chapter 2 of Part 2 of the Bill)
- Officials may operate in time/resource poor environments
- Is the stick better directed against public authorities?