

**ENACTMENT OF
APOLOGY LEGISLATION IN
HONG KONG: FINAL REPORT AND
RECOMMENDATIONS**

This Report is also published online at:

<http://www.doj.gov.hk/eng/public/apology.html>

ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG: FINAL REPORT AND RECOMMENDATIONS

CONTENTS

CHAPTER 1: BACKGROUND	1
THE 2 ND ROUND CONSULTATION PAPER	1
THE 2 ND ROUND CONSULTATION	1
METHODOLOGY OF CONSULTATION	2
CHAPTER 2: OVERVIEW OF THE RESPONSES RECEIVED	3
CHAPTER 3: ISSUE 1 – EXCEPTED PROCEEDINGS TO WHICH THE PROPOSED APOLOGY LEGISLATION SHOULD NOT APPLY	4
COMMENTS RECEIVED	4
ANALYSIS AND RESPONSE.....	23
FINAL RECOMMENDATION	33
CHAPTER 4: ISSUE 2 – WHETHER THE FACTUAL INFORMATION CONVEYED IN AN APOLOGY SHOULD LIKEWISE BE PROTECTED BY THE PROPOSED APOLOGY LEGISLATION	35
NUMBER OF RESPONSES IN RELATION TO THIS ISSUE	35
COMMENTS FROM THOSE WHO SUPPORT THIS ISSUE.....	35
COMMENTS FROM THOSE WHO OPPOSE THIS ISSUE	59
OTHER COMMENTS	63
THE 3 ALTERNATIVES.....	67
ANALYSIS AND RESPONSE.....	69
FINAL RECOMMENDATION	74
CHAPTER 5: ISSUE 3 – THE DRAFT APOLOGY BILL.....	75
COMMENTS RECEIVED	75
ANALYSIS AND RESPONSE.....	82
DRAFT APOLOGY BILL	86
CHAPTER 6: FINAL RECOMMENDATIONS.....	87
ANNEX 1: LIST OF RESPONDENTS TO THE 2ND ROUND CONSULTATION	88
ANNEX 2: MEMBERSHIP OF THE STEERING COMMITTEE ON MEDIATION	90
ANNEX 3: MEMBERSHIP OF THE REGULATORY FRAMEWORK SUB-COMMITTEE OF THE STEERING COMMITTEE ON MEDIATION	91
ANNEX 4: DRAFT APOLOGY BILL.....	92

Chapter 1: Background

The 2nd Round Consultation Paper

1.1 The paper entitled “*Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation*” (“2nd Round Consultation Paper”) was published by the Steering Committee on Mediation (“Steering Committee”) on 22 February 2016. It reported on the responses received during the 1st round consultation in June 2015 (“1st Round Consultation”) after the paper entitled “*Consultation Paper Enactment of Apology Legislation in Hong Kong*” (“1st Round Consultation Paper”) was published. Further, it invited comments from the public and stakeholders on the following issues:

- (1) Excepted proceedings to which the proposed apology legislation shall not apply;
- (2) Whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation; and
- (3) The draft Apology Bill annexed to the 2nd Round Consultation Paper.

1.2 The contents of the 1st Round Consultation Paper and the 2nd Round Consultation Paper will not be reproduced in this report but they should be read in conjunction with this report. Readers may find these papers at the following link: <http://www.doj.gov.hk/eng/public/apology.html>.

The 2nd Round Consultation

1.3 The 6-week 2nd round public consultation (“2nd Round Consultation”) started on 22 February 2016 and ended on 5 April 2016. Requests were received from some organisations/bodies for an extension of time for submissions of their written responses. All of the requests were acceded to since the extension requested

was not unreasonable and would not give rise to undue delay to the overall progress. Late submissions were received from a number of organisations which were included in the consideration.

Methodology of Consultation

1.4 Like the 1st Round Consultation, the submissions were received mainly through post, fax or e-mail as the prescribed means stated in the 2nd Round Consultation Paper. In addition, comments were received from attendees of two consultation forums organised by the Steering Committee. The first forum (conducted in Cantonese) was held on 15 March 2016 and about 100 persons attended. The second forum (conducted in English) was held on 21 March 2016 and about 70 persons attended. Furthermore, with the assistance of the Home Affairs Department to which the Steering Committee is grateful, comments were also received from the online Public Affairs Forum. The main responses received will be addressed in the following chapters. As stated in the 2nd Round Consultation Paper, anyone who responded to the consultation may be acknowledged and referred to in a subsequent document or report unless the respondent specified that an acknowledgement was not desired. A list of the organisations/bodies/persons responded to the 2nd Round Consultation is set out in **Annex 1** of this report.

1.5 Apart from the above, the Secretary for Justice, Ms Lisa Wong, SC, some members of the Steering Committee and counsel of the Department of Justice attended the meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council (“AJLS Panel”) on 22 February 2016 and briefed AJLS Panel Members on the 2nd Round Consultation Paper and the issues for consultation. This report had been reviewed by the Working Group on Apology Legislation and the Regulatory Sub-committee of the Steering Committee. The Steering Committee is grateful to members of the Steering Committee, the Regulatory Framework Sub-committee and the Working Group on Apology Legislation for their contribution before and throughout the 2nd Round Consultation. The updated lists of members of the Steering Committee and its Regulatory Framework Sub-committee can be found at **Annex 2** and **Annex 3** respectively.

Chapter 2: Overview of the responses received

2.1 In the 2nd Round Consultation, 60 written submissions were received, with 3 of the organisations/bodies/persons concerned requesting not to be acknowledged. In addition, comments were received from the attendees of the two consultation forums on 15 March 2016 and 21 March 2016 and the online forum mentioned in paragraph 1.4 above.

2.2 These responses were submitted by various Government departments, statutory bodies or regulators, political parties, academics, civil and social organisations as well as stakeholders from various sectors such as banking, engineering, medicine, law and mediation. As noted in paragraph 1.4 above, a list of the organisations/bodies/persons can be found at Annex 1.

2.3 In the chapters to follow, the comments regarding the 3 issues under consultation will be discussed. We do not find it necessary to set out each and every of the submissions received as some submissions are similar or overlap with the analysis in the 2nd Round Consultation Paper. There will be an analysis of the matters followed by the final recommendations of the Steering Committee. When preparing the statistics of the comments on the matter (where applicable), the following approach is taken: the comments received regarding the issues will be sorted into three categories: agree, oppose and neutral. For comments which give an express indication, they are categorised accordingly. For comments which do not express any views on the particular matter or raise neutral comments, they would be categorised as neutral or “no explicit stance made”.

Chapter 3: Issue 1 – Excepted proceedings to which the proposed apology legislation should not apply

Comments received

3.1 We received the following comments from various stakeholders regarding the excepted proceedings:

- (1) “Whilst we understand why criminal proceedings should be excluded from the application of the apology legislation and any other exclusion will have to be justified, there appears to be no reason why proceedings conducted under the Commissions of Inquiry Ordinance (Cap.86) and the Coroners Ordinance (Cap. 504) should be excluded. We are of the view that only criminal proceeding should be excluded from the application of the apology legislation.” (Hospital Authority)
- (2) “The Ombudsman shares the view of the Steering Committee that to ensure the efficacy of the apology legislation, both disciplinary proceedings and regulatory proceedings should be covered. Exemptions should be granted sparingly and only with strong justifications. While the concerns expressed by some regulatory bodies during the 1st Round Consultation are understandable, we note that in general regulatory bodies do have sufficient statutory power and means to obtain evidence in respect of matters that are tasked to regulate. If the apology containing an admission of fault is the only piece of evidence that the regulatory body can rely on to establish liability, it is inconceivable that the regulatee would have tendered that apology in the first place. Admission of fault caused by so-called slip of the tongue in a spontaneous apology is unsafe to rely on even if it happens. If necessary, the regulator may require the

regulatee to submit a separate statement of facts which would be admissible by virtue of clause 4(4) of the Bill.” (Office of the Ombudsman, Hong Kong)

- (3) “We note that the comments made in our previous letter of 29 July 2015 have been reproduced at paragraph 4.4(1) of the Report. However, the Report does not seem to address those comments in reiterating the proposals made in the first consultation. Thus, no account has been taken of the comments that we made about the nature of SFC disciplinary proceedings which should have made it clear that they differ from those in relation to healthcare, legal and engineering professionals as mentioned in paragraph 4.7 of the Report. Also, paragraph 4.10 both fails to respond to our comments about the Securities and Futures Appeals Tribunal and repeats the proposal that the apology legislation apply specifically to the Market Misconduct Tribunal with no additional explanation as to why this is appropriate. Regarding the invitation at paragraph 4.11 of the Report for ‘relevant stakeholders’ to propose specific regulatory proceedings to be exempted from the application of the apology legislation, for the reasons we gave previously (as stated in paragraph 4.4(1)) we propose that the following items be added to the Schedule to the new Bill following the format at page 87 of the Report: ‘4. Disciplinary proceedings under Part IX of the Securities and Futures Ordinance (Cap. 571). 5. Proceedings before the Securities and Futures Appeals Tribunal under the Securities and Futures Ordinance (Cap. 571). 6. Proceedings before the Market Misconduct Tribunal under the Securities and Futures Ordinance (Cap. 571).’ (Securities and Futures Commission)
- (4) “As we have mentioned before, the EAA’s inquiry proceedings under section 34 of the Estate Agents Ordinance (inquiry proceedings) are instituted for the purposes of protecting the public, maintaining public confidence in the integrity of the

estate agency trade and upholding the proper standards of estate agency practice in Hong Kong. They form an integral part of the EAA's regulatory functions and as the application of the proposed apology legislation might affect or undermine EAA's regulatory function, we reiterate that it would be better for the EAA's inquiry proceedings to be exempted from the application of the apology legislation, especially one where the factual information conveyed in an apology is also protected." (Estate Agents Authority)

- (5) "We are of the view that the proposed Apology Legislation should not cover proceedings involving the exercise of powers of the Monetary Authority ("MA") or the relevant tribunal under an enactment. The powers and duties of the MA are set out in a number of ordinances, including the Banking Ordinance (Cap. 155), the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap.615), the Payment Systems and Stored Value Facilities Ordinance (Cap. 584), the Securities and Futures Ordinance (Cap. 571), the Deposit Protection Scheme Ordinance (Cap. 581) and the proposed Financial Institutions (Resolution) Bill (collectively, the "Legislation"). The proceedings conducted by the MA are generally fact-finding in nature. When exercising his powers or performing his functions under the Legislation, the MA will take into account all relevant considerations which would include all relevant information as to the facts and questions in issue, and where appropriate, the apology made by a party. The application of the proposed Apology Legislation will render such apology and any admissions of fact contained therein inadmissible in the said proceedings. This may have adverse implications on the MA's ability to carry out his statutory functions under the Legislation as a blanket exclusion of an apology would fetter the MA's or the relevant tribunal's discretion to admit or consider (where the usual rules of evidence do not apply) evidence which

is relevant to issues not only of fault and responsibility but also to the appropriate sanction and this may have a broad impact on the fairness of the proceedings. Further, it appears that the rationale for Apology Legislation, namely to facilitate amicable settlement, does not apply to the above-mentioned proceedings as such proceedings are conducted by the MA in the exercise of his statutory functions and serve the wider public interest in achieving a measure of remediation, deterrence and punishment. The MA may still continue the proceedings even if an apology or a settlement has been made. Based on the aforesaid reasons, we consider that the proposed Apology Legislation should not apply to the proceedings involving the exercise of powers of the MA or the relevant tribunal under the above-mentioned Legislation and suggest that such proceedings be listed in the Schedule to the Apology Bill.” (Hong Kong Monetary Authority)

- (6) “The [Communications Authority (‘CA’)] performs functions under various ordinances including, amongst others, Telecommunications Ordinance, Cap. 106 (‘TO’), Broadcasting (Miscellaneous Provisions) Ordinance, Cap. 391 (‘B(MP)O’), Broadcasting Ordinance, Cap. 562 (‘BO’), Unsolicited Electronic Messages Ordinance, Cap. 593 (‘UEMO’) and Competition Ordinance, Cap. 619 (‘CO’) (collectively ‘Ordinances’). Headed by the Director-General of Communications, [Office of the Communications Authority (‘OFCA’)], as the executive arm of the CA, is responsible for supporting the CA in administering and enforcing the Ordinances. Under the Ordinances, the CA regulates the conduct of licensees and other parties (collectively ‘Regulated Parties’) and enforces the provisions in the Ordinances and conditions imposed in licences or other instruments issued under the Ordinances (collectively ‘Regulatory Requirements’) against the Regulated Parties. From time to time, the CA would receive information or complaint about suspected breach of the

Regulatory Requirements, carry out enquiry or investigation in respect of the suspected breach and make regulatory/enforcement decisions, namely whether to (1) make a finding of breach and impose directions or sanctions; or (2) bring the cases to the court seeking it to determine breach and impose sanctions ('Enforcement Decisions'), as per the regulatory/enforcement powers conferred to it under the relevant provisions in the Ordinances ('Enforcement Provisions')...In the process leading to the Enforcement Decisions, various information or documents may be provided by the Regulated Parties and relied on by the CA in making Enforcement Decisions. Such information or documents may be supplied by the Regulated Parties either voluntarily before or at an enquiry stage (i.e. before the CA formally launches an investigation on the matter or exercises its formal information seeking/investigation powers), or pursuant to the information seeking/investigation powers conferred on and exercised by the CA under various statutory provisions in the Ordinances or licence conditions ('Information Seeking Powers')...There may be circumstances that a Regulated Party, in providing information to the CA, either voluntarily or in compliance with the Information Seeking Powers exercised by the CA, expresses regret on or says sorry about certain act that it has committed against certain parties or is contrary to statutory/licensing provisions ('Apology to CA'). At present, the CA will take into account such Apology to CA (including any statement of facts made in the apology), together with other relevant information and evidence gathered, to make an Enforcement Decision in relation to the Regulated Party. OFCA submits that the enactment of the Apology Bill should not in any way affect or curtail the performance of the CA's regulatory or enforcement functions, in that any Apology to CA provided at any time (including in circumstances where an enquiry or investigation is

not yet formally launched, or Information Seeking Powers not formally exercised) should fall outside the scope of the Apology Bill, such that the CA may continue to take into account such Apology to CA in processing the matter and making an Enforcement Decision. We do not consider that Apology to CA has any relevance to the object of the draft Apology Bill of facilitating the resolution of disputes, as it is the duty of the CA as the regulatory/enforcement authority to enforce the Ordinances and take actions against parties who contravene the Ordinances, or licence conditions or other instruments issued under the Ordinances...OFCA notes that various regulatory authorities have made submissions during the first round of consultation and expressed concerns over potential problems that may arise from application of the draft Apology Bill. The performance of functions by the CA bears similarities with these regulatory authorities, particularly in relation to the process of discharging investigatory and regulatory/enforcement functions under the respective statutes. OFCA notes that only limited numbers of excepted proceedings have been listed in the Schedule to the draft Apology Bill, namely proceedings under the Prison Rules (Cap. 234A), the Commissions of Inquiry Ordinance (Cap. 86) and the Coroners Ordinance (Cap. 504), whilst proceedings of other regulatory authorities are not included in the Schedule despite the concerns raised by them. OFCA expects that the Apology Bill will not adversely affect the exercise of powers and performance of functions by the CA and other regulatory authorities, and on this basis OFCA has no strong view on whether the proceedings under the Ordinances should be included in the Schedule to the Apology Bill. However, in the event that the Steering Committee considers it appropriate for the proceedings of any other regulatory authorities to be included in the Schedule, OFCA requests that similar exception treatment be applied to the proceedings of the CA under the

Ordinances having regard to the similarity of the nature of the proceedings involved.” (Office of the Communications Authority)

- (7) “The Minor Employment Claims Adjudication Board (MECAB) has jurisdiction to adjudicate minor employment claims like that of the Labour Tribunal. Subject to whether the Judiciary, especially the Labour Tribunal, would seek exclusion from the Apology Legislation, at the moment we do not consider it necessary for MECAB to be excluded from the coverage of the Apology Legislation.” (Labour Department)
- (8) “This recommendation supports one purpose of the legislation, namely to remove the disincentive amongst professionals and others who are subject to disciplinary proceedings to apologise for fear that it will be adverse evidence in misconduct proceedings as well as in civil proceedings. In my view the rationale for the legislation applies to disciplinary proceedings. The apology provisions only preclude an apology having legal effect for specific purposes and do not preclude misconduct proceedings being pursued and misconduct being proved. Nor do they prevent an apology being admissible evidence for other purposes, including for decisions about sanctions. What may need to be considered is whether the Ordinance will apply to decisions as to *whether to bring* disciplinary proceedings. Clause 6 of the Apology Bill is confined to the scope of clause 5 which refers to ‘proceedings’. It is clear that once proceedings are commenced, evidence of an apology would be excluded for the purposes stated in the Ordinance. It would still be admissible for purposes of making orders because an apology and its terms will remain a mitigating or aggravating factor. A question raised by submissions referred to in the Report is, if the Ordinance applies to disciplinary proceedings what does this mean for proceedings where the usual rules of evidence do not apply. This is an important question which is addressed by clause 5 in conjunction with clause 6(b)

‘must not be taken into account in determining fault, liability or any other issue in connection with the matter to the prejudice of the person.’ (my emphasis). It is a question of statutory construction whether this Ordinance overrides the rules that apply to disciplinary proceedings. My understanding is that this is the intent behind this Bill. There is case law from Canada that confirms that evidence of an apology for the purposes of proving fault or liability will be inadmissible even in a jurisdiction where the usual rules of evidence do not apply. Evidence of an apology will be excluded in Canadian Human Rights Act provisions where the purposes of tendering evidence of the apology is to prove fault or liability: see *Sleightholm v Metrin* ((2013) Carswell BC 1258). Evidence may be admissible for other purposes. In *Boehler v Canfor Pulp* ((2011) Carswell BC 835), the British Columbia Human Rights Tribunal was required to determine whether Canfor Pulp Limited Partnership (Canfor) had discriminated against the applicant with respect to his employment on the basis of his physical disability, contrary to s13 of the Human Rights Code. The issue arose whether evidence of an apology made by another employee, Mr Brown, was admissible in the proceedings. The applicant argued that Apology Act, S.B.C. 2006, c. 19 was effective to exclude evidence of the apology being admitted and relied upon by the Tribunal. The Tribunal held that the Apology Act was not applicable to the matter because the evidence was being relied upon to demonstrate one of the repercussions to secret taping by a third party and not for any other purpose. The Tribunal member accepted the evidence tendered of Mr Brown’s apology as evidence at the hearing under section 27.2(1) of the Code on that basis...The Steering Committee takes the view that the proposed apology legislation should apply to regulatory proceedings unless valid justification of a specific type of proceedings can be put forward to exempt a specific type of regulatory proceedings. The proposal to create a schedule of

excepted proceedings appears justified and is sensible. This approach may need to be reviewed at some point. I have no other comments to make on this question.” (Professor Robyn Carroll)

- (9) “The HK Apology Legislation should not apply to fact finding proceedings.” (Kevin Ng & Co., Solicitors)
- (10) “We are thankful that the Steering Committee on Mediation has accepted our suggestion of not applying the proposed apology legislation to disciplinary proceedings against prisoners under rules 57 to 65 of the Prison Rules (Cap. 234 sub leg. A). Apart from prisoners, persons in custody under the management of CSD include other categories such as Detention Centres detainees, Drug Addiction Treatment Centres inmates, Training Centres inmates or Rehabilitation Centres offenders under the respective Ordinances. Suitable wording would be used to ensure that the proposed schedule of excepted proceedings would equally cover similar disciplinary proceedings against different categories of PICs.” (Correctional Services Department)
- (11) “The proposed ‘Security of Payment’ legislation will be introducing statutory adjudication to the construction industry. Whilst adjudication offers a very rapid process to determine a dispute between contracting parties, it sometimes involves a possible trade-off in the quality of the decision being rendered by the adjudicator. Given that adjudicators will not necessarily be legally trained, they might only be expected to conduct the adjudication fairly, observing the rules of natural justice. In those circumstances an adjudicator’s decision would be enforced by the Court even if such decision contained errors of fact and/or law. The Court could in some circumstances uphold and enforce the adjudicator’s decision even when protected information covered by the Apology Bill is relied upon in an adjudication. Accordingly, to offer certainty to the adjudication process and the subsequent enforcement by the Court, we consider that statutory adjudication under the proposed ‘Security of Payment’

legislation should not be subject to the Apology Bill. This would avoid any doubt as to whether an adjudicator admitting as evidence information protected by the Apology Bill would affect the enforceability of an adjudication decision.” (Construction Industry Council)

- (12) “While we have no excepted proceedings to be added onto the exception schedule, we suggest that the term ‘regulatory proceedings’ be defined in the proposed legislation for the sake of clarity.” (Anonymous)
- (13) “Having further considered the arguments for and against the enactment of an apology legislation to be applicable to civil and other forms of non-criminal proceedings, including disciplinary and regulatory proceedings, the HKBA is generally in support of the Recommendation that the apology legislation shall apply generally thereto, and in particular welcome the Recommendation to embrace views of relevant stakeholders who propose specific disciplinary or regulatory proceedings to be exempted there from.” (Hong Kong Bar Association)
- (14) “As far as the Law Society’s solicitors disciplinary proceedings are concerned, these proceedings are to maintain the standards of the legal profession and to protect the public’s interest. The powers of the Solicitors Disciplinary Tribunal and the Tribunal Convenor are set out in the Legal Practitioners Ordinance (Cap.159) and its subsidiary legislation. In the above context, the proposed apology legislation is not relevant to solicitors disciplinary proceedings. This is because the rationale of the proposed legislation to facilitate an early and amicable settlement has no application to the disciplinary proceedings themselves. Disciplinary proceedings are initiated by the Law Society as complainant against any person who is, or was at the relevant time, a solicitor, a registered foreign lawyer, a trainee solicitor or an employee of a solicitor or a registered foreign lawyer of Hong Kong for alleged professional misconduct.

Examples of professional misconduct include breaches of any of the provision of the Legal Practitioners Ordinance (Cap.159), Practice Directions or circulars issued by the Law Society, principles of professional conduct contained in the Hong Kong Solicitors' Guide to Professional Conduct and other rules, principles and guidelines governing professional conduct. While such proceedings may have been commenced as a result of a complaint from an aggrieved client of a firm of solicitors, there are often the occasions when proceedings are initiated following an inspection or inquiries by the Law Society of a firm of solicitors. Genuine remorse by a solicitor is already a matter that is taken into account by a Tribunal in determining what findings and orders should be made in a specific case. This approach is fair and proportionate in the circumstances. Further, the primary objective of the Tribunal's proceedings is to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour. For the most serious solicitors disciplinary proceedings, the tribunal will adopt the criminal standard of proof. By analogy to criminal proceedings, to which the apology legislation would have no application, we query the appropriateness to include disciplinary proceedings into the legislation. In our views, the policy objectives of public protection, the maintenance of public confidence in the legal profession and upholding proper standards of behaviour outweigh any potential benefit elsewhere in applying apology legislation to the proceedings of the Solicitors Disciplinary Tribunal. In any event, in our experience, apologies are rarely sought or given by the parties. We are on the other hand not aware of any significant body of academic research that supports a conclusion that apology legislation could materially enhance the early resolution of disciplinary disputes. We have been in correspondence with the Law Society of England and Wales on the experience of their apology legislation

in the context of solicitors disciplinary proceedings. We were given to understand that the relevant statutory provision (viz. section 2 of the Compensation Act 2006) has no application to professional disciplinary purposes, being itself limited to civil claims in negligence or breach of duty. We were also advised that the Legal Ombudsman in the UK has express power, in considering redress for poor service, to direct a practitioner to make an apology, which in some cases is all that the claimant wants. However, this will follow a formal finding of poor service after investigation. The facts determined by Legal Ombudsman would be relevant and potentially admissible in disciplinary proceedings; the fact that a solicitor had complied with a direction to apologize would not add anything to the factual findings. At any rate, apologies and any accompanying material in the UK could be admissible in the Tribunal's discretion because the strict rules of evidence do not apply. It would be a matter of fact for decision by the Tribunal as to whether the apology is relevant to the issues to be decided, but anything involving an admission of fault would unquestionably be regarded as relevant. An apology thus has no particular status in disciplinary proceedings. We are still researching and considering experiences in other jurisdictions. We may in due course supplement the above views where relevant. We therefore ask that the solicitors disciplinary proceedings be exempted.” (The Law Society of Hong Kong)

- (15) “The Council is a statutory authority established under the Midwives Registration Ordinance (“the Ordinance”) (Cap. 162, Laws of Hong Kong). Its objective is to provide the community with registered midwives of the highest professional standard and conduct. Apart from various functions relating to the registration of midwives in Hong Kong, the Council also exercises the regulatory and disciplinary powers for the profession in accordance with the Ordinance. It deals with

complaints against registered midwives touching on matters of professional misconduct. It has no jurisdiction over claims for refund or compensation, which should be pursued through separate civil proceedings. The Council noted that the main proposal of the draft Apology Bill is that evidence of an apology (depending on the final view, with or without statement of facts connected with the apology) will not be admissible as evidence for determining fault. As such, on the issue of the applicability of the apology legislation to the Council, we would like to obtain more information from the Steering Committee on Mediation regarding the operational experience of applying the apology legislation in disciplinary proceedings in the overseas jurisdiction. Besides, the Council is of the view that the apology legislation should be applied to the Council in the same manner as other boards and councils of healthcare professionals on the issues of (i) exemption from the application of the legislation; and (ii) the coverage of the legislation regarding statements of fact in connection with the matter in respect of which an apology has been made.” (Midwives Council of Hong Kong)

- (16) “Broadly speaking, we welcome the proposed legislation and agree with the underlying purpose and objective. We consider that in the right circumstances an apology may play an important part in resolving disputes between parties. We also agree that the proposed legislation should apply to both civil and regulatory proceedings – a more limited application of the legislation would likely cause confusion.” (Human Organ Transplant Board)
- (17) “We opine that Disciplinary proceedings under Rule 13(1) of Immigration (Treatment of Detainees) Order (Cap. 115E) should be exempted from the application of Apology Legislation. Given the Steering Committee took the view of the Correctional Services Department (“CSD”) into consideration and Prison Rules 57-65 are exempted from the application of the proposed legislation, we hold the same view as CSD that the prison-like

setting and mode of operation of the Castle Peak Bay Immigration Centre (“CIC”) make its overall management different from the other Sections within the Immigration Department. CIC is vested with statutory power to manage detainees under the Immigration (Treatment of Detainees) Order, Cap. 115E (Treatment Order) and committed to providing a secure and disciplined custodial environment. There are also stipulated provisions governing disciplinary proceedings against detainees who committed disciplinary offences under Rule 13(1) of the Treatment Order. In case of any undisciplined act occurred, whether the accused detainee makes an apology or not, the Superintendent of CIC must proceed with the disciplinary procedures as required by the law. The Superintendent may inquire into any matter, and admit and take into account any evidence or information which he considers relevant, and will base on the facts and evidences to determine whether a disciplinary offence is proved or not to impose appropriate punishment(s). The making of an apology, if any, from the party/detainee causing injury to the injured person or causing the undisciplined act in the centre is basically one of the considerations of the Superintendent in determining whether a disciplinary offence is proven or not and what appropriate punishment be imposed.” (Immigration Department)

- (18) “The Council is established under section 3 of the Chiropractors Registration Ordinance (Cap. 428, Laws of Hong Kong) (‘CRO’) and is responsible for registration and disciplinary control of chiropractors in Hong Kong. As the only proceedings of the Council which may be affected by the proposed apology legislation are disciplinary proceedings conducted under the CRO, the Council gives its comments only from the perspective of the implications of the proposed legislation to such proceedings. The Council is of the view that:- (1) The proposed apology legislation should not be applied to disciplinary

proceedings conducted under the CRO. (2) If the proposed apology legislation is not applied to disciplinary proceedings under the CRO, the question of whether the factual information conveyed in an apology should be protected by the proposed legislation does not arise. Nevertheless, even if disciplinary proceedings under the CRO are not exempted from the proposed legislation, the factual information conveyed In an apology should not be protected by the proposed legislation. (3) Disciplinary proceedings under the CRO should be included in the list of excepted proceedings set out in the Schedule of the draft Apology Bill. Such excepted proceedings should include not only proceedings under Part IV (i.e. section 16 to 21) of the CRO, but also proceedings under section 9(3) of the CRO. This can be achieved by the general description ‘Proceedings conducted under the Chiropractors Registration Ordinance’, or by the specific description ‘Proceedings conducted under section 9 and Part IV of the Chiropractors Registration Ordinance’. Furthermore, it is inappropriate to adopt the description ‘disciplinary *inquiries* conducted under the Chiropractors Registration Ordinance’, as such description will have the effect of excluding preliminary investigation and other connected proceedings. The Council’s view that the proposed apology legislation should not be applied to disciplinary proceedings under the CRO is based on the following reasons:- (a) The proposed legislation will not apply to criminal proceedings, for the obvious reasons that:- (i) criminal proceedings are not private proceedings between the wrongdoer and the victim, but are proceedings instituted by law enforcement authorities for protection of the public; (ii) unlike civil litigation between private parties, criminal proceedings cannot be settled between the offender and the victim (and anyone attempting to do so will commit the offence of perverting the course of public justice); (iii) the objective of the proposed legislation to encourage the

making of apologies for the purpose of facilitating settlement of disputes and legal actions is not applicable to criminal proceedings and is inconsistent with the purpose of protecting the public. (b) Such reasons as applicable to criminal proceedings are equally applicable to disciplinary proceedings under the CRO. Unlike civil proceedings seeking compensation for injuries caused by chiropractors (i.e. personal injury actions), disciplinary proceedings in respect of registered chiropractors:- (i) are pursued not by the injured person but by the Secretary of the Council (acting as the prosecutor in an inquiry) against the chiropractor, although the disciplinary proceeding is usually (but not always) triggered by a complaint lodged by the injured person; (ii) are not private proceedings but are of a public nature for protecting the public from persons who are unfit to practise chiropractic; (iii) are not for compensating the injured person for a chiropractor's misconduct but for protecting the public by preventing a chiropractor who is unfit to practise chiropractic from continuing to practise and posing a risk to the public; (iv) cannot be settled between the injured person and the chiropractor. (See *Dr Li Sum Wo v. Medical Council of Hong Kong*, HCMP 2191/1992) (c) The objective of encouraging private settlement of disputes (thus suppressing complaints against misbehaving chiropractors from coming to the notice of the Council) is contradictory to the purpose of protecting the public. (d) If a clear admission of fault is rendered inadmissible as evidence in disciplinary proceedings because it is connected with an apology, it may cause even more serious grievance and feeling of injustice to the aggrieved patient in case the misbehaving chiropractor is found not guilty because of the missing evidence. (e) If there is clear admission of fault by a misbehaving chiropractor but such evidence is artificially excluded from disciplinary proceedings thus resulting in acquittal of the chiropractor, this will diminish public confidence in the effectiveness of the disciplinary

mechanism under the CRO in protecting the public. (f) The policy consideration of facilitating settlement of disputes is not applicable to disciplinary proceedings under the CRO for the reason that public health is involved and it is not in the public interest to compromise the effectiveness of such disciplinary proceedings by suppressing crucial evidence. The Council notes that the disciplinary body of another health care profession (namely, the Medical Council of Hong Kong) has expressed concern that disciplinary proceedings might be seriously compromised if the apologies and/or the covering statements are excluded from being admitted in evidence. The Medical Council also questioned how the arguments set out in paragraphs 6.18 to 6.36 of the Consultation Paper could lead to the recommendation to extend the coverage of the apology legislation to disciplinary proceedings.” (Chiropractors Council)

- (19) “The Council is established under section 3 of the Supplementary Medical Professions Ordinance (Cap. 359, Laws of Hong Kong) (‘the Ordinance’) to promote adequate standards of professional practice and of professional conduct in the five supplementary medical professions, namely Medical Laboratory Technologists, Radiographers, Physiotherapists, Occupational Therapists and Optometrists. The Council also co-ordinates and supervises the activities of the five Boards established under section 5 of the Ordinance. Moreover, the Council and the Boards have to carry out various functions, including registration and discipline of the five professions, in accordance with the provisions of the Ordinance and its subsidiary legislations. The Council noted that the main objective of proposed apology legislation is to promote and encourage the making of apologies with a view to facilitating the resolution of disputes. The Council considered that the enactment of the apology legislation is compatible with the legal framework and the administration of the Ordinance. Besides, we noted that the apology legislation

only precludes an apology from being admitted as evidence or taken into account to the prejudice of the person who is subject to disciplinary proceedings. It does not preclude misconduct proceedings from being brought and pursued and misconduct proved. It also does not prevent an apology from being admissible evidence for other purposes such as the decision about the sanction to be imposed upon the person being disciplined. Given the above understanding, the Council is of the view that the legislation shall generally be applicable to the disciplinary proceedings held under the Ordinance and its subsidiary legislations.” (Supplementary Medical Professions Council)

- (20) “The Board is established under section 3 of the Pharmacy and Poisons Ordinance (Cap. 138, Laws of Hong Kong) (‘the Ordinance’) to carry out various functions, including registration and discipline of pharmacists, registration and classification of pharmaceutical products, licensing and regulatory control of retail traders, wholesale dealers and manufacturers of pharmaceutical products, and regulatory control of the selling, purchasing, compounding and dispensing of pharmaceutical products in accordance with the provisions of the Ordinance and its subsidiary legislation. The Board noted that the main objective of proposed apology legislation is to promote and encourage the making of apologies with a view to facilitating the resolution of disputes. The Board is of the view that the enactment of the apology legislation is compatible with the legal framework and the administration of the Ordinance. Besides, we noted that the apology legislation only precludes an apology from being admitted as evidence or taken into account to the prejudice of the person who is subject to disciplinary proceedings. It does not preclude misconduct proceedings from being brought and pursued and misconduct proved. It also does not prevent an apology from being admissible evidence for other

purposes such as the decision about the sanction to be imposed upon the person being disciplined. Regarding the applicability of the legislation to the Board's disciplinary proceedings, the Board is of the view that the legislation should generally be applicable to the Board's disciplinary proceedings." (Pharmacy and Poisons Board of Hong Kong)

- (21) "By our previous letter of 18 August 2015...we had informed the Steering Committee on Mediation ('the Steering Committee') of the Council's comments on the 'Consultation Paper on the Enactment of Apology Legislation in Hong Kong' ('first Consultation Paper'). The Council's main concerns were the legal implications of the apology legislation on its quasi-judicial function in disciplinary proceedings as well as its wider responsibility to maintain a high standard for professional conduct and to uphold public trust in the competence and integrity of the medical profession. In this regard, the Council would like to learn from the experience of other jurisdictions and particularly the impact of apology legislation on its counterparts' exercise of disciplinary powers. Although a number of arguments for and against applying the apology legislation to disciplinary proceedings were set out for discussion in paragraphs 6.18 and 6.36 of the first Consultation Paper, it was not entirely clear how the recommendation for the apology legislation to be extended to cover disciplinary proceedings could be arrived at. Besides, the Council was most concerned about the definition of 'apology' under the apology legislation if it was to be extended to cover disciplinary proceedings, viz. whether it would provide protection to partial apology, or full apology with or without covering the statement of facts other than the admission of fault or liability. The Council has recently discussed about the captioned Report for the 2nd round consultation. The Council appreciated that its views were grouped under the category of 'Other comments' in the

captioned Report. However, the Council noted with regret that despite the overwhelming concerns by disciplinary and regulatory bodies about the impact of the proposed legislation on their statutory functions, the Steering Committee on Mediation ('the Steering Committee') did not adequately address their concerns in the captioned Report. Indeed, the Steering Committee merely summarized the responses received during the 2nd round consultation. The Council reiterated that it would like to learn from the experience of other jurisdictions and particularly the impact of apology legislation on its counterparts' exercise of disciplinary powers." (The Medical Council of Hong Kong)

- (22) "The Chinese Medicines Board ('CMB') agrees that the apology legislation should apply generally to civil and other forms of non-criminal proceedings including disciplinary and regulatory proceedings. It is not necessary to exclude the CMB and its committees from the applicable proceedings under the proposed apology legislation." (Chinese Medicine Council of Hong Kong)

Analysis and response

3.2 After considering the submissions and comments including those set out above, the Steering Committee has the following analysis and response.

3.3 As stated in paragraph 12.1(8) of the 2nd Round Consultation Paper, proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86) and the Coroners Ordinance (Cap. 504) are fact-finding in nature without any determination of liability. S.2(1) of the Commissions of Inquiry Ordinance (Cap. 86) stipulates that the function of a Commissioner (as defined in that ordinance) is to inquire into the conduct or management of any public body, the conduct of any public officer or into any matter whatsoever which is, in the Chief Executive's opinion, of public importance. According to s.44(1)(a) of the Coroners Ordinance (Cap. 504), neither a coroner nor a jury at an inquest shall frame a finding in such a

way as to appear to determine any question of civil liability. Since these proceedings do not involve any determination of legal liability, and the number of such proceedings is relatively few when compared with other civil proceedings, the Steering Committee takes the view that it would not defeat the objectives of the proposed apology legislation if these proceedings are to be excluded. It is also noted that a similar approach has been adopted in the Apologies (Scotland) Act 2016 which does not apply to, *inter alia*, “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 in to inquiries under that Act” and “inquiries under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016”.

3.4 Consideration has also been given to the proceedings before the Obscene Articles Tribunal (“OAT”) pursuant to the Control of Obscene and Indecent Articles Ordinance (Cap. 390). As explained in *Three Weekly Ltd v Obscene Articles Tribunal* [2007] 3 HKLRD 673, there are two functions of the OAT, namely classification function and court referral function. The former is an administrative function under which the OAT is required to give an “opinion” as to whether an article is indecent or obscene while the latter is a judicial function under which the OAT is required to address the question of obscenity or indecency in the context of court proceedings, whether criminal or civil. It appears that the classification function of the OAT is similar to a fact-finding exercise in that it would not directly lead to any criminal or civil liability. Therefore, same as an inquiry before a Commission of Inquiry and a death inquest, the proceedings invoking the classification function of the OAT may be excluded from the application of the apology legislation. For the proceedings invoking the court referral function of the OAT, they are criminal or civil judicial proceedings in which liability would be determined. Insofar as the criminal proceedings are concerned, the apology legislation would have no application by virtue of the recommendation that the apology legislation should apply generally to civil and other forms of non-criminal proceedings only (Final Recommendation 2 in the 2nd Round Consultation Paper). As regards the civil proceedings before the OAT, the apology legislation should apply. However, this may give rise to confusion and inconsistency on the legal consequence of an apology in proceedings before the

OAR. The confusion and inconsistency may arise from the different treatment of an apology by the OAT when performing different functions notwithstanding that the OAT is determining the same issue in civil matters, i.e. whether the article is obscene or indecent. One may be confused as to why the OAT could sometimes take into account of an apology but sometimes it could not when the OAT is involved in a determination of the same issue of obscenity or indecency in civil matters. To avoid such confusion and inconsistency, it appears that a wholesale exclusion of the OAT proceedings from the application of the apology legislation would be appropriate as it provides clarity and ensures consistent treatment of apologies by the OAT when performing different functions.

3.5 The Steering Committee also notes that quite a number of professional bodies with disciplinary power and regulatory bodies have expressed serious concern on the impact on their power of investigation and their discretion when conducting disciplinary or regulatory proceedings that would be caused by the proposed apology legislation if their disciplinary and regulatory proceedings are not excluded from the application of the proposed apology legislation. Various reasons have been put forward and these include:

- (1) Apologies may not be relevant in certain regulatory proceedings.
- (2) Certain regulatory proceedings are more akin to criminal proceedings to which the proposed apology legislation does not apply.
- (3) The regulatory functions and powers might be jeopardised if evidence of apologies were to be excluded.
- (4) The objective of the proposed apology legislation, *viz.* to facilitate amicable settlement of disputes does not apply to disciplinary proceedings which serve to protect the public, maintain public confidence in the integrity of the profession and uphold proper standard of behaviour.
- (5) The objective of the proposed apology legislation does not apply to regulatory proceedings which serve a wider public interest in achieving a measure of remediation, deterrence and punishment.

- (6) If someone who apologises and admits liability but is subsequently found to be not liable in disciplinary or regulatory proceedings, this may diminish public confidence in the relevant tribunal and profession.

3.6 Some of the reasons above were already canvassed and analysed in the 1st Round Consultation Paper (paragraphs 6.23 – 6.42) and the 2nd Round Consultation Paper (paragraphs 4.7 – 4.10). Having further considered the submissions received, the Steering Committee takes the following views:-

- (1) If, as submitted by some respondents, an apology is completely irrelevant in establishing liability in certain disciplinary or regulatory proceedings, it would be inadmissible as evidence for lack of relevance. It follows that the proposed apology legislation which seeks to render the evidence of apologies inadmissible should not have impact on these proceedings and, if so, it should not matter whether these proceedings are excepted. However, it seems to the Steering Committee that most respondents with disciplinary or regulatory powers take the view that the evidence of apologies would be relevant to the proceedings, although none of them expressed that an apology would be a critical or a significant piece of evidence in establishing liability. This is further discussed below.
- (2) It is acknowledged that in most if not all of the disciplinary and regulatory proceedings the strict rules of evidence do not apply. This means that the tribunal could consider any appropriate evidence including an apology if relevant when making its determination on misconduct or liability. At the same time, from the various submissions received, it seems that the standard of proof adopted in these proceedings is not a low one (sometimes even using criminal standard as opposed to civil standard) because the consequence of these proceedings such as disqualification or loss of licence could be very serious which may significantly affect the livelihood of the respondents. In

such circumstances, it is doubtful whether an apology (except the accompanying statements of fact) by the respondent would be a significant piece of evidence in establishing liability because, as discussed in paragraphs 3.6 and 3.7 of the 1st Round Consultation Paper, it would be wrong to suggest that an apology would invariably amount in law to an admission of fault or liability. Even if there is an apology or an admission, it remains for the Court or the tribunal to determine the liability based on the facts and the relevant standard of care or professional standard. Viewing from this perspective, public confidence in the disciplinary and regulatory proceedings would not be lost even if someone who apologises and admits liability but is subsequently found to be not liable by the tribunal because his conduct has been found not to have fallen below the relevant standard after a due process. In any event, it is readily apparent that it would be quite unsafe for a tribunal to rely on an apology made by the respondent as the only evidence or as a piece of determinant evidence to find the respondent liable in disciplinary or regulatory proceedings. It follows that the impact, if any, on the power or discretion of the tribunal in conducting disciplinary or regulatory proceedings is rather limited. We also note from a response that apologies are rarely sought or given by the parties in disciplinary proceedings. In this regard, it is noted that none of the respondents suggested that they would be seriously and significantly affected and could not properly discharge their duties if the proposed apology legislation applies to their respective disciplinary and regulatory proceedings.

- (3) As stated in paragraph 6.37 of the 1st Round Consultation Paper, the proposed apology legislation will not prevent disciplinary and regulatory proceedings from being pursued and apologies can be considered for purposes other than determination of liability such as for the purposes of consideration of relief or sanctions. While an apology is not admissible as evidence for

determining fault, liability or any other issue to the prejudice of the person (see section 6(b) of the draft Apology Bill in 2nd Round Consultation Paper), an apology maker may adduce the apology made in support for a lesser sanction in these proceedings if he so wishes.

- (4) The responses submitted to the Steering committee include the argument that the objective of the proposed apology legislation to promote amicable settlement of disputes may be less relevant to disciplinary and regulatory proceedings which are more concerned with the wider public interests such as the maintenance of public confidence in a profession and protection to the public from malpractice. In this regard, as stated in paragraph 4.8 of the 2nd Round Consultation Paper, the purpose of the disciplinary proceedings is consistent with the making of apologies because a person who makes a genuine apology is likely to reflect on his mistake and avoid making the same mistake in future. This has the same effect in maintaining public confidence and protecting the public. Indeed a timely and proper apology could demonstrate one's insight and this may be a relevant factor when considering whether a professional (e.g. healthcare professional) is suitable to be allowed to practise or continue to practise.
- (5) On the other hand, as explained in paragraph 4.8 of the 2nd Round Consultation Paper, if the proposed apology legislation does not apply to all the disciplinary and regulatory proceedings, its efficacy would be significantly impaired. In civil proceedings against professionals or regulatees, it is not uncommon that there are parallel disciplinary proceedings or regulatory proceedings. Very often, the impact that might be caused by the disciplinary and regulatory proceedings, e.g. losing one's right to practise or the licence or qualification, is of equal if not greater concern to the professionals or regulatees than the impact of civil litigation which is mainly about monetary compensation. If the evidence

of apology would be admissible in disciplinary and regulatory proceedings, it is quite natural that these professionals and regulatees would have hesitation in making apologies for the fear of the prejudice that may be caused to them in the disciplinary and regulatory proceedings. The objective of the proposed apology legislation would be severely impaired insofar as these professionals and regulatees are concerned. As will be explained below, the Steering Committee prefers third approach when dealing with statements of fact conveyed in an apology. Under that approach, the protection of statements of fact conveyed in an apology would not be absolute and the Court or the tribunal would retain discretion to admit these statements as evidence. The Steering Committee considers that this discretion to admit statements of fact conveyed in an apology as evidence could alleviate the concern of the various professional bodies and the regulators.

- (6) The Steering Committee also wishes to point out that the proposed apology legislation should not affect the investigation power of the professional bodies and regulators. Professionals and regulatees who are under a duty or obligation to disclose information or documents would still need to fulfill that duty or obligation.
- (7) The Steering Committee notes that a few respondents wish to know how the apology legislation overseas affects disciplinary proceedings in their respective jurisdictions. The Steering Committee has considered the apology legislation in the United Kingdom which includes the Compensation Act 2006 for England and Wales (discussed in paragraphs 4.48 – 4.54 of the 1st Round Consultation Paper) and the Apologies (Scotland) Act 2016 for Scotland (discussed in paragraphs 4.55 – 4.68 of the 1st Round Consultation Paper and paragraphs 10.5 – 10.11 of the 2nd Round Consultation Paper) and their impact on disciplinary proceedings of the General Medical Council (“GMC”) and the

Nursing and Midwifery Council (“NMC”). As the Steering Committee understands it, the GMC and the NMC focus on promoting the duty of candour and openness. Their publications suggest that GMC and NMC may not rely on an apology to find liability in disciplinary proceedings, but it would be taken into account in considering sanctions: the *Guidance on Professional Duty of Candour* jointly published by the GMC and NMC in June 2015 states that “apologising to a patient does not mean that [a healthcare professional] is admitting legal liability for what has happened. This is set out in legislation in parts of the UK [referring to s.2 of the Compensation Act 2006]”. “Legal liability” is defined to be in relation to clinical negligence claim. The National Health Service Litigation Authority has stated the same, and went on to say that “we will never withhold cover for a claim because an apology or explanation has been given”. The GMC and the Medical Practitioners Tribunal Service’s *Sanctions Guidance* (effective from 1 March 2016) states that “for the purpose of fitness to practise proceedings, an apology by itself will not be treated as an admission of guilt (whether as to facts or impairment)”. The GMC’s *Memorandum on the Apologies (Scotland) Bill*, apart from commenting on legal liability, states that an apology may be evidence of insight, which is defined as “where a doctor is able with hindsight to stand back and accept that they should have behaved differently, and take steps to address their failings”. Insight carries weight in the consideration of sanctions. Despite the above, it appears that the GMC and NMC were eager to carve out an exception for themselves in the Apologies (Scotland) Act 2016. The NMC has repeatedly stated that it has the power to consider an apology in factual (and likely liability) finding. Enquiries were made and it is understood that the concern of the GMC was that the Apologies (Scotland) Act 2016 might potentially impact on the ability for the GMC to obtain evidence and bring a fitness to practise case, where an

apology features in background to the case, i.e. in statements made by the practitioner during an investigation. For instance, the GMC may be limited in the exercise of powers under s.35A of the Medical Act 1983 to require information from others in Scotland, as this power cannot be exercised in respect of information where disclosure is prohibited by any other enactment, or which would not be admissible in civil proceedings in the relevant jurisdiction. The GMC also has concern about the admissibility of evidence in ancillary proceedings arising from the GMC's fitness to practise proceedings or processes, which are heard in the Scottish courts. The GMC also considers that a doctor's failure to apologise may be evidence that they lack insight and insight is an important factor for tribunals to consider when determining the level of risk a doctor may pose to patient safety or public confidence. Further, GMC takes the view that apologies may also be relevant to other aspects of its function such as revalidation processes and appeals. In all, the GMC is keen to ensure consistency across the procedures, so that an apology can be admissible in any part of the GMC's regulatory proceedings or processes, whether they concern matters which take place in, or doctors who are registered in, England & Wales, Northern Ireland or Scotland. In response to these submissions, the Scottish government promised during parliamentary debates that it would add an exception by regulations for proceedings held by health professional bodies by invoking the power given to the ministers under s. 2(4) of the Apologies (Scotland) Act 2016. The NMC welcomed the promise at its Council meeting, and noted that it currently admitted evidence to prove the factual part of fitness to practise case. It is understood that the main provisions of the Apologies (Scotland) Act 2016 are not yet in force and the regulations providing for exception for civil proceedings conducted by, or relating to proceedings and processes of professional regulatory

bodies are likely to come into force at the same time as the main provisions of the Apologies (Scotland) Act 2016. The Steering Committee has considered the above development, in particular the exemption proposed to be given to the GMC and NMC, and takes the view that the concern by the GMC about the impact on the investigation power under s.35A of the Medical Act 1983 and lack of uniformity in the application of apology legislation across the UK is peculiar to the UK and may be less relevant to Hong Kong, if not inapplicable at all. As stated in sub-paragraph (6) above, the proposed apology legislation should not affect the investigation power of the professional bodies and regulators, although it is acknowledged that they cannot adduce evidence of apologies to prove liability in the disciplinary or regulatory proceedings (see sub-paragraph (2) above). Further, the apology legislation does not prohibit a tribunal from taking into account a failure of a person to apologise nor does it prohibit a tribunal from taking into account an apology for purpose other than to the prejudice of the person. Finally, the concern about the lack of uniformity is not applicable to Hong Kong. In the end, a proper balance must be struck between these conflicting interests.

- (8) The Steering Committee takes the views that it would be a balancing exercise when considering whether certain kinds of proceedings should be exempted. The impact of the application and that of exemption must be weighed carefully so that the policy objective of the proposed apology legislation should be achieved without unduly and disproportionately impairing other public interests. The Steering Committee notes and agrees with the broad principle provided in the comment of The Ombudsman that exemption from the proposed apology legislation should be granted sparingly and only with strong justifications.
- (9) As regards the disciplinary proceedings against the persons in custody and detainees under the purview of the Correctional Services Department and the Immigration Department, the

Steering Committee has been informed that they no longer seek exemption from the application of the apology legislation. However, they may consider seeking exemption in the future based on their operational experience.

- (10) In relation to the submissions by other disciplinary and regulatory bodies for exemption, the Steering Committee, having considered the matters set out in sub-paragraphs above, takes the views that without significantly affecting the disciplinary and regulatory powers of these bodies, the policy objective of the proposed apology legislation will be better achieved if the proposed apology legislation is to apply to these disciplinary and regulatory proceedings. The Steering Committee is also of the view that the effect of the proposed application is rationally connected to the aim of achieving the objective of the proposed apology legislation.
- (11) The Steering Committee further suggests that a mechanism should be provided for in the draft Apology Bill to allow future amendment of the schedule of excepted proceedings so to provide flexibility. After the proposed apology legislation has been enacted, review of the schedule of excepted proceedings may be conducted as and when appropriate. If it transpires that the legislation may disproportionately affect certain proceedings including disciplinary and regulatory proceedings, its application to the proceedings may be considered or re-considered and, where appropriate, the schedule may be amended to except the proceedings as appropriate. The power to amend the schedule may be provided to the Chief Executive in Council who may take into consideration all relevant factors before deciding on any amendments to the schedule.

Final recommendation

3.7 After considering all the responses received and based on the views expressed in paragraphs 3.6(8) – 3.6(11), the Steering Committee recommends that the proposed apology legislation should apply to all disciplinary and regulatory proceedings with the exception of proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86), the Coroners Ordinance (Cap. 504) and the Control of Obscene and Indecent Articles Ordinance (Cap. 390). Further, a mechanism should be provided for in the draft Apology Bill to allow future amendments to be made to the schedule of excepted proceedings so as to provide flexibility.

Chapter 4: Issue 2 – Whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation

Number of responses in relation to this issue

4.1 As mentioned above, 60 written responses were received in the 2nd Round Consultation. Amongst these 60 responses, 40 of them addressed the issue of whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation. Below is a summary of the responses regarding this issue:

	Number	Percentage (%)
Agree	30	75
Oppose	6	15
Neutral	4	10
<u>Total</u>	<u>40</u>	<u>100</u>

Comments from those who support this issue

4.2 Amongst the 40 responses received on this issue, 30 of them support that the factual information conveyed in an apology should likewise be protected by the proposed apology legislation. The key reasons given are as follows:

- (1) “As to the Final Recommendation 8, the Academy supports that the factual information conveyed in an apology should be protected by the First Approach because of its clarity and that this is the approach which would best promote the objective of an apology legislation.” (Hong Kong Academy of Medicine)

- (2) “HKAB maintains its view that protection afforded by the proposed apology legislation should extend to statements of fact. Accordingly, we support the adoption of the First Approach on page 70 of the Report that statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and should be protected. We submit that statements of fact should be protected from being admissible as evidence in court as this would encourage defendants to make meaningful and sincere apologies. Defendants would also be more inclined to provide full as opposed to partial apologies, which would be in keeping with the spirit of the legislation. To reiterate our previous submission, a full apology that includes disclosure of facts would help parties to understand the root cause or underlying circumstances that lead to the making of that apology. In so doing, such apologies would help facilitate settlement as well as mitigate the risk of further litigation. As discussed in the Report, an advantage of the First Approach would be that people who intend to make apologies know clearly in advance the legal consequence. This certainty would help the credibility of the legislation and increase its efficacy. We also recognise that it is often difficult, if not impossible, to draw a distinction between a statement of fact and the apology in which it is contained. The First Approach would eliminate the unenviable task of trying to extricate one from the other. As identified in the Report, the flexibility of the Second and Third Approaches can be a double-edged sword in that it introduces an element of uncertainty. Should either of these approaches be adopted, prudent lawyers may counsel their clients against making apologies to safeguard their position. This would be damaging to the ultimate objective of apology legislation. In determining whether the apology legislation would infringe the fundamental rights of the claimants, more specifically the right to a fair hearing, the Steering Committee

invited the public and stakeholders to consider three questions: (1) whether the infringement or interference pursues a legitimate societal aim; (2) whether the infringement or interference is rationally connected with that legitimate aim; and (3) whether the infringement or interference is no more than is necessary to accomplish that legitimate aim. We will consider each of these questions in more detail. In relation to the first question, we submit that the main objective of the proposed apology legislation is to promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes. In our opinion, this is a legitimate societal aim and one which has been pursued in other common law jurisdictions. It necessarily follows, in response to the second question, that any alleged infringement or interference is rationally connected with the legitimate aim of the legislation. In order to encourage people to make meaningful apologies, they need to be assured that the contents of their apology will be protected by the legislation. This applies to statements of fact as referred to in paragraph 2.2 above. Regarding the final question, HKAB agrees with the Report at paragraph 10.15 in respect of its point on the potential impairment of the claimants' rights to seek justice. In our opinion, it is arguable that claimants will not have suffered any prejudice as, without the enactment of apology legislation, an apology might not have been forthcoming in the first place. Therefore it can be argued that any alleged infringement or interference is no more than is necessary to accomplish the legitimate aim of the legislation and a proper balance has been struck. To claim otherwise would be an oversight of the intended purpose of the legislation.” (Hong Kong Association of Banks)

(3) “While we agree that the proposed apology legislation should protect statements of fact in connection with the matter in respect of which an apology has been made so as to facilitate the resolution of disputes by apology, we also hope to close any

loopholes that may enable the evasion of responsibility by the abuse of such statements. This is because if statements of fact in connection with the matter in respect of which an apology has been made are open to abuse to evade responsibility, the public will doubt the sincerity of the apology and it will be less likely for the victim to accept the apology and for the dispute to be resolved by mediation.

We therefore propose to include that “statements of fact in connection with the matter in respect of which an apology has been made” will not be protected by the proposed apology legislation if the court determines that a person making an apology has abused the legal protection of the same to evade responsibility.” (English translation) (GY Professional Mediation Services)

- (4) “We fully support that the apology legislation shall cover full apologies (Final Recommendation 3). In reality, a full apology which includes an admission of the person’s fault or liability in connection with the matter (clause 4(3)(a) of the draft Bill) will necessarily carry factual information about the relevant matter. We therefore submit that clause 4(3)(b) of the draft Bill should be retained.” (Hospital Authority)
- (5) “In terms of public policy, The Ombudsman would like to reiterate that public bodies should be encouraged to tender apologies where due and in so doing they should not be economical with the truth for the sake of avoiding compensation. All relevant facts should be disclosed to the complainant. Once this is done in connection with an apology, it is unthinkable then for the public body to deny the same facts or refuse to submit them separately to a court of law in case of a subsequent claim. Since such submission is admissible under clause 4(4) of the Bill, there is no need to put the onus on the Court to determine which part of the statement of fact accompanying an apology is admissible. As such, we agreed that the First Approach proposed

in the Report would best serve the objective of the apology legislation. As to the potential infringement of the claimant's rights to seek justice, we tend to agree with the argument in paragraph 10.15 of the Report that no apology (and facts) would have been given in the first place should there be no apology legislation. In the slip of tongue or spontaneous apology scenario, it would be unsafe and probably unfair to hold the maker of the apology responsible if it is the only evidence available.” (Office of the Ombudsman, Hong Kong)

- (6) “With the objective of the proposed Apology Bill to promote and encourage the making of apology in mind, we have sought to strike a proper balance between on the one hand the benefits of apology and legal clarity and certainty, and on the other, the potential injustice arising from the inability to use evidence connected to matter regarding which the apology has been made, and is material or even indispensable to the claim of the plaintiff. Our conclusion is that the third approach as recited below is preferable...We agree that the first approach under which the court does not have the discretion to admit the apology containing statements of fact as evidence against the maker of the apology, would be most effective when compared with the other two approaches in achieving the objective of encouraging and promoting the making of apology. A speedy and amicable settlement of dispute is more likely to be facilitated. However, the argument mentioned in para. 10.15 of the Report supporting the proposition that under the first approach a proper balance has been struck does not address the possibility that justice may be compromised where the statements of fact is the material or even indispensable evidence on which the claimant will rely. We are of the view that such a possibility cannot be ruled out. Even though such a situation may transpire rarely, we share the view mentioned in para. 10.10 of the Report that the claimants' right to draw upon an apology in their evidence base should not be

ignored simply because such cases are likely to be few in number. We do agree that ‘protecting the right of minorities is at the heart of good law making’. As for the second approach, we note that the Apologies (Scotland) Bill which has been recently passed contains no reference to statements of fact. We share the view that it is difficult, if not impossible to draw the distinction between ‘fact’ and ‘apology’ in a piece of legislation. Nevertheless, we have reservation on the approach of leaving the issue of whether statements of fact should form part of an apology to the discretion of the court on a case by case basis. It is our concern that in certain cases it would be extremely difficult to segregate statements of fact from an apology which have been mingled with each other in the representations of the apology makers. Furthermore, to determine the issue on a case by case basis will create enormous uncertainty and therefore discourage people from making apologies, contrary to the legislative intent of promoting a culture of making apologies for reaching settlement. Worse of all, this approach may create a situation where important evidence is excluded. On the other hand, we find the third approach preferable to the other two. Like the first approach, it attains legal certainty and clarity by making it a default position that statements of fact in connection with the matter in respect of which an apology has been made be treated as part of the apology and be protected. Nevertheless, flexibility is retained to secure justice in that the court has the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances, it would help avoid any inadvertence injustice being done to a claimant, such as where those statements of fact is the only evidence available to the claimant. Although this would leave the parties with some uncertainty, such uncertainty could be minimized by legislative provisions setting out the matters to be considered by the court when exercising its discretion to admit the statements

of fact [akin to s.6 of the Unconscionable Contracts Ordinance (Cap. 458)] and binding precedents. In this premise, the parties would have a clearer view of their positions; and a lawyer would advise his client alleged to have wronged according to the legislative provisions and precedents, instead of merely advising him not to apologize. In addition, the third approach may ensure observance of a fundamental principle of justice that court should always consider and value all the relevant evidence in maintaining a fair hearing to the parties, as guaranteed by Article 10 of the Hong Kong Bill of Rights. Last but not least, this approach is also consistent with the Final Recommendation 3 that the apology legislation shall cover full apologies, of which we are supportive.” (Consumer Council Hong Kong)

- (7) “1. The intent of an apology is for a party to apologise sincerely and whole-heartedly, giving all the true facts of a case to the other party so that the latter can get over the matter as soon as possible. Therefore, apart from expressing sincerity, an apology must also cover all statements of fact. Otherwise there is simply no point in making the legislation.
2. Given the present legal restrictions or insurance policy requirements, an apology-maker often cannot speak much, let alone admit guilt. It is thus necessary to protect statements of fact. On the other hand, an injured person should not be prejudiced unfairly to protect the apology-maker. In order to balance the pros and cons to the community, I think ultimately it should be left to the discretion of the court as to whether they should be admitted as evidence. If all statements of fact given by the apology-maker are protected and ruled inadmissible by the court, it would be difficult for the claimant to obtain evidence to prove his case. The proceedings would then be rendered meaningless and unfair. In fact, in order to balance social interests while doing justice, I support the Third Approach. The reason is that it is generally very difficult to obtain evidence

for proof by a claimant, who may only have available statements of fact made at the time of an apology. As it is a question to be decided by the court ultimately, it should be for the judge to decide whether to exercise his discretion. With the accumulation of considerable cases, mediation by lawyers or mediators will become much easier in the future.” (English translation) (Mr Chan Wai Kit)

- (8) “We consider it crucial to have factual information conveyed in an apology protected by the proposed apology legislation. With such protection, the party concerned will be more willing to make apology which aligns with the objective of the proposed apology legislation to encourage apologies and ultimately reduce litigation. To this end, the First Approach, i.e. the statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and should be protected, is preferred. This approach may ensure clarity and certainty whereby people, in considering whether or not to make apologies, would know clearly in advance the legal consequences. The other two approaches lack certainty in this area and may deter people from making apologies.” (Social Welfare Department)
- (9) “We support the First Approach that the factual information contained in an apology should be protected without any discretion retained by the Court. This would provide a large degree of relief, in the event where an apology is deemed to be advisable or unavoidable, the apology maker would at least be assured that the factual information conveyed in an apology would be protected and the statement of facts are not regarded as admissible evidence in court during litigation.” (Hong Kong Productivity Council)
- (10) “One objection to the legislation overall is based on the breadth of the definition of ‘apology’, see 3.3(2), p.9 of the Report. Views differ as to how broadly ‘apology’ ought to be defined and

whether ‘apology’ ought to be defined to include not only an admission of fault or liability, but also a statement of fact in connection with the matter in question. Statements of fact are potentially relevant to determinations of liability. Therefore, a court will need to decide what evidential weight should be attached to a statement of fact if it is admitted. The issue is how to strike a fair balance between encouraging apologies that can be of benefit to the parties, but not unfairly disadvantaging a plaintiff who tenders evidence of facts admitted by a defendant in their apology, which may be relevant to the issue of liability. A number of arguments have been made in favour of including statements of fact in the definition of apology. First, without a factual explanation of the cause of the event(s), which may include facts about the incident, an apology may not fully satisfy the needs of the intended recipient. There is a concern that fears that a statement of fact will be used as adverse evidence in subsequent proceedings will perpetuate the ‘chill’ on apologies and defeat the purpose of the legislation. Second, as illustrated by the Canadian case *Robinson v Cragg* (2010 ABQB 743), there are uncertainties that accompany the need for statements of fact to be separated out from an expression of sympathy or regret combined with an admission of fault. This may encourage interlocutory proceedings. Third, facts admitted by a defendant, but excluded as evidence with the apology, can still be relied upon as evidence of liability if they can be independently proven by a plaintiff. There are a number of additional points relevant to the decision whether to expressly include statements of fact within the legislative definition of apology. First, a wide definition of apology might encourage strategic apologies knowing that statements of facts will need to be independently provable. If a person who is willing to offer an apology that admits fault is only willing to do so because there is legislative protection for that admission, should they also be able

to offer a factual account that cannot be used as evidence? There are concerns that protection of statements of fact will favour experienced litigators and increase the inequality between one-time plaintiffs and knowledgeable and experienced defendants. Second, it is not clear that admissions of fact on their own (once an expression of regret or sympathy and admission of fault are excluded) are sufficiently detrimental to a defendant to justify their exclusion in all cases. Arguably, they are less likely to be prejudicial to a defendant than an admission of fault or liability and therefore the argument for protecting them is less compelling. Third, parties are still able to use privileged circumstances ('without prejudice' negotiations and mediation privilege) to disclose facts and give an account or explanation that goes beyond an apology as it is commonly understood. The defendant in *Robinson v Cragg* (a lawyer) could have achieved full protection by making his admission on a 'without prejudice' basis. I recognise however that the aim of this legislation is to broaden the circumstances in which this type of protection is available. Fourth, case law in Australia indicates that courts will take a broad view of what forms part of an apology for which protection is claimed. (In addition to *Duvuro Pty Ltd v Wilkins* (2003) 215 CLR 317, see *Westfield Shopping Centre Management Co Pty Ltd v Rock Build Developments Pty Ltd* [2003] NSWDC 306; *Wagstaff v Haslam* [2006] NSWSC 294; *Hardie Finance Corp Pty Ltd v Ahern (No 3)* [2010] WASC 403.) These decisions support the argument made by the Hong Kong Bar Association that what constitutes an apology in any particular set of circumstances is best determined by a court. Even if statements of fact are included in the definition of apology, uncertainties will persist as to where the legislative protection of an apology begins and ends. Parties, lawyers and the courts will need to establish what the legislation intends to exclude and satellite litigation is inevitable, whichever way

apology is defined. Uncertainty about the scope of legislative protection may continue to inhibit apologies by wary defendants. In the end, whichever way the legislation is framed, the public and the legal profession and insurance industry need to be made aware of the aims of the legislation and that there are limits, justifiably, to the protection it provides. I note that the Hong Kong Mediation Centre submitted (10.4(2)) that if statements of fact are protected the legislation should expressly protect the rights of plaintiffs to adduce evidence through discovery and similar proceedings. The intent behind this recommendation, presumably, is to confirm that the plaintiff will continue to have the same access to evidence and information which they can use to prove liability independently of an excluded apology. The Apology Bill includes a provision to this effect in clause 10(a). I share concerns that protecting statements of fact potentially will tip the balance between the interests of plaintiffs and defendants, unfairly, even further in favour of a defendant than under other apology legislation. Is there a need for this provision? I suggest that, should litigation arise concerning what exactly is inadmissible in a particular case, the same result could be reached with or without the inclusion of clause 4(3)(b). The definition in 4(1) that an apology means ‘an expression of the person’s regret, sympathy or benevolence in connection with the matter’ read in conjunction with the purpose of the legislation could be construed broadly to incorporate facts to which the expression relates. Alternatively, the court could be given the power to exclude evidence of statements of fact on a case by case basis, depending on the justice of the case. On the other hand, the inclusion of clause 4(3) is supported by the object of the legislation as stated in clause 2 and is part of a reasoned approach to comprehensive protection to encourage full apologies. One notable positive aspect of the proposed definition of apology in the Bill is that it defines apology in 4(1) as an

expression of regret, sympathy or benevolence and includes sorrow, for example, while leaving the legal consequence of saying sorry to be provided for in separate subsections. The meaning of apology is not easily reduced to words and additional components of an apology, such as a promise to act differently in the future, are not necessarily excluded from being an apology within s4(1) for the purposes of sections 6 and 7. It is important that the central definition in clause 4(1) is inclusive and reflects the many faceted nature of apologies and apologetic behaviour. Overall I am persuaded that, provided statement of fact in clause 4(3)(b) is construed narrowly by the courts as part of an ‘expression’ as defined in clause 4(1), the concerns that have been expressed can be allayed and there is much merit in the recommendation as reflected in the draft Apology Bill. Further, clause 10 clarifies that parties are still obliged to give disclosure, which might provide independent evidence of facts and admissions. By including clause 4(3) and excluding statements of fact as admissible evidence the Hong Kong legislation would go further than any other apology legislation. By taking a more comprehensive approach to addressing the issues raised in the emerging apology case law, the legislation creates a valuable opportunity to measure the effectiveness of removing the potential for admissions of fault, liability and of facts to be used as adverse evidence in civil proceedings to ‘promote and encourage the making of apologies with a view to facilitating the resolution of disputes’ (clause 2).” (Professor Robyn Carroll)

- (11) “1st Approach...It is fundamentally wrong to come to a conclusion that a sincere apology must be accompanied with statements of fact. We believe that apology without facts can be meaningful to the victims and the public. 2nd Approach...We do not agree to the 2nd approach. The gist of this approach is that once the Court ruled that the statement constitute part of the apology, the Court has no discretion to admit the statement of

fact. The 2nd approach will lead to numerous litigations arguing what constitute an apology. The facts similar to Robinson v Cragg will be repeatedly argued in Court. It will result in a waste of court resources. This approach also cannot rule out the possibility of injustice. We believe that the plaintiff's right to justice should not be prejudiced by legislation. Court should retain absolute discretion in admitting the statements of fact as evidence against the apology-maker. 3rd Approach... We agree to the 3rd approach. The 3rd approach solves the problem of numerous litigations concerning the definition of apology. As the statements of fact are generally protected, there will be no further litigation on this point. Second, it allows the Court retains discretion as to admit the statements of fact as evidence in certain situations, such as the victim cannot find any evidence but the statements made by the wrongdoer. In the eyes of general public, this approach will allow fair trial and public justice. The image of the Court can be preserved in the eyes of the public, which is crucial to our Court system as justice should not only be seen to be done in the eyes of legal practitioners and well educated persons. Yet, the legislation should clearly list a very low threshold for the Court to admit the statements of fact. The victims or the plaintiffs should not bear any additional burden of proof. Hong Kong Bill of Rights guarantees that all persons shall be equal before Court. Thus, the "appropriate circumstances" should not be exhaustive. As long as the plaintiff has reasonable ground to admit the statements of fact, the Court should seriously consider admitting the statements of fact to avoid injustice. The counter argument against the 3rd Approach is the uncertainty of this approach will discourage people making apologies with disclosure. For the sake of argument, we assume that insurance company will advise the insured not to disclose facts because of the uncertainty. As aforesaid, this argument cannot stand. People can deliver apologies and sympathy

immediately after the incident without disclosure of factual information. The victims will not automatically view such apology as untrue. The aims of this legislation will not be defeated simply because statements of fact are not delivered with apologies. On the flipside, by adopting the 1st approach or the 2nd approach, the potential interest of the legislation cannot outweigh the prejudice caused to the victims and the damage to our legal system. By adopting the 3rd approach, full apology with admission of fault can still be statutorily protected by the HK Apology Legislation. Generally, if the wrongdoer delivers statements of fact together with the apology, such statement is also covered by the HK Apology Legislation. The statements of fact will be admissible to Court in the circumstances that the justice will be substantially prejudiced. To conclude, we agree to the 3rd approach with great flexibility.” (Kevin Ng & Co., Solicitors)

(12) “We support the First Approach for the following reasons:

- (1) Paragraph 10.15 of the Report points out clearly the advantage of the First Approach: “The advantage of the First Approach is clarity and certainty, in that people who intend to make apologies would know clearly in advance the legal consequence. Viewed from this angle, this is the approach which would best promote the objective of an apology legislation
- (2) From the perspective of business operators, the First Approach with such clarity and certainty is undoubtedly the option most easy to understand and operate for general traders. It will be effective in promoting an apology culture to take shape in the business sector / among small and medium enterprises, as well as to take root in society to promote social harmony. Given the recommendation in the Report that an apology shall not affect any insurance cover to be available to the person making the apology, he should

be willing to use mediation to resolve disputes with claimants. In cases where mediations are unsuccessful, the common reason is usually that the two sides cannot reach a consensus on the quantum of compensation and have to bring it to court. Under normal circumstances, the claimant can still bring a claim to court with other specific supporting evidence even if statements of fact of the apology maker are inadmissible. Therefore, as the Report points out, the situation which some respondents worry that there may be infringement of a claimant's right to a fair hearing under the First Approach will merely be a rare exception.

- (3) With regard to the concern arising from such a rare exception, we believe that paragraph 10.15 of the Report has given a compelling response and conclusion: "...it is arguable that in some cases no apology whatsoever would be given but for the proposed apology legislation. Hence the claimant would not suffer any prejudice because he would not have received an apology (and the accompanying statements of fact) in the first place if there is no apology legislation. Viewed from this perspective, a proper balance has been struck.
- (4) Moreover, though a claimant cannot file an ex parte claim application to court using an apology maker's statements of fact as evidence in the rare exception where mediation fails because the claimant is dissatisfied with the quantum of compensation offered by the apology maker despite his apology, the proposed legislation does not stop the claimant from appealing to public opinion. Nor does it stop the apology maker, for the sake of maintaining his goodwill or other considerations, from waiving the protection afforded to him by the legislation and agree to leave the quantum of compensation to the determination of the court on the basis of his own statements of fact.

We oppose to the Second and Third Approaches. No matter whether it is to be left to the court to determine if statements of fact should constitute part of the apology on a case-by-case basis or to give the court the discretion to admit statements of fact as evidence against the maker of the apology in appropriate circumstances, this will inevitably give rise to uncertainty. Moreover, the general public will not find them easy to understand, so much so that the parties concerned would rather not make an apology given that the consequences are unclear. Apparently, this runs counter to the objective of the legislation to encourage the making of apologies and the use of mediation. Going against the goal of promoting the enactment of apology legislation for such rare exceptions will only do more harm than good.” (English translation) (Liberal Party)

- (13) “On the treatment of statements of fact, we are inclined towards the approach for treating them as part of an apology and thus protected from being admitted as evidence in court proceedings. Clarity and certainty encourages use of apologies which, in turn, may promote timely amicable resolution of disputes.” (The Land Registry)
- (14) “We recommend the factual information conveyed in an apology should be protected by the proposed apology legislation. If the factual information conveyed in an apology is not protected, it will defeat the purpose of the legislation. The parties concerned will not take any risk to any possibility of prejudicing themselves in future proceedings. Besides, protecting the factual information will not jeopardize the right of the ‘Victim’ or ‘Plaintiff’ to obtain the relevant information by other means. Instead, the factual information conveyed will otherwise provide the hints to discover the evidences in future proceedings. In fact, clause 10 the draft Apology Bill should have given adequate protection on discovery” (Hong Kong Mediation Centre)

- (15) “The factual information conveyed in an apology may be a source of evidence amongst other available sources of evidence to be considered when determining the facts of a matter. If the factual information contained in an apology represents the **only** source of evidence relevant to the matter, we consider that while the apology as a whole should be protected by the proposed apology legislation and should not be treated as an admission of liability, the judge or the tribunal should have the discretion to consider the factual information conveyed in the apology to **establish basic facts** of the matter in the absence of other evidence.” (Construction Industry Council)
- (16) “I favour approaches that generally protect statements of fact forming part of an apology. This view is eloquently presented by several respondents to your consultation request, such as the Hospital Authority. However, unlike the Hospital Authority, I am not persuaded that ‘the nexus between the apology and the statement of facts...must be clearly provided in the new legislation’ (page 59). We cannot anticipate the many situations that might arise, and the idea that legislative precision will solve the problem of fact-as-apology versus fact-as-necessary-evidence is something of a chimera. Such case law as there is suggests that results are driven more by judicial attitudes and statutory construction than by the wording, or even the existence, of apology legislation. This may seem like a bold statement to make, but I believe it is supported by a comparison of some relevant Australian and Canadian decisions. I turn to those next...The results in the Australian and Canadian cases summarized here—that is, the ones that my research suggests are most relevant to the ‘statement of fact’ issue—came as somewhat of a surprise to me. As the Committee notes in its main report, the Australian provisions were a ‘second wave’ of legislation after the US, and did not provide as broad a protection as the Canadian ‘third wave’. Yet the Australian courts have

tended to interpret the legislation in a broad, purposive manner—this seems so even in Western Australia, where the legislative language is weakest—while in Canada, courts in at least some cases have taken a narrow, literal approach. The number of cases in both instances is too small to say whether this indicates a trend, but cases like *Robinson v Cragg* and *Cormack v Chalmers* are a concern to those who, like me, have lauded the Canadian approach to law and apology. More to the point, the contrast between the two sets of cases reinforces my belief that judicial understanding of the legislation and attitudes towards it play as important, if not more important, a role as the legislative wording itself. For this reason, I am more attracted to the Committee’s Third Approach, or a variant of it, than to either the First or Second Approaches. I believe that statements of fact that are closely bound up with an apology should generally be protected, unless the court decides otherwise. I see this residual discretion as essential even where, as I view it, courts sometimes err in their application of apology laws. I would also have thought that it would not be necessary to say that statements of fact are included in the definition of ‘apology’, when the legislation protects fault-admitting apologies. The reasoning of Cogswell DCJ in *Westfield* shows that judges are quite capable of figuring this out with no need for the additional guidance. However, I can understand that the Committee might conclude that express wording is needed to protect factual statements that are closely linked to apologies. I assume this would be in the definition of ‘apology’, as in the bracketed clause 4(3) of the draft bill. If so, I recommend stating in the bill’s other sections (e.g., clauses 6–8) that courts can vary from the general exclusionary rule. This might be accomplished with the common legislative drafting approach of ‘unless the court otherwise orders,’ leaving it to courts to work out the circumstances in which statements of fact might be excepted from the general

exclusionary rule. Another approach would be to have a stand-alone section that gives courts authority to make exceptions and provides guidance for when they may do so. For instance, some stakeholders have suggested that if a relevant fact cannot be proven by any other means, the court should allow into evidence a statement of that fact, even if included in apology. It has also been suggested that a statement of fact included in an apology should be allowed into evidence for the purpose of impeaching a witness; indeed, one US state, South Dakota, has gone so far as to say so in its legislation. In such a circumstance, the apologetic statement is not offered for proof of liability, but to cast doubt on a witness's credibility. A good case can also be made that statements of fact made in testimony, whether in court or a court-based process such as an oral examination of discovery, should not be protected just because they come wrapped in an apology. Indeed, while this might seem obvious, Ontario has taken the precaution of saying so in its legislation. I suggest that, even if such guidance is provided, it be done in the form of a non-exhaustive list. Again, I believe that judges need discretion to deal with the multi-varied cases that will arise.”

(Professor John Kleefeld)

- (17) “we are in general in favour of protecting the factual information and we generally think that: (a) Such a protection may encourage genuine apologies, which in turn is conducive to settling disputes. Exclusion of protection of statement of facts may have the effect of complete avoidance of mentioning facts in the apologies, i.e. a bare apology which may appear to be not sincere. (b) It can afford protection to the one who says sorry on behalf of the department or unit from subsequent legal action in case he / she delivers a false or wrong message (but genuinely believed by the apology maker to be true and correct at the material time) during making of an apology and before completion of a formal investigation. (c) The three alternative options proposed by the

Steering Committee relating to the statements of fact each have their own respective advantages and drawbacks. While we have no specific views on these three options, we tend to support the Third Approach to give the Court discretion to admit the statements of fact as evidence against the maker of the apology in appropriate circumstances so that the proposed bill would not have the unintended effect of stifling individuals in pursuing a fair claim. Having said the above, we are also concerned that if such factual information is related to evidence or intelligence gathered from investigations or implementation of regulatory measures, disclosure of the factual information in apology may hamper further investigation or prosecutions. Would it not allow the defendant to evade ‘obstruction of justice’ during legal proceedings, if the defendant deliberately leaks such factual information conveyed via apology to the victims/consumers/the public? These are complex legal considerations that need to be addressed before protection could be extended under the proposed legislation to cover such ‘factual information’.”
(Anonymous)

- (18) “This issue is under close scrutiny by the Steering Committee, as it is seldom raised in the existing apology legislations enacted in other jurisdictions. Although the Scottish Parliament considered this issue in their draft apology bill, it is worth noting that in the Apologies (Scotland) Bill passed by the Scottish Parliament on 19th January 2016, *there is no reference to statements of fact*. The reason for removing statements of fact from the protection of apology law is essentially that such protection would affect a claimant’s right particularly when the statement of fact in an apology was the only evidence available. The key reasons put forward by those who support the inclusion of statements of fact in the definition of apology are not different from those arguments summarized by the Steering Committee in para. 5.36 of the Consultation Paper. The HKBA analyzed and commented

on each of those arguments in its submission dated 17th August 2015 and will not repeat herein. It seems that there are no sufficient reasons to justify the interference with and infringement of a claimant's right to adduce evidence in order to prove his claim given that evidential value of statements of fact in connection with an apology outweighs its prejudicial effect. The Steering Committee considers that there are 3 alternative approaches which may be adopted to address this issue. The HKBA takes the view that the Second Approach is the most appropriate one for the following reasons: a) Under the First Approach, statements of fact in connection with the matter in respect of which an apology has been made is treated as part of the apology and should be protected. The court does not have any discretion to admit the apology containing statements of fact as evidence against the maker of the apology. This blanket approach would indeed provide clarity and certainty; nevertheless, there is a high risk that such approach would infringe on a claimant's right to seek justice. It is argued that a claimant would not suffer any prejudice because he would not have received an apology (and the accompanying statements of fact) in the first place. However, such reasoning does not apply to a spontaneous apology tendered immediately after the adverse event, as spontaneous apology is unlikely to be influenced by the existence or non-existence of an apology legislation. Furthermore, case law shows that statements of fact contained in a spontaneous apology may be closely related to the adverse event and have evidential value. Ms Margaret Mitchell, a member of the Scottish Parliament who introduced the apology bill pointed out that she included statements of facts to 'try to encourage the *fullest possible apology*'. The HKBA considers that this is an ideal rather than an inevitable result. To put it in another way, protection of statements of fact thereby running a risk of infringing on or interfering with a claimant's right is more

than necessary to accomplish the objective of the proposed legislation which is to 'promote and encourage the making of the apologies with a view to facilitating the resolution of dispute'. b) Under the Third Approach, the court retains the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances. One of the examples given by the Steering Committee is when those statements of fact would be the only evidence available to the claimant. However, it is unclear as to why claimants who cannot independently establish their claim should be more favoured than those who can, and this will create unfairness among claimants. It is also unclear as to when and how the Court would exercise its discretion. c) Under the Second Approach, the definition of apology would make no reference to statements of fact, and whether the statements of fact form part of the apology depends on the circumstances of a particular case and is a question to be determined by the Court. This approach would be comparatively better off to promote the objective of an apology legislation and achieve a just outcome in a particular case because of the following reasons: i) Statements of fact, by their nature, are directly relevant to civil liability; and in our common law based adversarial system, it is for the Court to determine liability. ii) The arguments for protecting statements of fact are less compelling because (a) the objective of an apology legislation is to promote and encourage the making of apologies, not 'perfect' apologies or 'fullest possible' ones; and (b) statements of fact are less likely to be prejudicial to a defendant compared to expression of sympathy and admission of fault. iii) It allows litigants to adduce relevant statements of facts as evidence thereby removing the potential injustice to litigants. As pointed out by Mr. Paul Wheelhouse, the Minister for Community Safety and Legal Affairs of Scotland, 'we cannot ignore the rights of claimants or pursuers who might need to draw upon an apology

in their evidence base simply because such cases are likely to be few in number. Surely, protecting the rights of minorities is at the heart of good law making'. iv) It allows the Court to scrutinize the circumstances surrounding the making of the apology and determine whether the statements of fact form part of the apology. d) The Second Approach is actually the Canadian approach which was demonstrated by the case of *Robinson v Cragg*. It shows that the Court can separate factual contents from an apology containing expression of regret or sympathy and an admission of fault when an apology legislation does not refer to statements of fact. Master Laycock noted that- 'It is the expression of sympathy or regret combined with the admission of fault that the legislature has determined is unfairly prejudicial.' e) In *Cormack v Chalmers*, a very recent case handed down on 8 September 2015, in dealing with similar legislation in Ontario, the Honourable Justice Sheila Ray faced an issue concerning the legal effect of the Apology Act on certain evidence that the plaintiff proposed calling. In this case, the plaintiff was badly injured after she was hit by a motorboat while she was swimming near a harbor entrance. At the time of the accident, the plaintiff had been a guest at the residence of Shannon Pitt and Erik Rubadeau, the defendants. The plaintiff believed that the defendants had been negligent in not informing her about the danger of swimming at the end of the dock. i) The evidence the plaintiff proposed to call is as follows: 'Asen spoke with Shannon Pitt and Eric Rubadeau. Shannon told Asen that she was sorry and she could not forgive herself. She said that she always tells people not to swim behind the dock and has told her father not to go swimming there. Shannon regretted not telling Rumiana.' ii) Justice Ray referred to *Robinson v Cragg* and noted that- 'Clearly any evidence of an apology as defined is inadmissible. The question raised is whether an otherwise admissible relevant admission coupled to an apology is

admissible. This requires a contextual analysis of the words used. The statements in question each convey separate and distinct thoughts or messages'. Justice Ray ruled that Shannon's words expressing she was sorry about the plaintiffs accident was inadmissible thereby conforming with the requirements of the Apology Act but the remaining sentences were admitted as evidence. iii) This is a correct and just result. If all the sentences were ruled inadmissible, it would create an extra burden on the plaintiff to prove that the defendants were negligent. Given that no other apology legislations had covered statements of fact in the leading common law jurisdictions and the Canadian approach works well, it would be better off to leave the issue for the courts of Hong Kong to decide instead of making a blanket protection. Therefore, the HKBA supports the Second Approach among the 3 aforesaid Approaches put forward by the Steering Committee in dealing with factual information conveyed in an apology under the proposed apology legislation." (Hong Kong Bar Association)

- (19) "With the protection of statements of fact, the Chinese Medicine Practitioners Board will no longer need to determine in its inquiry whether a statement of fact should be treated as part of an apology and whether such a statement is admissible as evidence. This will make the relevant disciplinary and regulatory proceedings relatively simpler...The Chinese Medicines Board ('CMB') as a regulatory body for medical professionals does not have the legal expertise to determine whether a statement of fact in connection with an apology should be treated as part of the apology, and whether it is admissible as evidence in an inquiry. This process of determination will also render the related disciplinary and regulatory proceedings protracted and cumbersome. A decision by the CMB as to whether to admit an apology containing statements of fact as evidence, which is based on the non-legal judgment and discretion, is also likely to

be challenged by the defendant or the complainant.” (Chinese Medicine Council of Hong Kong) (English translation)

Comments from those who oppose this issue

4.3 Amongst the 40 responses received, 6 of them oppose this issue. The key reasons are as follows:

- (1) “If in the inevitable event that the proposed apology legislation is to cover the EAA’s inquiry proceedings, we would strongly submit that the definition of ‘apology’ under the new legislation should not cover factual information conveyed in an apology. Although the party concerned may be more willing to make an apology if the factual information conveyed in an apology is protected by the apology legislation, it should be noted that such factual information could also be highly probative in value and directly relevant to the liability of the party concerned, and hence such information should in principle be admissible as evidence. At present, the EAA’s Disciplinary Committee (DC) may receive and consider any material, whether by way of oral evidence, written statements or otherwise as it considers relevant to the hearing irrespective of whether or not such material would be admissible in a court of law. The EAA’s inquiry proceedings might be compromised if the factual information conveyed in an apology is protected by the apology legislation *per se* and cannot be taken into account by the DC in determining the fault or liability of the party concerned. Moreover, we are given to understand that overseas jurisdictions, such as Canada and Scotland, do not protect/make any reference to statements of fact in their apology legislation. We therefore take the view that the wording regarding statements of fact should be omitted from the apology legislation to allow flexibility.” (Estate Agents Authority)

- (2) “we are inclined to agree with the comments of Hong Kong Bar Association that there is doubt at this stage as to whether the apology legislation should protect a statement of fact conveyed in an apology, since statements of fact are not necessarily integral to an effective apology and the probative value of statements of fact conveyed in an apology outweighs its prejudicial value, and therefore it should be for the court to decide whether such statements of fact should be admitted as evidence. In this regard, of the 3 alternative options suggested, we tend to consider the Second Approach as more preferable.”
(Companies Registry)
- (3) “We have pointed out in our previous comments that there should be legal certainty that such legislation will not have any impact on misconduct proceedings pursued by regulatory bodies and the Insurance Authority (‘IA’)'s regulatory functions will not be affected in any way by the proposed apology legislation. Under s.4(3) of the draft Apology Bill, an apology includes ‘a statement of fact in connection with the matter’ and as such, will not be regarded as admissible evidence to s.7 of the draft Apology Bill. Under such circumstances, it may have difficulty in establishing the merits of misconduct cases (such as cases against the misconduct of insurance intermediaries) if a statement of fact cannot be used as admissible evidence in the disciplinary and regulatory proceedings. The regulatory functions of the IA would be jeopardized. As such, we propose that either there is an exemption provision to allow the admissibility of ‘a statement of fact’ as evidence in the disciplinary and regulatory proceedings under the Insurance Ordinance (Cap 41) (‘IO’), or otherwise the IA be exempted from the proposed apology legislation. If the suggested exemption for financial regulators is not considered appropriate, we propose that the protection for a statement of facts should, at the minimum, not be applicable under the circumstances when

the statement contains factual information of a person who admits to a contravention of any rules, regulations, codes or guidelines issued under the relevant Ordinance. The above potential implication of the draft Apology Bill also affects other similar regulatory regimes. Views from all financial regulators, including the Securities and Futures Commission and Hong Kong Monetary Authority, are advised to be sought. Exemption under the proposed apology legislation (if enacted) should apply equally to the disciplinary and regulatory proceedings under all the relevant Ordinances.” (Office of the Commissioner of Insurance)

- (4) “The Council is most concerned about the scope of the definition to ‘apology’ under section 4 of the draft Apology Bill. If the definition of ‘apology’ is to include statements of fact in connection with the matter, that would mean that statements of facts which are otherwise relevant to any issue before the Council would be excluded from being admitted as evidence. This may not be conducive to a fair hearing. In exercising its quasi-judicial function, the Council should be allowed to base its decision on any material which tends logically to show the existence or non-existence of facts relevant to the issue, and this should include statements of fact accompanying an apology. Therefore, the Council is of the view that it should retain the discretion to admit statements of fact accompanying an apology as evidence.” (The Dental Council of Hong Kong)
- (5) “The Council is a statutory authority established under the Nurses Registration Ordinance (‘the Ordinance’) (Cap. 164, Laws of Hong Kong). Its objective is to provide the community with nurses of the highest professional standard and conduct. Apart from various functions relating to the registration and enrolment of nurses in Hong Kong, the Council also exercises the regulatory and disciplinary powers for the profession in accordance with the Ordinance. It deals with complaints against

registered/enrolled nurses touching on matters of professional misconduct. It has no jurisdiction over claims for refund or compensation, which should be pursued through separate civil proceedings. The Council noted that the main proposal of the draft Apology Bill is that evidence of an apology will not be admissible as evidence for determining fault and such proposal will be applicable to disciplinary and regulatory proceedings. In this regard, the Council would like to express the concern on the definition of ‘apology’ under the legislation, in view of the possible impact on/hindrance to the Council’s disciplinary proceedings. In the event that the definition of ‘apology’ is to include statements of fact in relation to the matter, that would mean statements of fact which are otherwise relevant to any issue would be completely excluded from being admitted as evidence. This may not be conducive to a fair hearing. In this regard, the Council is of the view that the Council should retain the discretion to admit statements of fact accompanying an apology as evidence.” (Nursing Council of Hong Kong)

- (6) “In case the Council’s view that the proposed apology legislation should not be applied to disciplinary proceeding under the CRO is not adopted by the Steering Committee, the Council’s views on the question of whether factual information conveyed in an apology should be protected are:- (a) If it is intended to pacify the aggrieved patient, an expression of regret and/or sympathy will suffice to achieve that purpose. (b) While the aggrieved patient will naturally wish to hear an explanation setting out the relevant facts resulting in the unfortunate incident, the patient will equally be keen to pursue justice if the explanation shows that the chiropractor has been at fault. To shut the patient out from pursuing justice (if the admission is the only evidence to prove the chiropractor's misconduct) in the face of such admission will cause even more resentment than if no apology had been tendered at all. Knowledge of the chiropractor's fault,

coupled with anticipation that he may cause further injury to others and compounded by the helpless feeling of being unable to bring him to justice, will be even more unbearable psychologically for the aggrieved patient. (c) To artificially suppress the aggrieved patient from revealing the chiropractor's admission will damage the aggrieved patient's (and the public's) trust of the Council in regulating the professional conduct of registered chiropractors. (Chiropractors Council)

Other comments

4.4 There are other comments regarding this issue. The relevant ones are as follows:

- (1) "This matter may raise some controversies. We acknowledge the view that a bare apology itself without giving any statements of fact may lack sincerity; an apology accompanied with statement of facts tends to make the apology more effective and sincere. There are suggestions that statements of fact conveyed in an apology could provide important material facts that are of probative value to the related civil proceeding, and that instead of granting a blanket protection, the admissibility should better be left for the Court to decide. We do not agree to this suggestion, as it clumsily leaves a grey area, which could lead to satellite litigations. Instead of promoting settlement, this suggestion creates uncertainty and invites unnecessary arguments between parties and in court. It defeats the purpose of the proposed apology legislation. On this issue of litigation, we add that (a) if the legislation does not allow a partial apology to be adduced as evidence, this will almost invariably introduce arguments and litigation – on which part of the open statement is 'expression of regret, sympathy or benevolence in connection' (clause 4(1) of the Bill) and which part is not. That could be a very difficult if

not an impossible question, given the almost limitless factual matrix that could arise in different situations. (b) if the legislation is to cover full apologies (see clause 4(3) of the Bill), thus rendering them to be inadmissible as evidence, a witness at the time of a trial can testify in the witness box a version of event which could be completely different from or opposite to what he has said openly in an apology. As we have pointed out in our last submission, this could be hypocritical (§ 14(d), our submission dated 7 August 2015). Would that enhance settlement? Or would that instead generate ill-feelings between parties or even lead to more litigation on e.g. what has been said and what has not been said on the relevant occasions? (c) the legislation is silent on the responses to apologies – what if a receiving party, in response to an apology, says ‘That is okay’? Are these statements and other responses (both verbal and non-verbal) admissible? What are their status and their evidential weights? (d) constitutionally speaking, could the claimants or victims have a fair hearing, if they cannot rely at trial on any admission or statement of fact made by the apologizing party on an open basis? We feel obliged to point out that the object of the Bill is ‘*to promote and encourage the making of apologies with a view to facilitating the resolution of disputes*’ (clause 2). This object, insofar as the facilitating of resolution of disputes is concerned, is commendable, and is therefore supported in principle. However, the drafting appears to go beyond the object. Instead of confining itself to settlement efforts, it appears literally to render inadmissible, for example, statements made at the time of an accident, which are not made in the course of any such settlement efforts. That could then introduce debates as to whether words spoken are apology or not (e.g. are admission not apology). This is an entirely different issue. It could lead to exclusion of evidence presently admissible and of importance. It makes sense for apologies, including statements of facts

accompanying them, to be protected from admissibility when made as part of settlement efforts. It is not a rationale which applies to *res gestae* statements or to admissions made outside the context of settlement efforts. The object is that apologies made in a settlement effort, as in without prejudice negotiations or mediation, should be protected. The Steering Committee advised that the Apologies (Scotland) Bill has been passed by the Parliament on 19 January 2016 (§10.11 Consultation Report). In the Consultation Report, the Steering Committee quoted an extract of the Stage 1 Debate in the Chamber of the Scottish Parliament on 27 October 2015 (§ 10.10, *ibid*). There are other passages in the above debate which have not been quoted and which we consider should be brought up in this consultation. For instance, Ms Margaret Mitchell (who introduced the Scotland Bill) in the same debate said ‘*Some concern has been expressed that making an apology inadmissible in civil proceedings could prejudice a pursuer’s future case. However, as the Massachusetts experience makes plain and as various witnesses have confirmed, that places too much emphasis on the assumption that the majority of individuals automatically wish to pursue a claim in court. It also downplays the potentially life-altering benefits of an apology. As the Scottish Human Rights Commission, the Law Society of Scotland and Prue Vines—the academic expert on apologies—state from their experience, the pursuers are not prejudiced because, in most cases, no apology would be forthcoming if it was admissible in civil proceedings. I hope that those observations help to allay any concerns that members have about the issue.*’ What is worth noting from the above is the wide consultation and researches the Scottish Parliament has been able to receive in the scrutiny of their bill. Stage 2 of the parliament debate on the Apologies (Scotland) Bill took place on 8 December 2015. In the Stage 2 debate, the Minister for Community Safety and Legal Affairs Mr

Paul Wheelhouse explained why the Scotland has at that (late) stage agreed the definition of apology should be revised to exclude the statement of facts. Among other things, Mr Wheelhouse said *‘Making expressed or implied admissions of fault inadmissible because they are preceded by an expression of regret would not strike an appropriate balance. Some jurisdictions, including New South Wales, on whose legislation the bill is based, have largely replaced the common law of negligence with statutory no-fault compensation schemes. In such a context, apologies legislation does not present the same challenges. When fault is not at issue, apologising for causing injury does not put the person who caused the injury in a worse position. As I noted, making admissions of fault inadmissible as evidence in a largely common-law-based adversarial system presents concerns about access to justice for pursuers. That was clear from the evidence from the Faculty of Advocates and the Association of Personal Injury Lawyers at stage 1 [of the Parliament debate]. Ronald Conway of APIL explained that “The first thing that any justice system has to do is to get at the truth.” If “admission of fault” was retained in the definition of an apology, it would, in his words, remove an “extremely powerful and persuasive piece of evidence.” — [Official Report, Justice Committee, 9 June 2015; c 5.] He gave the example of a road traffic accident, but there are other scenarios where injustice could arise in cases where an admission of fault was the only means of demonstrating liability for the harm caused. A pursuer would be unable to succeed in an action for damages if “fault” remained part of the definition. As I explained to the committee previously, one of my main concerns was about the evidential hurdles that survivors of historical child abuse can face when they seek to progress a court action. Preventing the use of an admission of fault in the way proposed in the bill could add to their evidential burden...In its stage 1 report, the*

committee made it clear that it must be reassured that individuals who wish to pursue fair claims will not be disadvantaged by the measures in the bill. In an effort to work constructively with Margaret Mitchell, I have undertaken further inquiries into the impact of protecting a simple apology, which is what we would get if the definition was amended to remove references to 'fault' and 'fact'. Having listened to stakeholders, I have been persuaded that, if the definition is amended to remove 'fault' and 'fact' and the necessary exceptions are provided for in section 2, the concerns about access to justice that have been raised will be addressed. I trust that, if amendments 10 and 1 are agreed to, they will provide the committee with sufficient reassurance that the concerns about access to justice that were voiced during stage 1 have been addressed." The above references are absent from the Consultation Report. They are relevant to the discussion. We ask that the above and the rationales underlining the U-turn in the legislation process of the apology bill in the Scotland be closely examined and analysed *in the local context, and together with those issues we have raised in the above paragraphs.*" (The Law Society of Hong Kong)

The 3 alternatives

4.5 In paragraph 10.14 of the 2nd Round Consultation Paper, 3 approaches to address the issue of protection of statements of fact were set out:

- (1) Statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and should be protected. The Court does not have any discretion to admit the apology containing statements of fact as evidence against the maker of the apology. ("First Approach")

- (2) The wordings regarding statements of fact are to be omitted from the apology legislation and whether the statements of fact should constitute part of the apology would be determined by the Court on a case by case basis. In cases where the statement of fact is held by the Court as forming part of the apology, the Court does not have any discretion to admit the statement of fact as evidence against the maker of the apology. (“Second Approach”)
- (3) Statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and be protected. However, the Court retains the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances. (“Third Approach”)

4.6 Amongst the 40 respondents who addressed the issue of whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation, 10 supported the First Approach, 2 supported the Second Approach, 10 supported the Third Approach and 18 did not indicate any preference on the three approaches. Below is a table setting out the respondents’ stances on the issue and preferences of the approaches.

Issue 2 - Whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation					
	No. of submissions received	1st Approach	2 nd Approach	3 rd Approach	No preference on the three approaches
Agree	30	10	1	9	10
Disagree	6	0	1	1	4
No explicit stance made on Issue 2	4	0	0	0	4
Total	40	10	2	10	18

Analysis and response

4.7 After considering the submissions and comments including those set out above, the Steering Committee has the following analysis and response.

4.8 As pointed out in paragraph 10.13 of the 2nd Round Consultation Paper, the issue relating to statements of fact is admittedly a controversial one. The issue would potentially affect the claimants' rights and has not been covered in existing apology legislation enacted elsewhere. Of all the submissions received on this issue, the majority agreed that statements of facts conveyed in an apology should be protected by the proposed apology legislation. After considering all the submissions, the Steering Committee takes the view that by protecting statements of fact conveyed in an apology, a person may be encouraged to make a fuller and more meaningful apology. A fuller apology which includes disclosure of facts would help parties to understand the root cause or underlying circumstances of the incident. This would likely facilitate settlement and would be in line with the policy objective of the proposed apology legislation.

4.9 It appears that some of the organisations/bodies/persons are concerned that the inclusion of statements of fact in the definition of apology would render factual information which is highly probative in value and directly relevant to the liability of the party concerned inadmissible as evidence and would not be conducive to a fair hearing. Some are concerned that if statements of fact given in an apology are protected and inadmissible, a witness at the time of a trial can testify in the witness box a version of event which could be completely different from or opposite to what he has said openly in an apology which could be hypocritical and could generate ill-feelings or even lead to more litigation. The Steering Committee considers that while there may be situations where the statements of fact may be rendered inadmissible in applicable proceedings, this implication should be taken into account alongside with other factors in the balancing exercise, namely:-

- (1) that the proposed apology legislation does not prevent the person making the claim from relying on other independent evidence to

prove his claim. This is especially so as clause 10(a) of the draft Apology Bill expressly states that discovery in applicable proceedings will not be affected;

- (2) that the proposed apology legislation will not affect the investigation power of professional bodies and regulators in the gathering of evidence;
- (3) that the draft Apology Bill provides that an apology does not include one that is made by a person in a testimony, submission, or similar oral evidence given at a hearing of applicable proceedings;
- (4) that an apology with accompanying facts would probably not have been given in the first place if there is no apology legislation;
- (5) that if certain statement of fact given in an apology is the only evidence available, it may be unsafe and unfair to use that piece of evidence alone to establish liability against the maker of the apology;
- (6) that when the Third Approach will be adopted to deal with statements of fact conveyed in an apology (more explanations will be given below), this may help alleviate the concern over the risks of depriving an adjudicating body of the relevant and probative evidence as under that approach, the protection of statements of fact conveyed in an apology would not be absolute and the Court or the tribunal would retain discretion to admit these statements as evidence. This discretion can also be applied to deal with the situation where the a witness at the time of a trial testifies in the witness box a version of event which could be completely different from or opposite to what he has said openly in an apology.

4.10 After considering all the factors, the Steering Committee takes the view that the balance should be tilted towards protecting statements of fact conveyed in an apology which would better achieve the objective of the proposed legislation.

4.11 As regards whether the First, Second or Third Approach (no organisations/bodies/persons in their submissions suggested any other approaches) should be adopted in the treatment of statements of facts in an apology, the response is more varied. From the submissions received, 10 organisations/bodies/persons supported the First Approach while an equal number supported the Third Approach.

4.12 As explained above, for both the First and Third approaches, statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and should be protected. The difference between the First Approach and the Third Approach is that under the Third Approach, the Court retains the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances.

4.13 The Steering Committee notes the development of the Apologies (Scotland) Act 2016 which was passed in January 2016. It is noted that the Apologies (Scotland) Bill first introduced in the Scottish Parliament for debate sought to protect a statement of fact in an apology. However, this protection was removed when the Bill was enacted. The reason for removing statements of fact from the protection of the apology legislation is essentially that such protection would affect a claimant's right to remedies particularly when the statement of fact in an apology is the only evidence available. With the enactment of the Apologies (Scotland) Act 2016 which makes no reference to a statement of fact, currently, there is no overseas jurisdiction that expressly protects or makes reference to statements of fact in an apology. In the absence of overseas jurisdiction that protects a statement of fact in an apology in its apology legislation and that the apology legislation in the leading common law jurisdictions including Canada appears to be working well, some organisations/bodies/persons were of the view that it would be appropriate to adopt a conservative approach and let the court decide on a case by case basis whether certain statements of fact should be considered part of an apology and therefore protected, rather than providing a blanket protection to all statements of fact accompanying an apology.

4.14 The Steering Committee is of the view that having regard to the submissions received on this issue and noting that the majority of the submissions is in favour of protecting factual information conveyed in an apology, the Second Approach, which is silent on statements of fact and leaves it to the court to decide whether a statement of fact forms part of the apology on a case by case basis would not be adequate to address the concerns expressed in relation to the uncertainty despite the respectful submissions advanced. As discussed in paragraph 10.16 of the 2nd Round Consultation Paper, this approach can be perceived as an uncertainty and hence may be inconsistent with the objective of encouraging people to make fuller apologies. The Steering Committee considers that express wording on the protection of statements of fact will be needed.

4.15 Having regard to the issues of concern surrounding the debate of the Apologies (Scotland) Bill, the Steering Committee is of the view that a blanket protection of factual information conveyed in apologies under the First Approach may unduly affect the claimants' right to a fair hearing and this may not be rationally connected with the legitimate aim of the proposed legislation. As pointed out in paragraph 10.18 of the 2nd Round Consultation Paper, to ascertain whether the apology legislation would infringe the fundamental rights of the claimants, the following questions should be considered: (1) whether the infringement or interference pursues a legitimate societal aim; (2) whether the infringement or interference is rationally connected with that legitimate aim; and (3) whether the infringement or interference is no more than is necessary to accomplish that legitimate aim. A recent case of the Court of Final Appeal ruled that a fourth step of (4) weighing the detrimental impact of the infringement or interference against the social benefit gained should also be considered. Regarding question (1), the Steering Committee is of the view that the proposed apology legislation serves a legitimate societal aim, which is to facilitate settlement of disputes by encouraging the making of apologies. For question (2), the Steering Committee takes the view that a blanket protection of factual information conveyed in apologies regardless of circumstances and impact on the parties may not be rationally connected with the legitimate aim of the proposed apology legislation because such blanket protection may deny the claimants' access to justice which is contrary to the policy intent of

the proposed apology legislation to facilitate settlement of disputes. It follows that question (3) could not be satisfied and there is no need to consider question (4). Hence, the Steering Committee is concerned that the First Approach, if chosen, will give rise to an unacceptable risk that the relevant provision would be struck down by the Court.

4.16 Under the Third Approach, factual information conveyed in an apology would be protected by the proposed apology legislation but the Court or the tribunal would have the discretion to admit it as evidence in appropriate circumstances. It appears to the Steering Committee that with the discretion given to the Court or the tribunal to admit the otherwise inadmissible statements of fact as evidence when the circumstances require, the potential infringement or interference with the rights of the parties, in particularly the claimants' right to a fair hearing, could be avoided. Further, the Steering Committee considers this discretion is essential to deal with the different circumstances that may arise. This approach also addresses the concern expressed by some professional organisations/bodies and regulators that their regulatory powers would be significantly impaired if the disciplinary and regulatory proceedings they are responsible to administer were not exempted from the proposed apology legislation. The Steering Committee suggests that such discretion to admit statements of fact conveyed in apologies as evidence of fault or liability should be retained by the Court or the tribunal to be exercised when the Court or the tribunal finds it just and equitable to do so having regard to all the circumstances, including where the other parties consent to the admission of the statement of fact and whether there exists any other evidence that the claimant has or may obtain (e.g. through discovery and administration of interrogatories) to establish his claim. It is noted that there is concern that such discretion may lead to uncertainty and therefore satellite litigation. Nevertheless, it should also be noted that such kind of discretion by the Court or tribunal is not uncommon in civil proceedings under common law and statutes. Further, it is anticipated that such discretion would only be invoked in limited circumstances, e.g. the statement of fact accompanying the apology is the only piece of evidence available, and therefore it appears unlikely that there would be much satellite litigation on this issue and that any uncertainty would be settled or reduced with the development of case law.

Final recommendation

4.17 After considering all the responses received, the Steering Committee recommends that the factual information conveyed in an apology should likewise be protected by the proposed apology legislation and the Court or tribunal in applicable proceedings should retain a discretion to admit such statements of fact as evidence against the maker of the apology where it finds it just and equitable having regard to all the circumstances.

Chapter 5: Issue 3 – The draft Apology Bill

Comments received

5.1 We received the following comments regarding the draft Apology Bill:

- (1) “[W]e still hope that the Committee would consider revising the title of the legislation to facilitate public understanding of its contents. In the first round of the consultation, the Committee recommended that the proposed legislation was to cover full apologies and, *inter alia*, not to apply to certain excepted proceedings. However, since it is easy for the public to identify the making of an ‘apology’ with an admission of liability, the title ‘apology legislation’ may mislead them as to its meaning. An illustrative case in point is how the wording of ‘apology’ and ‘sorry or regret’ became a subject of controversy in communities following the collision of Chinese and American military aircrafts in 2001. Finally, the American side adopted ‘sorry or regret’ to resolve the controversy.” (English translation) (The Council of Social Development)
- (2) “Section 7(1) stipulates that ‘evidence of an apology made by a person in connection with a matter is not admissible in applicable proceedings...’ and that, in section 7(2), this ‘applies despite anything to the contrary in any rule of law or other rule concerning procedural matters.’ However, section 10 stipulates that the Apology Ordinance does not affect ‘discovery, or a similar procedure in which parties are required to disclose or produce documents in their possession, custody or power, in applicable proceedings’. In situations where documentary evidence of an apology and/or admission of liability is disclosed

in the course of discovery or any similar procedure, will section 7 or section 10 apply? Furthermore, if such documentary evidence exists but has never been published or disclosed to the intended recipient or any other third party, would this documentary evidence be admissible in court upon discovery or any similar procedure?” (Hong Kong Association of Banks)

- (3) “The definition of apology under clause 4: Meaning of apology of the Bill is too vague to be comprehensible to the general public. It is not easy for a victim to understand the extent of an apology made by the other party. We propose that clause 4: Meaning of apology should include the definitions of “full apology” and “partial apology” to give both parties to a dispute a better idea of the outcome and/or purpose achievable, and allow more room for the exchange of conditions, thus enhancing the chance of settlement.” (English translation)” (GY Professional Mediation Services)
- (4) “[W]e would like to reiterate that an appropriate balance should be struck in the legislation so that it will not encourage the Government to make apology statements loosely, or to increase public expectation that apologies would readily be made by the Government on any disputed issues - such drawbacks could adversely affect the authoritative image of the Government. In this connection, we have some reservations on the proposed ‘Object’ of the Apology Ordinance as included in the Draft Apology Bill at Annex 2 of the Consultation Report, which states that ‘The object of this Ordinance is to promote and encourage the making of apologies with a view to facilitating the resolution of disputes.’, without any qualification or limitation of the term ‘disputes’. We are of the view that whether or not a party, including the Government, should make an apology depends on whether the party does have actually done something wrong (or have done something right but in an undesirable way). If the party has already done the best he could, it seems not

desirable for the society to promote or encourage that party to make apologies even though it may facilitate the resolution of ‘disputes’. Otherwise, it may distort people’s values in distinguishing right from wrong, not to mention that we may run the risk of increasing the society’s expectation of the Government apologizing on each and every minor glitches...or overdoing apologies in general. We propose that a critical review of the ‘Object’ of the Ordinance is deemed necessary. Furthermore, we suggested...that as to whether the enactment of a local apology legislation would facilitate the resolution of disputes, *studies and research should preferably be conducted for Hong Kong in a scientific manner*. We would like to opine that the experience in overseas common law jurisdictions might not be entirely applicable to Hong Kong as we are also governed by the unique establishment of the Basic Law. Indeed, we have our own culture and ideology that could be different from other jurisdictions. This is an area that should merit further deliberations.” (Anonymous)

- (5) “To address the point raised in paragraph 8 above, OFCA suggests that the Apology Bill should define the term ‘apology’ in section 4(1) to expressly exclude any apology in any form given at any time, whether voluntarily or pursuant to any requirements, by a regulated party to the concerned regulatory/enforcement authority that may be subsequently considered by the authority in processing the matter or making any regulatory/enforcement decisions. Further or alternatively, the proposed exclusion from application of the Apology Bill as set out in paragraph 9 above can be expressly inserted to section 4(4) of the draft Apology Bill, which as presently drafted already excludes some form of apology that may be made to a regulatory authority, but is not wide enough to cover all forms of apologies made at any time by regulated parties to regulatory/enforcement authorities that may be subsequently considered by such

authorities in processing the matter or making any enforcement decisions. OFCA also assumes that the reference to ‘applicable proceedings’ in section 5 of the draft bill covers any stage of a regulatory/enforcement authority processing a matter in the context of its regulatory/enforcement functions prior to the making of regulatory/enforcement decisions (i.e. including all stages before or during an enquiry, a formal investigation or regulatory proceedings). Subject to the Steering Committee’s clarification on the meaning of ‘applicable proceedings’, OFCA considers that the finalised wording on exclusion should clearly cover all apologies made to regulatory authorities in all possible scenarios. As per section 10 of the draft Apology Bill, the new legislation shall not affect any requirement to disclose or produce documents in applicable proceedings. In so far as the CA is concerned, the Regulated Parties are obliged under the Information Seeking Powers to supply ‘documents’ and ‘information’ to the CA. Some of the Information Seeking Powers refer to specific types of documents such as data, book and record which may be in any form. OFCA considers that the present draft section 10 (which refers to ‘documents’ only) may not be clear or wide enough and would propose that more clear wording be used in section 10 so as to cover all the Information Seeking Powers that may be exercised by the CA (or similar powers administered by other regulatory authorities).” (Office of the Communications Authority)

- (6) “We notice that the Apology Bill (the Bill) does not provide a definition for ‘proceedings’. Historically, the term ‘proceeding’ was given a narrow interpretation to mean the ‘invocation of jurisdiction of the court by process other than a writ’: *Herbert Berry Associates Ltd v IRC* [1977] 1 WLR 1437. This traditional legal meaning has been extended to include any proceeding before any court, tribunal or person having by law power to hear, receive and examine evidence on oath: Crimes Ordinance (Cap.

200) s28. Under LRO, we do not find any description of ‘proceedings’ for conciliation, special conciliation and mediation. As such, we are of the view that the processes of the conciliation, special conciliation and mediation under LRO are unlikely the proceedings of the Apology Legislation and are hence outside the scope of the Bill. On the other hand, we consider that the proceedings of the arbitration tribunal and board of inquiry (e.g. both of which have the power to require any person to give evidence on oath – see sections 17(1)(b) and 28(1)(b) of LRO extracted below) are likely to be caught by section 5(1)(b) of the Bill as ‘other proceedings conducted under an enactment’, as follows: Section: 17(1)(b) of LRO (1) For the purposes of an arbitration, an arbitration tribunal may require any person- (b) to attend before it and give evidence on oath or otherwise. Section: 28(1)(b) of LRO (1) For the purposes of an inquiry, a board of inquiry may require any person- (b) to attend before it and give evidence on oath or otherwise. Having noted that the fundamental purpose of LRO is for the settlement of trade disputes and hence the machineries thereunder should have an aim to facilitate settlement of trade disputes which is in line with the spirit of the Apology Legislation, we see there being merits to encourage any parties involved in a trade dispute to make constructive expressions, including making apologies, to reach an amicable settlement of the dispute. As such, there may not be a need to seek exception of the process/proceeding of an arbitration tribunal and a board of inquiry under LRO from the Bill. Along the same line, we do not consider there is a need to seek exception of ‘conciliation, special conciliation and mediation’ under LRO from the Bill even if they are to be caught as ‘proceedings’ under the Bill. This notwithstanding, where you consider our interpretation of ‘proceedings’ as far as LRO is concerned is problematic, please let us know.” (Labour Department)

- (7) “I have no additional comments to make about the wording of the Bill other than to refer to clause 7. There will be circumstances where evidence of an apology will be excluded but a defendant will want to have it admitted for purposes other than those stated expressly in clause 6. For example, in contempt and disciplinary proceedings (as in defamation proceedings) an apology might be relevant to mitigation and any sanction to be applied. It would be beneficial to make reference to this in the Explanatory Memorandum.” (Professor Robyn Carroll)
- (8) “We note that the draft bill of HK Apology Legislation does not preclude retrospective effect. It is unclear whether the apology made before enforcement of this Legislation will be protected in the later legal proceedings.” (Kevin Ng & Co., Solicitors)
- (9) “We suggest to add a liability protection clause, viz Clause 12, to the Bill. ‘12. *Non-Compliance of this Ordinance: A person is not to be treated for the purposes of this Ordinance as having been negligent by reason of his failure to make an apology under this Ordinance.*’” (Immigration Department)
- (10) “While we have no excepted proceedings to be added onto the exception schedule, we suggest that the term ‘regulatory proceedings’ be defined in the proposed legislation for the sake of clarity.” (Anonymous)

5.2 We also received the following comments regarding the proposed apology legislation generally:

- (1) “Since the proposed legislation may apply to the disciplinary or regulatory proceedings such as the Disciplinary Committee of the Social Workers Registration Board, where the proceedings are presided and heard by persons of non-judicial or non-legal background, these personnel should be better equipped with the operation of this legislation, if enacted, when deciding the admissibility of evidence related to apology one way or another.

Community education should be provided adequately on the spirit of the legislation so that members of the public could be clearly helped to appreciate the legislation and not to use it as a means to force others or government officials to make apology, given the existence of this legislation.” (Social Welfare Department)

- (2) “It is obvious that the Apology Ordinance can, to a certain extent, facilitate early settlement between the two parties to a dispute, thus reduces the risk of litigation. Many people have misunderstanding about apology legislation and have the misconception that an apology amounts to protection against liability...Although the Apology Ordinance will help the resolution of disputes to a certain extent, medical disputes should be handled carefully so as to avoid misuse in particular. As mentioned above, most medical disputes arise from misunderstanding in communication. If frontline staff are rashly asked to apologise or apologised on their behalf by other hospital staff to avoid further action by complainants when they do not accept that they have made any mistakes, the apology might create unnecessary stress at work or damage staff morale.” (Hong Kong Patients’ Voice)
- (3) “The issues we have raised in the first round consultation include the inadequacies of the underlying research relied upon by the Steering Committee on full apology and the lack of analysis in the local context to support the proposed enactment of the legislation. We have queried whether differentiation has been made between jurisdictions with a regime for mandatory facilitation of mediation and those without. We have asked the Steering Committee the question that if those foreign countries have a regime that mandatorily requires mediation to resolve disputes, how much use an apology legislation would have, in terms of encouraging settlement and disposal of claims. In the Consultation Report released in this consultation, we note that

we have been quoted in few paragraphs (§§ 5.4, 7.4 and 8.2), but have not seen any specific response from the Steering Committee to the above questions and our concerns. In this second consultation, we would have anticipated a fuller discussion after the Steering Committee has considered the responses from the stakeholders. To the contrary, only three questions are posed in the consultation. They relate to excepted proceedings, the protection of statement of facts and a draft bill. These three questions are of course relevant, but the scope of this consultation is inappropriately and unfortunately restrictive. By limiting itself to very specific questions, the Steering Committee has wasted an opportunity to usefully source views in this complex matter. We repeat the issues we have raised in our previous submission on the matter. We also suggest a wider spectrum of stakeholders, including, for example, the victims groups in personal injuries claims and the relevant NGOs, be consulted in the process...Instead of confining itself to settlement efforts, it appears literally to render inadmissible, for example, statements made at the time of the accident, which are not made in the course of any such settlement efforts. That could then introduce debates as to whether words spoken are apology or not (e.g. are admission not apology). This is an entirely different issue. It could lead to exclusion of evidence presently admissible and of importance. It makes sense for apologies, including statements of facts accompany them, to be protected from admissibility when made as part of settlement efforts. It is not a rationale which applies to *res gestae* statements or to admissions made in a settlement efforts. The object is that apologies made in a settlement effort, as in without prejudice negotiations or mediation, should be protected.” (The Law Society of Hong Kong)

Analysis and response

5.3 The Steering Committee sees fit to respond to some of the submissions made.

Title of the Ordinance

5.4 The draft Apology Bill, if passed, would be cited as the Apology Ordinance. As to the concern expressed that this might cause confusion to the public in thinking that the legislation is about how to apologise or compelling people to apologise in certain circumstances and how words such as “sorry”, “regret” and “sympathy” are proposed to be used, the Steering Committee has considered whether a clearer title such as “Apology (Exemption of Liabilities) Ordinance” should be adopted. Having made reference to overseas jurisdictions and noted that the “apology” *simpliciter* is mostly used, the Steering Committee considers it appropriate to use the word “apology” instead of “apologies” or “apology (exemption of liabilities)” as the title of the Ordinance. The Steering Committee also considers that publicity and clarification of the objectives of the apology legislation may be undertaken to promote the apology legislation.

Definition of apology

5.5 In response to the submission made that full apologies and partial apologies should be defined in the draft Apology Bill, the Steering Committee wishes to clarify that by definition, full apologies would cover partial apologies and this has already been reflected in the draft Apology Bill.

5.6 In response to the submission made that “apology” should be defined to exclude any apology in any form given at any time, whether voluntarily or pursuant to any requirements, by a regulated party to the concerned regulatory/enforcement authority that may be subsequently considered by the authority, the Steering Committee considers that, for consistency, any apologies, even if they are made by a regulated party to the concerned regulatory/enforcement authority, should not be admissible as evidence in applicable proceedings. The Steering Committee considers that it would be quite seldom for a Regulatory

Authority having to rely on an apology as the only evidence in an applicable proceeding. Furthermore, it is hoped that the concern could be alleviated by the proposal that the Court or tribunal would retain the discretion to admit the statements of fact contained in apologies when it is just and equitable having regard to all the circumstances.

Objective of the legislation

5.7 In respect of the concern expressed that the objective of the proposed apology legislation in encouraging people to apologise might distort people's value in distinguishing right from wrong and might increase the society's expectation of the Government apologising on each and every minor glitches or overdoing apologies in general, the Steering Committee considers that although the proposed apology legislation aims to promote and encourage the making of apologies with a view to facilitating the resolution of disputes, it would still be an individual's own decision based on different factors as to whether s/he should make the apologies.

5.8 Some comments received from the consultation suggested that the drafting of the bill appeared to go beyond the object in that it literally rendered inadmissible statements made at the time of an accident which were not made in the course of any settlement efforts. In other words, the comments suggested that the application of the apology legislation should be confined to apologies made in the course of settlement only. The Steering Committee considers that an apology given at an early time would help to reduce the hostility and negative feeling of the injured person who may be more willing to communicate and engage in settlement negotiations with the person causing the harm. Indeed, the legislative intention is not just to cover settlement efforts where there exist other mechanisms such as without prejudice communication and mediation. The intention of the proposed apology legislation is to encourage the making of apologies irrespective of whether legal proceedings have commenced and whether settlement is contemplated. This would hopefully bring about a change in people's mindset and conduct in that more would be willing to make apologies so as to reduce the escalation and enhance the settlement of disputes.

Retrospective effect

5.9 In respect of the submission that the draft Apology Bill was unclear as to whether apologies made before the enactment would be protected in subsequent legal proceedings, the Steering Committee notes that in the absence of a clear intention to the contrary, a statute would not have retrospective effect. However, procedural statutes are generally applied retrospectively to proceedings that are not complete at the time of enactment no matter when the right to the action accrued, unless this may cause injustice. As the proposed apology legislation may affect both substantive rights of the parties and procedural rules and given that the demarcation between substantive rights and procedural rules is not always clear, it may be unclear as to how the presumption against retrospectivity should be applied if the statute is silent in this regard. To avoid any ambiguity and to reflect the legislative intent, it may be necessary to state that the proposed apology legislation applies only to apologies made after the commencement of the apology legislation. In addition, a similar clause may also be introduced to state that the apology legislation applies to contracts of insurance or indemnity irrespective of when they are entered into.

Definition of regulatory proceedings

5.10 In paragraph 6.40 of the 1st Round Consultation Paper, it is stated that “[r]egulatory proceedings refer to proceedings involving the exercise of regulatory power of a regulatory body under an enactment”. Similar to terms like “judicial proceedings”, “arbitral proceedings”, “administrative proceedings” and “disciplinary proceedings”, “regulatory proceedings” is self-explanatory and it may not be necessary to give a definition in the bill.

Miscellaneous

5.11 There have been comments that there was inadequate underlying research on full apology and a lack of analysis in the local context to support the proposed enactment of the apology legislation. The Steering Committee takes the

view that the recommendation to enact apology legislation is based on the research on the development of apology legislation in 56 jurisdictions (including Scotland) that the global trend is pointing to the direction of providing protection for full apology (see paragraph 4.69 of the 1st Round Consultation Paper) and that the academic study discussed in paragraphs 5.11-5.21 of the 1st Round Consultation Paper has provided sufficient support for the recommendation that full apologies, as opposed to partial apologies alone, should be protected by the apology legislation. Further, as mentioned in paragraph 3.7 of the 2nd Round Consultation Paper, Hong Kong is part of the common law system and there is no evidence to suggest that the objectives of the proposed apology legislation would be inconsistent with the local culture. On the contrary, from the responses received during the two rounds of consultation, it appears that the majority support the enactment of apology legislation in Hong Kong.

Draft Apology Bill

5.12 A draft Apology Bill was provided in Annex 2 to the 2nd Round Consultation Paper for comment. That draft was revised by the Department of Justice to reflect the final recommendations made by the Steering Committee. The revised draft Apology Bill is set out in **Annex 4** to this report and is for general reference only. It may not be the final version if legislation were to be introduced.

Chapter 6: Final Recommendations

The Steering Committee makes the following final recommendations after the 2nd Round Consultation:

Final Recommendation 1

The proposed apology legislation should apply to all disciplinary and regulatory proceedings except proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86), the Coroners Ordinance (Cap. 504) and the Control of Obscene and Indecent Articles Ordinance (Cap. 390). Further, a mechanism should be provided for in the draft Apology Bill to allow future amendments to be made to the schedule of excepted proceedings so as to provide flexibility.

Final Recommendation 2

Factual information conveyed in an apology should likewise be protected by the proposed apology legislation and the Court or tribunal in applicable proceedings should retain a discretion to admit such statements of fact as evidence against the maker of the apology where it finds it just and equitable having regard to all the circumstances.

Annex 1: List of Respondents to the 2nd Round Consultation

Responses were received from the following respondents in the 2nd round consultation, arranged in alphabetical order:

1. Buildings Department
2. Prof Carroll, Robyn
3. CCSS Mediation Service Centre
4. Mr Chan, Raymond
5. Mr Chan, Wai Kit
6. Chinese Medicine Council of Hong Kong
7. Chiropractors Council
8. Mr Chong, Yiu Kwong
Senior Teaching Fellow, Hong Kong Institute of Education
9. Mr Christensen, Paul
(HAB Public Affairs Forum)
10. Civil Aviation Department
11. Companies Registry
12. Construction Industry Council
13. Consumer Council
14. Correctional Services Department
15. Customs and Excise Department
16. Drainage Services Department
17. Estate Agents Authority
18. GY Professional Mediation Services
19. Hong Kong Academy of Medicine
20. Hong Kong Bar Association
21. Hong Kong Mediation Centre
22. Hong Kong Monetary Authority
23. Hong Kong Patients' Voices
24. Hong Kong Police Force
25. Hong Kong Productivity Council
26. Hong Kong Society of Notaries
27. Hospital Authority
28. Human Organ Transplant Board
29. Immigration Department
30. Independent Commission Against Corruption

31. Intellectual Property Department
32. Kevin Ng & Co., Solicitors
33. Prof Kleefeld, John
34. Labour Department
35. Legal Aid Department
36. Liberal Party
37. Little Bee
(HAB Public Affairs Forum)
38. Midwives Council of Hong Kong
39. Nursing Council of Hong Kong
40. Office of the Commissioner of Insurance
41. Office of the Communications Authority
42. Office of The Ombudsman, Hong Kong
43. Pharmacy and Poisons Board of Hong Kong
44. Planning Department
45. Registration and Electoral Office
46. Mr Robinson, Dundas
47. Securities and Futures Commission
48. Social Welfare Department
49. Supplementary Medical Professions Council
50. The Council of Mediation Development
51. The Council of Social Development
52. The Dental Council of Hong Kong
53. The Hong Kong Association of Banks
54. The Hong Kong Institution of Engineers
55. The Land Registry
56. The Law Society of Hong Kong
57. The Medical Council of Hong Kong
58. Anonymous
59. Anonymous
60. Anonymous

Annex 2: Membership of the Steering Committee on Mediation

(up to 26 November 2016)

Mr Rimsky Yuen, SC, JP, Secretary for Justice (**Chairperson**)

The Honourable Mr Justice Lam Man Hon, Johnson, VP

Ms Lisa Wong, SC

Mr So Shiu Tsung, Thomas

Mr Chan Bing Woon, SBS, MBE, JP

Mr John Robertson Budge, SBS, MBE, JP

Mrs Wong Ng Kit Wah, Cecilia

Professor To Wing, Christopher

Professor Nadja Alexander

Ms Siu Wing Yee, Sylvia, JP

Professor Leung Hai Ming, Raymond

Ms Amarantha Yip

Mr Danny McFadden

Dr Dai Lok Kwan, David, JP

Mr Law Wai Hung, Francis

Mr Yeung Man Sing

Ms Christina Cheung, JP

Mrs Tan Kam Mi Wah, Pamela, JP or her delegate

Mr Kwong Thomas Edward, JP or his delegate

*Annex 3: Membership of the Regulatory Framework Sub-committee
of the Steering Committee on Mediation*

(up to 26 November 2016)

Ms Lisa Wong, SC (**Chairperson**)

Mrs Wong Ng Kit Wah, Cecilia (**Vice-Chairperson**)

The Honourable Mr Justice Au Hing Cheung, Thomas

Professor Nadja Alexander

Dr Dai Lok Kwan, David, JP

Professor Leung Hing Fung

Ms Queenie Lau

Mr Iu Ting Kwok

Dr Shahla Ali

Mr Thomas Edward Kwong, JP, or his delegate

Draft Apology Bill

Contents

Clause	Page
1. Short title and commencement.....	1
2. Object of this Ordinance	1
3. Interpretation.....	1
4. Meaning of apology	1
5. Apology to which this Ordinance applies	2
6. Meaning of applicable proceedings	2
7. Effect of apology for purposes of applicable proceedings	3
8. Admissibility of evidence of apology	3
9. Apology not a Limitation Ordinance acknowledgment	4
10. Contract of insurance or indemnity not affected.....	4
11. Other matters not affected.....	4
12. Amendment of Schedule.....	5
13. Application to the Government.....	5
Schedule Proceedings That Are Not Applicable Proceedings.....	6

A BILL

To

Provide for the effect of apologies in certain proceedings and legal matters.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Apology Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

2. Object of this Ordinance

The object of this Ordinance is to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.

3. Interpretation

In this Ordinance—

apology (道歉)—see section 4;

applicable proceedings (適用程序)—see section 6.

4. Meaning of apology

- (1) In this Ordinance, an apology made by a person in connection with a matter means an expression of the person's regret, sympathy or benevolence in connection with the matter, and includes, for example, an expression that the person is sorry about the matter.
- (2) The expression may be oral, written or by conduct.

- (3) The apology also includes any part of the expression that is—
 - (a) an express or implied admission of the person's fault or liability in connection with the matter; or
 - (b) a statement of fact in connection with the matter.
- (4) In this Ordinance, a reference to an apology made by a person includes an apology made on behalf of the person.

5. Apology to which this Ordinance applies

- (1) This Ordinance applies to an apology made by a person on or after the commencement date of this Ordinance in connection with a matter, regardless of whether—
 - (a) the matter arose before, on or after that date; or
 - (b) applicable proceedings concerning the matter began before, on or after that date.
- (2) However, this Ordinance does not apply to—
 - (a) an apology made by a person in a document filed or submitted in applicable proceedings;
 - (b) an apology made by a person in a testimony, submission, or similar oral statement, given at a hearing of applicable proceedings; or
 - (c) an apology adduced as evidence in applicable proceedings by, or with the consent of, the person who made it.

6. Meaning of applicable proceedings

- (1) In this Ordinance, the following proceedings are applicable proceedings—
 - (a) judicial, arbitral, administrative, disciplinary and regulatory proceedings (whether or not conducted under an enactment);

- (b) other proceedings conducted under an enactment.
- (2) However, applicable proceedings do not include—
 - (a) criminal proceedings; or
 - (b) proceedings specified in the Schedule.

7. Effect of apology for purposes of applicable proceedings

- (1) For the purposes of applicable proceedings, an apology made by a person in connection with a matter—
 - (a) does not constitute an express or implied admission of the person's fault or liability in connection with the matter; and
 - (b) must not be taken into account in determining fault, liability or any other issue in connection with the matter to the prejudice of the person.
- (2) This section is subject to section 8.

8. Admissibility of evidence of apology

- (1) Evidence of an apology made by a person in connection with a matter is not admissible in applicable proceedings as evidence for determining fault, liability or any other issue in connection with the matter to the prejudice of the person.
- (2) However, the decision maker of the proceedings has a discretion to admit a statement of fact contained in the apology as evidence in the proceedings.
- (3) The decision maker may exercise the discretion only if satisfied that it is just and equitable to do so, having regard to all the relevant circumstances, including, for example, the absence of other evidence available for determining the issue concerned in the proceedings.
- (4) This section applies despite anything to the contrary in any rule of law or other rule concerning procedural matters.

(5) In this section—

decision maker (裁斷者), in relation to applicable proceedings, means the person (whether a court, a tribunal, an arbitrator or any other body or individual) having the authority to hear, receive and examine evidence in the proceedings.

9. Apology not a Limitation Ordinance acknowledgment

For the purposes of section 23 of the Limitation Ordinance (Cap. 347), an apology made by a person in connection with a matter does not constitute an acknowledgment within the meaning of that Ordinance in connection with the matter.

10. Contract of insurance or indemnity not affected

- (1) An apology made by a person in connection with a matter does not void or otherwise affect any insurance cover, compensation or other form of benefit for any person in connection with the matter under a contract of insurance or indemnity.
- (2) This section applies regardless of whether the contract of insurance or indemnity was entered into before, on or after the commencement date of this Ordinance.
- (3) This section applies despite anything to the contrary in any rule of law or agreement.

11. Other matters not affected

This Ordinance does not affect—

- (a) discovery, or a similar procedure in which parties are required to disclose or produce documents in their possession, custody or power, in applicable proceedings;
- (b) the operation of section 3, 4 or 25 of the Defamation Ordinance (Cap. 21); or

(c) the operation of the Mediation Ordinance (Cap. 620).

12. Amendment of Schedule

The Chief Executive in Council may, by notice published in the Gazette, amend the Schedule.

13. Application to the Government

This Ordinance applies to the Government.

Schedule

[ss. 6 & 12]

Proceedings That Are Not Applicable Proceedings

1. Proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86).
 2. Proceedings conducted under the Control of Obscene and Indecent Articles Ordinance (Cap. 390).
 3. Proceedings conducted under the Coroners Ordinance (Cap. 504).
-

Explanatory Memorandum

In Hong Kong, parties to disputes may be deterred from making apologies, expressions of regret or other similar expressions because of their concern about the potential legal implications. By providing for the effect of apologies in certain proceedings and legal matters, this Bill seeks to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.

2. Clause 1 sets out the short title and provides for commencement.
3. Clause 2 explains the object of the Bill.
4. Clause 3 lists the defined terms used in the Bill—*apology* and *applicable proceedings*. Their full meanings are spelt out in clauses 4 and 6.
5. Clause 4 defines *apology* for the purposes of the Bill. An apology made by or on behalf of a person means an expression of the person's regret, sympathy or benevolence. If part of the expression is an admission of the person's fault or liability, or a statement of fact, the admission or statement is also included in the meaning of the apology.
6. Clause 5 makes it clear that the Bill applies to an apology made on or after the commencement date of the Bill. This clause also provides that the Bill does not apply to an apology if it is made by a person in certain documents or oral statements in applicable proceedings, or if it is adduced as evidence in applicable proceedings by or with the consent of the person. That means such an apology may be taken into account in the proceedings if the apology maker so decides.
7. Clause 6 enumerates the *applicable proceedings* for the purposes of the Bill. They are judicial, arbitral, administrative, disciplinary and

regulatory proceedings, and other proceedings conducted under an enactment. However, applicable proceedings do not include criminal proceedings or some specific types of proceedings listed in the Schedule.

8. Clause 7 precludes a person's apology from constituting an admission of the person's fault or liability, or from being taken into account in determining fault, liability or any other issue (for example, appropriate remedies or sanctions, and issues of credibility) to the prejudice of the person, for the purposes of applicable proceedings. Clause 7 is subject to clause 8 concerning admissibility of evidence of apologies.
9. Currently, it is possible for an apology to be admitted in evidence in civil proceedings to prove the matters stated in the apology in order to establish legal liability. Clause 8(1) alters the position by making evidence of a person's apology generally inadmissible for determining fault, liability or any other issue to the prejudice of the person in applicable proceedings (including proceedings where the usual rules of evidence do not apply).
10. However, a statement of fact contained in an apology is admissible as evidence in applicable proceedings at the decision maker's discretion, which may be exercised only if it is just and equitable to do so, having regard to all the relevant circumstances (see clause 8(2) and (3)).
11. The Limitation Ordinance (Cap. 347) governs the limitation periods for bringing actions of various classes. Under section 23 of that Ordinance, the limitation periods for certain causes of action relating to land, personal property, debts and other claims may be extended by an acknowledgment of the title or claim in issue. Clause 9 precludes an apology from constituting an acknowledgment for the purposes of that section 23, and so also from extending the relevant limitation period.

12. Some parties to disputes may be concerned that insurance cover could be affected by apologies because of provisions in insurance contracts that prohibit the admission of fault by the insured without the insurer's consent. Clause 10 provides that a person's apology (defined by clause 4 to include an admission of fault) does not affect any insurance cover, compensation or other form of benefit for any person under a contract of insurance or indemnity.
13. Clause 11 stipulates other matters not affected by the Bill, namely—
 - (a) discovery or a similar procedure in applicable proceedings;
 - (b) the operation of the provisions involving apologies in the Defamation Ordinance (Cap. 21);
 - (c) the operation of the Mediation Ordinance (Cap. 620), which provides, among other things, that a mediation communication (which may contain an apology) may be disclosed for certain purposes, or admitted in evidence in proceedings, only with leave of a specified court or tribunal.
14. Clause 12 empowers the Chief Executive in Council to amend the Schedule, which specifies the proceedings that are not applicable proceedings (see also clause 6(2)(b)).
15. Clause 13 applies the Bill to the Government.