

Consultation Forum for the Enactment of Apology Legislation



Proposed Apology Legislation: Scope & How it affects Insurance Policies

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Main Objective of the proposed Apology Legislation



To promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes by clarifying the legal consequences of making an apology.

Recommendation 2: Scope of the Proposed Apology Legislation



The proposed apology
legislation is to apply to civil
proceedings
and
other forms of non-criminal
proceedings including
disciplinary proceedings.

Civil Proceedings



- Civil proceedings generally refer to “proceedings in any civil or commercial matter”.
- Examples are civil actions in court or before a tribunal and arbitration.

No application to criminal proceedings



- Criminal proceedings involve wider public interest perspectives such as upholding of justice.
- Apology plays an important role in restorative justice, which is about the idea that because crime hurts, justice should heal.

Disciplinary Proceedings



- Disciplinary proceedings are not criminal proceedings.
- Whether disciplinary proceedings should be regarded as civil proceedings is debatable.

Arguments against applying the apology legislation to disciplinary proceedings



1. In disciplinary proceedings, the main aim is not to settle but to protect the public, to maintain public confidence in the profession and to uphold proper standards of behaviour.
2. Excluding evidence of an apology in a disciplinary proceeding may affect public confidence in the integrity of the profession.
3. For some disciplinary proceedings, the statute or disciplinary rules may have already stated that the usual rules of evidence do not apply.

Arguments for applying the apology legislation to disciplinary proceedings



1. Disciplinary proceedings are civil in nature.
2. Objectives of the legislation will be defeated if disciplinary proceedings are excluded.
3. In disciplinary proceedings, the respondent is judged by his conduct and practice and is seldom judged by what he/she had said by way of an apology.
4. Disciplinary proceedings are covered in the apology legislation in other overseas jurisdictions.

Regulatory proceedings



- Regulatory proceedings refer to proceedings involving the exercise of regulatory powers of a regulatory body under an enactment.
- These proceedings involve the exercise of regulatory functions of a regulatory body and are for protecting the general public.

Whether the proposed apology legislation should apply to “regulatory proceedings”



- Some of the reasons behind the inclusion of disciplinary proceedings also apply to regulatory proceedings.
- In view of specific nature and consequence of the regulatory proceedings, public views are sought as to whether the apology legislation should apply to “regulatory proceedings”.

Recommendation 6: Impact on Insurance Policies



The apology legislation expressly provides that an apology shall not affect any insurance coverage that is, or would be available to the person making the apology.

Purpose of standard insurance conditions



The purpose of the standard conditions restricting an insured's contact with a potential plaintiff is to protect the insurer's right to control the defence of insured claims.

Private motor car insurance policy



(18) GENERAL CONDITIONS

(a)

(b)

(c) No admission offer promise payment or indemnity shall be made or given by or on behalf of the Insured or any person claiming to be indemnified without the prior written consent of the Company.....

Employees' compensation insurance policy (May 2008)



CLAIMS SETTLEMENT CONDITIONS

- (a)
- (b) Claims Control by the Company. The Company shall be entitled upon notice to the Insured to take over and conduct in the Insured's name the defence or settlement of any claim demand or proceedings against the Insured. In that event:
 - (i)
 - (ii) the Insured shall not without the written consent of the Company incur any expenditure in connection with any such claim demand or proceedings or make any payment admission offer or enter into any settlement whatsoever.

Removing an insurer's ability to decline cover



In removing an insurer's ability to decline cover where an insured has apologised to a claimant, apology legislation is a significant constraint on this right.

Insurer's interest being protected



However, the insurer's interest is protected by the fact that the apology is inadmissible as evidence of liability should the matter proceed to trial.

Why the insurance industry should support the apology legislation



An apology could

- facilitate early settlement of a claim;
- minimise exposure on claims that do proceed to judgment; or
- even prevent a claim from being made in the first place.

Overseas Experience



According to a New Zealand scholar, the Association of British Insurers (ABI), whose members account for some 90 percent of insurance premiums in the UK, supports the Apology (Scotland) Bill.

Overseas Experience (2)



ABI states in its submission:

“We support the aim of the Bill to provide legal certainty as to the effect of an apology on legal liability by removing its admissibility as evidence in civil proceedings and in turn removing one of the main barriers to provide an apology.....”

Overseas Experience (3)



British Columbia Apology Act 2006

“...2(1) An apology made by or on behalf of a person in connection with any matter

... (c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available to the person in connection with that matter, and.....”

What we believe



- In civil cases, apologies and appropriate compensation have to go hand in hand.
- “If you take my pen and say you are sorry, but don’t give me the pen back, nothing has happened.” (Archbishop Desmond Tutu)
- A timely and sincere apology could (1) open a sympathetic dialogue between the disputants; (2) may prevent a dispute from escalating into litigation; (3) where litigation has commenced, facilitate an earlier settlement.

References/Acknowledgment



- Consultation Paper: Enactment of Apology Legislation in Hong Kong (June 2015)
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- Khouri, N. (2014). Sorry Seems to be the Hardest Word: The Case for Apology Legislation in New Zealand. *New Zealand Law Review*, (4), 603-646.