

EXECUTIVE SUMMARY OF THE CONSULTATION PAPER

ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG

This Executive Summary of the Consultation Paper is also published
online at: *<http://www.doj.gov.hk/eng/public/apology.html>*

The Consultation Paper on Enactment of Apology Legislation in Hong Kong and this Executive Summary are prepared by the Steering Committee on Mediation (“Steering Committee”) chaired by the Secretary for Justice. The views and recommendations in the Consultation Paper and this Executive Summary are published with a view to facilitating comments and discussions. They do not represent the final views of the Steering Committee.

The Steering Committee invites comments on the matters raised in the Consultation Paper and this Executive Summary by 3 August 2015. All correspondence (marked “Apology Legislation”) should be addressed to:

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Executive Summary of the Consultation Paper on Enactment of Apology Legislation in Hong Kong

Background and Introduction

1. In a dispute following a mishap, a party causing injury may wish to convey his apology to the injured person for the loss and suffering sustained. Sometimes, a party to a dispute who genuinely believes that he has done nothing wrong may nevertheless wish to convey his condolences or sympathy to the other party out of goodwill and pure benevolence.
2. However, it appears that there is a common concern that an apology or a simple utterance of the word “sorry” may be used by a plaintiff/complainant in civil or other non-criminal proceedings (such as disciplinary proceedings) as evidence of an admission of fault by the defendant for the purpose of establishing legal liability.
3. Although the question of whether a party is legally liable for a mishap (e.g. in negligence) is usually a matter for the court and that an apology (depending on its terms and other relevant circumstances) is not necessarily an admission of fault or liability, the fact that the courts may draw the conclusion that an apology (especially one bearing an admission of fault or liability) provides evidence from which liability can be inferred is sufficiently alarming to a party, whether from private or public sector, which might otherwise be willing to offer an apology or a statement of condolences, sympathy or regret after a mishap has happened.
4. Further, it is not uncommon that a party may have concerns that an insurance policy covering the incident giving rise to the dispute may be rendered void or otherwise adversely affected by an apology because of clauses in the policy that prohibit the admission of fault by the insured.
5. For these reasons, it seems that there is a general unwillingness on the part of the persons causing injury to extend their sorrow, regret or sympathy to the person injured, not to mention extending formal apology when there are pending court proceedings. The concern that their apologies or expressions of similar effect could be used as evidence in court to support

the assertion that there was a prior admission of fault has halted many from doing so.

6. It is unfortunate that this is the perceived legal position as regards apologies, for the heat of the moment so commonly found in a dispute could have been extinguished (or at least reduced) by an apology or an expression of sympathy or regret, thus preventing the escalation of the dispute into legal action or making it more likely for the legal action to be settled.
7. The phenomenon of reluctance to apologise or express regret or sympathy is not confined to private individuals and commercial entities. Public officials and civil servants acting in their official capacities are similarly concerned with the legal implications of an apology or expression of regret. Indeed, as the general public might not appreciate the aforesaid concern on the part of public officials or civil servants, government departments in various jurisdictions have at various times attracted criticisms for appearing to be apathetic or uncaring by failing to express condolences or sympathy in face of mishaps which had resulted in great suffering or even death.
8. The general reluctance in both the public and private sectors of our community to apologise, particularly when the issue of liability is yet to be decided is not conducive to the prevention of escalation of disputes or the amicable settlement thereof.
9. The absence of a piece of clear and comprehensive legislation that would prevent liability from being based on an apology may be a reason for such general reluctance.
10. In 2010, the Working Group on Mediation of the Department of Justice recommended, amongst other things, that the question whether there should be apology legislation dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body. In 2012, the Secretary for Justice established the Steering Committee on Mediation (“Steering Committee”) to further promote the development of mediation in Hong Kong. The Regulatory Framework Sub-committee set up under the Steering Committee has been

tasked to consider whether there is a need to introduce apology legislation in Hong Kong. After reviewing the report prepared by the Regulatory Framework Sub-committee, the Steering Committee recommended the enactment of apology legislation in Hong Kong. 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 by clarifying the legal consequences of making an apology.

11. For the purpose of enacting apology legislation in Hong Kong, a Consultation Paper on the Enactment of Apology Legislation in Hong Kong (“Consultation Paper”) has been prepared by the Steering Committee (<http://www.doj.gov.hk/eng/public/apology.html>) and public opinion and comments are sought. This executive summary summarises the Consultation Paper.

Development of Apology Legislation in Other Jurisdictions

12. A survey of the apology legislation (including a bill from Scotland) of 56 jurisdictions suggests that the trend of apology legislation worldwide is clearly moving towards:
 - (1) a wider coverage (embracing full apology, i.e. one that includes an admission of fault, as opposed to a partial apology such as an expression of regret or sympathy which does not include an admission of fault); and
 - (2) a more general application (extending to all civil proceedings).

United States of America

13. Our research indicates that the first apology legislation was enacted in Massachusetts in 1986. The trend then spread to other states in the United States. At present over 30 states in the United States have apology legislation. Characteristics of the legislation vary. Some deem an apology not to be an admission of liability while others only limit the admissibility of an apology in court for certain purposes. It is noted that most of the apology legislation in the United States covers partial apology (i.e. apology that does not include an admission of fault) only and is targeted at civil actions against the health care profession or involving some other aspects of personal injuries only.

Australia

14. The trend of apology legislation did not stop at the United States and continued to develop across to the other end of the Pacific. In the early 2000s, apology legislation was enacted in Australia and at present each state and territory in Australia has its own apology legislation. The scope of the Australian apology legislation has been broadened to cover most civil proceedings except certain specified proceedings, thus making it broader in scope than the US legislation. Some cover full apology (i.e. apology that includes an admission of fault) which extends the general US legislative approach, while others do not.

Canada

15. The scope of the apology legislation was further developed as apology legislation was adopted in Canada in the late 2000s and early 2010s. Apology legislation exists in most provinces and territories of Canada and it covers full apology and applies to all proceedings with a few jurisdictions specifically excluding its application to criminal proceedings. Notably, it includes provisions directly preventing apologies from voiding or affecting insurance contracts. Most of the legislation also prevents an apology from extending limitation periods under the relevant limitation acts by deeming that an apology cannot constitute an acknowledgment or confirmation of a cause of action in relation to the matter for which the apology was offered.

The United Kingdom (excluding Scotland)

16. The substantive law providing immunity to apologies in the UK (excluding Scotland in view of the Scotland Act 1998 which established the devolved Scottish Parliament) is relatively brief and narrow in scope, being contained in a single section in the Compensation Act 2006, i.e. s.2 which provides that “[a]n apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty”.

17. The Act does not contain any definition of the term “apology” which does not seem to be sufficiently broad to cover an apology bearing an admission of fault or liability and is limited to claims based on negligence and breach of statutory duty. It is quite different from most of the apology legislation in other common law jurisdictions in its brevity and it does not contain a clause excluding apology from being admitted as evidence which is commonly found in apology legislation in other jurisdictions.

Scotland

18. The Apologies (Scotland) Bill was introduced to the Scottish Parliament in March 2015. The bill has the following features: (i) it applies generally to civil proceedings but not criminal proceedings; (ii) it provides that an apology would not be admissible as evidence of anything relevant to the determination of liability and cannot be used in any other way to the prejudice of the apology-maker; (iii) it covers full apology and also statements of facts conveyed during apology. The application to statements of facts in the bill is not provided for in other apology legislation under our study.

Observation

19. After studying the history and comparing the differences and similarities of the apology legislation in other jurisdictions, it appears that the international trend is developing towards providing protection for:

- (1) full apology (as opposed to partial apology)
- (2) in civil proceedings in general.

It appears that the Canadian approach is the broadest one insofar as existing apology legislation is concerned.

Discussions and Recommendations

Pros and Cons of Apology Legislation

20. After reviewing the relevant discussion paper on apology legislation of the British Columbia, the relevant consultation paper of Scotland and various academic articles, it appears that there are the following pros and cons of

apology legislation.

21. Benefits of apology legislation:

- (1) Avoiding litigation and encouraging the early and cost-effective resolution of disputes, as supported by empirical studies and research.
- (2) Encouraging natural, open and direct dialogue between people after injuries to reduce tension, antagonism and anger.
- (3) Encouraging people to engage in moral and humane act of apologising after they have injured another and to take responsibility for their actions.
- (4) Legislation would provide a better impact and removes the legal uncertainties that inhibit apologies.

22. Negative factors of apology legislation:

- (1) Public confidence in the courts might be adversely affected if a person who has admitted liability in an apology is found not liable.
- (2) Insincere and strategic apologies might be encouraged.
- (3) Apologies encouraged by such legislation might create an emotional vulnerability in some plaintiffs who might accept settlements that are inappropriately low.
- (4) Mechanisms to render apologies inadmissible as evidence already exist – for example, apologies made in “without prejudice” communication or during mediation.
- (5) There may be a risk that it would add unnecessary complexity to the litigation process.

23. Drawing from the experience overseas and in view of the situation in Hong Kong, after weighing the pros and cons, it is recommended that apology legislation should be enacted in Hong Kong.

Full Apology vs. Partial Apology

24. Arguments for and against providing legislative protection to partial and full apologies have been thoroughly considered by Professor Jennifer K. Robbennolt, Professor of Law and Psychology, University of Illinois College of Law, in her empirical examination studying the effect of apologising in legal settlement.

25. Professor Robbennolt found that receiving a partial apology increased the likelihood that the respondent would be unsure about how to respond to the settlement offer, while receiving a full apology increased the likelihood that the respondent would choose to accept the offer. She concluded that a full apology was viewed as more sufficient than either a partial apology or no apology.
26. The above conclusion is consistent with the approach taken in the latest apology legislation in Canada and the Apologies (Scotland) Bill.
27. Based on the above discussion, and to ensure that the apology legislation could effectively serve its purposes, it is recommended that the proposed apology legislation cover full apology.

Effect on Limitation of Actions

28. A limitation period in the context of civil proceedings is the period of time since the accrual of the relevant cause of action within which legal proceedings must be commenced. Many common law jurisdictions have enacted limitation legislation which sets the limitation periods for different causes of action to which the legislation applies subject to extension in certain circumstances, e.g. when there is an acknowledgment or a part payment by the potential defendant. The acknowledgment provisions in limitation legislation may have potential application when a defendant offers an apology to a plaintiff that includes an admission of a cause of action.
29. In Hong Kong, the limitation of actions is governed by the Limitation Ordinance (Cap. 347). Section 23 provides for the fresh accrual of a right of action for certain proceedings from the date of an acknowledgment or part payment in respect of the right of action. Section 24(1) further provides that every such acknowledgment shall be in writing and signed by the person making the acknowledgment. According to case law, what amounts to an acknowledgment is ultimately a question of construction. Therefore, there is a legal risk that an apology would constitute an acknowledgment for the purpose of the Limitation Ordinance. If the proposed apology legislation expressly precludes an admission of claim by

way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance, it may be able to remove a further disincentive of giving apologies.

30. It is observed that most of the Canadian apology legislation expressly precludes an admission of a claim by way of an apology from constituting an acknowledgment or confirmation of a claim for the purposes of limitation legislation. It is recommended that the proposed apology legislation should follow this approach to further remove a disincentive to making apologies.

Effect on Insurance Contracts

31. Another provision that appears in all the Canadian apology legislation is that an apology shall not render void or otherwise affect an insurance coverage. The effect of this provision is to render ineffective any provision in an insurance contract that disqualifies a person from claiming under his insurance policy because he has apologised to the person to whom his claim for indemnity relates.
32. This appears to be an important component of the apology legislation because it responds to reported anecdotal evidence of defendants and their lawyers that apologies are often not made because of the fear that doing so will render insurance coverage void or otherwise affected to the detriment of the defendants. This has been identified as a real and significant barrier to offers of apology.
33. The purpose of this provision is quite clear, viz. to remove a further disincentive of making apologies.
34. It is recommended that the proposed apology legislation provides that an apology shall not affect any insurance coverage that is, or would be available to the person making the apology.

Factual Information Conveyed in an Apology

35. When one makes an apology, he may not simply say sorry but may go on to explain or disclose what has gone wrong. If an apology is mixed with a

statement of fact, in the absence of a specific provision in the relevant apology legislation as to how to deal with the accompanying statement of fact, whether it amounts to part of the apology and is therefore protected by the legislation is often a matter of interpretation. In the Apologies (Scotland) Bill, it is proposed that apology would include a statement of fact in relation to the act, omission or outcome about which an apology was made.

36. There are pros and cons for covering statements of facts in the apology legislation. The main argument for applying apology legislation to statements of facts is that without such protection, people may just offer bare apologies which would be meaningless and ineffective and may even be regarded as insincere. On the other hand, there are arguments against applying apology legislation to statements of facts. If statements of facts are inadmissible, the plaintiff's claim may be adversely affected or even stifled in some circumstances.
37. There is no recommendation as to whether the apology legislation should also apply to statements of fact accompanying an apology. Comments and opinions are sought from the public in this regard.

Scope of Civil Proceedings – whether it should include disciplinary proceedings and regulatory proceedings

38. The proposed apology legislation is to apply to civil and other forms of non-criminal proceedings. Civil proceedings generally refer to "*proceedings in any civil or commercial matter*" (s.74 of Evidence Ordinance (Cap. 8)). This would include, for example, civil actions in court or before a tribunal and arbitration (ss.60(1) & 68(1) of Evidence Ordinance (Cap. 8)). While it is relatively less controversial that the proposed apology legislation should not be applicable to criminal proceedings, whether it should cover disciplinary proceedings warrants further and careful consideration. Disciplinary proceedings are clearly not criminal proceedings, although whether it should be regarded as part of civil proceedings is debatable.
39. There are a number of arguments for and against applying the apology legislation to disciplinary proceedings. Arguments for applying the

apology legislation to disciplinary proceedings include:

- (1) Disciplinary proceedings are civil in nature.
- (2) The objectives of the legislation will largely be defeated if disciplinary proceedings are excluded.
- (3) In disciplinary proceedings the defendant is judged by his conduct and practice and is seldom judged by what he had said by way of an apology.
- (4) Disciplinary proceedings are covered in the apology legislation in other overseas jurisdictions.

40. Arguments against applying the apology legislation to disciplinary proceedings include:

- (1) The rationale for apology legislation, namely to facilitate amicable settlement, does not apply to disciplinary proceedings which is to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour.
- (2) Public confidence in the integrity of the profession can be advanced by bringing proceedings and excluding evidence of an apology as evidence of misconduct in a disciplinary proceeding has a counter-effect on that.
- (3) For some disciplinary (and other non-criminal) proceedings, the statute expressly states that the usual evidentiary rules do not apply. In these circumstances, an apology may be admitted as evidence even with an apology legislation.

41. It appears that the rationale in favour of the enactment of apology legislation applies to disciplinary proceedings. Such legislation only precludes an apology from having legal effect for specific purposes and does not preclude misconduct proceedings from being brought and pursued and misconduct proved. Nor does it prevent an apology from being admissible evidence for other purposes, including for decisions about sanctions. In the light of the above, it is recommended that the proposed apology legislation is to apply to disciplinary proceedings.

42. Regulatory proceedings refer to proceedings involving the exercise of regulatory powers of a regulatory body under an enactment. Examples of

regulatory proceedings include proceedings brought before the Market Misconduct Tribunal or the Securities and Futures Appeals Tribunal. These proceedings involve the exercise of regulatory functions of a regulatory body and are instituted for protecting the general public. In some circumstances, these proceeding may have a serious consequence on a person against whom the proceedings are directed.

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

Part of Mediation Ordinance or a Stand-alone Legislation

44. For the following reasons, it is recommended that the proposed apology legislation is to take the form of a stand-alone legislation:
 - (1) The apology legislation will be visible leading to greater awareness of it. From the anecdotal evidence overseas, public awareness of the legislation is crucial for it to be effective.
 - (2) It will avoid the need to rely on more than one piece of legislation thus reducing the risk that the intended legislative effect would get lost in amendments to pre-existing legislation.
 - (3) It recognises that the legal effects of the provisions are not confined to the law of evidence or mediation.
 - (4) It recognises that apologising is regarded by the law as important to the resolution of civil disputes from the time that an accident or injury occurs, not just once “without prejudice” negotiations or mediation have begun.

Recommendations for Consultation

45. Your views are sought on the following recommendations and issues arising therefrom (including issues identified in the Consultation Paper):
 - (1) An apology legislation is to be enacted in Hong Kong.
 - (2) The apology legislation is to apply to civil and other forms of

non-criminal proceedings including disciplinary proceedings.

- (3) The apology legislation is to cover full apologies.
- (4) The apology legislation is to apply to the Government.
- (5) The apology legislation expressly precludes an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance.
- (6) 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.
- (7) The apology legislation is to take the form of a stand-alone legislation.