

**For discussion on
22 June 2015**

**Legislative Council Panel on
Administration of Justice and Legal Services**

Public Consultation on Enactment of Apology Legislation

PURPOSE

This paper briefs Members of the Panel on the public consultation to be launched by the Steering Committee on Mediation (“**the Steering Committee**”)¹ in respect of the question of whether to enact apology legislation in the Hong Kong SAR. The public consultation exercise will start on 22 June 2015, and will last for 6 weeks.

BACKGROUND

2. In 2010, the Working Group on Mediation established by the Department of Justice recommended, amongst others, that the question of whether there should be an apology legislation dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body. To follow up on this recommendation, an Apology Legislation Sub-group was formed under the Regulatory Framework Sub-committee of the Steering Committee.

3. Having reviewed the report prepared by the Regulatory Framework Sub-committee, the Steering Committee decided to launch a 6-week public consultation (from 22 June to 3 August 2015) to seek views from the general public on the proposal to enact an apology legislation in Hong Kong.

4. A Consultation Paper on the Enactment of Apology Legislation in Hong Kong (“**the Consultation Paper**”) and an Executive Summary of the Consultation Paper prepared by the Steering Committee will be made available online (<http://www.doj.gov.hk/eng/public/apology.html>) when the public consultation commences on 22 June 2015.

¹ Established in 2012 by the Secretary for Justice and chaired by him with three Sub-committees dealing with regulatory framework, accreditation and public education and publicity to advise and assist in the further promotion and development of mediation in Hong Kong, and supported by the Department of Justice.

APOLOGY LEGISLATION

5. The main objective of 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.

6. Following a mishap, a party causing injury may wish to convey his apology to the injured person for the loss and suffering sustained. Even if the former party genuinely believes that he has done nothing wrong, he may nevertheless still wish to convey his condolences or sympathy to the other party out of goodwill and benevolence.

7. However, for various reasons, there is a general unwillingness on the part of the party causing (or perceived to have caused) injury to make apologies. Amongst others, the absence of clear legislation on the legal consequences of an apology may be a reason for such reluctance to apologise. Some may fear that an apology, once made, may be used as evidence in legal proceedings by the plaintiff to establish legal liability, while others may fear that an insurance policy covering the incident in question may be rendered void or otherwise affected by an apology because of clauses that prohibit the admission of fault by the insured. Indeed, it is due to the lack of clear legislation and the consequential legal uncertainty that lawyers in many jurisdictions would generally prefer to err on the safe side, and thus are reluctant to advise their clients to make apologies.

Legal Implications of Making Apologies

8. At present, there is no comprehensive legal definition in Hong Kong explaining the meaning of “apology”, nor is there any legislation setting out the the legal consequences of making an apology. Strictly speaking, an apology *per se* is unlikely to determine legal liability. The court is the sole and ultimate tribunal to decide whether a person is legally liable. Indeed, even if someone admits that he was negligent, he may not be so regarded by the court if the court is of the view that such admission was, for example, made out of one’s unfamiliarity with the legal standard thus rendering the admission to be of dubious value. Nevertheless, there seems to be a common perception that an apology would automatically amount to an admission of fault or liability.

The Development of Apology Legislation in Other Jurisdictions and Issues Identified

9. Apology legislation is nothing new and can be found in many overseas jurisdictions. A survey of the apology legislation (including a bill from Scotland) of 56 common law jurisdictions suggests that the trend of apology legislation worldwide is clearly moving towards:-

- (a) 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
- (b) a more general application (extending to non-criminal proceedings including disciplinary proceedings).

10. It appears that the Canadian approach is thus far the broadest one in terms of its coverage and application. The latest development observed in the recent Apologies (Scotland) Bill would indicate further widening of the scope of apology legislation, if enacted, to cover statement of facts.

The Pros and Cons of Enacting Apology Legislation

11. The key pros and cons of apology legislation are as follows:-

Factors in favour of apology legislation:-

- (a) avoiding litigation and encouraging the early and cost-effective resolution of disputes, as supported by empirical studies and research;
- (b) encouraging natural, open and direct dialogue between people after injuries to reduce tension, antagonism and anger;
- (c) encouraging people to engage in moral and humane act of apologising after they have injured another and to take responsibility for their actions; and
- (d) legislation would provide a better impact and remove the legal uncertainties that inhibit the making of apologies.

Factors against apology legislation:-

- (a) public confidence in the courts might be adversely affected if a person who has admitted liability in an apology is found not liable;
- (b) insincere and strategic apologies might be encouraged;
- (c) mechanisms to render apologies inadmissible as evidence already exist in certain circumstances – for example, apologies made in “without prejudice” communication or during mediation; and
- (d) there may be a risk that it would add unnecessary complexity to the litigation process.

Other Issues

Full Apology vs. Partial Apology

12. A “full apology” refers to an apology accepting liability or fault while a “partial apology” refers to an apology which does not admit liability or fault. Arguments for and against providing legislative protection to full or partial apologies have been considered in detail by Professor Jennifer K. Robbennolt² in her empirical examination studying the effect of apologising in legal settlement³. In her study, it was found that receiving a full apology would increase 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. This conclusion is consistent with the approach taken in the latest apology legislation in Canada and the Apologies (Scotland) Bill.

13. To ensure that the apology legislation could effectively serve its purposes, it is currently recommended that the proposed apology legislation should cover full apology.

² Professor of Law and Psychology, University of Illinois College of Law; H. Ross & Helen Workman Research Scholar in Law; B.S. 1991, Willamette University; J.D. 1966, Ph.D. 1988 (Psychology), University of Nebraska.

³ Her Paper “Apologies and Legal Settlement: An Empirical Examination” was published in 102 *Mich L Rev* 460, 475.

Effect on Limitation of Actions

14. A limitation period is the time within which legal proceedings must be commenced from the date on which the cause of action accrues. 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.

15. 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. There is therefore a risk that an apology would constitute an acknowledgment for the purpose of the Limitation Ordinance and thereby extending the limitation period. An apology legislation which provides that an apology shall not constitute an acknowledgment for the purpose of the Limitation Ordinance may remove the uncertainty and disincentive of giving apologies.

16. 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 currently recommended that the proposed apology legislation should expressly preclude 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.

Effect on Insurance Contracts

17. 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 legislative provision is to render ineffective any contractual provision in an insurance policy that disqualifies a person from claiming under his insurance policy because he has apologised to the person to whom his claim for indemnity relates.

18. This appears to be an important component of 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.

19. To remove such disincentive of making apologies, it is currently recommended that the proposed apology legislation expressly provides that an apology shall not affect any insurance coverage that is, or would be, available to the person making an apology.

Factual Information Conveyed in an Apology

20. 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, whether such statement of fact amounts to or forms part of the apology and is therefore protected by the legislation is often a matter of interpretation in the absence of a specific provision in the relevant apology legislation as to how to deal with the accompanying statement of fact. 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. The Bill, introduced into the Scottish Parliament in March 2015, is yet to be debated. It is not certain at this stage whether the Scottish apology legislation, if enacted, will include the proposal concerning a statement of fact.

21. There are arguments for and against whether to cover accompanying statements of facts in the apology legislation. The main argument for applying apology legislation to accompanying 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 accompanying statements of facts. If accompanying statements of facts are inadmissible, there is concern that the plaintiff's claim may be adversely affected or even stifled in some circumstances.

22. Comments and opinions are welcome from the public on whether the apology legislation should also apply to statements of fact accompanying an apology.

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

23. The rationale for the apology legislation applies to disciplinary proceedings. Such legislation only precludes an apology from having legal effect for specific purposes. The inadmissibility of an apology in evidence however does not preclude disciplinary proceedings from being brought and pursued nor does it prevent the party from proving the misconduct on evidence other than the apology. Neither 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 should cover disciplinary proceedings.

24. 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.

25. 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 welcome as to whether the apology legislation should apply to regulatory proceedings as well.

A Stand-alone Legislation

26. There are many advantages of enacting a stand-alone apology legislation. A stand-alone apology legislation will be more visible, leading to greater public awareness of it. It will avoid the need for one to rely on more than one piece of legislation in order to have the benefits of the apology legislation, thus reducing the risk that the intended legislative effect would get lost in amendments to other pre-existing legislation. It recognises that the legal effects of the provisions are not confined to the law of evidence or mediation. It also 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 only when “without prejudice” negotiations or mediation have begun.

27. Proper public awareness of the apology legislation is crucial for the legislation to be effective. Based on the above analysis, it is recommended that the proposed apology legislation should be in the form of a stand-alone legislation.

RECOMMENDATIONS FOR CONSULTATION

28. Views are welcome from the public on the following recommendations and issues arising therefrom:-

- (a) an apology legislation is to be enacted in Hong Kong;
- (b) the apology legislation is to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings;
- (c) the apology legislation is to cover full apologies;
- (d) the apology legislation is to apply to the Government;
- (e) 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;
- (f) 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; and
- (g) the apology legislation is to take the form of a stand-alone legislation.

WAY FORWARD

29. At the close of the public consultation on 3 August 2015, the Steering Committee will consider the views and comments received during the public consultation period and make a final recommendation.

Department of Justice
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