

**For discussion on
28 November 2016**

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

**Report of Second Round Public Consultation on Enactment of
Apology Legislation and Final Recommendations**

PURPOSE

This paper briefs Members of the Panel on the “*Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations*” with the revised draft Apology Bill annexed (“**the Final Report**”). It is intended that the Final Report will be published on and publicly available as from 28 November 2016. The Final Report, when published, will be accessible online at this website: www.doj.gov.hk/eng/public/apology.html.

BACKGROUND

2. The Steering Committee on Mediation (“**Steering Committee**”) published a consultation paper entitled “*Enactment of Apology Legislation in Hong Kong*” (“**Consultation Paper**”) and launched a 6-week public consultation regarding apology legislation on 22 June 2015 (“**1st Round Consultation**”). On 22 February 2016, the Steering Committee published an interim report entitled “*Enactment of Apology in Hong Kong: Report & Second Round Consultation*” (“**Interim Report**”) and launched another 6-week consultation (“**2nd Round Consultation**”) on the following specific issues:

- (1) excepted proceedings to which the proposed apology legislation shall not apply;
- (2) whether factual information conveyed in an apology should likewise be protected by the proposed apology legislation; and

(3) the draft Apology Bill.

3. During the 2nd Round Consultation, two consultation forums (one conducted in English and one conducted in Cantonese) were held on 15 and 21 March 2016 respectively with a total attendance of about 170 persons. Furthermore, with the assistance of the Home Affairs Department, comments were also received from the online Public Affairs Forum.

4. The consultation concluded on 5 April 2016. A total of 60 written responses were received. The respondents included various Government bureaux and departments, statutory bodies or regulators, political parties, academics, civil and social organisations as well as stakeholders from the various sectors such as banking, engineering, medicine, law and mediation.

THE 3 MATTERS UNDER CONSULTATION

Excepted Proceedings – Responses Received

5. In the Interim Report, the Steering Committee made, amongst others, the following recommendation:

“The apology legislation shall apply generally to civil and other forms of non-criminal proceedings including disciplinary and regulatory proceedings with exceptions. All relevant stakeholders who would like to suggest any proceedings to be exempted from the application of the proposed apology legislation are invited to submit their views and reasons for consideration.”

6. There were different views expressed in relation to this recommendation. Some respondents¹ welcomed the general application of the apology legislation to all civil proceedings including disciplinary and regulatory proceedings while some professional bodies and

¹ For example, the Ombudsman, Professor Robyn Carroll, the Hong Kong Bar Association, the Human Organ Transplant Board, the Supplementary Medical Professions Council, the Pharmacy and Poisons Board of Hong Kong and the Chinese Medicine Council of Hong Kong.

regulators² expressed the concern that such general application may affect their investigation, disciplinary or regulatory power. The reasons for and against the recommendation have been considered by the Steering Committee.

Excepted Proceedings – Steering Committee’s Views and Recommendation

7. Having carefully considered all the submissions received, the Steering Committee takes the following views:

- (1) Proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86) and the Coroners Ordinance (Cap. 504) should be exempted from the application of the apology legislation since they are fact-finding in nature and do not involve any determination of liability. In this regard, it is noted that a similar approach was taken in the Apologies (Scotland) Act 2016 which was enacted in early 2016.
- (2) For the same reasons, proceedings before the Obscene Articles Tribunal under the Control of Obscene and Indecent Articles Ordinance (Cap. 390) should also be exempted.
- (3) It is unlikely that an apology would be a significant piece of evidence in disciplinary proceedings or regulatory proceedings and therefore the impact of the apology legislation, if any, on the power or discretion of the tribunal in conducting disciplinary or regulatory proceedings should be limited. It is also worthy to note that none of the respondents suggested that their functions or powers would be seriously affected or undermined if the proposed apology legislation applies to their respective disciplinary and regulatory proceedings.

² For example, the Securities and Futures Commission, the Estate Agents Authority, the Monetary Authority, the Office of the Communications Authority, the Construction Industry Council, the Law Society of Hong Kong and the Chiropractors Council.

- (4) The apology legislation will not prevent disciplinary and regulatory proceedings from being pursued and apologies can be considered for purposes other than determination of liability.
- (5) If the apology legislation does not apply to all the disciplinary and regulatory proceedings, its efficacy would be significantly impaired because professionals or people who are subject to these proceedings may be less likely to apologise.
- (6) The apology legislation does not affect the investigation power and discretion of the professional bodies and regulators.
- (7) 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 could be achieved without unduly and disproportionately impairing other public interests.
- (8) 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 two departments no longer seek exemption from the application of the apology legislation. However, they indicate that they may consider seeking exemption in the future based on their operational experience.
- (9) The policy objective of the proposed apology legislation will be better achieved if the proposed apology legislation is to apply to disciplinary and regulatory proceedings without materially affecting the disciplinary and regulatory powers of these bodies.
- (10) A mechanism should be provided for in the draft Apology

Bill to allow possible future amendments to the schedule of excepted proceedings to provide flexibility.

8. Based on the above, 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.

Factual Information Conveyed in an Apology – Responses Received

9. Amongst the 60 written responses received, 40 of them addressed the issue of whether factual information conveyed in an apology should likewise be protected by the proposed apology legislation. Out of these 40 respondents, 30 of them supported the protection while 6 of them opposed and the remaining 4 were neutral.

10. In the Interim Report, 3 proposed 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**”)

11. Amongst the 40 respondents, 10 supported the First Approach, 2 supported the Second Approach, 10 supported the Third Approach and 18 did not indicate any preference.

Factual Information Conveyed in an Apology – Steering Committee’s Views and Recommendation

12. Considering the nature of this issue and judging from the responses received, the Steering Committee fully appreciates that the issue is a controversial one as it would potentially affect the claimants’ rights and has not been covered in apology legislation enacted elsewhere. Some of the respondents were concerned that the inclusion of statements of fact in the definition of apology would render probative and relevant factual information inadmissible as evidence and would not be conducive to a fair hearing. The Steering Committee takes the view that this issue of protection of statements of fact should be considered with the other factors including:

- (1) The protection of statements of fact conveyed in an apology by the proposed apology legislation does not prevent the claimant from relying on other independent evidence to prove his claim.
- (2) The protection of statements of fact will not affect the investigation power of professional bodies and regulators in the gathering of evidence.
- (3) An apology with accompanying factual statements would

probably not have been given in the first place if there is no apology legislation.

- (4) If the Third Approach is adopted to deal with statements of fact conveyed in an apology, this may help alleviate the concern over the risks of depriving an adjudicating body of the relevant and probative evidence.

13. After considering the responses, the Steering Committee takes the view that the balance should be tilted towards protecting statements of fact conveyed in an apology as such an approach would better achieve the objective of the proposed legislation. As regards the 3 approaches (no respondent suggested any other approaches), the Steering Committee considers that the Second Approach would not be adequate to address the concerns expressed in relation to the uncertainty that may arise if the Court has to deal with the issue of admissibility on a case by case basis. Further, the blanket protection 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. In the circumstances, it appears that the most appropriate option would be the Third Approach and it is suggested that the discretion should be exercised in limited circumstances when the Court or tribunal finds it just and equitable to do so having regard to all the relevant circumstances.

Draft Apology Bill

14. The Steering Committee also received some responses commenting on the draft Apology Bill appended to the Interim Report. They concern various matters such as title of the ordinance, definition of terms, objectives of the legislation, etc. They are analysed and responded to in the Final Report and reflected in the revised draft Apology Bill.

FINAL RECOMMENDATIONS

15. In summary, the Steering Committee has the following final

recommendations:

- (1) 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.
- (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.

REVISED DRAFT APOLOGY BILL

16. As mentioned above, a revised draft Apology Bill is appended to the Final Report to reflect the final recommendations and the Steering Committee's views on the responses received during the 2nd Round Consultation.

WAY FORWARD

17. The Department of Justice will take the matter forward and prepare for the enactment of the apology legislation in the legislative year 2016/17.

Department of Justice
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