Bills Committee on Apology Bill
Government's response to the list of follow-up actions arising from the discussion at the meeting on 24 February 2017

This paper sets out the Government's response to the matters raised by Members in relation to the Apology Bill ("Bill") at the meeting on 24 February 2017.

Item 1 – Apology and Statements of Fact

2. As stated in the "Consultation Paper: Enactment of Apology Legislation in Hong Kong"[1] ("Consultation Paper") published by the Steering Committee on Mediation ("Steering Committee") in June 2015, there is "a common concern that an apology or a simple utterance of the word 'sorry' may be used by a plaintiff in civil or other non-criminal proceedings (such as disciplinary proceedings) as evidence of an admission of fault or liability by the defendant for the purpose of establishing legal liability. 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 which might otherwise be willing to offer an apology or a statement of condolences, sympathy or regret after a mishap has happened" (see §§1.1 and 1.2 of the Consultation Paper). The people's unwillingness to apologise for the fear that the apology may be used as evidence against them in applicable proceedings is the mischief that the Bill seeks to target.

3. The phenomenon of reluctance to apologise "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." This was also observed by the former Ombudsman (see §1.6 of the Consultation Paper).

4. The following extract from the Discussion Paper on Apology Legislation published by the Ministry of Attorney General, British Columbia (as cited in §3.4 of the Consultation Paper) further illustrates this:

"Yet, notwithstanding the recognized value of apologies, both morally and

[1] http://www.doj.gov.hk/eng/public/pdf/2015/apology.pdf

> as an effective tool in dispute resolution, apologies are not fully embraced within our legal culture. A recent review of apologies in Canadian law indicates the legal consequences of an apology are far from clear. However, lawyers continue to be legitimately concerned that an apology could be construed as an admission of liability. As apology could also have adverse consequences for insurance coverage. As a result, lawyers generally advise their clients to avoid apologizing."

5. However, as suggested above, the court is the sole and ultimate body to decide whether a person is liable and it is strictly speaking wrong to suggest that an apology would invariably amount in law to an admission of fault or liability. There are instances where the court has refused to find liability despite the fact that an apology was made, e.g. *Dovuro Pty Limited v Wilkins* [2003] HCA 51, an Australian case cited in §3.6 of the Consultation Paper. "The finding of liability often requires the application of the relevant legal standard or principles. A person who has admitted that he was negligent might not be so regarded by the court if the court is of the view that such admission was made out of one's unfamiliarity with or ignorance of the relevant legal standard or legal principles thus rendering the admission to be of dubious value" (§3.7 of the Consultation Paper). The same is applicable to disciplinary proceedings, otherwise it would usurp the task and power of the court or tribunal to judge the legal quality of the conduct.

6. Perhaps because of the position noted in paragraph 5 above, it appears that there is no court decision in Hong Kong in which the liability was found solely based on the defendant's apology (which does not contain statements of fact). However, as discussed above, the fact that an apology may be regarded as an admission of liability or fault in the relevant proceedings creates barriers to a party who wishes to apologise.

7. In civil proceedings, any relevant statement of fact is generally admissible as evidence in establishing liability. For overseas jurisdictions where apology legislation (which does not protect statements of fact) applies, the court would, in appropriate cases, segregate the statements of fact from the apology and admit such statements as evidence against the apology maker. For example, in *Robinson v Cragg*, 2010 ABQB 743, a decision made by the Court of Queen's Bench of Alberta, Canada, the court ruled that the part of the letter which contained an expression of sympathy or regret and an admission of fault was inadmissible and should be redacted. The remaining part of the letter was ruled admissible because it contained admissions

of facts that were not combined with the apology (see §5.32 of the Consultation Paper).

8. A similar approach was also adopted in *Cormack v Chalmers*, 2015 ONSC 5564 by the Ontario Superior Court of Justice (see §4.2(18) of the "Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations"[2] ("Final Report") published by the Steering Committee in November 2016).

9. There are different views on this approach of segregation of statements of fact from the apology. As stated in §5.33 of the Consultation Paper, Professor Robyn Carroll who was consulted by the Steering Committee during the 1st round public consultation, commented that it gave "proper effect to the intent of the legislation. It remains to be seen though how closely connected the 'admission' and the other words of 'apology' will need to be before both will be redacted or excluded completely." She was of the view that "an apology that does not incorporate, or is not attached to admission of fact or fault, lacks evidentiary value to establish liability. It follows that apology legislation is not necessary to protect a party who makes an apology that contains no admission of any kind. Where an apology does contain admissions, *Robinson v Cragg* confirms that apology legislation, depending on its terms, is effective to exclude evidence of words expressing emotion and admissions." However, Ms Nina Khouri criticised the judgment as being "problematic" because of the chilling effect, see §5.34 of the Consultation Paper. She argued that "defendants would most likely not have made the factual statements at all if not for the expectation that the letter would be protected from admission into evidence. As argued unsuccessfully by the defendants, it is analogous to saying that a without prejudice settlement letter becomes admissible simply by redacting the proposed settlement amount. This would be legally wrong; all common law jurisdictions protect surrounding statements made in connection with the attempt to settle the dispute. This narrow interpretation of the legislative protection is inconsistent with the legislation's aim of encouraging apologetic, pro-settlement discourse. Instead, it will have a chilling effect on defendants' willingness to apologise."

10. In this connection, it is noted that Professor Robyn Carroll made submissions to the Steering Committee in the 2nd round consultation and stated that there was much merit in the recommendation regarding statements of fact as reflected in the draft Apology Bill (see §4.2(10) of the Final Report). After discussing the pros and cons of protecting statements of fact, Professor Robyn Carroll stated the

[2] http://www.doj.gov.hk/eng/public/pdf/2016/apologyFinal_2016.pdf

followings:

> "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)"

11. We note that Professor John Kleefeld shared Professor Robyn Carroll's views, see §4.2(16) of the Final Report[3].

[3] §4.2(16) of the Final Report: "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."

12. The pros and cons of protecting statements of fact contained in apologies are canvassed in detail in §§5.22 to 5.38 of the Consultation Paper, Chapter 10 of the "Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation"[4] ("Interim Report") and Chapter 4 of the Final Report (**Annex A**). After considering the responses received during the two rounds of public consultation and the development of the apology legislation in Scotland, the Steering Committee made the following final recommendation in the Final Report:

> "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."

13. To conclude, the Government takes the following views:

(a) Under the existing law in Hong Kong, there is no assurance that an apology could not be relied on by a plaintiff in civil proceedings as evidence of admission of fault or liability on the part of the defendant (i.e. the party making the apology). As such, people are unwilling to make any apology.

(b) If there is apology legislation but statements of fact are not protected, the court has to decide on a case by case basis whether and how to segregate the statements of fact from the apologies. This would bring significant uncertainty. As a result, people may either refuse to make any apology at all or only make bare apologies without disclosing any facts (even if asked). The former is not conducive to the policy intent of the Bill and the latter may even be counter-productive to the resolution of disputes.

Item 2 – Clause 8(2) and Human Rights

14. As stated above, the pros and cons of protecting statements of fact contained in apologies are canvassed in detail in §§5.22 to 5.38 of the Consultation Paper, Chapter 10 of the Interim Report and Chapter 4 of the Final Report (Annex A). One of the arguments for excluding statements of fact from the protection of the apology legislation is that "[i]f statements of [fact] are inadmissible, the plaintiff's claim may be adversely affected or even be stifled in some circumstances, for example when those facts cannot be otherwise proved" (§5.37(2) of the Consultation

[4] http://www.doj.gov.hk/eng/public/pdf/2016/apologyreport.pdf

Paper).

15. In fact, after the 1st round public consultation in May 2015, the Justice Committee of the Scottish Parliament sought views on the general principles of the Apologies (Scotland) Bill including the definition of "apology" which included the statements of fact. Part of the written submissions as set out in §10.6 of the Interim Report is relevant for the present purpose and is reproduced below:

> "If the Bill is passed with an apology defined as drafted, it could have serious consequences, and risk denying injured people access to justice, such as in this hypothetical case: Driver A emerges from a minor road and immediately turns right, knocking down a child who is starting to cross the road. The child suffers serious brain injury. Driver A says in reply to the police interview: 'I am sorry I just wasn't paying attention'. By the time driver A has time to reflect on matters he takes a different view. He now decides that there was nothing he could do, and the child simply ran out on to the road without any warning. There is no other witness evidence available. In terms of the proposed legislation, the child's action for damages will fail on the burden of proof, as the driver's statement of fault would be inadmissible." (The Association of Personal Injury Lawyers)

16. Further, the Scottish Government also expressed its views on the issue of protection of statements of fact (see §10.7 of the Interim Report):

> "There is a concern that the benefits of hearing an apology will, in certain circumstances, not be sufficient to outweigh the potential injustice to pursuers in actions for damages. That injustice could arise in cases where an admission of fault or statement of fact is the only means of demonstrating liability for the harm caused but that admission is protected and so cannot be led in evidence because it is part of the statutory apology. If there is no other evidence available on liability, a pursuer would be unable to succeed in an action for damages for compensation." (Memorandum by the Scottish Government to the Convener of the Justice Committee)

17. After the debate, the Justice Committee stated the following in the Stage 1 report (see §10.9 of the Interim Report):

"The Committee notes the view of witnesses that individuals' rights to pursue civil action could be compromised if, under the Bill, they are unable to draw on the evidence of an apology, whether that be simple apology, a statement of fact or admission of fault. While we understand that the member's intention was to allow for the widest possible disclosure, particularly for victims of historical child abuse, we have strong concerns that these particular victims could face further evidential challenges in pursuing civil action. We therefore urge the member to consider how best a balance can be struck to ensure that there are no unintended consequences for victims, whilst ensuring that the legislation remains meaningful…Most importantly, [they] must be reassured that individuals wishing to pursue fair claims are not going to be disadvantaged by the measures in the Bill."

18. §10.10 of the Interim Report is also relevant:

"On 27 October 2015, at the debate in the Chamber of the Scottish Parliament, Ms Mitchell said as follows, 'I have listened closely to the witnesses' arguments, including those of the minister, about whether the effect of parts of the definition could possibly prevent an individual from securing compensation, particularly if a statement of fact in an apology was the only evidence available. I included statements of facts to try to encourage the fullest possible apology, but I am aware that their inclusion in the definition goes further than any other apology legislation. I have reflected on witnesses' concern and can confirm that I am persuaded that the definition in the bill should be revised to exclude statements of facts.' Mr Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, said this, 'I am aware of the argument that those unintended consequences might apply only to a small number of cases and would only rarely disadvantage individuals…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.'"

19. It was against this background that three approaches were proposed by the Steering Committee to deal with statements of fact, as set out in §10.14 of the Interim Report[5]. Each of the three approaches has its own pros and cons and they are

[5] The three approaches are as follow:
First Approach: Statements of fact in connection with the matter in respect of which an apology has

canvassed in §§10.15 to 10.18 of the Interim Report. In particular, §10.18 sets out the important Basic Law and human rights considerations:

> "When deciding which of the above alternative options should be adopted, one important issue that should be carefully considered is whether there would be any possible infringement of a claimant's right to a fair hearing. This right, though can be restricted by laws, is guaranteed by **Article 10 of the Hong Kong Bill of Rights (which corresponds with Article 14 of the International Covenant on Civil and Political Rights)** and is entrenched by **Article 39 of the Basic Law**. In the rare situation where an apology that includes statements of fact is the only evidence which can establish liability, the exclusion of such statements of fact as evidence may effectively stifle the claim and this unintended consequence may arguably interfere with the claimant's right to a fair hearing. 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." (emphasis added)

20. During the 2nd round public consultation, comments and views were sought again on the issue of protection of statements of fact. It is noted that the majority agreed that statements of fact should be protected. As to the approach that should be taken, most respondents supported the First Approach (i.e. full protection of statements of fact without discretion to the decision maker for admission) and the Third Approach (i.e. protection of statements of fact but with discretion to the decision maker for admission).

21. Having carefully considered the three approaches, the Steering Committee

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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.

Second Approach: 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.

Third Approach: 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.

recommended that, on balance, the Third Approach should be adopted.

22. Regarding the Second Approach, the Steering Committee stated the following in §4.14 of the Final Report:

> "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 §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."

23. Regarding the First Approach, the Steering Committee stated the following in §4.15 of the Final Report:

> "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 §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**." (emphasis added)

24. Regarding the Third Approach, the Steering Committee stated the following in §4.16 of the Final Report:

"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."

25. We agree to the analysis of the Steering Committee and share the same concern about Basic Law and human rights if the First Approach is adopted. In particular, similar to what was done by the Scottish Government and the Scottish Parliament regarding the Apologies (Scotland) Bill, the Bill must be scrutinised to ensure that there would be no infringement of a claimant's right to a fair hearing which is guaranteed by Article 10 of the Hong Kong Bill of Rights and is entrenched by Article 39 of the Basic Law. In this connection, it is emphasised that paragraph 2 of Article 11 of the Basic Law states that "[n]o law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

26. As discussed above, the right to a fair hearing can be restricted by laws but any restriction must satisfy the 4-step test as explained by the Court of Final Appeal in *Hysan Development Co Ltd and others v Town Planning Board* (2016) 19 HKCFAR 372: (1) whether the infringement or interference pursues a legitimate societal aim; (2) whether the infringement or interference is rationally connected with that legitimate aim; (3) whether the infringement or interference is no more than is necessary to accomplish that legitimate aim; (4) whether there is a reasonable balance between the societal benefits of the restriction and the effect on the protected rights. We agree that while the restriction pursues a legitimate societal aim, such restriction is not rationally connected with that aim when the claimant's case is stifled by the apology legislation and therefore it could not pass the 4-step test. The policy intent is to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution. Stifling a claim is certainly not amicable resolution and such unintended consequence is contrary to the policy intent. Thus, unless the decision maker has the discretion to admit statements of fact as evidence, the blanket protection of statements of fact regardless of the circumstances may unduly affect the claimants' right to a fair hearing. When a provision is strict and causes hardship, and if there is no discretion vested in the court to disapply it or to mitigate its consequence, however meritorious or deserving the

circumstances, the court may strike down such provision for being unconstitutional, see e.g. the decisions of the Court of Final Appeal in *Official Receiver v Zhi Charles, formerly known as Chang Hyun Chi and another* (2015) 18 HKCFAR 467 and *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing & Secretary for Justice* (2006) 9 HKCFAR 545 concerning s.30A(10) of the Bankruptcy Ordinance (Cap.6) which is now repealed.

27. Based on the above, we take the view that the First Approach should not be adopted because of the potential violation of human rights guaranteed by the Basic Law and the Hong Kong Bill of Rights. The Third Approach provides a suitable discretion to the decision maker and this strikes the proper balance between the policy intent and the claimant's right to a fair hearing.

Item 3 – Clause 8(2) and Clause 10

28. Clause 8(2) provides that if in particular applicable proceedings there is an exceptional case (for example, where there is no other evidence available for determining an issue), the decision maker may exercise a discretion to admit a statement of fact contained in an apology as evidence in the proceedings, but only if the decision maker is satisfied that it is just and equitable to do so, having regard to all the relevant circumstances. Clause 10(1) provides that 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.

29. Clause 8(2) and clause 10(1) are dealing with different matters. Clause 8(2) is about the discretion to admit a statement of fact contained in an apology as evidence in applicable proceedings. If the decision maker exercises the discretion, the statement of fact contained in the apology becomes admissible evidence. However, it does not affect the legal position that the statement of fact would still be part of the "apology" as defined under the Bill. As the statement of fact is part of the apology in connection with a matter, the protection under clause 10(1) applies. Accordingly, by virtue of clause 10(1), the statement of fact which is part of the apology is not to 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. It follows that the exercise of discretion under clause 8(2) has no effect on the protection of contracts of insurance or indemnity under clause 10.

30. Based on the above, we take the view that the operation of clause 8(2) has no bearing on clause 10 and it is not necessary to specify explicitly that clause 10 would apply to the "exceptional case" under clause 8(2).

Item 4 – Clause 13

31. We understand Members are aware of the principle that an Ordinance does not apply to the Government except by an express provision or by necessary implication (ref. section 66 of the Interpretation and General Clauses Ordinance (Cap. 1)). Clause 13 is included in the Bill to reflect the policy intent to apply the Bill to the Government. While we appreciate Members' suggestion, we consider it preferable for the application clause in the Bill not to be expressed differently from the usual formulation adopted in other legislation. As the current wording has been commonly used in application clauses across the statute book, we consider that its meaning and effect is sufficiently clear and certain to readers.

Department of Justice
March 2017

Annex A

CONSULTATION PAPER

ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG

This Consultation Paper is also published online at:
http://www.doj.gov.hk/eng/public/apology.html

drawbacks over a more limited legislation to cover only partial apology (see paragraphs 4.32-4.34 above).

Factual Information Conveyed in an Apology

5.22 As mentioned in paragraph 4.9 above, it seems that three main waves of apology legislation can be discerned: the first wave of apology legislation commencing in the 1980s in the United States, the Australian-led wave in the early 2000s and the Canadian legislation in the mid to late 2000s. It appears from the Apologies (Scotland) Bill introduced on 3 March 2015[119] that a fourth wave may be in the course of formation and that it may further broaden the scope of apology legislation in respect of the factual information contained in an apology.

5.23 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 becomes part of the apology and is therefore protected by the legislation is often a matter of interpretation as well as debate.

The Apologies (Scotland) Bill

5.24 In the "Summary of Consultation Responses" of the proposed Apologies (Scotland) Bill,[120] the arguments for and against excluding statements of facts accompanying an apology from the protection of apology legislation, and other comments and views are set out.

5.25 Arguments for excluding statements of facts from the protection of apology legislation are:

- "*Specifically protecting facts would lead to the assumption that some facts should not normally be released because they needed protecting.*

[119] n 83 above.
[120] Consultation by Margaret Mitchell MSP 29th June 2012 - *Apologies (Scotland) Bill* (n 63 above).

- *The Faculty of Advocates felt that '…it might become difficult in practice to disentangle the admissible factual statements from the non-admissible elements of an apology. We are unclear how in practice this separation could be achieved…*"[121]

5.26 Arguments for including statements of facts in the protection of apology legislation are:

- "*If statements of fact were not protected, it could result in encouraging minimum, bare apologies, making more apologies meaningless to the recipient, because the person apologising would be wary of giving of any details along with the apology.*
- *If statements of fact were not protected, the anticipated effectiveness of the proposals of encouraging a culture change could be limited.*
- *The opportunity to provide an explanation could be compromised, along with information about any review or lessons learned.*"[122]

5.27 There were also other relevant comments and views:

- "*Any explanation (i.e. statement of facts) might be made a highly desirable, rather than a necessary, element of the apology.*
- *To avoid unintended consequences it might be preferable for the Bill to remain silent on this matter and to focus on an appropriate definition of what would receive evidential protection, rather than seek to define what would not.*
- *Where the statements acknowledged a shortfall in service, it could be productive to offer those receiving the apology an opportunity to discuss how the service would approach similar situations in future. Discussion with staff might also allow the complainer to understand some of the constraints in how the service was delivered*"[123]

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[121] *Ibid.*, p 20.
[122] *Ibid.*, pp 20 – 21.
[123] *Ibid.*, p 21.

5.28 The Final Proposal is that "*any factual information conveyed in the apology will not be admissible in proceedings covered by the Bill*".[124] Two reasons are put forward to support this proposal. First, without a factual explanation of the cause of the event(s) which may include facts relating to the incident, an apology may not satisfy the needs of the intended recipient. Second, that facts admitted by the defendant but excluded with the apology can still be relied upon as evidence of liability if they can be independently proved by the plaintiff.

5.29 In line with such recommendation, the term "apology" is defined in section 3 of the Apologies (Scotland) Bill as follows:

> "In this Act an apology means any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains-
>
> (a) an express or implied admission of fault in relation to the act, omission or outcome,
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> (b) *a statement of fact in relation to the act, omission or outcome*, or
>
> (c) an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing recurrence." (emphasis added)

5.30 In the Explanatory Notes to the Bill, it is stated that "*(Section 3) provides that an apology is a statement (which could be written or oral) made either by the person who is apologising (whether a natural person, or a legal person such as a company), or by someone else on their behalf (e.g. a spokesperson or agent). The core element is an indication that the person is sorry about, or regrets, an act, omission or outcome. Where the statement includes an admission of fault, statement of fact, or an undertaking to look at the circumstances with a view to preventing an occurrence, these qualify as part of the apology itself.*".[125]

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[124] *Ibid.*, p 27.

[125] *Apologies (Scotland) Bill Explanatory Notes (and Other Accompany Documents)*, para 11: Available at http://www.scottish.parliament.uk/S4_Bills/Apologies%20(Scotland)%20Bill/b60s4-introd-en.pdf (visited May 2015).

5.31 In the Apologies (Scotland) Bill Policy Memorandum, it is stated that "*[i]n the final proposal, the reference to an expression of apology was expanded to include 'an expression of sympathy or regret and any statements of fact'. The revised approach reflects further assessment by the member, during the consultation process, of apologies legislation already in place in other jurisdictions – in particular, the New South Wales Civil Liability Act 2012 ('the NSW Act'). Section 68 of the NSW Act defines an apology as –*

> *'an expression of sympathy or regret, or of an general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.'*

The member, therefore, wished to include provision to the effect that statements, including admissions of fault in the context of an apology, are inadmissible in certain legal proceedings.".[126]

The Canadian Experience

5.32 In Alberta where the apology legislation is silent on whether it covers statements of facts, the Court of Queen's Bench, in *Robinson v Cragg*, 2010 ABQB 743, ruled that the part of a letter which contained an expression of sympathy or regret and an admission of fault was inadmissible under the Alberta Evidence Act R.S.A. 2000 and should be redacted from the letter. In reaching the decision, the court noted that the legislature has determined that an expression of sympathy or regret combined with an admission of fault is "unfairly prejudicial" and should be "kept away from the trier of fact". The remaining part of the letter was ruled admissible because it contained admissions of facts that were not combined with the apology.

[126] *Apologies (Scotland) Bill Policy Memorandum*, paras 15 & 16: Available at http://www.scottish.parliament.uk/S4_Bills/Apologies%20(Scotland)%20Bill/b60s4-introd-pm.pdf (visited May 2015).

5.33 This decision was commented upon by Professor Robyn Carroll as having given "*proper effect to the intent of the legislation. It remains to be seen though how closely connected the 'admission' and the other words of 'apology' will need to be before both will be redacted or excluded completely*".[127] Professor Carroll was of the view that "*an apology that does not incorporate, or is not attached to admission of fact or fault, lacks evidentiary value to establish liability. It follows that apology legislation is not necessary to protect a party who makes an apology that contains no admission of any kind. Where an apology does contain admissions, Robinson v Cragg confirms that apology legislation, depending on its terms, is effective to exclude evidence of words expressing emotion and admissions.*".[128]

5.34 The decision was, however, criticised by Ms Nina Khouri as being "problematic". She argued that the "*defendants would most likely not have made the factual statements at all if not for the expectation that the letter would be protected from admission into evidence. As argued unsuccessfully by the defendants, it is analogous to saying that a without prejudice settlement letter becomes admissible simply by redacting the proposed settlement amount. This would be legally wrong; all common law jurisdictions protect surrounding statements made in connection with the attempt to settle the dispute. This narrow interpretation of the legislative protection is inconsistent with the legislation's aim of encouraging apologetic, pro-settlement discourse. Instead, it will have a chilling effect on defendants' willingness to apologise.*".[129]

Arguments For and Against Protecting Statement of Facts Accompanying Apology

5.35 From the experience in Scotland and Canada, it seems that there are competing arguments for and against applying the proposed apology legislation to statements of facts conveyed during apologies in Hong Kong.

[127] Robyn Carroll "When Sorry is the Hardest Word to Say, How might an Apology Legislation Assist?" (2014) *HKLJ* 491, 509.
[128] *Ibid.*
[129] Nina Khouri "Sorry Seems to Be the Hardest Word: The Case for Apology Legislation in New Zealand" (2014) *New Zealand Law Review* 603, 625.

5.36 Arguments for applying apology legislation to statements of facts in Hong Kong include:

(1) If statements of fact are not protected, people may just offer bare apologies without appropriate disclosure of facts which may render apologies meaningless and ineffective (the chilling effect).
(2) A bare apology may be viewed as insincere and may even be counterproductive to the prevention of escalation of disputes and settlement thereof.
(3) Apology would be far more effective if it comes with disclosure of facts and explanation (see, for example, the experience of the health care industry discussed in paragraphs 5.72 – 5.77 below).
(4) Very often, it is difficult, if not impossible, to segregate statements of facts from an apology.
(5) The plaintiff could still adduce independent evidence to prove the facts included in the apology.
(6) Disclosure of facts may assist the parties to understand the underlying circumstances of the mishap and this may facilitate settlement and prevent recurrence.

5.37 Arguments for excluding statements of facts from the protection of apology legislation in Hong Kong include:

(1) Statements of facts, by their nature, are directly relevant to liability directly and should therefore as a matter of principle be admissible.
(2) If statements of facts are inadmissible, the plaintiff's claim may be adversely affected or even be stifled in some circumstances, for example when those facts cannot be otherwise proved (c.f. while one of the underlying objectives of the Civil Justice Reform in Hong Kong in 2009 is to facilitate the settlement of disputes (O.1A, r.1 of the Rules of the High Court), in giving effect thereto, the Court shall always recognise that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the

substantive rights of the parties (O.1A, r.2(2) of the Rules of the High Court).

(3) Whether the plaintiff may be able to adduce independent evidence depends on whether the fact can be proved by independent means and how resourceful he is. The extra burden on the part of the plaintiff may not be justified.

(4) Parties are still able to use privileged circumstances ("without prejudice" negotiations and mediation) to disclose facts and give an account or explanation that goes beyond an apology.

(5) The existing overseas legislation, which do not expressly protect statements of facts, seem to have worked well over the years.

(6) The provision of factual information addresses a need of the person injured that is different from that met by the giving of an apology (whether bearing an admission of fault or liability), i.e. the need to know what had happened and/or what had been/would be done to prevent future occurrences.

5.38 The Steering Committee is yet to reach a conclusion on this issue, and hence no recommendation is made in this Paper as to whether the apology legislation should also apply to statements of fact accompanying an apology. Apart from closely following the development in Scotland, the Steering Committee invites comments and opinions in this regard.

Effect on Limitation of Actions

5.39 Put shortly, 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.

5.40 Many such jurisdictions provide in their limitation legislation that a limitation period for a cause of action will be extended by an acknowledgment or a part payment by the defendant. For example, in the context of a claim for recovery

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Chapter 10: The issue of whether factual information conveyed in an apology should be protected by the proposed apology legislation

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Number of responses in relation to this issue

10.1 Below is a summary of the responses regarding the issue of whether factual information conveyed in an apology should be protected by the proposed apology legislation (i.e. the 2nd issue referred to in paragraph 1.2 above):

	Number	Percentage (%)
Agree	13	17.33
Oppose	3	4
Neutral	59	78.67
Total	75	100

Comments from those who support

10.2 Amongst the 75 responses received, 13 of them support that factual information conveyed in an apology should be protected by the proposed apology legislation. The key reasons are as follows:

(1) If statements of fact are not covered, people may simply give bare apology.

(2) "The Ombudsman would like to point out that in principle public officers should not withhold relevant facts from complainants or plaintiffs even if the assessment is that this might incur extra legal liabilities. If a government or public body knows as a matter of fact that it has damaged the interest of the complainant, it should frankly disclose all relevant information, let justice take its course and accept the consequences, including payment of fair

compensation. On this premise, it seems that it does not matter whether statements of facts are protected. However, taking into consideration the arguments set out in paragraph 5.36 and 5.37 of the Consultation Paper, we tend to favour protection as it would generally encourage disclosure of facts to give substance to apologies. It would then be open for the party making the apology to give up the protection in case of a subsequent claim." (Office of The Ombudsman Hong Kong)

(3) "We submit that these statements of fact should be afforded the same protection under the legislation and should not be admissible in any related litigation or subsequent proceedings. It would therefore be far more efficacious if statements of facts were afforded protection under the legislation. We agree that in addition to assisting the parties to understand the underlying circumstances of a mishap, the disclosure of facts may also facilitate settlement and prevent recurrence." (The Hong Kong Association of Banks)

(4) "HA also supports in principle the concept of protecting statement of facts accompanying an apology. For an apology to be meaningful, an apology is necessarily premised upon or given in the context of certain basis of facts, which facts may be agreed or disputed. Our concern is what facts will be considered as relevant facts to the apology in question and the factors to be taken into consideration for determining such relevance. The nexus between the apology and the statement of facts which governs the protection coverage for these facts must be clearly provided in the new legislation. This is an important aspect and we urge the Government to conduct further consultation when a substantive recommendation is available." (Hospital Authority)

(5) "[T]he proposal that the apology legislation should apply to statements of facts accompanying an apology is supported. The reason is that the person who makes an apology will normally provide some explanations on the wrongdoings. In the absence of such provision, people will tend to offer bare apologies without

giving any statements of facts, which will be regarded as lack of sincerity. An apology accompanied with statement of facts, on the contrary, would make the apology effective and sincere. In cases where the statements of facts are inadmissible, the claimant could still adduce evidence to prove the fact accompanying the apology in court during litigation." (Anonymous)

(6) "[W]e have strong reservation on whether those statements, which may be 'uttered' or 'expressed' by the apology-giving person after his apology, should be regarded as, or taken as having acquiring the evidential standard of being a "fact". The fact remains and only remains at the top level that the apology-giving person has giving out certain expressions which may be instantaneous reactions rather than pre-meditated statements or admissions. There are definite levels of standard on how an expression being given under certain manner or circumstance should be regarded evidentially as admission evidence or mere expressions. We consider that the statements or admissions after the apology is made as part of the (full) apology must be protected in the future legislation." (Hong Kong Construction Arbitration Centre)

(7) "We also support to include statement of facts under the protection because, with such protection, the concerned party will be more willing to make apology which align with the intended objective of the proposed apology legislation to encourage apology and ultimately minimize litigation…We suggest that "statement of facts accompanying apology" should be clearly stated and defined in the legislation in order to address the following concerns: (a) It is very difficult to differentiate what are the specific statements of facts that are regarded as accompanying apology…(b) It is unclear how to differentiate facts accompanying apology with independent evidences to prove the facts…(c) The practical concern of the apologizing party to refrain from disclosure of facts as it will ultimately result at highlighting of other related facts/ documents, by means of

written records, testimonial of witness, etc, could be summoned by Court or disciplinary board as independent evidence. Only if these related facts are also protected as under the apology legislation could alleviate the worry of the apologizing party. Otherwise, it is very unlikely that the apologizing party would make a full apology." (Hong Kong Family Welfare Society)

Comments from those who oppose

10.3 Amongst the 75 responses received, 3 of them disagree that factual information conveyed in an apology should be protected by the proposed apology legislation. The reasons are as follows:

(1) "This is presaged in the Apologies (Scotland) Bill and gives us cause for concern. It presents another reason why apology legislation will lead to satellite litigation. It is open to abuse and may further stifle a complainant's/plaintiff's claim. The alternative, where only the statements of fact (of a letter) are admissible, but the accompanying apology/admission of liability is not, is equally unpalatable." (Herbert Smith Freehills LLP)

(2) "The HKBA has considered the issue of applicability of apology legislation to the factual information in the light of the legislation (including draft legislation) in jurisdictions outside Hong Kong, as well as case law from common law jurisdictions outside Hong Kong. The HKBA is of the view that there is doubt at this stage as to whether apology legislation should protect a statement of fact conveyed in an apology. Unlike an expression of regret or admission of liability, statements of fact are not necessarily integral to an effective apology. Therefore, it is not necessary to extend protection to statements of fact. Further, the probative value of statements of fact conveyed in an apology or accompanying an apology outweighs its prejudicial value, and therefore it appears that such statements of fact should be

admitted as evidence. Also, a spontaneous apology containing important facts regarding what happened at the material time; there is no sufficient reason to justify exclusion. Since an apology can be made by any party at any time and for any purpose, the public policy in creating mediation confidentiality and without-prejudice privilege does not apply to apologies. More consultations and research should be conducted before this issue is determined. In this respect, the HKBA notes that the Steering Committee has not yet reached a conclusion on this issue…So it is uncertain as to whether the apology legislation should include protection in respect of a statement of fact conveyed in an apology. One apparently strong argument is that it should be the court to consider and value all the relevant evidence. Canadian and Australian cases have shown that even without such protection in the written law, the court may still exclude the entire apology, including the statements of fact from evidence in appropriate cases. There is a valid argument *in law* that it would be better off to leave the issue for the court to decide instead of making a blanket protection." (Hong Kong Bar Association)

Other comments

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

(1) "If the legislation protects the Statement of Facts accompanying apology, it shall also expressly protect the rights of the plaintiff in adducing the evidence or information which is subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power." (Hong Kong Mediation Centre)

(2) "When a defendant makes an apology, statements of facts will inevitably be conveyed in the apology. In order to encourage a

defendant to apologise, statements of facts should be included in the protection of the apology legislation to avoid bare apology and reduce risks of legal liability as well. However, statements of facts are mostly directly relevant to the legal liability of the defendant, and should in principle be admissible as evidence. If statements of facts are inadmissible as evidence, a plaintiff's claim may be prejudiced. In addition, as regards the Scottish legislative proposal to include statements of facts in the protection of apology legislation mentioned in the Consultation Paper, we consider that the rationality of the legislative approach will need to be tested in practice in more overseas jurisdictions. Therefore, we recommend that in the first phase of enactment of the apology legislation in Hong Kong, the legislative approach to statements of facts should follow that in Canada where the apology legislation does not expressly stipulate whether it covers statements of facts or not…Further, at present, parties are still able to use privileged circumstances ("without prejudice" negotiations and mediation) to disclose facts and give an account or explanation that goes beyond an apology. An absence of protection for the statements of fact accompanying an apology has in no way rendered communication impossible. Besides, with most plaintiffs being the disadvantaged parties (for example, patients or relatives of the deceased who claim for damages for personal injuries arising out of medical incidents usually lack financial resources, professional knowledge or ways to gather evidence), the inclusion of statements of facts in the protection of the apology legislation will further widen the inequality in legal resources available to parties." (Society for Community Organization – Patient's Rights Association) (English translation)

Update on the Apologies (Scotland) Bill

10.5 The Consultation Paper contains information and materials regarding the Apologies (Scotland) Bill ("the Bill") up to May 2015. In May 2015, the Justice Committee of the Scottish Parliament sought views on the general principles of the Bill[1]. One of the matters covered concerns the definition of apology in the Bill[2]. The call for written evidence closed on 8 May 2015 and 20 written submissions were received[3]. The Justice Committee received oral evidence on the Bill at its meetings held on 9, 16 and 23 June 2015[4].

10.6 Insofar as the issue of statement of fact is concerned, the following extracts from the written submissions appear to be relevant:

(1) "If the Bill is passed with an apology defined as drafted, it could have serious consequences, and risk denying injured people access to justice, such as in this hypothetical case: Driver A emerges from a minor road and immediately turns right, knocking down a child who is starting to cross the road. The child suffers serious brain injury. Driver A says in reply to the police interview: 'I am sorry I just wasn't paying attention'. By the time driver A has time to reflect on matters he takes a different view. He now decides that there was nothing he could do, and the child simply ran out on to the road without any warning. There is no other witness evidence available. In terms of the proposed legislation, the child's action for damages will fail on the burden of proof, as the driver's statement of fault would be inadmissible. The Apologies (Scotland) Bill goes much further than the law in some

[1] Call for evidence on the Apologies (Scotland) Bill: Available at http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/88341.aspx (visited January 2016)

[2] Under the Apologies (Scotland) Bill proposed by Ms Margaret Mitchell and before amendment, "apology" is defined as "any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains (a) an express or implied admission of fault in relation to that act, omission or outcome, (b) a statement of fact in relation to the act, omission or outcome, or (c) an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing recurrence."

[3] Submissions received on the Apologies (Scotland) Bill: Available at http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/89281.aspx (visited January 2016)

[4] Official Reports of the evidence sessions: Available at http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29847.aspx (visited January 2016)

other jurisdictions. The Compensation Act 2006 includes a section on apologies in England and Wales but which does not prevent apology being used in evidence. Section two of the Act reads: 'An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.' Section two of that Act meets the principle of encouraging appropriate expressions of regret, whilst retaining the capability to use that expression where there is a clear acceptance of legal responsibility. If the Justice Committee is persuaded that there needs to be an encouragement to provide an apology, then the terms of that legislation will suffice." (The Association of Personal Injury Lawyers)

(2) "In our previous response to a consultation on the Bill, I was concerned about protecting factual statements and whether that was appropriate. However, on reflection, I think it is difficult to extract facts from other parts of the statement. Facts can also be separately established so including them in this protected conversation does not mean they will not be available in other areas." (The Scottish Public Services Ombudsman)

(3) "The distinction between the apology part of a statement and the acknowledgement of fault part (ie what might be an admission) and the extent to which these can be severed is the basic dilemma with this legislation. If courts can completely sever the words acknowledging fault then there is no point in the legislation because an expression of regret doesn't need protection anyway. On the other hand, if the apology can be extended to any words, however connected, this may create a situation where important evidence is excluded. As Professor Robyn Carroll from University of Western Australia has pointed out, in *Robinson v Cragg*, a case from Alberta, Canada, the Master ordered that words of apology that incorporated an admission of fault in a letter be redacted but that admissions of fact were not protected by the apology legislation in that jurisdiction (Alberta). The definition in this Scottish legislation does go further than any

other similar legislation. Clause 3 extends the protection beyond express and implied admissions of fault to a statement of fact in relation to the act, omission or outcome that the person is sorry about (cl 3(b)), and to an undertaking to look at the circumstances giving rise to the act etc with a view to preventing a recurrence (Cl 3(c)). I am not entirely sure about extending the protection to any 'statement of fact' unless it is made clear that it must have a link with the apology – that is, that the person included the statement as part of the apology. I would like to see this made clearer because otherwise one runs the risk that in a case like *Robinson v Cragg* the entire letter would be excluded. I think the outcome in *Robinson v Cragg*, which left some of the letter intact and admissible is the correct outcome. In that case the letter included a sentence 'I assure you that our registration of the Discharges was through inadvertence and I apologise for doing so'. The letter also contained some other admissions of fact. The Master redacted the sentence and the admissions of fault but retained the admissions of fact and held they were admissible because they were not combined with the apology. The definition of apology in the Alberta Evidence Act 2000 included (s 26) 'an expression of sympathy or regret, a statement that one is sorry or other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate'. This is not significantly different in substance from the definition in the Scottish bill. The Alberta Act then provides that such an apology does not constitute admission of fault and '…shall not be taken into account in any determination of fault or liability' and prevents it from being admissible. Again, this is very similar to s 1(a). Section 1(b) is broader and very protective. It would protect I think against voiding of insurance contracts, for example, which I think is a very important matter. Opinions differ on where the balance should be struck and the

best way to ensure the intention that the words connect with the apology." (Professor Prue Vines, University of New South Wales)

10.7 The Scottish Government also expressed its views in a memorandum[5] and a letter from the Minister for Community Safety and Legal Affairs to the Convener of the Justice Committee[6]. The relevant views are extracted below:

(1) "There is a concern that the benefits of hearing an apology will, in certain circumstances, not be sufficient to outweigh the potential injustice to pursuers in actions for damages. That injustice could arise in cases where an admission of fault or statement of fact is the only means of demonstrating liability for the harm caused but that admission is protected and so cannot be led in evidence because it is part of the statutory apology. If there is no other evidence available on liability, a pursuer would be unable to succeed in an action for damages for compensation…Although the Bill states that an apology as defined in clause 3 is not admissible as evidence, an admission of fault or statement of fact would be very close to an express admission. It is foreseeable that one party may seek to sever the admission or the statement of fact from the expression of regret in the courts…The Scottish Government supports the aim of the proposal which is to encourage and protect the giving of apologies by private and public bodies to achieve a better outcome for victims and to reduce the number of cases which result in litigation. We consider that the definition of apology needs some further consideration in order to ensure that it does not create any inadvertent injustice; that the application of the Bill to certain legal proceedings requires further consideration; and that the implications for

[5] Available at http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20150501_SG_Memorandum.pdf (visited January 2016)

[6] Available at http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20150617_MfCSLA_to_CG.pdf (visited January 2016)

insurance cover have been fully taken into account…Given the concerns with the proposed legislation, the Scottish Government maintain a neutral position on this legislation at this time." (the memorandum)

(2) "Although we agree that there is merit in encouraging a culture where apologies are readily provided this should not be at the expense of potential injustice to pursuers…People who wanted to rely on admissions of fault or fact or simple apologies will no longer be able to put them before the courts in civil proceedings, and courts would no longer be able to take into account evidential matters that they are currently able to consider. By defining apology in the manner proposed in the legislation, in my view, the benefit of hearing an apology may be outweighed by the inability to use this as evidence in any civil proceedings…That injustice could arise in cases where an admission of fault or statement of fact is the only means of demonstrating liability for the harm caused but that admission is protected and so cannot be led in evidence because it is part of the statutory apology. If there is no other evidence available on liability, a pursuer would be unable to succeed in an action for damages for compensation" (Annex to the letter from the Minister for Community Safety and Legal Affairs to the Convener of the Justice Committee)

10.8 In the light of the position taken by the Scottish Government, Ms Margaret Mitchell, a member of the Scottish Parliament who introduced the Bill, said this, "[h]aving listened carefully to what witnesses and the minister have had to say, I am persuaded that the wording of section 3(b) on statements of fact could be omitted from the bill."[7] The above was also reported in the Stage 1 report of the Justice Committee of 11 September 2015 to the Scottish Parliament[8] ("Stage 1 report").

[7] Official Report of Meeting of the Justice Committee of the Scottish Parliament on 23 June 2015, p 6: Available at http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10036 (visited January 2016)

[8] Available at http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/92121.aspx (visited January 2016)

10.9 In the Stage 1 report, the Justice Committee set out its views at paragraph 66, "[t]he Committee notes the view of witnesses that individuals' rights to pursue civil action could be compromised if, under the Bill, they are unable to draw on the evidence of an apology, whether that be simple apology, a statement of fact or admission of fault. While we understand that the member's intention was to allow for the widest possible disclosure, particularly for victims of historical child abuse, we have strong concerns that these particular victims could face further evidential challenges in pursuing civil action. We therefore urge the member to consider how best a balance can be struck to ensure that there are no unintended consequences for victims, whilst ensuring that the legislation remains meaningful" and concludes at paragraph 106 that "[m]ost importantly, [they] must be reassured that individuals wishing to pursue fair claims are not going to be disadvantaged by the measures in the Bill."

10.10 On 27 October 2015, at the debate in the Chamber of the Scottish Parliament, Ms Mitchell said as follows, "I have listened closely to the witnesses' arguments, including those of the minister, about whether the effect of parts of the definition could possibly prevent an individual from securing compensation, particularly if a statement of fact in an apology was the only evidence available. I included statements of facts to try to encourage the fullest possible apology, but I am aware that their inclusion in the definition goes further than any other apology legislation. I have reflected on witnesses' concern and can confirm that I am persuaded that the definition in the bill should be revised to exclude statements of facts."[9] Mr Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, said this, "I am aware of the argument that those unintended consequences might apply only to a small number of cases and would only rarely disadvantage individuals…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."[10]

[9] Official Report of Meeting of the Scottish Parliament on 27 October 2015, p 35: Available at http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10157 (visited January 2016)
[10] *Ibid*, p 54.

10.11 On 19 January 2016, the Apologies (Scotland) Bill was passed by the Scottish Parliament and there is no reference to statements of fact in the bill.

Analysis and response

10.12 After considering the responses and comments including those specified above, as well as the latest development of the Apologies (Scotland) Bill, the Steering Committee has the following analysis and response.

10.13 The issue relating to statements of fact is admittedly a controversial one, as can be seen from the responses received and the debate of the Apologies (Scotland) Bill in the Scottish Parliament, because this issue would potentially affect the claimants' rights and has not been covered in the existing apology legislation enacted elsewhere. It is also relevant to note that the Apologies (Scotland) Bill passed by the Scottish Parliament contains no reference to statements of fact.

10.14 As far as we see, there are 3 alternative options which may be adopted to address this issue:

(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")

10.15 Under the First Approach, statements of fact in connection with the matter in respect of which an apology has been made would form part of the apology and therefore would be protected by the apology legislation. Arguments for this approach have been set out in paragraph 5.36 of the Consultation Paper. As to the potential impairment on the claimants' rights to seek justice, 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. 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.

10.16 Under the Second Approach, whether statements of fact would form part of the apology depends on the circumstances, and is a question to be decided by the Court. There are views to the effect that as a matter of principle, relevant statements of fact should be admissible as evidence; however, whether the nexus between an apology and the accompanying statements of fact is so close that it should become part of the apology and therefore inadmissible depends on circumstances surrounding the making of the apology. This aspect has been discussed in paragraph 5.32 of the Consultation Paper in which the Canadian case of *Robinson v Cragg* was mentioned. There are also views to the effect that it is difficult, if not impossible, to draw the distinction between "fact" and "apology" in a piece of legislation which is subject to interpretation and therefore this issue should be left to be judged by the Court on a case by case basis. Further arguments have been set out in paragraph 5.37 of the Consultation Paper. The advantage of the

Second Approach is flexibility. However, such flexibility may be a double-edged sword in that it can also be perceived as uncertainty, and hence may be inconsistent with the ultimate objective of encouraging people to make apologies.

10.17 Under the Third Approach, generally the statements of fact accompanying an apology would form part of the apology and therefore would be inadmissible as evidence against the maker of the apology. However, the Court would retain the discretion to grant leave to allow the claimant to adduce such evidence against the maker of the apology in certain circumstances such as when those statements of fact would be the only evidence available to the claimant. The flexibility provided under this approach could address the concern that some claims may be stifled for lack of evidence and that the right to a fair hearing may be denied for these claimants. However, at the same time, the flexibility would render the legislation uncertain which may considerably affect the efficacy of the legislation or even defeat the whole purpose of the legislation. It is not surprising that given such uncertainty (especially as to when and how would the Court exercise its discretion), a prudent lawyer would err on the safe side and advise the clients not to apologise.

10.18 When deciding which of the above alternative options should be adopted, one important issue that should be carefully considered is whether there would be any possible infringement of a claimant's right to a fair hearing. This right, though can be restricted by laws, is guaranteed by Article 10 of the Hong Kong Bill of Rights (which corresponds with Article 14 of the International Covenant on Civil and Political Rights) and is entrenched by Article 39 of the Basic Law. In the rare situation where an apology that includes statements of fact is the only evidence which can establish liability, the exclusion of such statements of fact as evidence may effectively stifle the claim and this unintended consequence may arguably interfere with the claimant's right to a fair hearing. 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.

10.19 As noted above, this issue is admittedly a controversial one. Accordingly, at the moment, the Steering Committee has yet to reach a final conclusion as regards the approach to be taken in addressing this issue. Therefore, in the draft Apology Bill in Annex 2, the definition of apology would only provisionally include statements of fact. The Steering Committee stress that this aspect is open for consultation and public views are sought.

Final Recommendation

10.20 As to whether the apology legislation shall cover statements of fact in connection with the matter in respect of which an apology has been made, the public and all relevant stakeholders are invited to express further views on it. The Steering Committee will only make a final decision on this issue after it has a chance to consider the views to be received in the 2nd round consultation.

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

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

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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
Total	40	100

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 to 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 sorriness, 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 overweigh 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	2nd Approach	3rd 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.