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Chairman, Bills Committee on Apology Bill,
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Dear Chairman,

I am submitting my view on the proposed "Apology Bill ("Bill") to be enacted by Legislative Council. As a medical practitioner also with some background in law and training in arbitration, I strongly support the proposed legislation. I have witnessed and been involved in many disputes not only in health services but also in other services. Conflicts and disputes would arise when we are dealing with human issues. In medical field as well as other professional fields, the practitioners are always vigilant of their professional and delivering best possible services according to the best available evidence. Not matter how strong is the scientific evidence, there will always be some degree of error. During a real life situation such as acute medical problems, the medical and health professionals need to come to immediate decision within short period of time which would be matter of seconds, medical personnel would act for the best interests of patients with maximum benefits and minimal harm. However if one expects a perfect condition with absolutely no harm and 100% benefit, one would easily miss the golden opportunity for treatment. Is this serving the best interest of patients? The judgment is reasonable care being excised under particular condition.

However the occurrence of medical mishaps even due to unforeseeable circumstances, it can still be very traumatic for patients and family members. Conflicts and disputes arisen need careful management. The so called 'victims' would like to have detail explanation and open disclosure of the events including why certain decisions have been made. Certain decisions would be regrettable with hindsight but not necessary wrong or negligent act at that time. If the open disclosure is bounded by defensive mode without expression of sympathy, sorrow and perhaps regret if appropriate, the feelings of doubts and anger of the patient and family members cannot be fully ventilated. Not surprisingly, the 'victim' will take further action to resolve their grievances. It will jeopardize the possibility of resolving the matter by mutual understandings. If the 'victim' can be provided with detail information why adverse event has happened, at least they will take time to digest the information before next step. Maintaining the rapport would ensure the dialogue to be continued paving way for alternate dispute resolution. However the medical and health professionals including the insurers are concerned with saying sorry or expression of regret as admission to liability exposing them to medico-legal risks. That is why we need apology legislation to protect the professionals and encourage true and frank open disclosure.

In clause 7 of the "Bill", it has stipulated that apology made by a person in connection with a matter not constituting an express or implied admission of fault or liability and must not be taken into account in determining fault or liability with prejudicial effect of the person concerned. However it is subject to clause 8. Although in clause 8(a) evidence of apology is not admissible in applicable

proceedings as evidence for determining fault or liability, there can be exceptional case, e.g., 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 when the decision maker satisfied that it is just and equitable to do so. This part would raise concerns as not all decision makers of applicable proceedings are judge with substantial skills in judicial decisions. Applicable proceeding can be judicial, arbitral, administrative, disciplinary and regulatory proceedings. This would apply to disciplinary board or related professional councils. One would take referenced from Open Disclosure Standard Review Report in Australia that “...*the determination of fault is for the court not for the parties to make*”.¹ Therefore the admission of fault is in the eye of law. Therefore the decision to include statement of apology as evidence needs to be construed narrowly as matter of necessity in law to be determined by court rather than any decision maker of applicable proceedings.


With regard to applicable proceedings, will this apply to administrative, disciplinary and regulatory proceedings not established under Statutory or Public Authorities such as disciplinary proceeding of a non-statutory organization? This needs to be defined clearly and should be widely applicable to all types of civil proceedings. This will allow more frank open disclosure to facilitate resolution by mutual understandings.

Will the proposed legislation of apology cover the oral expression of fault or liability or any other issues in connection with the matter to police officers or officers involving law and orders? Again this would allow open disclosure of the whole incidents to the officers in charge so they would have better insights of the whole situation.

One should emphasize the rule of evidence submission. “*Admission of evidence must be relevant. Relevance is tested by whether this evidence makes it more probable or less probable. The burden of proof is the obligation to prove and the person alleging has the burden of proving. Legal burden of proof is ‘probative’ or ‘persuasive’ which is obligation resting on the party wishing to raise a particular fact in issue, which must be discharged or satisfied if the party is to win. The evidential burden of proof is the obligation upon a party to adduce sufficient evidence to justify a finding on that fact in favour of that party, i.e., making the issue a live one. The evidential burden related to the particular facts in issue and is discharged when the party having the burden of proof has put sufficient cogent evidence before the court.*” The “Bill” should make reference that decision to admit statement of apology as evidence is construed narrowly under the rule of evidence.

Thank you for your kindest attention!

Yours sincerely,


Albert Lee
(Professor in Public Health and Primary Care and Arbitrator)

¹ Australian Commission on Safety and Quality in Health Care. Open Disclosure Standard review report. Sydney: ACSQHC, 2012.

<http://www.safetyandquality.gov.au/wp-content/uploads/2012/05/63652-Open-Disclosure-Standard-Review-Report-Final-Jun-2012.pdf>

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