Submission to Bills Committee on Apology Bill in the Meeting on 9 May 2017.

Chairman and members of the Bills Committee on Apology Bill, Ladies and Gentlemen,
Thank you for allowing me to present the views of JC Professional Dispute Resolution Centre (承平專業解紛中心), which is a professional organisation dedicated to the promotion, training and practising of dispute resolution in the fields of mediation and collaborative practice. As such, we are supportive of all measures which will facilitate amicable settlement between disputants, and apology legislation is one of them.

We are of the opinion that apology legislations will benefit all walks of life - both the plaintiffs and the defendants. We have also observed that more and more common law jurisdictions have passed apology legislations in one form or another since the first one, which was enacted in the State of Massachusetts in the USA just over 30 years ago in 1986. The most recent one being the Apologies (Scotland) Act 2016.

At present, apologies can be risky unless they are made in 'without prejudice' communication in settling a dispute, or in mediation with confidentiality clauses included in the agreements. Other than these 'protected' environments, understandably, many lawyers would not advise their clients to make any statements to the other party more than an expression of sorrow for fear that an apology could be interpreted as an admission of liability. However, an overseas academic clearly expressed her view that a full apology was better than a partial apology, that a partial sympathy-expressing apology was (often) not different from no apology and that instead there was evidence showing that a partial apology could be particularly detrimental when the resulting injury was severe or when there was strong evidence of the offender's responsibility.

That is why we support the Apology Bill (the Bill) which not only protects “an expression of the person's regret, sympathy or benevolence in connection with the matter, and includes, for example, an expression that the person is sorry about the matter” Clause 4(1) (i.e. a partial apology); but also protects “any part of the expression that is and express or implied admission of the person's fault or liability in connection with the matter” (Clause 4 (3) (a) (i.e. a full apology). This is similar to the Apology Act of British Columbia which came into force in 2006.

It is our experience that some lawyers are very careful in protecting their clients from making apologies even in mediation sessions. We are of the opinion that this Bill, which protects full apologies, will be more reassuring to them, and will allow their clients to offer full apologies more freely and hopefully will facilitate more amicable settlements. Clause 11 (c) also stipulates this Bill does not affect the operation of the Mediation Ordinance (Cap. 620), which provides, among other things, that a mediation communication (which may contain an apology) may be disclosed for certain purposes, or admitted in evidence in proceedings, *only* with leave of a specified court or tribunal. (*emphasis added*).

Overseas academics have emphasized the importance of full disclosure of facts, together with apology and offer after an adverse event in the medical and healthcare sector, and proposed the DA & O model. A simple explanation is that a bare apology without explanation may have the same adverse effect as a partial apology mentioned above. The Bill points out that an “apology also includes any part of the expression that is a statement of fact in connection with the matter”. (Clause 4 (3) (b)) However, this is qualified in Clause 8 (2) that “the decision maker of the proceedings has a discretion to admit a statement of fact contained in the apology as evidence in the proceedings”. Here, a “decision maker” means the person (whether a court, a tribunal, an arbitrator or any other body or individual) having the authority to hear, receive and examine evidence in the proceedings. (Clause 8 (5)) This arrangement provides the flexibility which 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 could render the legislation uncertain. The uncertainty as to when and how the Court would exercise the discretion could be a concern to some lawyers in advising their clients whether to apologise or not. Another concern could be on how well some of the decision makers who do not have legal training can exercise their discretion. One example of such is the Chairman and Deputy Chairman of the Preliminary Investigation Commitee (PIC) of the Medical Council of Hong Kong, which has been under the lime light in recent years. At present, and in the past, none of them have any formal legal training. It is interesting to note that, of all the five committees in the Medical Council, the PIC is the only one which does not have a Legal Adviser.

We welcome the Bill specifies that it is applicable to disciplinary proceedings (Clause 6(1)(a)) and that contracts of insurance or indemnity will not be affected. (Clause 10)

Thank you all for your attention.