

LEGISLATIVE COUNCIL BRIEF

APOLOGY BILL

INTRODUCTION

At the meeting of the Executive Council on 17 January 2017, the Council ADVISED and the Chief Executive ORDERED that the Apology Bill (“Bill”), at **Annex A**, should be introduced into the Legislative Council.

JUSTIFICATIONS

2. In a dispute following a mishap, a party may genuinely believe that he or she has done nothing wrong but would still wish to convey condolences or sympathy to the other party for the loss and suffering sustained out of goodwill and pure benevolence. There are also other circumstances where a party may wish to make an apology for other reasons after a dispute has arisen. However, at the moment, people are often inhibited from making an apology or may be advised by their legal advisers not to make an apology even if they wish to do so. This is because, under the current law of 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). Indeed, as experience and research in Hong Kong and other jurisdictions show, the concern that their apologies could be used in court or disciplinary tribunals as evidence of admission of fault has inhibited many people from making apologies even when they wanted to do so. Further, there is a common concern against the making of an apology for fear that one’s insurance company may seek to repudiate liability under an insurance policy by relying on clauses in the insurance contract that prohibit the admission of fault by an insured.

3. Such a general reluctance to apologise, however, is not conducive to the prevention of escalation of disputes or their amicable resolution. On the contrary, anxiety and anger on the part of victims or their families might inflate if there is neither signs of regret nor expression of sorrow coming from the other party involved. Total apparent apathy about the mishap from one side remains an irremovable stumbling block rendering it unlikely for the other side to be willing to attempt to resolve the dispute amicably.

4. Studies and experience in overseas jurisdictions show that enactment of apology legislation is conducive to: (a) preventing the escalation of disputes; and (b) promoting, encouraging and facilitating resolution of disputes by removing disincentives from making apologies which include the concern that apologies could be used in subsequent proceedings as evidence of admission of fault or liability, as well as other disincentives caused by the law of limitations and insurance contracts. Areas where apology legislation has been proved to be most relevant include where monetary compensation might not be the top priority of the victims. Examples include disputes in the medical and health care sectors. Research and experience in various jurisdictions (especially the United States) show that an offer of apology could be effective in resolving disputes at an early stage.

5. Apology legislation is not something new among common law jurisdictions. In short, there were three periods of development. As far as our research reveals, the first apology legislation was apparently enacted in Massachusetts in 1986. The trend then spread to other states in the United States. At present, over 30 American states have apology legislation. This trend did not stop at the United States, but continued to develop across the other side of the Pacific. In the early 2000s, the second period of development began when apology legislation was enacted in Australia. Each state and territory in Australia now has its own apology legislation. The third period of development took place in Canada and started in the late 2000s and early 2010s. At the moment, apology legislation exists in most provinces and territories of Canada. After these three periods of development, the most recent development took place in Scotland when its apology legislation was enacted in early 2016.

THE BILL

6. By providing for the effect of apologies in certain proceedings and legal matters, the Bill seeks to facilitate the amicable resolution of disputes by promoting and encouraging the making of apologies by parties in disputes when they want to do so. The apology legislation, if enacted, will not compel any person to make an apology. Similar to the apology legislation enacted in other jurisdictions, the Bill is relatively short. The Bill contains 13 clauses and a Schedule. The main provisions are summarised below –

- (a) Clause 4 defines **apology** for the purposes of the Bill. An apology made by or on behalf of a person means an expression of the person's regret, sympathy or benevolence. If part of the expression is an admission of the person's fault or liability, or a statement of fact, the admission or statement is also included in the meaning of "apology".¹

¹ Clause 4, together with clause 8(2), implement (i) the Final Recommendation 3 (1st round consultation) of the Steering Committee that the apology legislation is to cover full apologies and (ii) the Final Recommendation 2

- (b) Clause 6 enumerates the *applicable proceedings* for the purposes of the Bill. They are judicial, arbitral, administrative, disciplinary and regulatory proceedings, and other proceedings conducted under an enactment. However, applicable proceedings do not include criminal proceedings or some specific types of proceedings listed in the Schedule. Clause 12 empowers the Chief Executive in Council to amend the Schedule.²
- (c) Clause 7 precludes an apology from constituting an admission of fault or liability, and from being taken into account in determining fault, liability or any other issue³ to the prejudice of the apology maker, for the purposes of applicable proceedings.
- (d) Clause 8(1) makes evidence of an apology generally not admissible for determining fault, liability or any other issue to the prejudice of the apology maker in applicable proceedings. However, under clause 8(2), a statement of fact contained in an apology is admissible as evidence in particular applicable proceedings at the decision maker's discretion, which may be exercised in an exceptional case and only if it is just and equitable to do so, having regard to all the relevant circumstances.
- (e) Clause 9 precludes an apology from constituting an acknowledgment of a right of action, and so also from extending the relevant limitation period for the purposes of the Limitation Ordinance (Cap. 347)⁴.
- (f) Clause 10 provides that an apology does not affect any insurance cover, compensation or other form of benefit under a contract of insurance or indemnity⁵.

(2nd round consultation) that the factual information conveyed in an apology should likewise be protected by the apology legislation and the Court or tribunal in applicable proceedings should retain the 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.

² These clauses implement (i) the Final Recommendation 2 (1st round consultation) of the Steering Committee that the apology legislation is to apply generally to civil proceedings and other forms of non-criminal proceedings including disciplinary and regulatory proceedings with exceptions and (ii) the Final Recommendation 1 (2nd round consultation) that the proposed apology legislation should apply to all disciplinary and regulatory proceedings except proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86), the Coroners Ordinance (Cap. 504) and the Control of Obscene and Indecent Articles Ordinance (Cap. 390) and that a mechanism should be provided for in the draft Apology Bill to allow future amendments to be made to the Schedule of excepted proceedings so as to provide flexibility.

³ This would include issues such as appropriate remedies or sanctions, and credibility.

⁴ This clause implements the Final Recommendation 5 (1st round consultation) of the Steering Committee that the apology legislation is to expressly preclude an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance.

⁵ This clause deals with the Final Recommendation 6 (1st round consultation) of the Steering Committee that the apology legislation is to expressly provide that an apology does not affect any insurance cover or indemnity that is, or would be, available to the person making the apology and that any contracting out of the apology legislation

- (g) Clause 11 provides that the Bill does not affect discovery or a similar procedure in applicable proceedings, certain provisions in the Defamation Ordinance (Cap. 21) in which an apology is relevant as defence or for mitigating damages, or the operation of the Mediation Ordinance (Cap. 620).
- (h) Clause 13 provides that the Bill applies to the Government⁶.

LEGISLATIVE TIMETABLE

7. The legislative timetable will be as follows –

| | |
|--|-----------------|
| Publication in the Gazette | 27 January 2017 |
| First reading and Commencement of Second Reading debate | 8 February 2017 |
| Resumption of Second Reading debate, committee stage and Third Reading | to be notified |

IMPLICATIONS OF THE PROPOSAL

8. The Proposal is in conformity with the Basic Law, including the provisions concerning human rights. The Bill applies to the Government by an express provision. The Proposal does not have any significant economic, environmental, sustainability, civil service, family, gender and productivity implications.

9. The Proposal may have financial implications. While the objective of the Bill is to promote and encourage the making of apologies in order to facilitate amicable settlement of disputes, the provisions of the Bill do not compel any party to apologise and to settle disputes. The apology, if made, does not bar any person from commencing legal proceedings. We consider that it is not possible to quantify with certainty the exact extent of impact, if any, on reduction of the litigation costs and Government's expenditure.

should be prohibited or declared void.

⁶ This clause implements the Final Recommendation 4 (1st round consultation) of the Steering Committee that the apology legislation is to apply to the Government.

CONSULTATION

10. Two rounds of 6-week public consultation were conducted in June 2015 and February 2016 respectively on the proposal to enact apology legislation in Hong Kong.

11. In the 1st round public consultation conducted in June 2015, the public's views were sought on the following recommendations by the Steering Committee on Mediation ("Steering Committee") -

- (a) An apology legislation is to be enacted in Hong Kong.
- (b) The apology legislation is to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings.
- (c) The apology legislation is to cover full apologies.
- (d) The apology legislation is to apply to the Government.
- (e) The apology legislation expressly precludes an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance.
- (f) The apology legislation expressly provides that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology.
- (g) The apology legislation is to take the form of stand-alone legislation.

———— (See **Annex B**, which is the Executive Summary of the Consultation Paper published in June 2015.)

12. Two consultation forums were held in July 2015. In addition, members of the Steering Committee, the Regulatory Framework Sub-committee and the Working Group on Apology Legislation attended the meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council ("AJLS Panel"), various interviews by the media and briefings and sharing sessions with various stakeholders and concerned parties. The majority of the responses in the 1st round consultation were in favour of enacting apology legislation in Hong Kong.

13. In the 2nd round public consultation conducted in February 2016, 8 final recommendations were made and the public's views were sought on the following 2 specific issues and on the draft Apology Bill -

- (a) Excepted proceedings to which the proposed apology legislation should not apply.
- (b) Whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation.

———— (See **Annex C**, which is Chapter 11 of the report published in February 2016.)

14. Two consultation forums were held in March 2016. In addition, members of the Steering Committee, the Secretary for Justice and counsel of the Department of Justice attended the meeting of the AJLS Panel on 22 February 2016 and briefed the panel on the 2nd Round Consultation Paper and the issues for consultation.

15. In relation to the issue on excepted proceedings to which the proposed apology legislation does not apply, there were submissions made from organisations such as certain Government Departments and regulatory bodies proposing to be exempted from the Bill⁷. In relation to the issue as to whether statements of fact conveyed in an apology should be protected, the majority view is that it should be protected to better achieve the objective of the proposed legislation. However, there were differences in views as to whether the court should retain a discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances.

16. Having taken into account the responses received in the 2nd round consultation and all other relevant considerations, the Steering Committee made the following final recommendations in its Final Report and Recommendations published in November 2016 -

- (a) The proposed apology legislation should apply to all disciplinary and regulatory proceedings except proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86), the Coroners Ordinance (Cap. 504) and the Control of Obscene and Indecent Articles Ordinance (Cap. 390). Further, a mechanism should be provided for in the draft Apology Bill to allow future amendments to be made to the schedule of excepted proceedings so as to provide flexibility.
- (b) 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 the 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.

———— (See **Annex D**, which is Chapter 6 of the Final Report and Recommendations.)

⁷ The reasons for applying for exemption can be divided into two categories: 1) some Government Departments have special concern over public safety and security and the maintenance of discipline in prisons or custodial institutions and 2) some regulatory bodies have concern that the proposed apology legislation would affect their powers and hence the efficacy of their disciplinary or regulatory proceedings. These Government Departments are no longer seeking exemption from the application of the apology legislation but may consider doing so in the future based on their operational experience.

17. The Secretary for Justice and counsel of the Department of Justice attended the meeting of the AJLS Panel on 28 November 2016 and briefed the panel on the Final Report and recommendations.

PUBLICITY

18. A press release is to be issued on 25 January 2017. A spokesperson will be available to handle enquiries.

ENQUIRY

19. Any enquiry on this brief can be addressed to Mr Simon Lee, Deputy Law Officer (Civil Law), Civil Division, Department of Justice at telephone number 3918 4335.

Department of Justice

25 January 2017

Apology Bill
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A BILL
To

Provide for the effect of apologies in certain proceedings and legal matters.

Enacted by the Legislative Council.

- 1. Short title and commencement**
- (1) This Ordinance may be cited as the Apology Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.
- 2. Object of this Ordinance**
- The object of this Ordinance is to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.
- 3. Interpretation**
- In this Ordinance—
- apology* (道歉)—see section 4;
- applicable proceedings* (適用程序)—see section 6.
- 4. Meaning of *apology***
- (1) In this Ordinance, an apology made by a person in connection with a matter means 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.
- (2) The expression may be oral, written or by conduct.

- (3) The apology also includes any part of the expression that is—
 - (a) an express or implied admission of the person's fault or liability in connection with the matter; or
 - (b) a statement of fact in connection with the matter.
- (4) In this Ordinance, a reference to an apology made by a person includes an apology made on behalf of the person.
- (5) Section 5 specifies the apologies to which this Ordinance applies.

5. Apology to which this Ordinance applies

- (1) This Ordinance applies to an apology made by a person on or after the commencement date of this Ordinance in connection with a matter, regardless of whether—
 - (a) the matter arose before, on or after that date; or
 - (b) applicable proceedings concerning the matter began before, on or after that date.
- (2) However, this Ordinance does not apply to—
 - (a) an apology made by a person in a document filed or submitted in applicable proceedings;
 - (b) an apology made by a person in a testimony, submission, or similar oral statement, given at a hearing of applicable proceedings; or
 - (c) an apology adduced as evidence in applicable proceedings by, or with the consent of, the person who made it.

6. Meaning of *applicable proceedings*

- (1) In this Ordinance, the following proceedings are applicable proceedings—

- (a) judicial, arbitral, administrative, disciplinary and regulatory proceedings (whether or not conducted under an enactment);
 - (b) other proceedings conducted under an enactment.
- (2) However, applicable proceedings do not include—
 - (a) criminal proceedings; or
 - (b) proceedings specified in the Schedule.

7. Effect of apology for purposes of applicable proceedings

- (1) For the purposes of applicable proceedings, an apology made by a person in connection with a matter—
 - (a) does not constitute an express or implied admission of the person's fault or liability in connection with the matter; and
 - (b) must not be taken into account in determining fault, liability or any other issue in connection with the matter to the prejudice of the person.
- (2) This section is subject to section 8.

8. Admissibility of evidence of apology

- (1) Evidence of an apology made by a person in connection with a matter is not admissible in applicable proceedings as evidence for determining fault, liability or any other issue in connection with the matter to the prejudice of the person.
- (2) However, 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.

(3) This section applies despite anything to the contrary in any rule of law or other rule concerning procedural matters.

(4) In this section—

decision maker (裁斷者), in relation to applicable proceedings, 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.

9. **Apology not a Limitation Ordinance acknowledgment**

For the purposes of section 23 of the Limitation Ordinance (Cap. 347), an apology made by a person in connection with a matter does not constitute an acknowledgment within the meaning of that Ordinance in connection with the matter.

10. **Contract of insurance or indemnity not affected**

(1) 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.

(2) This section applies regardless of whether the contract of insurance or indemnity was entered into before, on or after the commencement date of this Ordinance.

(3) This section applies despite anything to the contrary in any rule of law or agreement.

11. **Other matters not affected**

This Ordinance does not affect—

- (a) discovery, or a similar procedure in which parties are required to disclose or produce documents in their possession, custody or power, in applicable proceedings;
- (b) the operation of section 3, 4 or 25 of the Defamation Ordinance (Cap. 21); or
- (c) the operation of the Mediation Ordinance (Cap. 620).

12. **Amendment of Schedule**

The Chief Executive in Council may, by notice published in the Gazette, amend the Schedule.

13. **Application to Government**

This Ordinance applies to the Government.

Schedule

[ss. 6 & 12]

Proceedings that are Not Applicable Proceedings

1. Proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86).
 2. Proceedings conducted under the Control of Obscene and Indecent Articles Ordinance (Cap. 390).
 3. Proceedings conducted under the Coroners Ordinance (Cap. 504).
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Explanatory Memorandum

In Hong Kong, parties to disputes may be deterred from making apologies, expressions of regret or other similar expressions because of their concern about the potential legal implications. By providing for the effect of apologies in certain proceedings and legal matters, this Bill seeks to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.

2. Clause 1 sets out the short title and provides for commencement.
3. Clause 2 explains the object of the Bill.
4. Clause 3 lists the defined terms used in the Bill—*apology* and *applicable proceedings*. Their full meanings are spelt out in clauses 4 and 6.
5. Clause 4 defines *apology* for the purposes of the Bill. An apology made by or on behalf of a person means an expression of the person's regret, sympathy or benevolence. If part of the expression is an admission of the person's fault or liability, or a statement of fact, the admission or statement is also included in the meaning of *apology*.
6. Clause 5 makes it clear that the Bill applies to an apology made on or after the commencement date of the Bill. That clause also provides that the Bill does not apply to an apology if it is made by a person in certain documents or oral statements in applicable proceedings, or if it is adduced as evidence in applicable proceedings by or with the consent of the person. That means such an apology may be taken into account in the proceedings if the apology maker so decides.
7. Clause 6 enumerates *applicable proceedings* for the purposes of the Bill. They are judicial, arbitral, administrative, disciplinary and

regulatory proceedings, and other proceedings conducted under an enactment. However, applicable proceedings do not include criminal proceedings or some specific types of proceedings listed in the Schedule.

8. Clause 7 precludes a person's apology from constituting an admission of the person's fault or liability, and from being taken into account in determining fault, liability or any other issue (for example, appropriate remedies or sanctions, and issues of credibility) to the prejudice of the person, for the purposes of applicable proceedings. Clause 7 is subject to clause 8 concerning admissibility of evidence of apologies.
9. Currently, it is possible for an apology to be admitted in evidence in civil proceedings to prove the matters stated in the apology in order to establish legal liability. Clause 8(1) alters the position by making evidence of a person's apology generally inadmissible for determining fault, liability or any other issue to the prejudice of the person in applicable proceedings (including proceedings where the usual rules of evidence do not apply).
10. However, a statement of fact contained in an apology is admissible as evidence in particular applicable proceedings at the decision maker's discretion, which may be exercised in an exceptional case and only if it is just and equitable to do so, having regard to all the relevant circumstances (see clause 8(2)).
11. The Limitation Ordinance (Cap. 347) governs the limitation periods for bringing actions of various classes. Under section 23 of that Ordinance, the limitation periods for certain rights of action relating to land, personal property, debts and other claims may be extended by an acknowledgment of the title or claim in issue. Clause 9 precludes an apology from constituting an acknowledgment for the purposes of that section 23, and so also from extending the relevant limitation period.

12. Some parties to disputes may be concerned that insurance cover could be affected by apologies because of provisions in insurance contracts that prohibit the admission of fault by the insured without the insurer's consent. Clause 10 provides that a person's apology (defined by clause 4 to include an admission of fault) does not affect any insurance cover, compensation or other form of benefit for any person under a contract of insurance or indemnity.
13. Clause 11 stipulates other matters not affected by the Bill, namely—
 - (a) discovery or a similar procedure in applicable proceedings;
 - (b) the operation of the provisions involving apologies in the Defamation Ordinance (Cap. 21);
 - (c) 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.
14. Clause 12 empowers the Chief Executive in Council to amend the Schedule, which specifies the proceedings that are not applicable proceedings (see also clause 6(2)(b)).
15. Clause 13 applies the Bill to the Government.

EXECUTIVE SUMMARY OF THE CONSULTATION PAPER

ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG

This Executive Summary of the Consultation Paper is also published
online at: *<http://www.doj.gov.hk/eng/public/apology.html>*

The Consultation Paper on Enactment of Apology Legislation in Hong Kong and this Executive Summary are prepared by the Steering Committee on Mediation (“Steering Committee”) chaired by the Secretary for Justice. The views and recommendations in the Consultation Paper and this Executive Summary are published with a view to facilitating comments and discussions. They do not represent the final views of the Steering Committee.

The Steering Committee invites comments on the matters raised in the Consultation Paper and this Executive Summary by 3 August 2015. All correspondence (marked “Apology Legislation”) should be addressed to:

Address : 10/F., Rumsey Street Multi-storey Carpark Building,
2 Rumsey Street, Sheung Wan, Hong Kong
(Attention: Ms Jenny Fung)

Telephone : 3695 0894

Fax : 3543 0390

E-mail : mediation@doj.gov.hk

It may be helpful for the Steering Committee, either in discussion with others or in any subsequent documents, to be able to refer to and attribute comments submitted in response to the Consultation Paper or this Executive Summary. Any request to treat all or part of a response in confidence will be respected but if no such request is made, it will be assumed that the response is not intended to be confidential.

Anyone who responds to the Consultation Paper or this Executive Summary may be acknowledged by name in subsequent documents or reports. If an acknowledgement is not desired, please indicate so in your response.

Executive Summary of the Consultation Paper on Enactment of Apology Legislation in Hong Kong

Background and Introduction

1. In a dispute following a mishap, a party causing injury may wish to convey his apology to the injured person for the loss and suffering sustained. Sometimes, a party to a dispute who genuinely believes that he has done nothing wrong may nevertheless wish to convey his condolences or sympathy to the other party out of goodwill and pure benevolence.
2. However, it appears that there is a common concern that an apology or a simple utterance of the word “sorry” may be used by a plaintiff/complainant in civil or other non-criminal proceedings (such as disciplinary proceedings) as evidence of an admission of fault by the defendant for the purpose of establishing legal liability.
3. 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, whether from private or public sector, which might otherwise be willing to offer an apology or a statement of condolences, sympathy or regret after a mishap has happened.
4. Further, it is not uncommon that a party may have concerns that an insurance policy covering the incident giving rise to the dispute may be rendered void or otherwise adversely affected by an apology because of clauses in the policy that prohibit the admission of fault by the insured.
5. For these reasons, it seems that there is a general unwillingness on the part of the persons causing injury to extend their sorrow, regret or sympathy to the person injured, not to mention extending formal apology when there are pending court proceedings. The concern that their apologies or expressions of similar effect could be used as evidence in court to support

the assertion that there was a prior admission of fault has halted many from doing so.

6. It is unfortunate that this is the perceived legal position as regards apologies, for the heat of the moment so commonly found in a dispute could have been extinguished (or at least reduced) by an apology or an expression of sympathy or regret, thus preventing the escalation of the dispute into legal action or making it more likely for the legal action to be settled.
7. The phenomenon of reluctance to apologise or express regret or sympathy 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. Indeed, as the general public might not appreciate the aforesaid concern on the part of public officials or civil servants, government departments in various jurisdictions have at various times attracted criticisms for appearing to be apathetic or uncaring by failing to express condolences or sympathy in face of mishaps which had resulted in great suffering or even death.
8. The general reluctance in both the public and private sectors of our community to apologise, particularly when the issue of liability is yet to be decided is not conducive to the prevention of escalation of disputes or the amicable settlement thereof.
9. The absence of a piece of clear and comprehensive legislation that would prevent liability from being based on an apology may be a reason for such general reluctance.
10. In 2010, the Working Group on Mediation of the Department of Justice recommended, amongst other things, that the question whether there should be apology legislation dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body. In 2012, the Secretary for Justice established the Steering Committee on Mediation (“Steering Committee”) to further promote the development of mediation in Hong Kong. The Regulatory Framework Sub-committee set up under the Steering Committee has been

tasked to consider whether there is a need to introduce apology legislation in Hong Kong. After reviewing the report prepared by the Regulatory Framework Sub-committee, the Steering Committee recommended the enactment of apology legislation in Hong Kong. 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 by clarifying the legal consequences of making an apology.

11. For the purpose of enacting apology legislation in Hong Kong, a Consultation Paper on the Enactment of Apology Legislation in Hong Kong (“Consultation Paper”) has been prepared by the Steering Committee (<http://www.doj.gov.hk/eng/public/apology.html>) and public opinion and comments are sought. This executive summary summarises the Consultation Paper.

Development of Apology Legislation in Other Jurisdictions

12. A survey of the apology legislation (including a bill from Scotland) of 56 jurisdictions suggests that the trend of apology legislation worldwide is clearly moving towards:
 - (1) a wider coverage (embracing full apology, i.e. one that includes an admission of fault, as opposed to a partial apology such as an expression of regret or sympathy which does not include an admission of fault); and
 - (2) a more general application (extending to all civil proceedings).

United States of America

13. Our research indicates that the first apology legislation was enacted in Massachusetts in 1986. The trend then spread to other states in the United States. At present over 30 states in the United States have apology legislation. Characteristics of the legislation vary. Some deem an apology not to be an admission of liability while others only limit the admissibility of an apology in court for certain purposes. It is noted that most of the apology legislation in the United States covers partial apology (i.e. apology that does not include an admission of fault) only and is targeted at civil actions against the health care profession or involving some other aspects of personal injuries only.

Australia

14. The trend of apology legislation did not stop at the United States and continued to develop across to the other end of the Pacific. In the early 2000s, apology legislation was enacted in Australia and at present each state and territory in Australia has its own apology legislation. The scope of the Australian apology legislation has been broadened to cover most civil proceedings except certain specified proceedings, thus making it broader in scope than the US legislation. Some cover full apology (i.e. apology that includes an admission of fault) which extends the general US legislative approach, while others do not.

Canada

15. The scope of the apology legislation was further developed as apology legislation was adopted in Canada in the late 2000s and early 2010s. Apology legislation exists in most provinces and territories of Canada and it covers full apology and applies to all proceedings with a few jurisdictions specifically excluding its application to criminal proceedings. Notably, it includes provisions directly preventing apologies from voiding or affecting insurance contracts. Most of the legislation also prevents an apology from extending limitation periods under the relevant limitation acts by deeming that an apology cannot constitute an acknowledgment or confirmation of a cause of action in relation to the matter for which the apology was offered.

The United Kingdom (excluding Scotland)

16. The substantive law providing immunity to apologies in the UK (excluding Scotland in view of the Scotland Act 1998 which established the devolved Scottish Parliament) is relatively brief and narrow in scope, being contained in a single section in the Compensation Act 2006, i.e. s.2 which provides that “[a]n apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty”.

17. The Act does not contain any definition of the term “apology” which does not seem to be sufficiently broad to cover an apology bearing an admission of fault or liability and is limited to claims based on negligence and breach of statutory duty. It is quite different from most of the apology legislation in other common law jurisdictions in its brevity and it does not contain a clause excluding apology from being admitted as evidence which is commonly found in apology legislation in other jurisdictions.

Scotland

18. The Apologies (Scotland) Bill was introduced to the Scottish Parliament in March 2015. The bill has the following features: (i) it applies generally to civil proceedings but not criminal proceedings; (ii) it provides that an apology would not be admissible as evidence of anything relevant to the determination of liability and cannot be used in any other way to the prejudice of the apology-maker; (iii) it covers full apology and also statements of facts conveyed during apology. The application to statements of facts in the bill is not provided for in other apology legislation under our study.

Observation

19. After studying the history and comparing the differences and similarities of the apology legislation in other jurisdictions, it appears that the international trend is developing towards providing protection for:

- (1) full apology (as opposed to partial apology)
- (2) in civil proceedings in general.

It appears that the Canadian approach is the broadest one insofar as existing apology legislation is concerned.

Discussions and Recommendations

Pros and Cons of Apology Legislation

20. After reviewing the relevant discussion paper on apology legislation of the British Columbia, the relevant consultation paper of Scotland and various academic articles, it appears that there are the following pros and cons of

apology legislation.

21. Benefits of apology legislation:

- (1) Avoiding litigation and encouraging the early and cost-effective resolution of disputes, as supported by empirical studies and research.
- (2) Encouraging natural, open and direct dialogue between people after injuries to reduce tension, antagonism and anger.
- (3) Encouraging people to engage in moral and humane act of apologising after they have injured another and to take responsibility for their actions.
- (4) Legislation would provide a better impact and removes the legal uncertainties that inhibit apologies.

22. Negative factors of apology legislation:

- (1) Public confidence in the courts might be adversely affected if a person who has admitted liability in an apology is found not liable.
- (2) Insincere and strategic apologies might be encouraged.
- (3) Apologies encouraged by such legislation might create an emotional vulnerability in some plaintiffs who might accept settlements that are inappropriately low.
- (4) Mechanisms to render apologies inadmissible as evidence already exist – for example, apologies made in “without prejudice” communication or during mediation.
- (5) There may be a risk that it would add unnecessary complexity to the litigation process.

23. Drawing from the experience overseas and in view of the situation in Hong Kong, after weighing the pros and cons, it is recommended that apology legislation should be enacted in Hong Kong.

Full Apology vs. Partial Apology

24. Arguments for and against providing legislative protection to partial and full apologies have been thoroughly considered by Professor Jennifer K. Robbennolt, Professor of Law and Psychology, University of Illinois College of Law, in her empirical examination studying the effect of apologising in legal settlement.

25. Professor Robbennolt found that receiving a partial apology increased the likelihood that the respondent would be unsure about how to respond to the settlement offer, while receiving a full apology increased the likelihood that the respondent would choose to accept the offer. She concluded that a full apology was viewed as more sufficient than either a partial apology or no apology.
26. The above conclusion is consistent with the approach taken in the latest apology legislation in Canada and the Apologies (Scotland) Bill.
27. Based on the above discussion, and to ensure that the apology legislation could effectively serve its purposes, it is recommended that the proposed apology legislation cover full apology.

Effect on Limitation of Actions

28. A 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 subject to extension in certain circumstances, e.g. when there is an acknowledgment or a part payment by the potential defendant. The acknowledgment provisions in limitation legislation may have potential application when a defendant offers an apology to a plaintiff that includes an admission of a cause of action.
29. In Hong Kong, the limitation of actions is governed by the Limitation Ordinance (Cap. 347). Section 23 provides for the fresh accrual of a right of action for certain proceedings from the date of an acknowledgment or part payment in respect of the right of action. Section 24(1) further provides that every such acknowledgment shall be in writing and signed by the person making the acknowledgment. According to case law, what amounts to an acknowledgment is ultimately a question of construction. Therefore, there is a legal risk that an apology would constitute an acknowledgment for the purpose of the Limitation Ordinance. If the proposed apology legislation expressly precludes an admission of claim by

way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance, it may be able to remove a further disincentive of giving apologies.

30. It is observed that most of the Canadian apology legislation expressly precludes an admission of a claim by way of an apology from constituting an acknowledgment or confirmation of a claim for the purposes of limitation legislation. It is recommended that the proposed apology legislation should follow this approach to further remove a disincentive to making apologies.

Effect on Insurance Contracts

31. Another provision that appears in all the Canadian apology legislation is that an apology shall not render void or otherwise affect an insurance coverage. The effect of this provision is to render ineffective any provision in an insurance contract that disqualifies a person from claiming under his insurance policy because he has apologised to the person to whom his claim for indemnity relates.
32. This appears to be an important component of the apology legislation because it responds to reported anecdotal evidence of defendants and their lawyers that apologies are often not made because of the fear that doing so will render insurance coverage void or otherwise affected to the detriment of the defendants. This has been identified as a real and significant barrier to offers of apology.
33. The purpose of this provision is quite clear, viz. to remove a further disincentive of making apologies.
34. It is recommended that the proposed apology legislation provides that an apology shall not affect any insurance coverage that is, or would be available to the person making the apology.

Factual Information Conveyed in an Apology

35. 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 amounts to part of the apology and is therefore protected by the legislation is often a matter of interpretation. In the Apologies (Scotland) Bill, it is proposed that apology would include a statement of fact in relation to the act, omission or outcome about which an apology was made.

36. There are pros and cons for covering statements of facts in the apology legislation. The main argument for applying apology legislation to statements of facts is that without such protection, people may just offer bare apologies which would be meaningless and ineffective and may even be regarded as insincere. On the other hand, there are arguments against applying apology legislation to statements of facts. If statements of facts are inadmissible, the plaintiff's claim may be adversely affected or even stifled in some circumstances.
37. There is no recommendation as to whether the apology legislation should also apply to statements of fact accompanying an apology. Comments and opinions are sought from the public in this regard.

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

38. The proposed apology legislation is to apply to civil and other forms of non-criminal proceedings. Civil proceedings generally refer to "*proceedings in any civil or commercial matter*" (s.74 of Evidence Ordinance (Cap. 8)). This would include, for example, civil actions in court or before a tribunal and arbitration (ss.60(1) & 68(1) of Evidence Ordinance (Cap. 8)). While it is relatively less controversial that the proposed apology legislation should not be applicable to criminal proceedings, whether it should cover disciplinary proceedings warrants further and careful consideration. Disciplinary proceedings are clearly not criminal proceedings, although whether it should be regarded as part of civil proceedings is debatable.
39. There are a number of arguments for and against applying the apology legislation to disciplinary proceedings. Arguments for applying the

apology legislation to disciplinary proceedings include:

- (1) Disciplinary proceedings are civil in nature.
- (2) The objectives of the legislation will largely be defeated if disciplinary proceedings are excluded.
- (3) In disciplinary proceedings the defendant is judged by his conduct and practice and is seldom judged by what he had said by way of an apology.
- (4) Disciplinary proceedings are covered in the apology legislation in other overseas jurisdictions.

40. Arguments against applying the apology legislation to disciplinary proceedings include:

- (1) The rationale for apology legislation, namely to facilitate amicable settlement, does not apply to disciplinary proceedings which is to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour.
- (2) Public confidence in the integrity of the profession can be advanced by bringing proceedings and excluding evidence of an apology as evidence of misconduct in a disciplinary proceeding has a counter-effect on that.
- (3) For some disciplinary (and other non-criminal) proceedings, the statute expressly states that the usual evidentiary rules do not apply. In these circumstances, an apology may be admitted as evidence even with an apology legislation.

41. It appears that the rationale in favour of the enactment of apology legislation applies to disciplinary proceedings. Such legislation only precludes an apology from having legal effect for specific purposes and does not preclude misconduct proceedings from being brought and pursued and misconduct proved. Nor does it prevent an apology from being admissible evidence for other purposes, including for decisions about sanctions. In the light of the above, it is recommended that the proposed apology legislation is to apply to disciplinary proceedings.

42. Regulatory proceedings refer to proceedings involving the exercise of regulatory powers of a regulatory body under an enactment. Examples of

regulatory proceedings include proceedings brought before the Market Misconduct Tribunal or the Securities and Futures Appeals Tribunal. These proceedings involve the exercise of regulatory functions of a regulatory body and are instituted for protecting the general public. In some circumstances, these proceeding may have a serious consequence on a person against whom the proceedings are directed.

43. Some of the reasons behind the inclusion of disciplinary proceedings also apply to regulatory proceedings. In view of the specific nature and consequence of the regulatory proceedings as stated above, public views are sought as to whether the apology legislation should apply to “regulatory proceedings” as well.

Part of Mediation Ordinance or a Stand-alone Legislation

44. For the following reasons, it is recommended that the proposed apology legislation is to take the form of a stand-alone legislation:

- (1) The apology legislation will be visible leading to greater awareness of it. From the anecdotal evidence overseas, public awareness of the legislation is crucial for it to be effective.
- (2) It will avoid the need to rely on more than one piece of legislation thus reducing the risk that the intended legislative effect would get lost in amendments to pre-existing legislation.
- (3) It recognises that the legal effects of the provisions are not confined to the law of evidence or mediation.
- (4) It recognises that apologising is regarded by the law as important to the resolution of civil disputes from the time that an accident or injury occurs, not just once “without prejudice” negotiations or mediation have begun.

Recommendations for Consultation

45. Your views are sought on the following recommendations and issues arising therefrom (including issues identified in the Consultation Paper):

- (1) An apology legislation is to be enacted in Hong Kong.
- (2) The apology legislation is to apply to civil and other forms of

non-criminal proceedings including disciplinary proceedings.

- (3) The apology legislation is to cover full apologies.
- (4) The apology legislation is to apply to the Government.
- (5) The apology legislation expressly precludes an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance.
- (6) The apology legislation expressly provides that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology.
- (7) The apology legislation is to take the form of a stand-alone legislation.

**ENACTMENT OF
APOLOGY LEGISLATION IN
HONG KONG: REPORT &
2ND ROUND CONSULTATION**

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Chapter 11: Final Recommendations and 2nd Round Consultation

The Steering Committee makes the following final recommendations after the Consultation:

Final Recommendation 1

An apology legislation shall be enacted in Hong Kong.

Final Recommendation 2

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

Final Recommendation 3

The apology legislation shall cover full apologies.

Final Recommendation 4

The apology legislation shall apply to the Government.

Final Recommendation 5

The apology legislation shall expressly preclude an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance.

Final Recommendation 6

The apology legislation shall expressly provide that an apology shall not affect any insurance cover or indemnity that is, or would be, available to the person making the apology and that any contracting out of the apology legislation should be prohibited or declared void.

Final Recommendation 7

The apology legislation shall take the form of a stand-alone legislation.

Final Recommendation 8

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 this issue for consideration.

2nd Round Consultation

The Steering Committee also invites comments from the public and stakeholders on the following matters:

- (1) Excepted proceedings to which the proposed apology legislation shall not apply;
- (2) Whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation; and
- (3) The draft Apology Bill.

Any comments on the above matters should be raised by 5 April 2016. All correspondence (marked “Apology Legislation”) should be addressed to:

Address : 2/F, East Wing, Justice Place, 18 Lower Albert Road, Central,
Hong Kong (Attention: Ms Jenny Fung)

Telephone : 3918 4430

Fax : 3918 4523

E-mail : mediation@doj.gov.hk

Similar to what was stated in the Consultation Paper, it may be helpful for the Steering Committee, either in discussion with others or in any subsequent documents, to be able to refer to comments submitted in response to this 2nd round consultation. Any request to treat all or any part of a response in confidence will be fully respected, but it will be assumed that the response is not intended to be confidential if no such request is made.

Anyone who responds to this consultation paper may be acknowledged by name in subsequent document or report. If an acknowledgement is not desired, please indicate so in your response.

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

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<http://www.doj.gov.hk/eng/public/apology.html>

Chapter 6: Final Recommendations

The Steering Committee makes the following final recommendations after the 2nd Round Consultation:

Final Recommendation 1

The proposed apology legislation should apply to all disciplinary and regulatory proceedings except proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86), the Coroners Ordinance (Cap. 504) and the Control of Obscene and Indecent Articles Ordinance (Cap. 390). Further, a mechanism should be provided for in the draft Apology Bill to allow future amendments to be made to the schedule of excepted proceedings so as to provide flexibility.

Final Recommendation 2

Factual information conveyed in an apology should likewise be protected by the proposed apology legislation and the Court or tribunal in applicable proceedings should retain a discretion to admit such statements of fact as evidence against the maker of the apology where it finds it just and equitable having regard to all the circumstances.