

立法會
Legislative Council

LC Paper No. CB(4)150/16-17(04)

Ref : CB4/PL/AJLS

Panel on Administration of Justice and Legal Services

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 28 November 2016**

Proposed Apology Legislation

Purpose

This paper provides a brief account of the past discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on the proposed apology legislation.

Public consultation on enactment of apology legislation

2. In 2010, the Working Group on Mediation established by the Department of Justice ("DoJ") recommended, amongst others, that the question of whether there should be an apology legislation dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body. To follow up on this recommendation, an Apology Legislation Sub-group was formed under the Regulatory Framework Sub-committee of the Steering Committee on Mediation ("the Steering Committee").¹

3. After reviewing the report prepared by the Regulatory Framework Sub-committee, the Steering Committee published the Consultation Paper: Enactment of Apology Legislation in Hong Kong ("Consultation Paper") on 22 June 2015 for a six-week public consultation during which 75 written responses were received. The majority of the responses received were in

¹ Established in 2012 by the Secretary for Justice and chaired by him with three Sub-committees dealing with regulatory framework, accreditation and public education and publicity to advise and assist in the further promotion and development of mediation in Hong Kong, and supported by the Department of Justice.

support of the recommendations that an apology legislation should be enacted in Hong Kong.

4. Having considered the responses received on the Consultation Paper, the Steering Committee had made the following final recommendations:

- (a) an apology legislation should be enacted in Hong Kong;
- (b) the apology legislation should apply generally to civil and other forms of non-criminal proceedings including disciplinary and regulatory proceedings with exceptions,² on which public views were invited;
- (c) the apology legislation should cover full apologies;³
- (d) the apology legislation should apply to the Government;
- (e) the apology legislation should 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 (Cap. 347);
- (f) the apology legislation should expressly provide that an apology should not affect any insurance cover or indemnity that was, 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;
- (g) the apology legislation should take the form of a stand-alone legislation; and
- (h) as to whether the apology legislation should cover statements of fact in connection with the matter in respect of which an apology had been made, public views were invited.

5. In view of certain responses received on two specific issues, viz: (a) whether the proposed apology legislation should cover all disciplinary and regulatory proceedings and (b) whether factual information conveyed in an

² Regulatory proceedings refer to proceedings involving the exercise of regulatory powers by 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 under the Securities and Futures Ordinance (Cap. 571).

³ A “full apology” refers to an apology accepting liability or fault while a “partial apology” refers to an apology which does not admit liability or fault.

apology should be protected by the proposed apology legislation; and the suggestion that a draft Apology Bill should be made available for consideration, the Steering Committee decided to launch a second round public consultation and published the Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation ("Consultation Report") on 22 February 2016 for a six-week consultation. Comments from the public and the stakeholders were sought on the following matters:

- (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; and
- (c) the draft Apology Bill as prepared by DoJ.

The second round public consultation ended on 5 April 2016.

Past discussions

6. The Panel was briefed on the proposal to enact apology legislation at its meetings on 22 June 2015 and 22 February 2016. Major views expressed by members and the Hong Kong Bar Association ("the Bar Association") are summarized in the ensuing paragraphs.

Views of the Hong Kong Bar Association

7. The Bar Association in principle supported the enactment of an apology legislation 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. The Bar Association had submitted its views on the enactment of apology legislation in Hong Kong to the Steering Committee.

Efficacy of apology legislation

8. Some members expressed their support for the enactment of apology legislation in Hong Kong, and hoped that the legislation could be enacted as soon as possible. A member pointed out that the Medical Council of Hong Kong presently took long time, sometimes as long as eight to 10 years, to settle a dispute following a medical accident, because the attending doctor was afraid that his/her apology would be used by the patient and/or family members of the patient as evidence of admission of fault for the purpose of establishing legal liability.

9. On recommending full apologies in the proposed apology legislation, the Steering Committee explained that this was because full apologies were viewed as more effective than either a partial apology or no apology. This conclusion was consistent with the approach taken in the latest apology legislation in Canada and the Apologies (Scotland) Bill ("the Bill").

10. A member raised query as to why statements of facts were not recommended to accompany an apology in the proposed apology legislation. The Steering Committee advised that there were pros and cons for covering statements of facts in the proposed apology legislation. The main argument for applying apology legislation to statements of facts was that without such protection, people might just offer bare apologies which would be meaningless and ineffective and might even be regarded as insincere. On the other hand, there were arguments against applying apology legislation to statements of facts. If statements of facts were inadmissible, the plaintiff's claims might be adversely affected or even stifled in some circumstances, such as where the facts could not otherwise be obtained through specific discovery. In the light of this, the Steering Committee therefore did not make any recommendation as to whether the apology legislation should also apply to statements of facts accompanying an apology. Comments and opinions were sought from the public in this regard.

11. Question was also raised as to whether an apology legislation, which sought to separate apology from liability, could resolve dispute or prevent the escalation of the dispute into legal action. A member was of the view that the efficacy of the apology legislation would further be reduced if factual information conveyed in an apology should also be protected by the apology legislation, not to mention that such protection would give rise to injustice to the injured party seeking damages from the party causing the injury.

12. DoJ responded that in the absence of apology legislation, a party causing the injury would generally be reluctant to offer an apology to the injured party for fear that his/her apology might 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 liability. Overseas experience and research indicated that a dispute following a mishap might be resolved (or at least partially resolved) 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. For example, in the United States, the apology legislation had helped to reduce the number of medical malpractice lawsuits, as apologies made by the attending physicians were found to be a very effective type of redress to alleviate the sorrow and anger of the victims and/or family members of the victims of medical accidents.

13. DoJ further advised that even if statements of fact were protected by the apology legislation, it did not necessarily mean that this would bring injustice to the injured party seeking damages from the wrongdoers. As pointed out from the debate of the Bill in the Scottish Parliament, injustice to the injured would only arise if statements of fact conveyed in an apology were the only evidence available and it was rarely the case that there was no other evidence available on liability. Three options to address the handling of statements of fact conveyed in an apology were set out in the Consultation Report with a view to seeking views from the public on this issue.

14. In reply to a member's enquiry about the legal consequence for a person causing injury but who refused to convey his/her apology to the injured person for the loss and suffering sustained under the proposed apology legislation, the Steering Committee advised that the purpose of the proposed apology legislation was not to compel apologies. The main objective of the legislation was to promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes. The proposed apology legislation as contemplated by the Steering Committee should comprise three elements. First, an apology would not constitute an admission of liability in law. Second, an apology admitting fault or liability by a party causing the injury would not be admissible as evidence in legal proceedings by the plaintiff to establish legal liability. Third, apologies would not be relevant to the determination of legal liability by the court.

15. On the question as to whether consideration would be given to empower the Labour Tribunal or other tribunals tasked to settle disputes to require the wrongdoers to make apologies to the parties filing the claims, DoJ responded that the proposed apology legislation was not intended to force the wrongdoers to make apologies to the injured persons. That said, with the wider use of mediation to resolve disputes, coupled with the enactment of apology legislation, there should be much greater general willingness amongst parties causing the injuries to offer apologies to the injured parties.

Applicable proceedings of the proposed apology legislation

16. As to the scope of non-criminal proceedings under the proposed apology legislation, the Steering Committee advised that as there were a number of arguments for and against applying the proposed apology legislation to disciplinary proceedings, which were in the nature of civil proceedings, and regulatory proceedings, which were between civil and criminal proceedings, public views were sought as to whether the apology legislation should apply to these proceedings.

17. Noting that there were two responses from regulatory bodies which expressed opposing views and concerns that their regulatory functions and powers might be compromised if the apology legislation applied to regulatory proceedings, a member asked why the Steering Committee recommended that the apology legislation should generally be applicable to regulatory proceedings.

18. The Steering Committee explained that the main reason given by the two respondents for opposing the application of the apology legislation to regulatory proceedings was that the fact that the apology legislation would render an apology not admissible in applicable proceedings might jeopardize their regulatory functions and powers. Nevertheless, the Steering Committee held the view that similar to disciplinary proceedings, liability in regulatory proceedings would seldom be established solely on the basis of apologies.

19. Responding to a member's enquiry on why the proposed apology legislation would only be applicable to civil and non-criminal proceedings and not also criminal proceedings, DoJ explained that unlike civil proceedings which were instituted to protect private rights and enforce remedies, criminal proceedings were instituted under the name of the Government from a public interest perspective to deter crimes and punish criminals. No apology legislation enacted elsewhere covered criminal proceedings explicitly.

Application of the proposed apology legislation to the Government

20. A member enquired whether the Government would devise a "Code of Practice" to enable public monitoring of the application of the apology legislation by bureaux/departments ("B/Ds"), DoJ advised that it would consider the need some time after the apology legislation had come into operation.

Latest position

21. At the close of the six-week second round public consultation on 5 April 2016, 60 written submissions were received. The Administration will brief the Panel on the Report of the Steering Committee on the second round consultation and its final recommendation at its meeting scheduled for 28 November 2016.

Relevant papers

22. A list of relevant papers is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
22 November 2016

Appendix

Proposed Apology Legislation

List of relevant papers

Date	Meeting	Paper
22 June 2015	Panel on Administration of Justice and Legal Services	Administration's paper on "Public Consultation on Enactment of Apology Legislation" LC Paper No. CB(4)1168/14-15(05) Minutes of meeting LC Paper No. CB(4)1427/14-15
22 February 2016		Administration's paper on "Report of Public Consultation on Enactment of Apology Legislation and Second Round Consultation" LC Paper No. CB(4)604/15-16(03) Minutes of meeting LC Paper No. CB(4)826/15-16

Council Business Division 4
Legislative Council Secretariat
22 November 2016