

Consultation Paper – Enactment of Apology Legislation in Hong Kong

Submission of the Hong Kong Bar Association

1. The Steering Committee on Mediation issued in June 2015 a consultation paper on the enactment of apology legislation in Hong Kong (“the Consultation Paper”). The Consultation Paper makes 7 recommendations, including the principal recommendation that an apology legislation (“AL”) is to be enacted in Hong Kong.
2. The Hong Kong Bar Association (“the HKBA”) makes this Submission on the 7 recommendations and also issues related to each of them.

Recommendation 1

An apology legislation is to be enacted in Hong Kong.

3. Having considered the arguments for and against the enactment of an apology legislation as discussed in the Consultation Paper, the HKBA is generally in support of the enactment of an apology legislation in Hong Kong. The HKBA supports Recommendation 1 in principle.

Recommendation 1: Related Issue

“...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.”¹ (“issue of applicability of AL to the factual information”).

4. The HKBA has considered the issue of applicability of AL 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 AL 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

¹ Paragraph 5.38 of the Consultation Paper.

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 consultation 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.

5. The HKBA presents its analysis in the paragraphs that follow.

Existing Legal Consequences of Apology in Hong Kong

6. Chapter 3 of the Consultation Paper sets out the existing law regarding apology. The legal consequences of apology in civil proceedings can be summarised as follows:

- a) Apology or even an admission of fault or liability *per se* is unlikely to determine liability conclusively ("Rule A"); and
- b) Apology, whether containing an admission of fault or liability or not, if relevant, is admissible as evidence upon which the court may rely to determine liability ("Rule B").

7. This is even so if the apology is hearsay evidence, unless the party against whom the evidence is to be adduced objects to the admission of the evidence and the court is satisfied, having regard to all the circumstances of the case, that the exclusion of the evidence is not prejudicial to the interests of justice.²

8. Hence while it remains for the court to determine the ultimate question of liability, a statement of fact conveyed in an apology could be used to prove a fact that goes towards establishing liability. It is the task of the court to determine the weight, if any, to be attached to the evidence and whether the probative value of the evidence

² Section 47 of the Evidence Ordinance (Cap.8).

outweighs its prejudicial effect. The court will also sort through conflicting evidence and weigh credibility of the witness.³

9. The basic rule is that evidence which is relevant is admissible unless there is a reason to exclude it. For example, Chief Justice Gleeson stated in the Australian case of *Dovuro Pty Ltd v Wilkins*⁴ that "... certainly a party may admit the facts from which a conclusion of law can then be drawn."

10. On the other hand, subject to certain exceptions apology as well as its surrounding communications tendered in the course of "without prejudice" settlement negotiations and in mediation is not admitted into evidence.⁵

The Scotland Bill

11. Section 3 of the Apologies (Scotland) Bill ("the Scotland Bill") seems to contain so far the broadest definition of "apology" among different jurisdictions:

"In this Act an apology means any statement made by or on behalf of a person in which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains-

- 1) An express or implied admission of fault in relation to the act, omission or outcome;
- 2) A statement of fact in relation to the act, omission or outcome, or
- 3) An undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing recurrence."

12. Section 1 of the Scotland Bill provides that an apology "is not admissible as evidence of anything relevant to the determination of liability in connection with that matter", and "cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made".⁶

13. The main reason the Scotland Bill protects statements of fact is that "an apology that did not include an explanation of the causes of the event, which may include facts relating to the incident, would not be sufficient in most cases for the intended recipient".

³ Catherine Morries, "Legal Consequences of Apologies in Canada", Draft Working Paper presented at a workshop on "Apologies, Non-apologies and Conflict Resolution", October 3, 2003 at the University of Victoria. Available at: www.peacemakers.ca/publications/MorrisLegalConsequencesofApologyOct2003.html

⁴ [2003] HCA 51, [69]

⁵ Sections 8 and 9 of the Mediation Ordinance (Cap.620).

⁶ Apology (Scotland Bill), available at: [www.scottish.parliament.uk/S4_Bills/Apologies%20\(Scotland\)%20Bill/b60s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Apologies%20(Scotland)%20Bill/b60s4-introd.pdf)

On the other hand, 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.⁷

What would happen if AL also protects statements of fact conveyed in an Apology?

14. The AL would extend the protection of apology and its surrounding communications beyond the limits of formal dispute resolution process. People may not need to wait until they enter into formal dispute resolution to say “sorry”. There would be more timely, effective apologies which may in turn allow people to enter into a direct dialogue facilitating a settlement, which is consistent with policies to broaden and improve the means for resolving civil disputes through alternatives to litigation. As set out in Order 1A rule 1(c) of the Rules of the High Court (Cap.4A), one of the underlying objectives is to “facilitate the settlement of disputes”.

15. The AL will also make Rule A with a higher level of certainty, which is a welcoming outcome and *does* change the evidential rule in Rule B. In such a case, the result of *Robinson v Cragg*⁸ could be that the whole letter be excluded from being admitted as evidence to prove liability, which may be unfortunate. There is a risk, therefore, that the AL could deny litigants a readily available piece of evidence by making them more difficult to bring legal actions. This may also make an impression on the public that the government is placing higher value on reaching a settlement than accepting a responsibility for wrongful actions.

16. Arguments in support of applying the AL to statements of fact include: -

- a) Promote/encourage more effective apology.
- b) Create greater certainty.
- c) Legal policy behind “without prejudice” privilege, mediation and the AL is the same.
- d) Facts can still be adduced if they can be independently proved.
- e) Facilitate settlement.

⁷ M. Mitchell, “Proposed Apologies (Scotland) Bill Margaret Mitchell MSP Summary of Consultation Responses” (2014), at p. 27. Available at: www.scottish.parliament.uk/S4_MembersBills/Apologies_summary_final.pdf.

⁸ 2010 ABQB 743, referred to in para 5.32 of the Consultation Paper.

f) Prejudicial effect may outweigh probative value. The role of apology in proving liability should not be overstated.

The HKBA has analyzed each of the above arguments. The HKBA's views are present below.

Analysis of Argument a) Promote/encourage more effective apology

17. It is argued that if statements of fact are not protected, people may just offer bare apologies which may render apologies meaningless and ineffective, insincere, etc., which is consequently not helpful for preventing an escalation of disputes nor facilitating parties to reach a settlement.⁹

18. These arguments hinge on the assumption that people do not tender apology or disclose facts for fear of legal consequences.

19. First, as Trevor Stones has pointed out, in any conflict, there are "social, psychological, legal, moral and tactical considerations that exist which will influence a party's willingness to give an apology".¹⁰ Even if the adverse legal consequences are removed by the AL, people may still refrain from giving apology or disclosing facts for other reasons. For example, an apology may reveal a fact that would embarrass a defendant if it be made public. Unlike confidentiality in mediation which prevents disclosing mediation communications to third parties, the AL only removes the evidential value of apology and all accompanying statements of fact. It does not prevent the recipient to disclose the apology to a third party.

20. The fear of legal consequences, which may be an important factor to obstruct defendants from putting forward an apology, should not be overly emphasized. In broadening the means of alternative dispute resolution, the AL should not go so far to promote effective apology at the cost of civil justice. As recognized by Professor Adrian Zukerman, the objective of the civil legal process remains: "enabling the court to determine disputes on their merits and thereby assisting litigants to enforce their rights".¹¹

⁹ Paragraph 5.36 of the Consultation Paper, items (1) to (3).

¹⁰ Trevor Stones, *The Implications, Challenges and Impacts of Apology: A Canadian Cultural Interpretation* (Paper presented to the 3rd Asia Pacific Mediation Forum Conference held at the University of the South Pacific, Suva, on Mediating Cultures in the Pacific and Asia, June 2006), at page 3.

¹¹ Adrian Zukerman, *Zukerman on Civil Procedure Principle of Practice*, 2nd Edition, at para. 1.3.

Order 1A, rule 2(2) of the Rules of the High Court (Cap.4A) also provides that “the court shall always recognize 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.”

21. Second, compared with “acknowledgement of fault/liability”, statements of fact are a desirable rather than a necessary or essential part of an effective apology. Stones summarized the core elements of an apology as (a) an expression of regret or remorse; (b) open acceptance of responsibility; and (c) a genuine offer of repair, restitution or compensation and a promise to avoid similar future behaviour.¹² Compared to these elements which address a need of the person injured, provision of factual information serves a different purpose. Lack of detailed explanation in an apology does not necessarily render the apology a “bare apology”.

22. In *Robinson v Cragg*, Master Laycock relied on an article by Professor Prue Vines to explain why apologies that are mixed with statements of fact are problematic.¹³ Professor Vines commented that “an apology which includes in it an admission of fact may well be problematic because the court will consider it as evidence relevant to the determination of liability...”, and went on to imply that factual content is not part of an apology and therefore does not have to be excluded.¹⁴ It should also be noted that in his comment on the Apology (Scotland) Bill, Professor Vines, though supporting the protection of full apology, considered that the decision of *Robinson v Cragg* is a right one.¹⁵

23. Third, even if the proposed legislation may encourage apologizers to make explanations, it is doubtful that a recipient would consider such apology as valuable if no part of it could be used against the apologizer in subsequent proceedings. As point out by Lee Taft, apology legislation devalues the moral significance of an apology since a true apology is delivered with acceptance of the consequences of acknowledging fault.¹⁶

¹² *Ibid*, at page 3.

¹³ n8, at paras 13-19.

¹⁴ Prue Vines, “Apologies and Civil Liability in England, Wales and Scotland: The View from elsewhere” (2008) 12(2) *Edin. L.R.*200, at 217-218.

¹⁵ Prue Vines, (2015) Justice Committee Apologies (Scotland) Bill Written submission from Professor Prue Vines, University of New South Wales: www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A16_Professor_Prue_Vines.pdf

¹⁶ Lee Taft, “Apology Subverted: The Commodification of Apology” (2000) 109 *Yale LJ* 1135 at 1151.

24. Fourth, arguments that protection of statements of fact may promote effective apology do not apply to a spontaneous apology which is tendered immediately after the adverse event. It is commented by the Faculty of Advocates in Scotland that: "The making or withholding of an apology of this sort, which might be said to be part of the event itself, does not appear to be liable to influence by the legal protection created by the bill. The admissibility in legal proceedings of such apologies is unlikely to encourage or discourage spontaneous apology at or shortly after an adverse event."¹⁷ It is also doubtful the present or absence of such apology at the accident scene would have any impact on reducing the risk of litigation or driving people into litigation as such an apology is usually an instantaneous reaction which is not combined with any suggestion of compensation.

Analysis of Argument b) Create greater certainty

25. The Consultation Paper acknowledges that it is difficult, if not impossible, to segregate statements of fact from an apology.¹⁸ By removing the legal consequences of apology, it may create greater certainty.

26. However, this certainty is obtained at a cost. Whether an identical statement of fact would be admissible or not depends upon whether it was accompanied with an apology. That consequence is unfortunate or otherwise hardly reconcilable. And, it appears to be arbitrary to an extent.

Analysis of Argument c) Legal policy behind "without prejudice" privilege, mediation and the proposed apology legislation is the same

27. Some scholars argue that same protection should be granted to apology made on occasions other than mediation or without-prejudice communications.¹⁹

28. In criticizing the decision of *Robinson v Cragg*, Nina Khouri made an analogy between the formal apology letter and a without prejudice settlement letter and argued

¹⁷ Faculty of Advocates (2015) Justice Committee Apologies (Scotland) Bill Written submission from the Faculty of Advocates: www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/A6_Faculty_of_Advocates.pdf

¹⁸ Paragraph 5.36 of the Consultation Paper, item (4).

¹⁹ Nina Khouri, "Sorry Seems to Be the Hardest Word: The Case for Apology Legislation in New Zealand" (2014) *New Zealand Law Review* 603, 620-621.

that the protection of surrounding statements made in connection with the attempt to settle the dispute should also be extended to apologies.²⁰

29. Similar arguments were made by Russell Getz. He questioned “[i]f it is justifiable as a matter of legal policy to foster the resolution of disputes by protecting apologies made in these circumstances, should not an apology made outside those presently protected categories also be protected?”²¹

30. There appears to be a difference - people tender apology for different reasons while people enter into without prejudice settlement negotiation or mediation for the purpose of solving disputes. In the latter case, both parties know that facts disclosed in the process are privileged in nature and cannot be used against them in subsequent proceedings unless one of the exceptions applies. Facts may not be disclosed at all but for the purpose of mediation or without prejudice communications. Hence, parties do not suffer any prejudice for not being able to use those disclosed facts. In contrast, an apology is offered unilaterally. Jonathan Cohen has pointed out that “when the injurer offers an apology, the injured party has impliedly consented to nothing”.²² Further, as discussed above, the existence of a spontaneous apology is unlikely to be affected by the absence of legal consequences.

31. Further, both of these established privileges have some limit. For mediation, the communication protected must be “for the purpose of mediation or in the course of mediation”.²³ Taking into account factors set out in s.10(2) of the Mediation Ordinance (Cap. 620), the court may grant leave for mediation communication to be disclosed. In summary, these factors include (a) where disclosure is permitted by s.8(2); (b) where it is in the public interest or the interests of justice for the mediation communication to be disclosed or admitted in evidence, and (c) any other circumstances or matters the court or tribunal considers relevant. For without prejudice privilege, the test is “whether the

²⁰ *Ibid*, 625.

²¹ Russell J. Getz, *Policy Paper on Apology Legislation* (September 2007) Uniform Law Conference of Canada, at para.25. Available at: www.ulcc.ca/en/home-en-gb-1/119-josetta-1-en-gb/uniform-acts/apology-act-presentation-dexcuses/1128-policy-paper-on-apology-legislation

²² Jonathan R. Cohen, “Legislating Apology: The Pros and Cons” 70 U.Cin.L.Rev. 819 (2002), at 862.

²³ Section 2 of the Mediation Ordinance (Cap.620).

communication is connected with an attempt to arrive at an agreed solution”²⁴. The privilege may be lost where there is clear evidence of abuse of a privileged occasion.²⁵

32. No such limit is imposed on the protected apology. People may tender apology for different reasons and in different circumstances. A piece of AL will remove existing legal consequences of any apology as long as it falls within the definition *regardless its purpose*.

Analysis of Argument d) Facts can still be adduced if they can be independently proved

33. The Consultation Paper considers that the plaintiff could still adduce independent evidence to prove the facts included in the apology.²⁶

34. The HKBA notes that this may be true. But for cases lacking independent evidence, the plaintiff may be deprived of the right of adducing a piece of important evidence. The fact that the plaintiff has a bad case does not mean he could be deprived of a right of adducing relevant evidence for the court to consider.

35. The interests to be balanced are the public interest in encouraging defendants to apologise to plaintiffs where appropriate, thereby facilitating dispute resolution, against the public interest in ensuring all available evidence is before a court of law. Nina Khouri argues that “this closely mirrors the competing interests involved in without prejudice privilege, where the law prioritises the public interest in encouraging disputing parties to engage in settlement discussions.”²⁷ The HKBA considers that, again, this is not the same. Without prejudice communication is intended to facilitate parties to settle disputes, while apology does not necessarily lead to settlement negotiation and can be tendered in any time and for any reason. To exclude apology altogether from evidence may be very detrimental to a plaintiff’s right, especially if the accompanying factual statements are the best evidence of the defendant’s liability. It may be detrimental to the defendant’s case as well; case law shows that sometimes a defendant may want to rely on an apology tendered by the plaintiff after the accident to show the plaintiff was negligent.²⁸

²⁴ n11, at para. 16.12

²⁵ *Ibid*, para.16.26.

²⁶ Paragraph 5.36 of the Consultation Paper, item (5).

²⁷ n 19, 621.

²⁸ *Dupre v Patterson* 2013 BCSC 1561, [40]; *Pinchbeck v Craggy Island Ltd* [2012] EWHC 2745, [12].

Analysis of Argument e) Facilitate settlement

36. No such limit is imposed on the protected apology. People may tender apology for different reasons and in different circumstances. A piece of AL will remove existing legal consequences of any apology as long as it falls within the definition *regardless its purpose*.

37. There is little in dispute that disclosure of facts may assist the parties to understand the underlying circumstances of the incident²⁹; however, this does not necessarily facilitate settlement. It is possible that knowing the details of the incident, an injured party may be more determined to pursue litigation or adopt a robust attitude in settlement negotiation. As observed by Trevor Stones, depending on the nature of the wrong, the severity of the harm and suffering caused by the offence and other factors, the act of an apology can be both “powerful rewarding and very costly”.³⁰

Analysis of Argument f) Prejudicial effect may outweigh probative value. The role of apology in proving liability should not be overstated

38. This argument suggests that an apology is more prejudicial than probative. The HKBA considers that an apology, or its absence, will rarely be determinative. The weight to be given to an admission would depend on the circumstances under which it was made.

39. In *Dupre v Patterson*,³¹ defence counsel pointed to some statements made by the plaintiff to the defendant after the accident when the plaintiff apologized. The judge said “it is clear that an apology made by or on behalf a person in connection with any matter does not constitute an express or implied admission or acknowledgement of fault or liability: see the *Apology Act*, S.B.C. 206, c.19, s.2” (original highlight).³² The judge also commented “Roadside admissions at accident scenes are unreliable, since people tend to be shaken and disorganized”.³³

40. In *Pinchbeck v Craggy Island Ltd*³⁴, the defendant sought to rely on the claimant having apologised after the accident as evidence of admission that the accident was

²⁹ Paragraph 5.36 of the Consultation Paper, item (6).

³⁰ n10, at page 5.

³¹ 2013 BCSC 1561.

³² *Ibid*, para. 41.

³³ *Ibid*, para. 42.

³⁴ [2012] EWHC 2745.

caused by her own foolishness. The judge, however, recognized that it was simply an expression of embarrassment.³⁵

41. Therefore, at least in the law of negligence, courts have recognized that an apology may be prejudicial and may reflect other matters than the liability of the apologizer.³⁶

42. While it can be argued that an apology after event may have little probative value, the same does not apply to statements of fact conveyed in or in connection with such an apology.

43. Master Laycock's conclusion in *Robinson v Cragg* is worth noting:

"An apology is therefore prejudicial and should be kept away from the trier of fact. Factual statements will be admitted as evidence in court unless excluded by other rules of evidence. Therefore the factual content of the letter, stripped of apology words may be admissible in court. *It is the expression of sympathy or regret combined with the admission of fault that the legislature has determined is unfairly prejudicial.*"³⁷ (Emphasis added)

44. The admission of fault may not be reliable or of any assistance to the court in deciding liability but the statement of fact is relevant in proving what happened before or during the accident.

45. Lord Osborne had pointed out in *Lockhart Bryson v BT Rolatruc Limited* (9 October 1998, Court of Session, Outer House), in determining the issue of liability, "the crucial factual question which has to be resolved is what happened immediately before the rear of the reach truck ran over the left foot of the pursuer", and the court has to consider all the evidence of what happened before the event, and not the subsequent apology.

The Arguments Analyzed

³⁵ *Ibid*, at para.39.

³⁶ n14, at 217.

³⁷ n.8, at para.20.

46. The above discussion shows, in the opinion of the HKBA, that it is uncertain at this stage if there has been enough reason to justify a change of Rule B. So it is uncertain as to whether the AL 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.

Recommendation 2

The apology legislation is to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings.

47. Having considered the views for and against this recommendation, the HKBA considers that the question of whether AL should be extended to disciplinary proceedings (“DPs”) is intrinsically controversial and should deserve a fuller level both of study and of consideration, for example, by different disciplinary bodies. There is not yet a fully informed view. Therefore, the HKBA takes a reserved stance on this Recommendation.

Recommendation 2: Related Issue

“...Some of the rationales 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, we would like to invite your views and comments on, insofar as non-criminal proceedings are concerned, whether the apology legislation should also apply to regulatory proceedings”.³⁸

Nature of Disciplinary Proceedings

48. In general, DPs are not criminal proceedings. However, there are a number of features which are unique to DPs.

³⁸ Paragraph 6.42 of the Consultation Paper.

49. First, as pointed out in the Consultation Paper, the primary objective of DPs is to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour.³⁹

50. Second, the tribunal is the master of its own procedure within its limit and normal rule of evidence does not apply.⁴⁰ Thus, the tribunal “may inquire into any matter and admit and take into account any evidence or information which it considers relevant, and shall not be bound by any rules of evidence. The relevant interview records being ruled inadmissible in the criminal proceedings alone does not preclude [the tribunal] from considering them. It would be open to the [tribunal] to admit a piece of evidence if, having considered the reasons for which such evidence was ruled inadmissible in the criminal proceedings, it considers that such evidence is relevant to an issue in the proceedings of the inquiry and that there is no unfairness caused to the [accused].”⁴¹

51. Third, insofar as the conduct of proceedings is concerned, certain requirements of fair trial which are integral to criminal proceedings are present in DPs.⁴²

52. Hence, although proceedings before a disciplinary tribunal are civil in nature, it does not follow that they are in all aspects equivalent to civil proceedings. They have their own special characters, regulatory in nature where specified persons stand in jeopardy perhaps of their career.⁴³ The HKBA therefore suggests that more study should be conducted as to the nature and categories of DPs.

Application of apology legislation in other jurisdictions

53. The Consultation Paper relies heavily on the Canadian and Australian apology laws to argue in favour of inclusion of DPs under the AL for Hong Kong. However, the HKBA believes that the Consultation Paper should also adequately consider the exceptions provided for in those pieces of legislation. For example, in the United States,

³⁹ *R (Coke-Wallis) v Institute of Chartered Accountants* [2011] 2 AC 146.

⁴⁰ *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248 at [32]; *Lam Siu Po v Commissioner of Police* [2009] 4 HKLRD 575 at [138]

⁴¹ n.Error! Bookmark not defined., at [29].

⁴² *Chau Chin Hung v Market Misconduct Tribunal*, unrep., HCAL 123/2007, 124/2007, 22/2008, as Hartmann and Lam JJ (as they then were) observed, “disciplinary proceedings against a professional person, although not classified as criminal in nature, may still incorporate certain requirements of a fair trial that are more normally identified as being integral to criminal proceedings: the presumption of innocence would be one example.”

⁴³ *Ibid*, at [84].

notwithstanding the apology provisions may arguably apply to DPs, it only restricts apologies to certain aspects of medical practice or to some other aspects of personal injury.

54. In Australia, it is not uncommon that their apology legislation does not apply to certain statutory regimes, intentional tort, sexual misconducts and defamation.

55. Notwithstanding that the Compensation Act 2006 of England and Wales applies to civil actions generally, it does not seek to restrict admissibility of an apology.

56. Canada is by far the only jurisdiction that unqualifiedly extends apology legislation to DPs. However, as pointed out in the Consultation Paper, the reports and debates surrounding the enactment of the legislation do not discuss the arguments for and against the inclusion of the DPs.

57. The HKBA therefore is of the view that further study on this matter is warranted.

The AL does not preclude DPs to be pursued in the interest of the public on the basis of evidence other than the apology

58. The HKBA generally agrees to the view set out in the Consultation Paper that the AL for Hong Kong should not preclude the pursuit of DPs in the interest of the public on the basis of evidence other than the apology. However, as stated earlier, a disciplinary tribunal (without a piece of apology legislation) is at liberty to admit evidence having considered its relevance and the issue of fairness. A change of the evidential rule by way of a blanket exclusion of apology therefore fetters the tribunal's discretion as to whether to admit evidence may have a wide impact on fairness; in particular, when the evidence may go to credibility of witness, reasonable standard of care or for determination of a person's fitness to carry on the profession. Given the complex technical issues involved, the HKBA recommends further specialized study be conducted before a more informed recommendation can be put forward.

Practitioners judged according to their conduct and not by their apology

59. Whilst the HKBA generally agrees that practitioners against which these proceedings are brought will be judged by their conduct, it should be noted that DPs in

Hong Kong cover a wide range of disciplines and professions.⁴⁴ It follows that the conducts to be judged by the disciplinary tribunals are also wide ranging and are governed by different codes of conduct⁴⁵ which, as per Lord Upjohn's observation, "*must be different by the nature of its calling and the reliance placed upon by the public from those carrying on trade and commerce.*"⁴⁶ The impact of the AL on these codes of conduct must be carefully examined. The HKBA takes the view that the various disciplinary bodies are best positioned to review the matters and therefore should be specifically consulted in later stage of legislative process.

Recommendation 3

The apology legislation is to cover full apologies.

60. In view of the discussions in the Consultation Paper, and especially taking into account of the approach taken in the latest apology legislation in Canada and the Apologies (Scotland) Bill, plus the aim of ensuring that the apology legislation could effectively serve its purposes, the HKBA supports in principle that the AL for Hong Kong should cover full apologies.

Recommendation 4

The apology legislation is to apply the Government.

61. The HKBA supports the recommendation that the AL for Hong Kong should be applicable to the Government.

Recommendation 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.

62. Taking into account the discussions in the Consultation Paper and especially the fact that most of the Canadian apology legislations expressly preclude an admission of a

⁴⁴ Andrew Mak, *Disciplinary and Regulatory Proceedings in Hong Kong* 2011

⁴⁵ For example, the civil servants are governed by the Public Service (Disciplinary) Regulation and police officers are governed by the Police (Disciplinary) Regulations.

⁴⁶ *R v General Medical Council, ex parte Coleman* [1990] 1 All ER 489 at 508, citing *Pharmaceutical Society of GB v Dickson* [1970] AC 403 at 436

claim by way of an apology from constituting an acknowledgment or confirmation of a claim for the purposes of limitation legislation, the HKBA supports the recommendation that the AL for Hong Kong should follow this approach to further remove a disincentive to making apologies.

Recommendation 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.

63. The HKBA acknowledges that an apology put forward which shall not affect any insurance coverage appears to be an important component of the AL. Otherwise, apologies are often not made because of the defendants' or their legal representatives' fear that doing so will render insurance coverage void or otherwise affected to the detriment of the defendants. Therefore, the HKBA supports in principle this Recommendation.

Recommendation 7

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

64. The HKBA supports in principle this Recommendation.

Dated 17th August 2015.

HONG KONG BAR ASSOCIATION