

**ENACTMENT OF  
APOLOGY LEGISLATION IN  
HONG KONG: REPORT &  
2<sup>ND</sup> ROUND CONSULTATION**

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# ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG: REPORT & 2<sup>ND</sup> ROUND CONSULTATION

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## *Chapter 1: Background*

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### **The Consultation Paper**

1.1 The Consultation Paper entitled “*Enactment of Apology Legislation in Hong Kong*” (“Consultation Paper”) prepared by the Steering Committee on Mediation (“Steering Committee”) was published on 22 June 2015. In short, the Consultation Paper contains the following 7 recommendations (“7 Recommendations”):

- (1) An apology legislation shall be enacted in the Hong Kong Special Administrative Region (“Hong Kong”).
- (2) The apology legislation shall apply to civil and other forms of non-criminal proceedings including disciplinary proceedings.
- (3) The apology legislation shall cover full apologies.
- (4) The apology legislation shall apply to the Government.
- (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.
- (6) The apology legislation shall expressly provide 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 shall take the form of a stand-alone legislation.

1.2 The Consultation Paper also raised the following 2 issues (“2 Issues”):-

- (1) Whether the proposed apology legislation should be applicable to regulatory proceedings.

- (2) Whether factual information conveyed in an apology should be protected by the proposed apology legislation.

The Steering Committee had not made any recommendations on the 2 Issues and views and comments thereon were sought.

1.3 The contents of the Consultation Paper will not be reproduced in this report but it should be read in conjunction with this report. Readers may refer to <http://www.doj.gov.hk/eng/public/pdf/2015/apology.pdf> for the Consultation Paper.

## **The Consultation**

1.4 The 6-week public consultation (“Consultation”) started on 22 June 2015 and ended on 3 August 2015. Requests were received from various respondents for an extension of time for the submission of written response. Most of the requests were acceded to since the extension requested was not unreasonable and would not give rise to undue delay to the overall progress.

## **Methodology of Consultation**

1.5 Responses were received mainly through post, fax or e-mail as the prescribed means stated in the Consultation Paper. In addition, comments were received from attendees of two consultation forums organised by the Steering Committee. The first forum (conducted in English) was held on 11 July 2015 and about 110 persons attended. The second forum (conducted in Cantonese) was held on 22 July 2015 and about 30 persons attended. The responses received during these two forums were generally supportive of the proposed apology legislation. The main responses received will be addressed in the following chapters. As stated in the Consultation Paper, anyone who responded to the Consultation Paper may be acknowledged and referred to in a subsequent document or report unless the respondent specified that an acknowledgement was not desired. A list of the respondents to the consultation is set out in **Annex 1** of this report.

1.6 In addition to the two consultation forums, 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, various interviews by the media and briefings or sharing sessions with various stakeholders and concerned parties. The Steering Committee is grateful to members of the Steering Committee, the Regulatory Framework Sub-Committee and the Working Group on Apology Legislation for their contribution before and throughout the consultation exercise.

## *Chapter 2: Overview of the responses received*

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2.1 In the Consultation, 75 written responses were received, with 4 of the respondents requesting not to be acknowledged. In addition, comments were received from the attendees of the two consultation forums on 11 July 2015 and 22 July 2015 mentioned in paragraph 1.5 above.

2.2 These responses were sent by various Government bureaux and departments, statutory bodies or regulators, legislative councillors, political parties, civil and social organisations as well as stakeholders from various sectors such as insurance, medicine, law and mediation. As noted above, a list of the respondents can be found at Annex 1.

2.3 The majority of the comments received addressed the 7 Recommendations and the 2 Issues while some addressed other issues not specifically raised by the Steering Committee but relevant to the question of whether an apology legislation should be enacted in Hong Kong.

2.4 In the chapters to follow, the comments regarding the 7 Recommendations and the 2 Issues will be discussed (with the 2<sup>nd</sup> recommendation and the 1<sup>st</sup> issue discussed together in one chapter). In each chapter, the number of responses received with statistics would be set out, followed by the major comments on the recommendations or issues. We do not find it necessary to set out each and every of the responses received as some responses are similar or overlap with the analysis in the Consultation Paper in which case a summary would be given by reference to the substances of the matters raised. There will be an analysis of the issues followed by the final recommendations of the Steering Committee. When preparing the statistics of the comments on each of the recommendations or issues, the following approach is taken: the comments received regarding each recommendation or issue will be sorted into three categories: agree, oppose and neutral. For comments which give an express indication, they are categorised accordingly. For comments which do not express any views on the particular



recommendation or issue or raise neutral comments, they would be regarded as neutral.

2.5 For reasons to be explained in this report, the Steering Committee invites view on matters regarding: (1) the list of 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 drafted by the Department of Justice as annexed to this report (**Annex 2**).

*Chapter 3: Recommendation 1 – An apology legislation shall be enacted in Hong Kong*

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**Number of responses in relation to this recommendation**

3.1 Below is a summary of the responses regarding recommendation 1: An apology legislation shall be enacted in Hong Kong:

	Number	Percentage (%)
Agree	51	68
Oppose	3	4
Neutral	21	28
<u>Total</u>	<u>75</u>	<u>100</u>

**Comments from those who support this recommendation**

3.2 Amongst the 75 responses received, 51 of them are in support of the recommendation that an apology legislation shall be enacted in Hong Kong. The key reasons given are as follows:

- (1) It can remove the legal uncertainty regarding the making of an apology and thus promote the use of apology which may facilitate settlement of disputes.
- (2) There should be an apology legislation which should define clearly as to what would constitute an apology.
- (3) “Hoping that it can result in lesser civil claims and/or reduced costs including legal costs. Such law would be conducive to better success rate on mediations and other alternative dispute resolution processes... There is a need to enact this legislation to offer protection to persons who wish to make an apology without

fear that this will attract legal liability and constitute an admission of fault or liability. This is particularly the case in the personal injury context where one party has suffered injury or loss caused by or resulting from another party's actions or advice. The protection offered and advantages of enacting apology legislation out-weigh the cons as the making of a timely apology is very powerful (emotionally and psychologically to the injured person and family members) and can help reduce the anger and hurt resulting from the injury. The acknowledgment of one's feelings by the utterance of words (e.g. I'm sorry for what's happened) expressing sympathy or regret by the person causing the injury allows both parties to move on and communicate about the future. Diffusing the negative feelings including anger and hurt could prevent the escalation of disputes to legal action and facilitate amicable settlements." (The Hong Kong Federation of Insurers)

- (4) "This Council supports this Recommendation, which is the core of the consultation. Its internal survey suggests that apology made by traders, no matter out of sincere regret or as a gesture of goodwill, would usually be an effective form of relief in settling consumer disputes."(Consumer Council Hong Kong)
- (5) "We agree that in a dispute following a mishap, a sincere apology from the party causing injury to the injured person will help alleviate the negative emotions of anxiety and anger of the latter, thus having a positive effect on dispute resolution and settlement...We are of the opinion that the enactment of apology legislation in Hong Kong, which serves to promote and encourage the making of apologies for the amicable settlement of disputes by clarifying the legal consequences of making an apology, will help create a people-oriented, harmonious and inclusive society. However, we would like to stress that in enacting the apology legislation, consideration must be given to ensuring that its implementation will not affect an injured party's

right to proceed with claims or litigation.” (The Hong Kong Council of Social Service) (English translation)

- (6) “The HRM agrees that sincere and full apologies to injured persons have psychological significance in that they often give them a feeling that they are treated with respect and concern, and that their dignity is preserved. Besides, an important consideration underlying our support for promoting and encouraging the making of apologies is that it is emphasised under the international human rights law system that persons who have suffered violation of their human rights are entitled to remedies and an apology can be one of them. Whether an apology can facilitate the settlement of disputes and is conducive to the use of mediation is not our major concern.” (Hong Kong Human Rights Monitor) (English translation)

### **Comments from those who oppose this recommendation**

3.3 Amongst the 75 responses received, 3 of them oppose this recommendation. The key reasons are as follows:

- (1) “We have concerns regarding the benefit of enacting apology legislation in Hong Kong. We do not believe that the perceived upsides (encouraging morally correct behaviors which in turn enhance settlement) are either established or outweigh the practical downsides. We are concerned that new legislation will in fact serve to: (1) complicate matters for users of dispute resolution processes and their advisors; and (2) detract from the already wide scope to offer apologies (both partial and full) ‘safely’ in the context of ADR processes (which are confidential and privileged).” (Herbert Smith Freehills LLP)
- (2) “I agree with the Steering Committee on Mediation in its intention to achieve the policy objective of ‘promoting and encouraging the making of apologies in order to facilitate the

amicable settlement of disputes’ by law reform. But I have reservation about whether an apology legislation should be enacted, especially when the Administration has yet to decide on the definition of ‘apology’ as well as the cover of the apology legislation, which would have varying implications. It is unfair to ask at this stage if the public support the enactment of apology legislation. I object to the enactment of the apology legislation if its protection render inadmissible as evidence of an ‘apology’ (whether a full or partial apology) containing an admission of certain material facts which may otherwise be admissible as evidence in court under general rules of evidence. While a civil dispute (generally in terms of monetary compensation) may be settled for various factors, any settlement brought about deliberately through law reform advocated by me should not deviate from the course of justice. If an ‘apology’ is protected from being admissible in court, the objective effect would be: I would be assisting those at fault to use touching words bearing no legal consequences to please or move the victims, so as to coax them into settlement. Even any admission of material facts through a slip of tongue during an apology would be protected from being admissible in court.” (Office of Raymond Wong Yuk-man, Legislative Councillor) (English translation)

### **Other comments**

3.4 There are other comments regarding this recommendation, and the relevant ones are as follows:

- (1) “The word ‘sorry’ or ‘apology’ should not be casually used since it shall imply legal consequences if so demanded by moral, ethics, culture or by the law, e.g. compensation or remedy to other party... Reluctance to express apology shall not be handled as a legal issue. It should be an ethical issue related to conscience of human being. Government is wrong to believe that

they could send their apology without necessarily committing legal responsibility. Government officials or in reciprocal, the public shall be examined by his own conscience which differentiates among performing and not-performing civil servants. Legal consequence is not a punishment in this respect. Instead, it is a remedy to the damages and also helps government officials avoid self-blame from his conscience...Reluctance to send apology is mainly a culture issue. Government shall change the culture giving the public a positive message, instead of giving the public an impression that the Government is coward by denying responsibility.” (Mr Yeung)

- (2) “For the enactment of Apology Legislation in Hong Kong, the culture and custom in Hong Kong should be taken into account. As the controversial wording of ‘Apology’ may mislead the public that it is a conviction of fault to any incident, and it would be better to change the term ‘Apology’ to other more appropriate term. With an appropriate term, it would be easier for the public to understand and accept this legislation.” (The Council of Social Development)
- (3) “For the legislation to be of any legally binding effect, the definition of ‘apology’ has to be laid down carefully. Strictly speaking, the English phrase ‘I am sorry’ or ‘I apologise’ has different implications and so do the corresponding Chinese phrases. When someone heard about somebody having an accident or a misfortune, the mere use of the words ‘I am sorry to hear that’ does not mean that he is in any way responsible. A defendant may be truly sad to hear about the loss of the plaintiff but saying sorry in such a case should not mean that he considers himself to be blameworthy.” (Construction Industry Council)
- (4) “I have reservation about the validity and reliability of this proposal, as it is based solely on information obtained from the West. There is a lack of discussion of the situation in the East, in particular, the meaning and implications of apology in dispute

settlement...Without considering the situation in the East, I am doubtful whether making an apology can really facilitate the amicable settlement of disputes. I am concerned that apology may in fact escalate disputes and conflicts and make settlement more difficult to achieve...The consultation paper has not discussed in depth about the consequence of the apology being rejected. It only proposes that full apology is more promising than partial apology. This area deserves further attention. A rejection of apology can create more problems and cause more damages to both parties. The wrongdoer may need to be taught how best to apologize so that the expected outcome can be achieved. The DAO model is too simple. It is easier said than done and is difficult to be put into practice...further information is required in the following areas before apology legislation can proceed: (1) Local concept of the meanings, functions and consequences of apology. (2) The culture of Forgiveness in Hong Kong society. (3) Rejection of Apology.” (Ms Hung, Kit May, Beatrice, Registered Psychologist / Accredited Mediator)

- (5) “[W]e may need to study more on the communication style, perception on and reaction towards apology between the west and the east before it may become a real representation of the success of such initiative in Hong Kong.” (The CCSS Mediation Service Centre)
- (6) “Though it has been advocating in Hong Kong for long to resolve disputes via mediation instead of court proceedings, the mediation (apology) culture is yet to be developed. Under the present culture of complaints and fight for personal right in the Hong Kong society, the impact of enactment of apology legislation is uncertain as there might be lots of practical loopholes. Hence, we suggest to have **phased implementation**, starting with limited scope, e.g. medical community and healthcare providers (refers to para. 4.17 for concrete case in USA), or the legal community and legal professionals. Upon

reviewing its application, it can be further extended to all other civil proceedings.” (Hong Kong Family Welfare Society)

- (7) “We also note that the benefits of the proposed enactment of an apology legislation in Hong Kong, e.g. early and cost-effective resolution of disputes, are predominantly based on results from empirical studies and research conducted overseas. The Consultation Paper has implicitly assumed that such results are applicable to Hong Kong. In taking forward the proposal, we would suggest that such studies and research should preferably be conducted for Hong Kong in a scientific manner, as societal/cultural factors and people’s mindset could be quite different from those overseas.” (Anonymous)

## **Analysis and response**

3.5 After considering the responses and comments including those set out above, the Steering Committee has the following analysis and response.

3.6 It is appreciated there may be a possible risk of satellite litigation if the proposed apology legislation is enacted. However, such possible risk could be minimised by providing clear provisions and definitions so that any ambiguity or chances of different interpretation could be reduced. Indeed, having a clear definition of the word “apology” is of paramount importance. The definition of “apology” can be found at the draft Apology Bill at Annex 2. Further, as in the case of other new legislation, the actual or perceived ambiguity (if any) may be resolved through court proceedings. Some comfort could also be found from overseas experience where there is little evidence of much satellite litigation on apology legislation drafted in terms similar to the draft Apology Bill. On the whole, the benefit of having an apology legislation in Hong Kong outweighs the possible risk of satellite litigation.

3.7 There were comments about difference in terms of culture and custom. While the local culture and custom regarding apology may be a relevant factor to be



taken into account when considering whether an apology legislation should be enacted in Hong Kong, one must not lose sight of the ultimate objective of the proposed apology legislation which is to promote the settlement of disputes and prevent them from escalating by clarifying the legal consequences of making an apology. Hong Kong is part of the common law world in which there is a common legal culture. It is believed that experience of apology legislation from overseas common law jurisdictions would be relevant. In any event, there is no evidence to suggest that the objectives of the proposed apology legislation would be inconsistent with the local culture.

### **Final recommendation**

3.8           After considering all the responses received in the Consultation, the Steering Committee confirms its recommendation that an apology legislation shall be enacted in Hong Kong.

*Chapter 4: Recommendation 2 – The apology legislation shall apply to civil and other forms of non-criminal proceedings including disciplinary proceedings*

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**Number of responses in relation to this recommendation**

4.1 Below is a summary of the responses regarding recommendation 2: The apology legislation shall apply to civil and other forms of non-criminal proceedings including disciplinary proceedings:

	Number	Percentage (%)
Agree	37	49.33
Oppose	4	5.33
Neutral	34	45.33
<u>Total</u>	<u>75</u>	<u>100</u>

4.2 Relating to this recommendation is the issue of whether the proposed apology legislation should cover regulatory proceedings (i.e. the 1<sup>st</sup> issue referred to in paragraph 1.2 above). Below is a summary of the responses regarding this issue:

	Number	Percentage (%)
Agree	7	9.33
Oppose	2	2.67
Neutral	66	88
<u>Total</u>	<u>75</u>	<u>100</u>

**Comments from those who support this recommendation and this issue**

4.3 Amongst the 75 responses received, 37 of them are in support of the recommendation that an apology legislation shall apply to civil and other forms of non-criminal proceedings including disciplinary proceedings and 7 of them support the idea that the proposed apology legislation should also cover regulatory proceedings. The key reasons given are as follows:

- (1) The objective of the proposed apology legislation, which is to facilitate settlement of disputes, does not apply to criminal proceedings which serve to, *inter alia*, punish the criminals and deter criminal offences.
- (2) If the proposed apology legislation does not apply to disciplinary proceedings and/or regulatory proceedings, the efficacy of the legislation would be reduced significantly because the existing problem of unwillingness to apologise will continue regarding professionals.
- (3) “If the Hong Kong Government were minded to include disciplinary matters within the legislation it should be explicitly stated that no adverse inference can be drawn in disciplinary proceedings from an apology. This should only be admissible as evidence in the practitioner’s favour. Legislation aimed at preventing legal liability from being attached to an apology made in disciplinary procedures would not ameliorate the risk of this being perceived as an admission of a failing on the practitioner’s part which could have implications for their future employment and, indeed, registration.” (Medical Protection Society)
- (4) “HKAB also strongly recommends that appropriate protection be extended to the potential regulatory consequences of an apology, such as to ensure, by way of example, that an apology is not inappropriately taken as an indication of guilt for the purposes of any regulatory enquiry, or a consideration of ongoing compliance with the conditions of any license or approval (including as to fitness and propriety). Sufficient protection

should be afforded to all investigations and prosecutions initiated by regulatory bodies or authorities including the Securities and Futures Commission, the Hong Kong Monetary Authority, the Independent Commission Against Corruption and the Police...The objectives of the legislation will largely be defeated if certain forms of civil dispute resolution are excluded and a potential prejudicial effect would then come into play. For the avoidance of doubt, our members would welcome a non-exhaustive list of civil proceedings covered by the apology legislation to be included in its provisions.” (The Hong Kong Association of Banks)

- (5) “As with many other jurisdictions, the HKIE observes that the scope of apology legislation in Hong Kong should be restricted to civil proceedings and, indeed, part of such proceedings. In relation to disciplinary proceedings, the HKIE notes their unique features as civil proceedings and the involvement of regulatory regimes in the same. The HKIE is of the view that prudence should be exercised in this regard. Subject to operative details, the HKIE sees a viable option to be explored at this stage is to allow statutory/professional/trade institutions/bodies/associations charged with disciplinary functions to opt in the apology legislation on a voluntary basis. This may also be utilised as an opportunity for the promotion of settlement culture to the wider community in Hong Kong.” (The Hong Kong Institute of Engineers)
- (6) “We support the proposed legislation would cover civil and disciplinary proceedings to the effect that an apology will not be viewed as an admission of one’s legal liability.” (The Hong Kong Medical Association)
- (7) “The proposed Apology Legislation is recommended to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings. Generally speaking, disciplinary proceedings in the civil service are based on evidence and issue

of an apology will unlikely have any bearing on the disciplinary actions.” (Social Welfare Department)

- (8) “Although disciplinary and regulatory proceedings may not have much direct bearing on the rights and interests of an affected individual consumer, the purpose for these proceedings, among others, is to maintain high ethical standards for the trades and professions, and therefore does have certain bearing on general consumer protection. The decisions of the disciplinary and regulatory bodies would affect consumer confidence in the integrity and ethical standards of the trades and professions. Application of the proposed Apology Legislation to disciplinary and regulatory proceedings may have the effect of encouraging the traders/professionals under complaint to give apology. This would in turn be conducive to emotion management of the aggrieved consumers, and thus enhance the chance of attaining an amicable settlement.” (Consumer Council Hong Kong)
- (9) “We consider the apology legislation should apply to disciplinary proceedings. Although the disciplinary proceedings is to protect the public or maintain public confidence in the integrity of the profession, the core purpose which the Consultation Paper does not mention is to relieve the grievance of the party. We observe numerous examples showing the claimant(s) are unsatisfied with the outcome of the disciplinary proceedings. The defendant(s) are described as ‘too busy in defending himself / herself’ and no sign of regret can be observed. We disagree that the public confidence in the integrity of the profession would be damaged by the exclusion of an apology as evidence of misconduct. The disciplinary decision should be based on cautious investigation and interrogation and the ability for the disciplinary committee to justify the decision will be the key factor to maintain the public confidence. On the other hand, an apology should not be the sole or core evidence in

deciding a misconduct. This should be protected by the legislation.” (Hong Kong Society of Accredited Mediators)

- (10) “With the enactment of the Apology Legislation, an apology made by a professional may be dissociated from the admission of liability in a court of law. This will remove some barriers for, or even prompt, a professional to make an apology in good will. However, an apology may imply admitting his or her wrong-doings. Thus, it is important to ensure that related professional disciplinary bodies (The Medical Council of Hong Kong, The Dental Clinic of Hong Kong and The Nursing Council of Hong Kong in our case) would take a similar stand. There had been occasions where admission in civil court for legal technicality had been construed by the Medical Council as a basis to reopen cases that had already been closed. Moreover, a statement of fact in relation to the act, omission or outcome about which an apology was made can be used in professional disciplinary hearings. Without an alignment with professional disciplinary bodies, an apology without admission of liability recorded by a court of law may be differently interpreted as admission of professional misconduct by the professional disciplinary body. The legislation will not become a trap to the professionals only if it had the provision that the apology recorded by the legal court would not constitute evidence in disciplinary hearings of other statutory bodies.” (The Federation of Medical Societies of Hong Kong)
- (11) “The primary purpose of disciplinary proceedings is to protect the public, to maintain public confidence in the integrity of a profession, and to uphold proper standards of behaviour. As to the disciplinary proceedings involving professionals (for example, medical professionals, officers from disciplined services such as the Police and Immigration Department), we consider that **if an apology within the meaning of the apology legislation is not to be taken as evidence of fault or legal**

**liability, it follows that an apology made by a party/government official is not to affect the institution of and the conduct of disciplinary proceedings.** It is essential for the disciplinary proceedings to proceed for the purpose of protecting the public, maintaining public confidence in the integrity of the profession, and upholding proper standards of behavior. Regulatory proceedings mainly involve the exercise of regulatory functions of a regulatory body (for example, the Market Misconduct Tribunal, the Securities and Futures Appeals Tribunal) and are instituted for protecting the general public. We consider that **notwithstanding the specific nature of regulatory proceedings and the serious consequence of a decision made by a regulatory body, the apology legislation should also apply to regulatory proceedings since an apology offered by a party to the proceedings will not lead to the termination of regulatory proceedings taken by the regulatory body.**” (Society for Community Organization – Patient’s Rights Association) (English translation)

- (12) “We agree that the apology legislation is to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings. Since an apology cannot be admitted into evidence in civil proceedings, the same should also apply to disciplinary proceedings. In general, transcripts and judgments of disciplinary hearings can be produced as evidence in related civil proceedings. If an apology is taken as evidence of admission of liability in a disciplinary proceeding, it will be recorded in the transcript and judgment of the hearing. It then follows that the fact that a defendant has apologised or even the accompanying statements of facts will indirectly be admitted into evidence. This will defeat the original intention of offering legal protection to apologies and the purposes of legislation. We would like to raise two more points: (1) If the apology legislation is to apply to disciplinary proceedings, it should also provide that a person

who is the subject of a disciplinary action should not mention that he has made an apology even in the mitigation during sentencing, otherwise the fact that a defendant has made an apology will be admitted into evidence indirectly; (2) Besides the inadmissibility of an apology made by a defendant in evidence in civil and disciplinary proceedings, the legislation should also provide that the fact that a defendant has made an apology must be kept away from the judge dealing with the claim or the adjudicator or the tribunal dealing with the disciplinary action lest they be affected in any way. The absence of such a provision may result in defendants being reluctant to apologise, and the legislative intent of the apology legislation will not be achieved.” (The Hong Kong Council of Social Service) (English translation)

- (13) “It should be reiterated that the enactment of apology legislation is to deal with apology issues so that victims can get the apology and compensation due to them, thereby enhancing settlement. It would only defeat the purpose of the legislation if disciplinary proceedings are excluded. A defendant in a disciplinary proceeding will be judged by his conduct and practice and seldom be judged by what he has said by way of an apology. However, if after the breach and before the internal hearing the defendant makes a full apology to the victim in which he admits legal liability and makes statements of facts, such an apology will be admissible as evidence in court under the Evidence Ordinance. The judge may decide not to pass a heavy sentence on the grounds that the defendant has made an apology voluntarily. Further, the fact that the defendant is willing to admit liability can reduce the damage to his reputation. It would appear to be a double jeopardy if a settlement in a civil claim is to be followed by a disciplinary proceeding. Even so, an internal disciplinary action against a defendant does not mean it is a personal admission of fault and is not intended to offer



compensation and apology to the victim. Therefore, I agree that disciplinary proceedings are civil in nature, and should not be excluded for the reason that a defendant is a professional or in the disciplined services. As such, civil proceedings should not exclude disciplinary proceedings.” (Office of Raymond Wong Yuk-man, Legislative Councillor) (English translation)

- (14) “As to whether the legislation should cover disciplinary proceedings, the HRM is worried that if disciplinary proceedings are not to be covered, even if the legislation is applicable to civil claims proceedings, the officers concerned might still refuse to offer an apology or admit fault to avoid prejudicing themselves in disciplinary proceedings due to the apology. This will render the legislation less effective in encouraging the making of sincere and full apologies.” (Hong Kong Human Rights Monitor) (English translation)
- (15) “HKSHM supports the enactment of the apology legislation to apply to professional disciplinary proceedings. However, HKSHM considers it is important to make explicit provisions in the legislation to state no adverse inference could be drawn during disciplinary proceedings when the defendant healthcare professionals offered apologies to the complainants. HKSHM further considers that any apologies offered by the healthcare professionals to the complainants should be viewed positively, and be admissible as a mitigating factor in sentencing during disciplinary proceedings.” (Hong Kong Society of Healthcare Mediation)

### **Comments from those who oppose this recommendation and this issue**

4.4 Amongst the 75 responses received, 4 of them oppose this recommendation and 2 of them disagree that the proposed apology legislation should cover regulatory proceedings. The key reasons are as follows:

- (1) “Regarding extending the proposed apology legislation to ‘disciplinary proceedings’, in our view the arguments against this in the consultation paper are more compelling in the context of the SFC’s disciplinary jurisdiction under Part IX of the SFO since the rationale to facilitate an amicable settlement does not apply. Disciplinary proceedings initiated by the SFC against regulated persons usually involve breaches of the regulatory regime that we administer. The issue will involve alleged misconduct or lack of fitness and properness to be licensed or registered to conduct regulated activities under the SFO. While such proceedings may have been commenced as a result of a complaint from an aggrieved client, normally it will have been initiated for other reasons, such as following an inspection of a regulated person. It is not clear to us how an apology by the regulated person would be relevant in this context. In any event, genuine remorse is already taken into account in our disciplinary procedures though concrete remedial steps will be given more weight. Regarding ‘regulatory proceedings’, the SFAT and the MMT serve different purposes. The SFAT is chaired by a judge and hears appeals from specified decisions of the SFC (including decisions in Part IX disciplinary proceedings), the Hong Kong Monetary Authority and the Investor Compensation Company Limited under the SFO. It is hard to see how the apology legislation would apply in relation to appeals against such specified decisions as the imposition of a licensing condition or the quantum of an award of compensation to an investor. This is because such decisions will involve the exercise of a statutory discretion in discharge of statutory objectives and in performance of statutory functions. As for the MMT, also chaired by a judge, this is either an alternative to criminal proceedings in the case of market misconduct or the means of enforcing against an alleged breach by a listed corporation of the obligation to disclose the inside information under Part XIVA of

the SFO. It seems to us that the rationale here is more akin to that for criminal proceedings which the consultation paper proposes should be excluded from the ambit of the apology legislation.” (Securities and Futures Commission)

- (2) “Given we do not support the enactment of apology legislation, we believe that its potential application to all forms of civil proceedings (including all tribunals) is alarming. Support for apology legislation and the circumstances where it has been shown to be helpful is very limited. One can see the benefit an apology may serve in a PI context, or in a case of alleged medical negligence. However, extrapolating this to the full gamut of disputes (excluding criminal claims), seemingly for the sake of consistency, is undesirable in our view. Such a course presupposes that complainants in all disputes desire an apology. In fact, in practice, it will usually apply in only a limited number of disputes. Whilst it is certainly the case that apologies can unlock other types of dispute (including commercial cases, as successful mediations show), it is disproportionate to apply apology legislation to all forms of dispute.” (Herbert Smith Freehills LLP)
- (3) “We are concerned that MPFA’s regulatory functions and powers might be jeopardized if apology legislation applies to regulatory proceedings. For example, problems may arise in a situation where a regulatee makes an apology accompanied by admission or statements of facts in the course of investigation conducted by MFPA, and the apology legislation renders such matter inadmissible for the purpose of MPFA’s determination on making a disciplinary order. There might also be operational difficulties in differentiating an apology accompanied by admission and a sole admission because in some occasions they could be rather equivocal.” (Mandatory Provident Fund Schemes Authority)

- (4) “We are of the view that, in any event, the proposed apology legislation should not apply to the disciplinary proceedings in our context since the nature of correctional setting is unique and distinct from those other government departments and professional bodies. The Correctional Services Department (CSD) is empowered to manage persons in custody (PICs) and staff members by, amongst others, the Prisons Ordinance, Cap. 234 and the Prison Rules (PR), Cap. 234A. The overall objective is to provide a secure and disciplined custodial environment in the correctional intuitions conducive to the effective delivery of rehabilitation programmes and to help the PICS to turn over a new leaf upon discharge. In particular, there are specific provisions governing disciplinary proceedings against PICs (PR 57-65) and staff members (PR 239-255) respectively...To safeguard the integrity of the correctional system in order to achieve our mission of maintaining a secure and disciplined custodial environment is our top priority. Whether the accused PIC or staff member concerned makes an apology or not, the Adjudicating Officer or the respective authority must proceed with the procedures as required by the law, and will base on the facts and evidences to determine whether a disciplinary offence is proved or not to impose appropriate punishment(s).”  
(Correctional Services Department)

### **Other comments**

4.5 There are other comments regarding this recommendation and the issue of whether the proposed apology legislation should cover regulatory proceedings. The relevant ones are as follows:

- (1) “In respect of regulatory and disciplinary matters, the HKICPA, as a regulator of the accountancy profession, would be concerned with an apology legislation that would effect and undermine its regulatory and disciplinary function...In fact, unless it can be shown that there exists a compelling need to include regulatory

or disciplinary proceedings within the proposed apology legislation, it is questionable that this should be the case, especially when: unlike private litigation, there is a high degree of public interest involved in these types of proceedings. A regulator or professional body is expected to serve and protect the public interest and it should not be hampered in carrying out that function; members of a professional body are measured to a high standard of professional behaviour of which honesty and integrity are paramount values. The proposed legislation rather than promoting these values could unintentionally legitimize and encourage professionals to be less than forthcoming to either their professional organization or in subsequent disciplinary proceedings; and not all jurisdictions that have mature apology legislation have considered it necessary to extend their legislation to include all disciplinary or regulatory proceedings.” (Hong Kong Institute of Certified Public Accountants)

- (2) “In addition, the expression ‘regulatory proceeding’ appears to be not defined for any general application in the Laws of Hong Kong. If the new Apology Legislation is to cover regulatory proceedings, it should leave no room for doubt or argument as to what proceedings are ‘regulatory proceedings’ and should set out the particular proceedings in a list or schedule. It also seems that some proceedings held under current statutes may serve both a regulatory as well as a disciplinary purpose. So how will regulatory proceedings interplay with disciplinary proceedings? Further, what is the nature of proceedings conducted by different authorities such as the Ombudsman, the Equal Opportunities Commission or the Privacy Commissioner for Personal Data? We will not be able to comment on whether the new Apology Legislation should apply to regulatory proceedings until the Steering Committee or the Government can say what are the proceedings intended to be covered.” (Hospital Authority)

- (3) “As regards whether the apology legislation should also apply to **regulatory proceedings**, such as inquiry proceedings before the EAA under section 34 of the EAO (inquiry proceedings), we have the following views and comments: The EAA’s inquiry proceedings involve the exercise of EAA’s regulatory functions under the EAO and they are instituted for the purposes of protecting the public, maintaining public confidence in the integrity of the estate agency trade and upholding the proper standards of estate agency practice in Hong Kong. At present, inquiry proceedings may nonetheless be pursued (even if a complaint against a licensee is withdrawn or an apology is offered/given by the licensee) if the grounds for taking disciplinary actions against the licensee concerned have been made out on the basis of facts and evidence available. It is therefore important that the EAA’s discretion to conduct an inquiry as it thinks fit and to exercise its disciplinary power under the EAO as it considers appropriate (whether or not an apology has been offered/given by the licensee) should be maintained notwithstanding the passing of the apology legislation. Pursuant to section 34 of the EAO which provides for the procedures of the inquiry proceedings, the EAA or, as the case may be, the disciplinary committee conducting the inquiry may, among others, take evidence on oath and summon any person to attend the inquiry to give evidence. Rule 13(1) of the Proceedings Rules on Inquiry Hearings, which set out the procedures of inquiry hearings adopted by the EAA’s Disciplinary Committee (DC), provides that the DC may receive and consider any material, whether by way of oral evidence, written statements or otherwise as it considers relevant to the hearing irrespective of whether or not such material would be admissible in a court of law. As the usual rules of evidence do not apply to EAA’s inquiry hearings and the apology legislation may potentially exclude evidence that may have relevance, we

are of the view that the apology legislation should not apply to the EAA's inquiry proceedings so as to allow the EAA to consider and admit any material, statements or evidence (including an apology containing an admission of fault or liability i.e. full apology) as it considers relevant to its proceedings notwithstanding the passing of the apology legislation. In light of the aforesaid and if it is decided that the EAA's inquiry proceedings are to be excluded from the apology legislation, the EAA is of the further view that it would be best to exclude the application of the apology legislation to EAA's inquiry proceedings by way of an express provision to such effect." (Estate Agents Authority)

- (4) "Regulatory proceedings are necessary for the Insurance Authority ('IA') to carry out its functions to protect the insuring public. Same as our comments on disciplinary proceedings above, there should be legal certainty that the IA's regulatory functions will not be affected in any way by the proposed apology legislation." (Office of the Commissioner of Insurance)
- (5) "[T]he Council needs to consider the legal implications of an apology legislation on its quasi-judicial function in disciplinary proceedings as well as its wider responsibility to maintain a high standard for professional conduct and to uphold public trust in the competence and integrity of the medical profession. The Council would also like to learn from the experience of other jurisdictions and particularly the impact of apology legislation on its counterparts' exercise of disciplinary powers. In paragraphs 6.18 to 6.36 of the Consultation Paper, a number of arguments for and against applying the apology legislation to disciplinary proceedings have been set out for discussion. It is however not entirely clear how the recommendations in paragraph 6.39 for the apology legislation to be extended to cover disciplinary proceedings can be arrived at. Anyhow, if the apology legislation is to be extended to cover disciplinary proceedings, the Council

is most concerned about the definition of “apology” under the legislation, viz. whether it would provide protection to partial apology, or full apology with or without covering the statement of facts other than the admission of fault or liability. The Council opines that disciplinary proceedings might be seriously compromised if the apologies and/or the covering statements are excluded from being admitted in evidence. This is because strict rules of evidence do not apply to a disciplinary inquiry by the Council. In exercising its quasi-judicial functions, the Council should be allowed to base its decision on any material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined.” (The Medical Council of Hong Kong)

- (6) “Having considered the views for and against this recommendation, the HKBA considers that the question of whether apology legislation 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...In general, DPs are not criminal proceedings. However, there are a number of features which are unique to DPs. 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. Second, the tribunal is the master of its own procedure within its limit and normal rule of evidence does not apply. 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].’ Third, insofar as the conduct of proceedings is concerned, certain requirements of fair trial which are integral to criminal proceedings are present in DPs. 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. The HKBA therefore suggests that more study should be conducted as to the nature and categories of DPs. 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, 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. In Australia, it is not uncommon that their apology legislation does not apply to certain statutory regimes, intentional tort, sexual misconducts and defamation. 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. 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. The HKBA therefore is of the view that further study on this matter is warranted. 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 pieces 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. 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 discipline and professions. It follows that the conducts to be judged by the disciplinary tribunals are also wide ranging and are governed by different codes of conduct 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.'* 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." (Hong Kong Bar Association)

- (7) "The consultation paper recommends applying the apology legislation to civil and other forms of non-criminal proceedings including disciplinary proceedings. Cases such as trademark disputes or traffic accidents causing casualties usually involve both criminal and civil elements, so much so that some require a

court decision as to whether they are criminal in nature. Once such cases involve criminal proceedings, an act of apology may prejudice the ruling. Therefore, we consider it necessary for the administration to elaborate further what civil proceedings will be included under the apology legislation and step up publicity accordingly. This can enhance public understanding and spare a party making an apology any negative impacts or even legal liability arising from the making of the apology.” (The Chinese General Chamber of Commerce) (English translation)

## **Analysis and response**

4.6 After considering the responses and comments including the ones specified above, the Steering Committee has the following analysis and response.

4.7 Disciplinary proceedings are mainly applicable to professionals including the healthcare professionals, legal professionals and engineering professionals as well as officers of the Government including those in the disciplined services. Examples of disciplinary proceedings include those before the Medical Council of Hong Kong and the Solicitors Disciplinary Tribunal. Amongst the comments received, the Steering Committee is currently of the view that the case of the Correctional Services Department may deserve special consideration in view of the unique nature of correctional setting and consideration such as strict discipline and security which is important and necessary for rehabilitation and safety of the persons in custody and for public safety.

4.8 As stated in the Consultation Paper, the primary purpose of disciplinary proceedings is to protect the public and maintain public confidence in the relevant profession. The Steering Committee takes the view that the purpose of disciplinary proceedings is consistent with the making of apologies because a person who makes a genuine apology is likely to reflect on his mistake. Furthermore, it is highly unlikely that a disciplinary tribunal would find professional misconduct by basing solely on apologies. On the contrary, if the

apology legislation is not to apply to disciplinary proceedings, this would significantly defeat the purpose of the apology legislation because professionals or persons who are subject to professional rules or conduct would still have worries that their apologies may be used against them in disciplinary proceedings and therefore would refuse to apologise even if they are otherwise willing to do so. This is especially the case where the same incident may lead to both civil and disciplinary proceedings.

4.9 In the light of the aforesaid, after considering all relevant matters, the Steering Committee comes to the view that the proposed apology legislation should apply to disciplinary proceedings with exceptions such as the disciplinary proceedings conducted by the Correctional Services Department under rules 57 to 65 of the Prison Rules (Cap. 234A). It is suggested that a schedule of excepted proceedings like Schedule 1 of the Mediation Ordinance (Cap. 620) would be useful. For this purpose, any stakeholders who wish to suggest any type of disciplinary proceedings be exempted from the application of the proposed apology legislation are invited to submit their views to the Steering Committee so that the list of excepted proceedings to be included in the proposed schedule can be drawn up.

4.10 Regarding regulatory proceedings, they are important to maintain public confidence in the matter being regulated. For instance, certain proceedings before the Market Misconduct Tribunal are alternatives to criminal proceedings and they serve to protect the integrity of the financial market and maintain public confidence. There is a great public interest involved in these proceedings. Similar to disciplinary proceedings, it appears that liability in regulatory proceedings would seldom be established solely on the basis of apologies. One of the reasons for applying the apology legislation to disciplinary proceedings is to ensure the efficacy of the legislation and it seems that the same reason is equally applicable in the context of regulatory proceedings. Accordingly, for the present purpose, it is difficult to distinguish regulatory proceedings from disciplinary proceedings. After balancing all the relevant factors, the Steering Committee takes the view that the proposed apology legislation should also apply to regulatory proceedings unless valid justification can be put forward to exempt a specific type of regulatory proceeding. In the circumstances, all relevant stakeholders who take the view that

any types of regulatory proceeding should be exempted from the application of the proposed apology legislation are invited to submit their views to the Steering Committee so that the list of excepted proceedings to be included in the proposed schedule can be drawn up.

## **Final Recommendation**

4.11 After considering all the responses received in the Consultation, the Steering Committee recommends that the apology legislation shall apply generally to civil and other forms of non-criminal proceedings including disciplinary and regulatory proceedings, save those excepted proceedings to be included in a schedule thereto. All relevant stakeholders who propose specific disciplinary or regulatory proceedings to be exempted from the application of the apology legislation are invited to submit their views and reasons to the Steering Committee for consideration.

*Chapter 5: Recommendation 3 – The apology legislation shall cover full apologies*

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**Number of responses in relation to this recommendation**

5.1 Below is a summary of the responses regarding recommendation 3: The apology legislation shall cover full apologies:

	Number	Percentage (%)
Agree	45	60
Oppose	1	1.33
Neutral	29	38.67
<u>Total</u>	<u>75</u>	<u>100</u>

**Comments from those who support this recommendation**

5.2 Amongst the 75 responses received, 45 of them are in support of the recommendation that the apology legislation shall cover full apologies. The key reasons given are as follows:

- (1) The objective of the apology legislation is to facilitate settlement. A full apology is likely to be more effective in increasing the chance of settlement compared to a partial apology.
- (2) “From the PCPD’s past experience, some aggrieved individuals are prepared to drop their complaints if the PCAs are willing to make sincere apologies. While some aggrieved individuals are prepared to accept partial apology (i.e., expression of regret or sympathy), more insist that a sincere apology should include a certain extent an admission of fault or acknowledgment of the

- wrong done.” (Office of the Privacy Commissioner for Personal Data, Hong Kong)
- (3) “HA supports this Recommendation in principle but the new legislation should define well what constitutes an apology, what “partial apology” and “full apology” mean and how they are different from each other. For clarity, the impact and scope of protection applicable to a partial apology need to be identified.” (Hospital Authority)
  - (4) “In relation to whether to cover a full apology or just a partial apology, the HKIE is of the view that, from the perspective of encouraging settlement of disputes, the receipt of a full apology is to be supported. This also helps avoid questions over the sincerity of partial apology in the perception of the recipient.” (The Hong Kong Institution of Engineers)
  - (5) “This Council agrees that a bare or partial apology would have a disadvantage of creating uncertainty and making the aggrieved party unsure about how to respond to the offer of apology. On the other hand, the aggrieved party would be more receptive to full apology which may be perceived as a genuine and definite statement of regret. This Council considers the primary purpose of enacting the proposed Apology Legislation is to facilitate amicable settlement through apology given by the alleged wrongdoer. Such a purpose will more likely be achieved when the proposed legislation is founded upon protection of full apology rather than partial apology.” (Consumer Council Hong Kong)
  - (6) “We opine that the objective of the legislation would be defeated if it only applies to the partial apologies. In fact, since the partial apologies usually not involve an admission of fault, legal liability may not be aroused. We cannot see the real need to legislate for partial apology. Hence, to balance the public expectation on apology and the admission of liability, the

apology legislation is to cover full apologies.” (Hong Kong Society of Accredited Mediators)

- (7) “The biggest difference between a full apology (i.e. an expression of regret and acknowledgement of fault from one party to a potential claimant) and a partial apology (i.e. a mere expression of regret from one party to a potential claimant) is that the former also expresses an acknowledgement of fault in the incident to the claimant. The findings of Professor Jennifer K. Robbennolt as cited in the Consultation Paper (see paragraphs 5.11 to 5.13 of the Consultation Paper) show that receiving a full apology will increase the likelihood of a respondent choosing to accept a settlement offer. Therefore, **if the public recognise that one of the purposes of the apology legislation is to resolve disputes more effectively, then the apology legislation should all the more cover full apology to facilitate better resolution of disputes.**” (Society for Community Organization – Patient’s Rights Association) (English translation)
- (8) “The HRM considers that to prevent the abuse of the apology legislation as a tool to exclude adverse evidence and to avoid inflicting possible additional harm or distress on injured persons by insincere and partial apologies, the apology legislation to be enacted should expressly provide protection for sincere and full apologies only so that its objective of encouraging the making of apologies to show respect and concern for injured persons can be fulfilled. (Hong Kong Human Rights Monitor) (English translation)
- (9) “We think that “partial apology” merely clarifies the legal consequences of an apology which does not in itself constitute an admission of liability. It cannot change the sad reality that a person would steadfastly refuse to apologise despite being fully aware of his own liability. This is just better than nothing, and we do not agree to it. We support the recommendation in the consultation paper to provide that an apology, including an



admission of fault or legal liability, does not amount to an admission of legal liability and is inadmissible for the purpose of civil proceedings.” (Liberal Party) (English translation)

### **Comments from those who oppose this recommendation**

5.3 Amongst the 75 responses received, 1 of them opposes this recommendation. The reasons are as follows:

“[W]e have serious concerns about the benefit of enacting legislation to cover full apologies. A plaintiff/complainant, armed with an open admission of fault by the counterparty, is likely to be very surprised that they cannot use this to their advantage, should the dispute not settle. Protecting admissions automatically in this way is open to abuse. It is one thing to offer a without prejudice admission as its status should be clear. Apology legislation leaves the complainant/plaintiff to adduce evidence of fault in other ways. This does not present justice in our view and is likely to decrease faith in the system, rather than enhance it. We note that 1990 research in the PI context suggested that only full apologies increased the likelihood of settlement. In our view, this does not justify full apology legislation, particularly where there is no recent evidence that such legislation has been successful.” (Herbert Smith Freehills LLP)

### **Other comments**

5.4 There are other comments regarding this recommendation. The pertinent one is as follows:

“The answer to this question essentially is a matter of policy and as such the Law Society does not have comment. Having said the above, we wish to highlight the following for consideration for policy formulation....The Steering Committee recommended that the apology legislation is to cover full apologies (§6.11). The Law Society notes that this recommendation is founded on overseas examples and the empirical research by Professor Jennifer K. Robbennolt (§5.11 - §5.20). While Professor Robbennolt’s findings and reasoning have been relied upon in the Consultation Paper (§5.11 - §5.20), we have not seen the logic and the analysis which could translate and apply the reasoning of Professor Robbennolt *to the local context*. The Consultation Paper’s averment that legislation for full apology is preferred, as the Steering Committee has ‘*considered the nature and effect of the different types of apology legislation in the [relevant] overseas jurisdictions, including their pros and cons and the global development in this respect, and the analysis and experiments by leading academics in this field,*’ (§6.11) is too abridged in terms of analysis and reasoning. In view of the importance of this legislation, we invite a fuller discussion as to how and in what manner Professor Robbennolt’s findings could help the consideration of enactment of the legislation in *the local context*. The above is particularly important and relevant when, seemingly, the Hong Kong society has become more demanding on accountability and responsibility of different professions and sectors. The differences in culture between Hong Kong and those jurisdictions as surveyed, in our views, have not been addressed sufficiently or at all in the Consultation Paper.” (The Law Society of Hong Kong)

## **Analysis and response**

5.5 After considering the responses and comments including those stated above, the Steering Committee has the following analysis and response.

5.6 It appears that some of the respondents may not have a proper understanding of the concepts of partial apology and full apology. It is pertinent to note that by definition, a full apology would include a partial apology. The Steering Committee observes that modern apology legislation, including the one recently passed in Scotland, would cover full apologies and that a protection of partial apologies may promote apologies which are counter-productive to the settlement of disputes.

### **Final Recommendation**

5.7 After considering all the responses received in the Consultation, the Steering Committee maintains its recommendation that the apology legislation shall cover full apologies.

*Chapter 6: Recommendation 4 – The apology legislation shall apply to the Government*

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**Number of responses in relation to this recommendation**

6.1 Below is a summary of the responses regarding recommendation 4: The apology shall apply to the Government:

	Number	Percentage (%)
Agree	41	54.67
Oppose	0	0
Neutral	34	45.33
<u>Total</u>	<u>75</u>	<u>100</u>

**Comments from those who support this recommendation**

6.2 Amongst the 75 responses received, 41 of them are in support of the recommendation that the apology legislation shall apply to the Government. The key reasons are as follows:

- (1) The proposed apology legislation should apply to the Government so as to promote a sense of fairness and consistency because the Government could be a party to a dispute or a party in civil proceedings.
- (2) “The proposed Apology Legislation, which aims at promoting the making of apologies to facilitate the amicable settlement of disputes and prevent escalation of disputes, may help promote the government's public image. The government is often blamed to be unsympathetic and slow in response in handling disputes/mishaps because of the reluctance to make apologies.

The proposed Apology Legislation seems to aim at, among others, addressing the concern of public officers and civil servants acting in their official capacity on the legal implication of an apology or expression of regret for fear of legal liability. It seems that the proposed legislation will be able to provide good protection to government bureaux/departments (b/ds) in circumstances where the b/ds consider it desirable to issue an apology or expression of regret especially for the purpose of easing the emotions of the public. Nevertheless, the enactment of Apology Legislation will encourage apologies and affect the public expectation for apologies from b/ds. The public may expect b/ds to make prompt apologies even before the completion of investigation of incidents/complaints.” (Social Welfare Department)

- (3) “Our members generally opined that the proposed apology legislation shall also extend its application to the Government (including, government officers, governmental departments, persons being appointed under public function/capacity by the government, civil servants, public bodies and any statutory bodies). It is viewed that the new legislation will mark a departure from the current situation where government officials are (deemed by the general public and media) reluctant to deliver a prompt apology in the case of a tragedy for fear of possible legal liabilities. Our members see no reason why the proposed legislation should not apply to the Government.” (Hong Kong Mediation and Arbitration Centre)
- (4) “Application of the proposed Apology Legislation to the Government would make the Government less hesitant in making apology in justifiable circumstances. Its apology may relieve the affected consumers’ or their families’ pains and sorrow of loss. This may facilitate an effective emotion management of the consumers affected, their families and the general public at an early stage and enhance the prospect of

resolving disputes through amicable settlement. As such, this Recommendation is supported.” (Consumer Council Hong Kong)

- (5) “Since the apology legislation is to provide statutory protection for apologies made by any person or organisation, the HKPSEA considers that it should also apply to the government and the public agencies so that public officials and the staff of the public agencies would be more willing to apologise when necessary without fearing that an apology will amount to an admission of fault or that extra legal liability will be incurred. Unnecessary public misunderstanding or grievance against the government in incidents can thus be avoided and better interaction between the government and the public can be established. Social harmony can be enhanced as a result.” (Hong Kong Professionals and Senior Executives Association) (English translation)

### **Comments from those who oppose this recommendation**

6.3 Amongst the 75 responses received, none of them opposes this recommendation.

### **Other comments**

6.4 There are other comments regarding this recommendation. The relevant ones are as follows:

- (1) “We feel that an appropriate balance should be struck in the legislation so that it will not encourage the Government to make apology statements loosely, or to increase public expectation that apologies would readily be made by the Government on any disputed issues...such drawbacks could adversely affect the authoritative image of the Government.” (Anonymous)

- (2) “On the application of the proposed legislation to Government, it is not uncommon that a mishap might be related to the work of a bureau/department of the Government, rather than to a particular public officer. If the proposed legislation applies to the Government, then there are certain operational issues that the Government may need to consider. For example, will there be any guidelines on the authority to decide whether, and what type (full or partial) of apology should be conveyed? And when a PO / HoD makes an apology, shall it be his personal apology, or is it made on behalf of the relevant B/D? These are important aspects to be clarified and have clear guidelines in order to achieve the objective of the proposed legislation - to promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes.” (Food and Health Bureau)

## **Analysis and response**

6.5 As a matter of principle, the Steering Committee sees no reason why the proposed apology legislation should not be applicable to the Government. Besides, it is clearly in the public interest to have the proposed apology legislation applicable to the Government. It is therefore not surprising that no opposition to this recommendation has been received.

## **Final Recommendation**

6.6 After considering all the responses received in the Consultation, the Steering Committee maintains its recommendation that the apology legislation shall apply to the Government.

*Chapter 7: 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*

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**Number of responses in relation to this recommendation**

7.1 Below is a summary of the responses regarding recommendation 5: The apology legislation shall expressly preclude an admission of a claim by way of an apology from constituting an acknowledgement of a right of action for the purposes of the Limitation Ordinance.

	Number	Percentage (%)
Agree	32	42.67
Oppose	3	4
Neutral	40	53.33
<u>Total</u>	<u>75</u>	<u>100</u>

**Comments from those who support this recommendation**

7.2 Amongst the 75 responses received, 32 of them are in support of the recommendation the apology legislation shall expressly preclude an admission of a claim by way of an apology from constituting an acknowledgement of a right of action for the purposes of the Limitation Ordinance. The key reasons given are as follows:

- (1) By expressly precluding in an apology legislation an admission of a claim by way of an apology from constituting an acknowledgement of a claim for the purposes of section 23 of the



Limitation Ordinance, it will remove the disincentive of giving apologies for the fear of attracting undesirable consequence of having the limitation period extended.

- (2) The recommendation is consistent with the purpose of the apology legislation to prevent further escalation of disputes into legal action or to make it more likely for the legal action to be settled.
- (3) “Otherwise, it follows that without such legal certainty, it is likely that apology-makers will be deterred from proffering an apology, thereby defeating the purpose of such legislation. We acknowledge that such a proposal may well give rise to other ramifications on recovery of debts or other similar claims but, until such ramifications are fully articulated, we on balance, do not believe this warrants adopting an alternative stance.” (The Hong Kong Association of Banks)
- (4) “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 claim by way of an apology from constituting an acknowledgement or confirmation of a claim for the purposes of limitation legislation, the HKBA supports the recommendation that the apology legislation for Hong Kong should follow this approach to further remove a disincentive to making apologies.” (Hong Kong Bar Association)
- (5) “The existing Limitation Ordinance provides for time limits on various claims in civil actions. Offering an apology may run a real or perceived risk for it may not only be an admission or evidence relevant to the determination of liability or fault, but may also extend the limitation period within which a plaintiff may sue a defendant. **To encourage a defendant to offer an apology and to avoid creating additional legal risks, we agree that the apology legislation must expressly preclude an admission of a claim by way of an apology from constituting an acknowledgement of a right of action under the Limitation**

**Ordinance.”** (Society for Community Organization – Patient’s Rights Association) (English translation)

- (6) “We support this recommendation to provide that an apology does not constitute an acknowledgment of a right of action in relation to the matter concerned for the purposes of the Limitation Ordinance. This would ensure that an apology cannot be used to extend a limitation period if the matter is not settled and remove a further barrier to apologies being offered.” (Liberal Party) (English translation)

### **Comments from those who oppose this recommendation**

7.3 Amongst the 75 responses received, 3 of them oppose this recommendation. The key reasons are as follows:

- (1) “This recommendation, we believe, focusses on reducing perceived disincentives to offering apologies, rather than the effects such a provision may have. As has been seen in Canada, detailed legislation would be needed to address tolling. In circumstances where there appears to be no recent evidence that apology legislation enhances settlement, we believe that interfering with the Limitation Ordinance is undesirable.” (Herbert Smith Freehills LLP)
- (2) “I understand that it is necessary for a new legislation to dovetail with other relevant legislation. But regarding arrangements in respect of the Limitation Ordinance, I disagree with the Government’s proposal to follow the Canadian apology legislation to preclude 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. In fact, if an apology is precluded from ‘constituting an acknowledgment or confirmation of a claim for the purposes of limitation legislation’, a ‘full apology’ is not acknowledged to have any legal effect and

will have no implications on any legislation. This is not indeed a full apology and may instead change the approach of the apology legislation to ‘partial apology’. This is contrary to the objective of full apology mentioned above. Given that the Limitation Ordinance does not provide any definition for ‘acknowledgment’ as stated in paragraph 5.48 of the Paper, and that a full apology contains legal effect, the Limitation Ordinance should not exclude full apologies. Rather, the Limitation Ordinance and the apology legislation should operate side by side and complement each other. When a full apology meets the requirement that an acknowledgment is made in writing in Hong Kong and signed by the person making the acknowledgement as mentioned paragraph 5.40, it should be covered by section 23 of the above ordinance and the limitation period should accrue afresh, meaning that the limitation period for a cause of action will be extended. The Limitation Ordinance should not exclude full apologies. A victim who does not accept an apology from a defendant and has to resort to litigation following a failed mediation would have lost time for pursuing litigation if the limitation period cannot be extended. In light of this, the Limitation Ordinance should not exclude full apologies.” (Office of Raymond Wong Yuk-man, Legislative Councillor) (English translation)

## **Other comments**

7.4 There are other comments regarding this recommendation. The relevant ones are as follows:

- (1) “Regarding the issue concerning the Limitation Ordinance (Cap. 347), in order to be effective and avoid uncertainty, the HKIE sees the benefits of precluding an admission of a claim by way of apology from constituting an acknowledgement or confirmation of a claim for the purposes of that Ordinance. However, we suggest

that a set of clear guidelines/ delimitations of what should not be read as an apology for this purpose should be laid down.” (The Hong Kong Institution of Engineers)

- (2) “The Law Society has no views at this stage. By way of remark, we note that in Canada, *‘most of the legislation...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’* (§ 4.8) (emphasis supplied). Due to the short time available, we have not been able to research into the Canadian legislation for the differences between ‘acknowledgment’ and ‘confirmation of a cause of action’, if there are any such differences, in the above quote. We invite the Steering Committee to look into the above aspect.” (The Law Society of Hong Kong)

## **Analysis and response**

7.5 After considering the responses and comments including those set out above, the Steering Committee takes the view that the policy intent of facilitating settlement of disputes by removing disincentives of making apologies would provide sufficient and proportionate justification for precluding an admission of a claim by way of an apology from constituting an acknowledgement of a right of action for the purposes of the Limitation Ordinance. Further, it is not desirable to apply partial apologies instead of full apologies to the Limitation Ordinance as this would cause confusion.

## **Final Recommendation**

7.6 After considering all the responses received in the Consultation, the Steering Committee maintains its recommendation that the apology legislation shall expressly preclude an admission of a claim by way of an apology from constituting an acknowledgement of a right of action for the purposes of the Limitation Ordinance.

*Chapter 8: Recommendation 6 – The apology legislation shall expressly provide that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology*

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**Number of responses in relation to this recommendation**

8.1 Below is a summary of the responses regarding recommendation 6: The apology legislation shall expressly provide that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology.

	Number	Percentage (%)
Agree	39	52
Oppose	0	0
Neutral	36	48
<u>Total</u>	<u>75</u>	<u>100</u>

**Comments from those who support this recommendation**

8.2 Amongst the 75 responses received, 39 of them are in support of the recommendation that the apology legislation shall expressly provide that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology. The key reasons given are as follows:

- (1) By expressly providing that an apology legislation shall not affect any insurance cover that is, or would be, available to the person making the apology, it will remove a disincentive to apologising arising from a concern to preserve insurance cover and is

considered necessary to achieve the purposes of the apology legislation.

- (2) “We suggest that the practical effect in Canada of such provisions is interrogated further. In practice, insurers in Hong Kong tend to agree apologies of any sort only in limited circumstances (for example where there has been a clear breach). In complex claims in particular, insurers are likely to counsel against (early) without prejudice apologies. Comfort may therefore be gained by apology legislation.”(Herbert Smith Freehills LLP)
- (3) “The effect of the proposed recommendation 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. If this provision is not enacted, parties will be discouraged from making apologies because it could mean they will not be covered under the insurance contract and the purpose of the apology legislation would not be achieved.” (The Hong Kong Federation of Insurers)
- (4) “We strongly agree to para. 5.63 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 defendant. This has been identified as a real and significant barrier to offers of apology. It is essential to include this in the apology legislation to remove barrier to apology.” (Hong Kong Family Welfare Society)
- (5) “Agree. Furthermore, if the legislative intent is to prevent apologies from voiding or affecting insurance contracts in all circumstances, then it may be desirable to have a provision explicitly prohibiting the contracting out in an insurance contract notwithstanding mutual consent of the parties.” (The Law Society of Hong Kong)
- (6) “The HKBA acknowledges that an apology put forward which shall not affect any insurance coverage appears to be an important component of the apology legislation. 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.” (Hong Kong Bar Association)

- (7) “For the insurance sector, premiums are calculated based on the risks involved, and an apology should theoretically have no impact on risk analysis and calculation of insurance. The HKPSEA supports in principle that the apology legislation should provide protection to the effect that any insurance coverage that is, or would be, available to the person making the apology would not be affected by the apology. This can allay people’s worry that apologies would affect insurance contracts.” (Hong Kong Professionals and Senior Executives Association) (English translation)
- (8) “HKSHM supports the enactment of the apology legislation to provide expressly that an apology shall not affect any insurance coverage available to the person making the apology. Healthcare professionals are usually members of professional indemnity organizations. If the apology legislation aims to encourage healthcare professionals to offer appropriate and honest apologies upfront in medical mishaps, it should make sure all professional indemnity organizations cannot rescind the coverage on their members in the circumstances.” (Hong Kong Society for Healthcare Mediation)

### **Comments from those who oppose this recommendation**

8.3 Amongst the 75 responses received, none of them opposes this recommendation.

### **Other comments**

8.4 There are other comments regarding this recommendation. The relevant ones are as follows:

- (1) “MPS does not have a position as to whether or not this should be the case. MPS encourages its members to make appropriate apologies and it does not penalise its members for doing so. This is therefore not an issue for healthcare professionals and dentists with membership of MPS. MPS is not an insurance company. Benefits of membership include access to indemnity and all the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.” (Medical Protection Society)
- (2) “While policyholders’ rights would likely be protected by express provisions (i.e. an apology shall not affect any insurance coverage available), insurers’ legal position in insurance contracts (e.g. liability to plaintiffs and right of recovery) should also be taken care of. Without detailed provisions at the moment, how insurers and their legal position (e.g. during claims management) will be affected is uncertain. We would appreciate further discussions at a later stage when detailed provisions are available.” (Office of the Commissioner of Insurance)

## **Analysis and response**

8.5 The Steering Committee notes that there is no objection to this recommendation. Further, to avoid any potential loophole in the legislation, it is desirable to explicitly prohibit the contracting out of the apology legislation. Finally, apart from insurance contracts, the proposed apology legislation should also expressly cover indemnity.

## **Final Recommendation**

8.6 After considering all the responses received in the Consultation, the Steering Committee recommends that 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.

*Chapter 9: Recommendation 7 – The apology legislation shall take the form of a stand-alone legislation*

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**Number of responses in relation to this recommendation**

9.1 Below is a summary of the responses regarding recommendation 7: The apology legislation shall take the form of a stand-alone legislation.

	Number	Percentage (%)
Agree	32	42.67
Oppose	1	1.33
Neutral	42	56
<u>Total</u>	<u>75</u>	<u>100</u>

**Comments from those who support this recommendation**

9.2 Amongst the 75 responses received, 32 of them are in support of the recommendation that the apology legislation shall take the form of a stand-alone legislation. The key reasons are as follows:

- (1) A stand-alone legislation will lead to greater public awareness of the apology legislation and is crucial for the legislation to be effective and easily accessible.
- (2) It will also 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) “Noting the experiences of countries that have enacted apology legislation such as Australia and Canada, it is readily apparent that the promotion of such legislation is required to make the general public and even those in the legal community aware of its

existence. Indeed, it is imperative that legal practitioners, to whom members of the public often turn before proceedings are commenced, are able to identify and promulgate any enacted apology legislation. We therefore believe that the best way to publicize and effect a cultural change pursuant to the introduction of apology legislation is if such legislation is enacted in a stand-alone guise.” (The Hong Kong Association of Banks)

- (4) “The legislation should be stand-alone mainly because it defines the legal implication of apology which will have far-reaching and extensive impact on various spheres, such as civil, disciplinary and regulatory proceedings, and various kinds of alternative dispute resolution. It should not be appropriate to form part of any existing legislation, like the Mediation Ordinance.” (Consumer Council Hong Kong)
- (5) “...having stand-alone legislation will lead to greater awareness which the committee believes is crucial for the legislation to be truly effective. Lawyers must also be made well aware of the legislation, since they are often consulted by persons whether to apologise before being served with proceedings. From the Australian and Canadian experience, it is clear that much needs to be done to promote awareness and usage among the general public and legal professionals.” (Hong Kong General Chamber of Commerce)
- (6) “The experiences of many countries with apology legislation show that apology can facilitate the settlement of disputes. The HKPSEA supports the enactment of a stand-alone apology legislation by the government under the government’s concept of promoting the development of mediation and enhancing public awareness of the apology legislation. By clarifying the legal consequences of making an apology, it will help the public to better appreciate that an apology will neither constitute an acknowledgement of fault, nor be admissible as evidence in court, so that the court’s determination of legal liability based on law

and facts will not be affected.” (Hong Kong Professionals and Senior Executives Association) (English translation)

- (7) “A stand-alone legislation will have visible effect and be conducive to raising public awareness of it. Also, this approach recognises that the legal effects of the provisions are not confined to the law of evidence or mediation, and that apologising is regarded by the law as important to resolving civil disputes from the time an accident or injury occurs, not just once ‘without prejudice’ negotiations or mediation have begun.” (Liberal Party) (English translation)

### **Comments from those who oppose this recommendation**

9.3 Amongst the 75 responses received, only 1 of them opposes this recommendation. The reasons are as follows:

“The recommendations in the Paper rely on research (some dating back to the 1980s and 1990s – before the mainstream advent of ADR) with no empirical evidence that the apology legislation enacted elsewhere since then has achieved the desired goals. Indeed, more recent articles from 2012 and 2013 cited at page 102 of the Paper suggest that apology legislation (even the far-reaching, stand-alone type recommended to be enacted in Hong Kong) has not changed cultures, and has been sparsely and inconsistently interpreted by the courts. The 2012 article on the Canadian legislation describes it as “*almost incognito*”. This problem exists in Australia too, according to the 2013 article. This cannot be explained simply by reference to the federal nature of those jurisdictions...stand-alone legislation has not enhanced understanding or changed cultures.” (Herbert Smith Freehills LLP)

## **Analysis and response**

9.4 The Steering Committee takes the view that a stand-alone apology legislation will better enhance public awareness which is crucial in order for the legislation to be effective and accessible.

## **Final Recommendation**

9.5 After considering all the responses received in the Consultation, the Steering Committee maintains its recommendation that the apology legislation shall take the form of a stand-alone legislation.

*Chapter 10: The issue of whether factual information conveyed in an apology should be protected by the proposed apology legislation*

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**Number of responses in relation to this issue**

10.1 Below is a summary of the responses regarding the issue of whether factual information conveyed in an apology should be protected by the proposed apology legislation (i.e. the 2<sup>nd</sup> issue referred to in paragraph 1.2 above):

	Number	Percentage (%)
Agree	13	17.33
Oppose	3	4
Neutral	59	78.67
<u>Total</u>	<u>75</u>	<u>100</u>

**Comments from those who support**

10.2 Amongst the 75 responses received, 13 of them support that factual information conveyed in an apology should be protected by the proposed apology legislation. The key reasons are as follows:

- (1) If statements of fact are not covered, people may simply give bare apology.
- (2) “The Ombudsman would like to point out that in principle public officers should not withhold relevant facts from complainants or plaintiffs even if the assessment is that this might incur extra legal liabilities. If a government or public body knows as a matter of fact that it has damaged the interest of the complainant, it should frankly disclose all relevant information, let justice take its course and accept the consequences, including payment of fair

compensation. On this premise, it seems that it does not matter whether statements of facts are protected. However, taking into consideration the arguments set out in paragraph 5.36 and 5.37 of the Consultation Paper, we tend to favour protection as it would generally encourage disclosure of facts to give substance to apologies. It would then be open for the party making the apology to give up the protection in case of a subsequent claim.” (Office of The Ombudsman Hong Kong)

- (3) “We submit that these statements of fact should be afforded the same protection under the legislation and should not be admissible in any related litigation or subsequent proceedings. It would therefore be far more efficacious if statements of facts were afforded protection under the legislation. We agree that in addition to assisting the parties to understand the underlying circumstances of a mishap, the disclosure of facts may also facilitate settlement and prevent recurrence.” (The Hong Kong Association of Banks)
- (4) “HA also supports in principle the concept of protecting statement of facts accompanying an apology. For an apology to be meaningful, an apology is necessarily premised upon or given in the context of certain basis of facts, which facts may be agreed or disputed. Our concern is what facts will be considered as relevant facts to the apology in question and the factors to be taken into consideration for determining such relevance. The nexus between the apology and the statement of facts which governs the protection coverage for these facts must be clearly provided in the new legislation. This is an important aspect and we urge the Government to conduct further consultation when a substantive recommendation is available.” (Hospital Authority)
- (5) “[T]he proposal that the apology legislation should apply to statements of facts accompanying an apology is supported. The reason is that the person who makes an apology will normally provide some explanations on the wrongdoings. In the absence of such provision, people will tend to offer bare apologies without

giving any statements of facts, which will be regarded as lack of sincerity. An apology accompanied with statement of facts, on the contrary, would make the apology effective and sincere. In cases where the statements of facts are inadmissible, the claimant could still adduce evidence to prove the fact accompanying the apology in court during litigation.” (Anonymous)

(6) “[W]e have strong reservation on whether those statements, which may be ‘uttered’ or ‘expressed’ by the apology-giving person after his apology, should be regarded as, or taken as having acquiring the evidential standard of being a “fact”. The fact remains and only remains at the top level that the apology-giving person has giving out certain expressions which may be instantaneous reactions rather than pre-meditated statements or admissions. There are definite levels of standard on how an expression being given under certain manner or circumstance should be regarded evidentially as admission evidence or mere expressions. We consider that the statements or admissions after the apology is made as part of the (full) apology must be protected in the future legislation.” (Hong Kong Construction Arbitration Centre)

(7) “We also support to include statement of facts under the protection because, with such protection, the concerned party will be more willing to make apology which align with the intended objective of the proposed apology legislation to encourage apology and ultimately minimize litigation...We suggest that “statement of facts accompanying apology” should be clearly stated and defined in the legislation in order to address the following concerns: (a) It is very difficult to differentiate what are the specific statements of facts that are regarded as accompanying apology...(b) It is unclear how to differentiate facts accompanying apology with independent evidences to prove the facts...(c) The practical concern of the apologizing party to refrain from disclosure of facts as it will ultimately result at highlighting of other related facts/ documents, by means of



written records, testimonial of witness, etc, could be summoned by Court or disciplinary board as independent evidence. Only if these related facts are also protected as under the apology legislation could alleviate the worry of the apologizing party. Otherwise, it is very unlikely that the apologizing party would make a full apology.” (Hong Kong Family Welfare Society)

### **Comments from those who oppose**

10.3 Amongst the 75 responses received, 3 of them disagree that factual information conveyed in an apology should be protected by the proposed apology legislation. The reasons are as follows:

- (1) “This is presaged in the Apologies (Scotland) Bill and gives us cause for concern. It presents another reason why apology legislation will lead to satellite litigation. It is open to abuse and may further stifle a complainant’s/plaintiff’s claim. The alternative, where only the statements of fact (of a letter) are admissible, but the accompanying apology/admission of liability is not, is equally unpalatable.” (Herbert Smith Freehills LLP)
- (2) “The HKBA has considered the issue of applicability of apology legislation 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 apology legislation 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 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 consultations 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...So it is uncertain as to whether the apology legislation 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.” (Hong Kong Bar Association)

## **Other comments**

10.4           There are other comments regarding this issue. The relevant ones are as follows:

- (1) “If the legislation protects the Statement of Facts accompanying apology, it shall also expressly protect the rights of the plaintiff in adducing the evidence or information which is subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power.” (Hong Kong Mediation Centre)
- (2) “When a defendant makes an apology, statements of facts will inevitably be conveyed in the apology. In order to encourage a

defendant to apologise, statements of facts should be included in the protection of the apology legislation to avoid bare apology and reduce risks of legal liability as well. However, statements of facts are mostly directly relevant to the legal liability of the defendant, and should in principle be admissible as evidence. If statements of facts are inadmissible as evidence, a plaintiff's claim may be prejudiced. In addition, as regards the Scottish legislative proposal to include statements of facts in the protection of apology legislation mentioned in the Consultation Paper, we consider that the rationality of the legislative approach will need to be tested in practice in more overseas jurisdictions. Therefore, we recommend that in the first phase of enactment of the apology legislation in Hong Kong, the legislative approach to statements of facts should follow that in Canada where the apology legislation does not expressly stipulate whether it covers statements of facts or not...Further, at present, parties are still able to use privileged circumstances ("without prejudice" negotiations and mediation) to disclose facts and give an account or explanation that goes beyond an apology. An absence of protection for the statements of fact accompanying an apology has in no way rendered communication impossible. Besides, with most plaintiffs being the disadvantaged parties (for example, patients or relatives of the deceased who claim for damages for personal injuries arising out of medical incidents usually lack financial resources, professional knowledge or ways to gather evidence), the inclusion of statements of facts in the protection of the apology legislation will further widen the inequality in legal resources available to parties." (Society for Community Organization – Patient's Rights Association) (English translation)

## **Update on the Apologies (Scotland) Bill**

10.5 The Consultation Paper contains information and materials regarding the Apologies (Scotland) Bill (“the Bill”) up to May 2015. In May 2015, the Justice Committee of the Scottish Parliament sought views on the general principles of the Bill<sup>1</sup>. One of the matters covered concerns the definition of apology in the Bill<sup>2</sup>. The call for written evidence closed on 8 May 2015 and 20 written submissions were received<sup>3</sup>. The Justice Committee received oral evidence on the Bill at its meetings held on 9, 16 and 23 June 2015<sup>4</sup>.

10.6 Insofar as the issue of statement of fact is concerned, the following extracts from the written submissions appear to be relevant:

- (1) “If the Bill is passed with an apology defined as drafted, it could have serious consequences, and risk denying injured people access to justice, such as in this hypothetical case: Driver A emerges from a minor road and immediately turns right, knocking down a child who is starting to cross the road. The child suffers serious brain injury. Driver A says in reply to the police interview: ‘I am sorry I just wasn’t paying attention’. By the time driver A has time to reflect on matters he takes a different view. He now decides that there was nothing he could do, and the child simply ran out on to the road without any warning. There is no other witness evidence available. In terms of the proposed legislation, the child’s action for damages will fail on the burden of proof, as the driver’s statement of fault would be inadmissible. The Apologies (Scotland) Bill goes much further than the law in some

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<sup>1</sup> Call for evidence on the Apologies (Scotland) Bill: Available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/88341.aspx> (visited January 2016)

<sup>2</sup> Under the Apologies (Scotland) Bill proposed by Ms Margaret Mitchell and before amendment, “apology” is defined as “any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains (a) an express or implied admission of fault in relation to that act, omission or outcome, (b) a statement of fact in relation to the act, omission or outcome, or (c) an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing recurrence.”

<sup>3</sup> Submissions received on the Apologies (Scotland) Bill: Available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/89281.aspx> (visited January 2016)

<sup>4</sup> Official Reports of the evidence sessions: Available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29847.aspx> (visited January 2016)

other jurisdictions. The Compensation Act 2006 includes a section on apologies in England and Wales but which does not prevent apology being used in evidence. Section two of the Act reads: ‘An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.’ Section two of that Act meets the principle of encouraging appropriate expressions of regret, whilst retaining the capability to use that expression where there is a clear acceptance of legal responsibility. If the Justice Committee is persuaded that there needs to be an encouragement to provide an apology, then the terms of that legislation will suffice.” (The Association of Personal Injury Lawyers)

- (2) “In our previous response to a consultation on the Bill, I was concerned about protecting factual statements and whether that was appropriate. However, on reflection, I think it is difficult to extract facts from other parts of the statement. Facts can also be separately established so including them in this protected conversation does not mean they will not be available in other areas.” (The Scottish Public Services Ombudsman)
- (3) “The distinction between the apology part of a statement and the acknowledgement of fault part (ie what might be an admission) and the extent to which these can be severed is the basic dilemma with this legislation. If courts can completely sever the words acknowledging fault then there is no point in the legislation because an expression of regret doesn’t need protection anyway. On the other hand, if the apology can be extended to any words, however connected, this may create a situation where important evidence is excluded. As Professor Robyn Carroll from University of Western Australia has pointed out, in *Robinson v Cragg*, a case from Alberta, Canada, the Master ordered that words of apology that incorporated an admission of fault in a letter be redacted but that admissions of fact were not protected by the apology legislation in that jurisdiction (Alberta). The definition in this Scottish legislation does go further than any

other similar legislation. Clause 3 extends the protection beyond express and implied admissions of fault to a statement of fact in relation to the act, omission or outcome that the person is sorry about (cl 3(b)), and to an undertaking to look at the circumstances giving rise to the act etc with a view to preventing a recurrence (Cl 3(c)). I am not entirely sure about extending the protection to any ‘statement of fact’ unless it is made clear that it must have a link with the apology – that is, that the person included the statement as part of the apology. I would like to see this made clearer because otherwise one runs the risk that in a case like *Robinson v Cragg* the entire letter would be excluded. I think the outcome in *Robinson v Cragg*, which left some of the letter intact and admissible is the correct outcome. In that case the letter included a sentence ‘I assure you that our registration of the Discharges was through inadvertence and I apologise for doing so’. The letter also contained some other admissions of fact. The Master redacted the sentence and the admissions of fault but retained the admissions of fact and held they were admissible because they were not combined with the apology. The definition of apology in the Alberta Evidence Act 2000 included (s 26) ‘an expression of sympathy or regret, a statement that one is sorry or other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate’. This is not significantly different in substance from the definition in the Scottish bill. The Alberta Act then provides that such an apology does not constitute admission of fault and ‘...shall not be taken into account in any determination of fault or liability’ and prevents it from being admissible. Again, this is very similar to s 1(a). Section 1(b) is broader and very protective. It would protect I think against voiding of insurance contracts, for example, which I think is a very important matter. Opinions differ on where the balance should be struck and the

best way to ensure the intention that the words connect with the apology.” (Professor Prue Vines, University of New South Wales)

10.7 The Scottish Government also expressed its views in a memorandum<sup>5</sup> and a letter from the Minister for Community Safety and Legal Affairs to the Convener of the Justice Committee<sup>6</sup>. The relevant views are extracted below:

- (1) “There is a concern that the benefits of hearing an apology will, in certain circumstances, not be sufficient to outweigh the potential injustice to pursuers in actions for damages. That injustice could arise in cases where an admission of fault or statement of fact is the only means of demonstrating liability for the harm caused but that admission is protected and so cannot be led in evidence because it is part of the statutory apology. If there is no other evidence available on liability, a pursuer would be unable to succeed in an action for damages for compensation...Although the Bill states that an apology as defined in clause 3 is not admissible as evidence, an admission of fault or statement of fact would be very close to an express admission. It is foreseeable that one party may seek to sever the admission or the statement of fact from the expression of regret in the courts...The Scottish Government supports the aim of the proposal which is to encourage and protect the giving of apologies by private and public bodies to achieve a better outcome for victims and to reduce the number of cases which result in litigation. We consider that the definition of apology needs some further consideration in order to ensure that it does not create any inadvertent injustice; that the application of the Bill to certain legal proceedings requires further consideration; and that the implications for

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<sup>5</sup> Available at [http://www.scottish.parliament.uk/S4\\_JusticeCommittee/Inquiries/20150501\\_SG\\_Memorandum.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20150501_SG_Memorandum.pdf) (visited January 2016)

<sup>6</sup> Available at [http://www.scottish.parliament.uk/S4\\_JusticeCommittee/Inquiries/20150617\\_MfCSLA\\_to\\_CG.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20150617_MfCSLA_to_CG.pdf) (visited January 2016)

insurance cover have been fully taken into account...Given the concerns with the proposed legislation, the Scottish Government maintain a neutral position on this legislation at this time.” (the memorandum)

- (2) “Although we agree that there is merit in encouraging a culture where apologies are readily provided this should not be at the expense of potential injustice to pursuers...People who wanted to rely on admissions of fault or fact or simple apologies will no longer be able to put them before the courts in civil proceedings, and courts would no longer be able to take into account evidential matters that they are currently able to consider. By defining apology in the manner proposed in the legislation, in my view, the benefit of hearing an apology may be outweighed by the inability to use this as evidence in any civil proceedings...That injustice could arise in cases where an admission of fault or statement of fact is the only means of demonstrating liability for the harm caused but that admission is protected and so cannot be led in evidence because it is part of the statutory apology. If there is no other evidence available on liability, a pursuer would be unable to succeed in an action for damages for compensation” (Annex to the letter from the Minister for Community Safety and Legal Affairs to the Convener of the Justice Committee)

10.8 In the light of the position taken by the Scottish Government, Ms Margaret Mitchell, a member of the Scottish Parliament who introduced the Bill, said this, “[h]aving listened carefully to what witnesses and the minister have had to say, I am persuaded that the wording of section 3(b) on statements of fact could be omitted from the bill.”<sup>7</sup> The above was also reported in the Stage 1 report of the Justice Committee of 11 September 2015 to the Scottish Parliament<sup>8</sup> (“Stage 1 report”).

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<sup>7</sup> Official Report of Meeting of the Justice Committee of the Scottish Parliament on 23 June 2015, p 6: Available at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10036> (visited January 2016)

<sup>8</sup> Available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/92121.aspx> (visited January 2016)



10.9 In the Stage 1 report, the Justice Committee set out its views at paragraph 66, “[t]he Committee notes the view of witnesses that individuals’ rights to pursue civil action could be compromised if, under the Bill, they are unable to draw on the evidence of an apology, whether that be simple apology, a statement of fact or admission of fault. While we understand that the member’s intention was to allow for the widest possible disclosure, particularly for victims of historical child abuse, we have strong concerns that these particular victims could face further evidential challenges in pursuing civil action. We therefore urge the member to consider how best a balance can be struck to ensure that there are no unintended consequences for victims, whilst ensuring that the legislation remains meaningful” and concludes at paragraph 106 that “[m]ost importantly, [they] must be reassured that individuals wishing to pursue fair claims are not going to be disadvantaged by the measures in the Bill.”

10.10 On 27 October 2015, at the debate in the Chamber of the Scottish Parliament, Ms Mitchell said as follows, “I have listened closely to the witnesses’ arguments, including those of the minister, about whether the effect of parts of the definition could possibly prevent an individual from securing compensation, particularly if a statement of fact in an apology was the only evidence available. I included statements of facts to try to encourage the fullest possible apology, but I am aware that their inclusion in the definition goes further than any other apology legislation. I have reflected on witnesses’ concern and can confirm that I am persuaded that the definition in the bill should be revised to exclude statements of facts.”<sup>9</sup> Mr Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, said this, “I am aware of the argument that those unintended consequences might apply only to a small number of cases and would only rarely disadvantage individuals... We cannot ignore the rights of claimants or pursuers who might need to draw upon an apology in their evidence base simply because such cases are likely to be few in number. Surely protecting the rights of minorities is at the heart of good law making.”<sup>10</sup>

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<sup>9</sup> Official Report of Meeting of the Scottish Parliament on 27 October 2015, p 35: Available at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10157> (visited January 2016)

<sup>10</sup> *Ibid*, p 54.

10.11 On 19 January 2016, the Apologies (Scotland) Bill was passed by the Scottish Parliament and there is no reference to statements of fact in the bill.

### **Analysis and response**

10.12 After considering the responses and comments including those specified above, as well as the latest development of the Apologies (Scotland) Bill, the Steering Committee has the following analysis and response.

10.13 The issue relating to statements of fact is admittedly a controversial one, as can be seen from the responses received and the debate of the Apologies (Scotland) Bill in the Scottish Parliament, because this issue would potentially affect the claimants' rights and has not been covered in the existing apology legislation enacted elsewhere. It is also relevant to note that the Apologies (Scotland) Bill passed by the Scottish Parliament contains no reference to statements of fact.

10.14 As far as we see, there are 3 alternative options which may be adopted to address this issue:

- (1) Statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and should be protected. The Court does not have any discretion to admit the apology containing statements of fact as evidence against the maker of the apology. ("First Approach")
- (2) The wordings regarding statements of fact are to be omitted from the apology legislation and whether the statements of fact should constitute part of the apology would be determined by the Court on a case by case basis. In cases where the statement of fact is held by the Court as forming part of the apology, the Court does not have any discretion to admit the statement of fact as evidence against the maker of the apology. ("Second Approach")

- (3) Statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and be protected. However, the Court retains the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances. (“Third Approach”)

10.15 Under the First Approach, statements of fact in connection with the matter in respect of which an apology has been made would form part of the apology and therefore would be protected by the apology legislation. Arguments for this approach have been set out in paragraph 5.36 of the Consultation Paper. As to the potential impairment on the claimants’ rights to seek justice, it is arguable that in some cases no apology whatsoever would be given but for the proposed apology legislation. Hence the claimant would not suffer any prejudice because he would not have received an apology (and the accompanying statements of fact) in the first place if there is no apology legislation. Viewed from this perspective, a proper balance has been struck. The advantage of the First Approach is clarity and certainty, in that people who intend to make apologies would know clearly in advance the legal consequence. Viewed from this angle, this is the approach which would best promote the objective of an apology legislation.

10.16 Under the Second Approach, whether statements of fact would form part of the apology depends on the circumstances, and is a question to be decided by the Court. There are views to the effect that as a matter of principle, relevant statements of fact should be admissible as evidence; however, whether the nexus between an apology and the accompanying statements of fact is so close that it should become part of the apology and therefore inadmissible depends on circumstances surrounding the making of the apology. This aspect has been discussed in paragraph 5.32 of the Consultation Paper in which the Canadian case of *Robinson v Cragg* was mentioned. There are also views to the effect that it is difficult, if not impossible, to draw the distinction between “fact” and “apology” in a piece of legislation which is subject to interpretation and therefore this issue should be left to be judged by the Court on a case by case basis. Further arguments have been set out in paragraph 5.37 of the Consultation Paper. The advantage of the

Second Approach is flexibility. However, such flexibility may be a double-edged sword in that it can also be perceived as uncertainty, and hence may be inconsistent with the ultimate objective of encouraging people to make apologies.

10.17 Under the Third Approach, generally the statements of fact accompanying an apology would form part of the apology and therefore would be inadmissible as evidence against the maker of the apology. However, the Court would retain the discretion to grant leave to allow the claimant to adduce such evidence against the maker of the apology in certain circumstances such as when those statements of fact would be the only evidence available to the claimant. The flexibility provided under this approach could address the concern that some claims may be stifled for lack of evidence and that the right to a fair hearing may be denied for these claimants. However, at the same time, the flexibility would render the legislation uncertain which may considerably affect the efficacy of the legislation or even defeat the whole purpose of the legislation. It is not surprising that given such uncertainty (especially as to when and how would the Court exercise its discretion), a prudent lawyer would err on the safe side and advise the clients not to apologise.

10.18 When deciding which of the above alternative options should be adopted, one important issue that should be carefully considered is whether there would be any possible infringement of a claimant's right to a fair hearing. This right, though can be restricted by laws, is guaranteed by Article 10 of the Hong Kong Bill of Rights (which corresponds with Article 14 of the International Covenant on Civil and Political Rights) and is entrenched by Article 39 of the Basic Law. In the rare situation where an apology that includes statements of fact is the only evidence which can establish liability, the exclusion of such statements of fact as evidence may effectively stifle the claim and this unintended consequence may arguably interfere with the claimant's right to a fair hearing. To ascertain whether the apology legislation would infringe the fundamental rights of the claimants, the following questions should be considered: (1) whether the infringement or interference pursues a legitimate societal aim; (2) whether the infringement or interference is rationally connected with that legitimate aim; and (3) whether the infringement or interference is no more than is necessary to accomplish that legitimate aim.

10.19 As noted above, this issue is admittedly a controversial one. Accordingly, at the moment, the Steering Committee has yet to reach a final conclusion as regards the approach to be taken in addressing this issue. Therefore, in the draft Apology Bill in Annex 2, the definition of apology would only provisionally include statements of fact. The Steering Committee stress that this aspect is open for consultation and public views are sought.

### **Final Recommendation**

10.20 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 it. The Steering Committee will only make a final decision on this issue after it has a chance to consider the views to be received in the 2<sup>nd</sup> round consultation.

## *Chapter 11: Final Recommendations and 2<sup>nd</sup> Round Consultation*

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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.

## **2<sup>nd</sup> 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](mailto: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 2<sup>nd</sup> 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.



## *Chapter 12: Introduction of the Draft Apology Bill*

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12.1 Similar to the apology legislation enacted in other jurisdictions, the draft Apology Bill is relatively short. It contains 11 clauses and a schedule covering the following main areas:

- (1) The definition of an apology is set out in clauses 3 and 4 of the draft Apology Bill<sup>11</sup>;
- (2) The proceedings in which the proposed apology legislation would be applicable are set out in clauses 3 and 5 of the draft Apology Bill<sup>12</sup>;
- (3) The effect of an apology is set out in clauses 6 and 7 of the draft Apology Bill. In gist, an apology does not constitute admission of fault or liability, it cannot be taken into account in determining fault, liability or any other issue<sup>13</sup> to the prejudice of the apology maker and it is not admissible as evidence in determining fault, liability or any other issue to the prejudice of the apology maker;
- (4) The effect of an apology on Limitation Ordinance (Cap. 347) is set out in clause 8 of the draft Apology Bill<sup>14</sup>;
- (5) The effect of an apology on contracts of insurance and indemnity is set out in clause 9 of the draft Apology Bill<sup>15</sup>;
- (6) For avoidance of doubt, clause 10 of the draft Apology Bill provides that the proposed apology legislation would not affect discovery or similar procedure and would not affect certain provisions in the Defamation

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<sup>11</sup> These clauses implement the Final Recommendation 3 of the Steering Committee that the apology legislation shall cover full apologies and the Final Recommendation 8 that 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.

<sup>12</sup> These clauses implement the Final Recommendation 2 of the Steering Committee that the apology legislation shall apply generally to civil proceedings and other forms of non-criminal proceedings including disciplinary and regulatory proceedings with exceptions.

<sup>13</sup> This would include issues such as appropriate remedies or sanctions, and credibility. Reference has been made to section 1 of the Apologies (Scotland) Bill as passed.

<sup>14</sup> This clause implements the Final Recommendation 5 of the Steering Committee that 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.

<sup>15</sup> This clause implements the Final Recommendation 6 of the Steering Committee that 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.

Ordinance (Cap. 21) in which an apology is relevant as defence or for mitigating damages;

- (7) Clause 11 of the draft Apology Bill provides that the proposed apology legislation applies to the Government<sup>16</sup>; and
- (8) The list of excepted proceedings to which the proposed apology legislation does not apply is set out in the schedule of the draft Apology Bill<sup>17</sup>. Solely by way of example, disciplinary proceedings conducted by the Correctional Services Department under rules 57 to 65 of the Prison Rules (Cap. 234 sub. leg. A) have been included in the schedule as excepted proceedings. Certain fact-finding proceedings in which there would be no determination of liability are also included. Examples of proceedings of this nature are proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86) and proceedings conducted under the Coroners Ordinance (Cap. 504).

12.2 The draft Apology Bill with an Explanatory Memorandum is annexed at Annex 2. Regarding the 2 issues which are subject to consultation, they have been provisionally set out in the draft Apology Bill in square brackets. Members of the public and stakeholders are invited to express further views on them.

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<sup>16</sup> This clause implements the Final Recommendation 4 of the Steering Committee that the apology legislation shall apply to the Government.

<sup>17</sup> The schedule of excepted proceedings implements the Final Recommendation 2 of the Steering Committee that the apology legislation shall apply generally to civil proceedings and other forms of non-criminal proceedings including disciplinary and regulatory proceedings with exceptions.

## *Annex 1: List of Respondents to the Consultation*

Responses were received from the following respondents, arranged in alphabetical order:

1. Buildings Department
2. Prof Burd, Andrew
3. Mr Chow, Daniel, DAB Mediation Affairs Group, Convener; New Home Association, Mediation Consultant; Community Mediation Services Association, Founding Chairman
4. Civic Party
5. Companies Registry
6. Construction Industry Council
7. Consumer Council Hong Kong
8. Correctional Services Department
9. Driver Trett
10. Equal Opportunities Commission
11. Estate Agents Authority
12. Food and Health Bureau
13. Herbert Smith Freehills LLP
14. Home Affairs Department
15. Hong Kong Academy of Medicine
16. Hong Kong Bar Association
17. Hong Kong Chinese Women's Club College
18. Hong Kong Construction Arbitration Centre, Limited
19. Hong Kong Dental Association (Ltd)
20. Hong Kong Family Welfare Society
21. Hong Kong Federation of Women
22. Hong Kong General Chamber of Commerce
23. Hong Kong Human Rights Commission
24. Hong Kong Human Rights Monitor
25. Hong Kong Institute of Arbitrators
26. Hong Kong Institute of Certified Public Accountants
27. Hong Kong Mediation Alliance and Professional Mediation Consultancy Centre
28. Hong Kong Mediation and Arbitration Centre
29. Hong Kong Mediation Centre

30. Hong Kong Monetary Authority
31. Hong Kong Police Force
32. Hong Kong Professionals and Senior Executives Association
33. Hong Kong Society of Accredited Mediators
34. Hong Kong Society of Certified Insurance Practitioners
35. Hong Kong Society for Healthcare Mediation
36. Hospital Authority
37. Ms Hung, Kit May, Beatrice, Registered Psychologist / Accredited Mediator
38. Inland Revenue Department
39. Dr Lam, David
40. Legal Aid Department
41. Liberal Party
42. Ms Lui, Ming, Rosita, Accredited Mediator
43. Mandatory Provident Fund Schemes Authority
44. Medical Protection Society
45. Office of Raymond Wong Yuk-man, Legislative Councillor
46. Office of the Commissioner of Insurance
47. Office of The Ombudsman Hong Kong
48. Office of the Privacy Commissioner for Personal Data, Hong Kong
49. Proletariat Political Institute
50. Registration and Electoral Office
51. Securities and Futures Commission
52. Social Welfare Department
53. Society for Community Organization - Patient's Rights Association
54. The CCSS Mediation Service Centre
55. The Chinese General Chamber of Commerce
56. The Council of Mediation Development
57. The Council of Social Development
58. The Federation of Medical Societies of Hong Kong
59. The Hong Kong Association of Banks
60. The Hong Kong Chinese Women's Club
61. The Hong Kong Confederation of Insurance Brokers
62. The Hong Kong Council of Social Service
63. The Hong Kong Federation of Insurers
64. The Hong Kong Institution of Engineers
65. The Hong Kong Medical Association
66. The Land Registry

67. The Law Society of Hong Kong
68. The Medical Council of Hong Kong
69. The New Medico Legal Society of Hong Kong
70. Mr Wu, Anthony, Barrister
71. Mr Yeung
72. Anonymous
73. Anonymous
74. Anonymous
75. Anonymous

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## **Apology Bill**

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# A BILL

## To

Provide for certain legal matters relating to apologies.

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 facilitating the resolution of disputes.

### 3. Interpretation

In this Ordinance—

*apology* (道歉)—see section 4;

*applicable proceedings* (適用程序) means proceedings in relation to which this Ordinance applies under section 5.

### 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 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) For the purposes of this Ordinance, an apology does not include one that is made by a person in—
  - (a) a document filed or submitted in applicable proceedings; or
  - (b) a testimony, submission, or similar oral statement, given at a hearing of applicable proceedings.
- (5) In this Ordinance, a reference to an apology made by a person includes an apology made on behalf of the person.

## **5. Applicable proceedings**

- (1) This Ordinance applies in relation to—
  - (a) judicial, arbitral, administrative, disciplinary and regulatory proceedings (whether or not conducted under an enactment); and
  - (b) other proceedings conducted under an enactment.
- (2) However, this Ordinance does not apply in relation to—
  - (a) criminal proceedings; or
  - (b) proceedings specified in the Schedule.

## **6. Effect of apology for purposes of applicable proceedings**

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.

**7. Evidence of apology not admissible**

- (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) Subsection (1) applies despite anything to the contrary in any rule of law or other rule concerning procedural matters.

**8. 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.

**9. 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 that is available, or would but for the apology be available, to the person in connection with the matter under a contract of insurance or indemnity.
- (2) Subsection (1) applies despite anything to the contrary in any rule of law or agreement.

**10. 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; or
- (b) the operation of section 3, 4 or 25 of the Defamation Ordinance (Cap. 21).

**11. Application to the Government**

This Ordinance applies to the Government.

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## Schedule

[s. 5]

### **Proceedings in Relation to Which this Ordinance Does Not Apply**

*[For example:*

1. Proceedings provided in rules 57 to 65 of the Prison Rules (Cap. 234 sub. leg. A) in relation to an offence alleged to be committed by a prisoner against prison discipline.
2. Proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86).
3. Proceedings conducted under the Coroners Ordinance (Cap. 504).]

### 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 dealing with various legal matters that may be of concern to potential apology-makers, this Bill seeks to promote and encourage the making of apologies with a view to facilitating the resolution of disputes.

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 5.
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 included in the meaning of the apology. However, an apology does not include one that is made in certain documents or oral statements in applicable proceedings so that the apology may be taken into account in the proceedings if the apology-maker so decides.
6. Clause 5 enumerates the *applicable proceedings*, namely, proceedings in relation to which the Bill applies. They are judicial, arbitral, administrative, disciplinary and regulatory proceedings, and other proceedings conducted under an enactment. However, the Bill does not apply in relation to criminal proceedings. Some specific types of proceedings are also excluded from the application of the Bill. They are listed in the Schedule.

7. Clause 6 precludes a person's apology from constituting an admission of the person's fault or liability, or 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.
8. 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 7 alters the position by making evidence of a person's apology 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).
9. 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 causes 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 8 precludes an apology from constituting an acknowledgment for the purposes of that section 23, and hence from extending the relevant limitation period.
10. 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 9 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 available to the person under a contract of insurance or indemnity.
11. Clause 10 makes it clear that discovery or a similar procedure in applicable proceedings is not affected by the Bill. Neither does it affect the operation of the provisions involving apologies in the Defamation Ordinance (Cap. 21).

12. Clause 11 applies the Bill to the Government.