



CONSULTATION ON ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG

SUBMISSIONS

Introduction

1. In June 2015, the Steering Committee on Mediation ("Steering Committee") chaired by the Secretary for Justice issued a *Consultation Paper on Enactment of Apology Legislation in Hong Kong* ("the Consultation Paper") for views.
2. The Law Society has reviewed the Consultation Paper. The Consultation Paper introduces the concept of apology legislation and sets out the possible implications arising from apologies. The Law Society notes with interest the research by the Steering Committee on the development of apology legislation in various jurisdictions, and the pros and cons of enacting an apology legislation.
3. The consultation lasts for six weeks. Given the importance and the ramifications arising from an apology legislation, the Law Society considers the consultation period to be short. A request has been made for time for submission, but we were given only a time extension of a week. As only a short time extension has been agreed upon, the comments canvassed below could only be succinct. We expect to be further engaged if and when a draft bill on apology legislation is released, and that at that stage a longer consultation could be arranged.
4. Our comments on the Consultation Paper are set out in the following.

Specific Responses to the Recommendations for consultation

Recommendation 1

An apology legislation is to be enacted in Hong Kong.

Law Society's Response:

5. Subject to the caveats and the observations set out below, the Law Society is in support of the enactment of apology legislation in Hong Kong.

Recommendation 2

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

Law Society's Response:

6. The Law Society agrees that the apology legislation should be applicable to civil proceedings. As to whether the legislation should also apply to other forms of non-criminal proceedings including disciplinary proceedings, at this stage we have no views.

Recommendation 3

The apology legislation is to cover full apologies.

Law Society's Response:

7. The answer to this question essentially is a matter of policy and as such the Law Society does not have comment.

8. Having said the above, we wish to highlight the following for consideration for policy formulation.
9. The Consultation Paper recognises the dichotomy between “full apology” and “partial apology” (§4.3 of the Consultation Paper). The Law Society understands that "full apology" refers to an apology accepting liability or fault which would be legally protected in that such an apology is inadmissible as evidence to infer liability in court proceedings (§6.6).
10. A "partial apology" on the other hand refers to an apology which does not admit liability or fault, for example, *"an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgement of fault by that person"* or *"an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter; which does not contain an admission of fault in connection with the matter"*. A partial apology is not regarded as an admission of liability or fault. It would be protected, but not the admission of liability or fault (§6.8).
11. 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).
12. 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*.

13. 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.
14. Consider a typical medical negligence claim:-
- (a) There are investigations in the aftermath of the incident. Interviews are conducted and investigation reports are prepared. Under the proposed apology legislation, irrespective of whether a full or partial apology is rendered, if views on the cause of the incident and/or investigation reports are offered in tandem with an apology, these reports and views would become "without prejudice" communication, and are thus precluded from discovery. How could the procedural rights of the victims or their families on e.g. discovery be protected?
 - (b) The non-disclosure regime conferred under the apology legislation could be abused by parties and if so, are there to be remedies?
 - (c) Consider that a victim or the family has been given an apology with suggestions as to what has gone awry in the medical procedures, but there are no other independent source of evidence on the cause or course of the incident. As the information accompanying the apology could not be disclosed, how could a plaintiff plead his case – could he still rely on e.g. the doctrine of *res ipsa loquitur*, given that the plaintiff is required to sign a statement of truth on his pleadings?
 - (d) If a doctor apologizes with admission of liability openly or in front of the press, but subsequently he chooses to defend a medical negligence claim and he defends the allegations successfully in a court, how will the victim and the public perceive the result of the successful defence? Would the doctor be viewed to be a hypocrite? Would the whole litigation cause a backlash on the medical doctor, the hospital (if involved) or the medical profession?
 - (e) What if the medical doctor has done nothing which caused the mishap but the angry yet innocent patient or the family members insist upon an

apology from the doctor/hospital. Armed with the protection of the apology legislation, the medical doctors might be more inclined to or tempted to offer an apology. Would these “convenient” apologies negatively impact upon the morale of the medical profession, and that the apology legislation have unwittingly become counter-productive?

15. We also wish to point out the following, and invite views from the Steering Committee:
 - (a) There are impacts to the parties, legally and emotionally, if an apology is not accepted. The non-acceptance of an apology could drive a deeper wedge between the parties and make settlement discussion to be more difficult and unlikely, in particular in cases with emotive matrix, such as personal injuries claims. A non-acceptance of apology might also escalate the settlement quantum.
 - (b) Have the factors of emotion of the parties and local culture been taken into account in the consultation?
 - (c) The Consultation Paper has surveyed those jurisdictions which have legislation on the protection of apologies. What is the status of mediation legislation in these jurisdictions? Do they, for example, encourage or mandatorily require mediation and also do they have a pre-action protocol on mediation? If they do have a mandatory mediation regime, how much use would the apology legislation have, in terms of encouraging settlement and disposal of claims?
16. Apology could have *negative* effects on the on-going dispute resolution process - for example, it could unhelpfully enlarge expectation by the claimants. It could also cause the claimants further harm by building up an expectation which ultimately is not fulfilled (for whatever reasons).
17. The Steering Committee might also wish to note that the proposed apology legislation should not be abused to degrade the virtue and value of a true apology in the society of Hong Kong. For example, if only a technical apology is prepared for the sake of tactics, would that apology achieve the purposes of facilitating settlement and avoiding the escalation of disputes? On the other hand, if an apology is too general to become insincere, would

that help dissipate the emotion of the parties, or would it instead provoke the emotions of the parties?

18. Apart from "full apology" and "partial apology", the Law Society notes the Steering Committee is yet to reach a conclusion or make a recommendation on whether the apology legislation should also apply to "statements of facts accompanying apology" (§5.38). The matters involved are intriguing and call for considerations of a range of kindred issues, such as what should be the "statements of facts made in the context of the apology which could be used to determine fault or wronging" (§4.61)? The Apologies (Scotland) Bill being considered in Scotland could be inspirational (§4.55 - §4.68), as the Bill clearly and explicitly defines apology to include a statement of fact (clause 3). It is quite unfortunate that Hong Kong could not wait for or borrow the experience from the Scotland.

Recommendation 4

The apology legislation is to apply to the Government.

Law Society's Response:

19. Agree.

Recommendation 5

The apology legislation expressly precludes an admission of a claim by way of an apology from constituting an acknowledgement of a right of action for the purpose of the Limitation Ordinance.

Law Society's Response:

20. The Law Society has no views at this stage.

21. 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. .

Recommendation 6

The apology legislation expressly provides that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology.

Law Society's Response:

22. 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.

Recommendation 7

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

Law Society's Response:

23. Agree.

Other observations

24. We wish to draw the attention of the Steering Committee to the following, i.e.
- (a) the apology legislation should have a clear and unambiguous definition on “apology” and
 - (b) the apology legislation should not affect the existing legal rights of the parties in civil proceedings.
25. The compelling of a party to make an apology by the court (e.g. under the Disability Discrimination Ordinance (Cap. 487), as in the Court of Final Appeal judgment in *Ma Bik Yung v. Ko Chuen* [2002] 2 HKLRD 1), is not within the ambit of this consultation. Whether this power should be enlarged and be extended is worthy of further consideration. We ask the Steering Committee to review this matter in due course.

Conclusion

26. The Law Society acknowledges the main objective of the proposed apology legislation is to promote and encourage the making of apologies, in order to facilitate the amicable settlement of disputes by clarifying the legal consequences of making an apology (§1.12). This is consistent with the Judiciary's directions of promoting the use of mediation and other means to resolve disputes in an amicable manner (§3.14).
27. We are in principle in support of the enactment of the apology legislation, but at the same time we have highlighted in the above various issues which call for further consideration.
28. We consider that the apology legislation could have significant implications. When there is a second stage of consultation, the consultation should be thorough, and different sectors should be engaged. For personal injuries claims where apology legislation could have wide impacts, insurance sectors and those organizations that work closely with injured victims and families of deceased should continually be consulted. There should also be a longer consultation period.

29. It also goes on without saying that, apart from the legislative process, the Government should also be prepared to educate the public on this new regime, if and when introduced.

The Law Society of Hong Kong
7 August 2015