# SECOND ROUND CONSULTATION ON ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG

## SUBMISSIONS

## SUMMARY


1. The Law Society considers that the proposed legislation goes beyond its stated object. Our concerns raised in the previous consultation have not been addressed, sufficiently or at all.

2. We do not agree that the proposed apology legislation should be applicable to the Solicitors Disciplinary Proceedings.

3. Apologies made in settlement efforts, as rendered in mediation, should be protected. The experience in the Scotland in enacting the apology legislation should carefully be looked into.

4. We express no views on the drafting of the apology bill, at this stage.


## INTRODUCTION

5. In late February 2016, the Steering Committee on Mediation ("Steering Committee") chaired by the Secretary for Justice launched a second round consultation on its proposal to enact an apology legislation in Hong Kong. A consultation report entitled "*Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation*" ("the Consultation Report") was released. In the Consultation Report, the Steering Committee among other things sets out its final recommendations and the consultation questions.

6. The Law Society has reviewed the Consultation Report and in response thereto provides the following comments.

7. Our general observations will first be set out, followed by specific comments on the consultation questions in the Consultation Report.

## GENERAL COMMENTS

8. The current consultation is the second consultation by the Steering Committee on the proposed enactment of an apology legislation in Hong Kong. For the first consultation conducted in 2015, the Law Society has in August 2015 responded and provided a submission. We have in that submission highlighted several issues for the attention of the Steering Committee. A copy of the above submission can be found on our website[1].

9. The issues we have raised in the first round consultation include the inadequacies of the underlying research relied upon by the Steering Committee on full apology and the lack of analysis in the local context to support the proposed enactment of the legislation. We have queried whether differentiation has been made between jurisdictions with a regime for mandatory facilitation of mediation and those without. We have asked the Steering Committee the question that if those foreign countries have a regime that mandatorily requires mediation to resolve disputes, how much use an apology legislation would have, in terms of encouraging settlement and disposal of claims.

10. In the Consultation Report released in this consultation, we note that we have been quoted in few paragraphs (§§ 5.4, 7.4 and 8.2), but have not seen any specific response from the Steering Committee to the above questions and our concerns.

11. In this second consultation, we would have anticipated a fuller discussion after the Steering Committee has considered the responses from the stakeholders. To the contrary, only three questions are posed in the consultation. They relate to excepted proceedings, the protection of statement

[1] http://www.hklawsoc.org.hk/pub_e/news/submissions/20150807.pdf

of facts and a draft bill. These three questions are of course relevant, but the scope of this consultation is inappropriately and unfortunately restrictive. By limiting itself to very specific questions, the Steering Committee has wasted an opportunity to usefully source views in this complex matter.

12. We repeat the issues we have raised in our previous submission on the matter. We also suggest a wider spectrum of stakeholders, including, for example, the victims groups in personal injuries claims and the relevant NGOs, be consulted in the process.

## COMMENTS ON THE CONSULTATION QUESTIONS

13. Three consultation questions are set out on page 76 of the Consultation Report. These relate to:

    (a) excepted proceedings to which the proposed apology legislation shall not apply;
    (b) whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation; and
    (c) the draft Apology Bill by the Department of Justice.

*Question 1: Excepted proceedings to which the proposed apology legislation shall not apply*

14. The Steering Committee makes a recommendation that:

> "*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."*

15. As far as the Law Society's solicitors disciplinary proceedings are concerned, these proceedings are to maintain the standards of the legal profession and to

protect the public's interest. The powers of the Solicitors Disciplinary Tribunal and the Tribunal Convenor are set out in the Legal Practitioners Ordinance (Cap.159) and its subsidiary legislation.

16. In the above context, the proposed apology legislation is not relevant to solicitors disciplinary proceedings. This is because the rationale of the proposed legislation to facilitate an early and amicable settlement has no application to the disciplinary proceedings themselves. Disciplinary proceedings are initiated by the Law Society as complainant against any person who is, or was at the relevant time, a solicitor, a registered foreign lawyer, a trainee solicitor or an employee of a solicitor or a registered foreign lawyer of Hong Kong for alleged professional misconduct. Examples of professional misconduct include breaches of any of the provision of the Legal Practitioners Ordinance (Cap.159), Practice Directions or circulars issued by the Law Society, principles of professional conduct contained in the Hong Kong Solicitors' Guide to Professional Conduct and other rules, principles and guidelines governing professional conduct.

17. While such proceedings may have been commenced as a result of a complaint from an aggrieved client of a firm of solicitors, there are often the occasions when proceedings are initiated following an inspection or inquiries by the Law Society of a firm of solicitors.

18. Genuine remorse by a solicitor is already a matter that is taken into account by a Tribunal in determining what findings and orders should be made in a specific case. This approach is fair and proportionate in the circumstances.

19. Further, the primary objective of the Tribunal's proceedings is to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour. For the most serious solicitors disciplinary proceedings, the tribunal will adopt the criminal standard of proof. By analogy to criminal proceedings, to which the apology legislation would have no application, we query the appropriateness to include disciplinary proceedings into the legislation.

20. In our views, the policy objectives of public protection, the maintenance of public confidence in the legal profession and upholding proper standards of behaviour outweigh any potential benefit elsewhere in applying apology

legislation to the proceedings of the Solicitors Disciplinary Tribunal.

21. In any event, in our experience, apologies are rarely sought or given by the parties.

22. We are on the other hand not aware of any significant body of academic research that supports a conclusion that apology legislation could materially enhance the early resolution of disciplinary disputes.

23. We have been in correspondence with the Law Society of England and Wales on the experience of their apology legislation in the context of solicitors disciplinary proceedings. We were given to understand that the relevant statutory provision (viz. section 2 of the Compensation Act 2006) has no application to professional disciplinary purposes, being itself limited to civil claims in negligence or breach of duty.

24. We were also advised that the Legal Ombudsman in the UK has express power, in considering redress for poor service, to direct a practitioner to make an apology, which in some cases is all that the claimant wants. However, this will follow a formal finding of poor service after investigation. The facts determined by Legal Ombudsman would be relevant and potentially admissible in disciplinary proceedings; the fact that a solicitor had complied with a direction to apologize would not add anything to the factual findings.

25. At any rate, apologies and any accompanying material in the UK could be admissible in the Tribunal's discretion because the strict rules of evidence do not apply. It would be a matter of fact for decision by the Tribunal as to whether the apology is relevant to the issues to be decided, but anything involving an admission of fault would unquestionably be regarded as relevant. An apology thus has no particular status in disciplinary proceedings.

26. We are still researching and considering experiences in other jurisdictions. We may in due course supplement the above views where relevant.

27. We therefore ask that the solicitors disciplinary proceedings be exempted.

*Question 2: Whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation*

28. This matter may raise some controversies.

29. We acknowledge the view that a bare apology itself without giving any statements of fact may lack sincerity; an apology accompanied with statement of facts tends to make the apology more effective and sincere.

30. There are suggestions that statements of fact conveyed in an apology could provide important material facts that are of probative value to the related civil proceeding, and that instead of granting a blanket protection, the admissibility should better be left for the Court to decide. We do not agree to this suggestion, as it clumsily leaves a grey area, which could lead to satellite litigations. Instead of promoting settlement, this suggestion creates uncertainty and invites unnecessary arguments between parties and in court. It defeats the purpose of the proposed apology legislation.

31. On this issue of litigation, we add that

    (a) if the legislation does not allow a partial apology to be adduced as evidence, this will almost invariably introduce arguments and litigation – on which part of the open statement is "expression of regret, sympathy or benevolence in connection" (clause 4(1) of the Bill) and which part is not. That could be a very difficult if not an impossible question, given the almost limitless factual matrix that could arise in different situations.

    (b) if the legislation is to cover full apologies (see clause 4(3) of the Bill), thus rendering them to be inadmissible as evidence, a witness at the time of a trial can testify in the witness box a version of event which could be completely different from or opposite to what he has said openly in an apology. As we have pointed out in our last submission, this could be hypocritical (§ 14(d), our submission dated 7 August 2015). Would that enhance settlement? Or would that instead generate ill-feelings between parties or even lead to more litigation on e.g. what has been said and what has not been said on the relevant occasions?

(c) the legislation is silent on the responses to apologies – what if a receiving party, in response to an apology, says "That is okay"? Are these statements and other responses (both verbal and non-verbal) admissible? What are their status and their evidential weights?

(d) constitutionally speaking, could the claimants or victims have a fair hearing, if they cannot rely at trial on any admission or statement of fact made by the apologizing party on an open basis?

32. We feel obliged to point out that the object of the Bill is *'to promote and encourage the making of apologies with a view to facilitating the resolution of disputes'* (clause 2). This object, insofar as the facilitating of resolution of disputes is concerned, is commendable, and is therefore supported in principle. However, the drafting appears to go beyond the object. Instead of confining itself to settlement efforts, it appears literally to render inadmissible, for example, statements made at the time of an accident, which are not made in the course of any such settlement efforts. That could then introduce debates as to whether words spoken are apology or not (e.g. are admission not apology). This is an entirely different issue. It could lead to exclusion of evidence presently admissible and of importance. It makes sense for apologies, including statements of facts accompanying them, to be protected from admissibility when made as part of settlement efforts. It is not a rationale which applies to *res gestae* statements or to admissions made outside the context of settlement efforts. The object is that apologies made in a settlement effort, as in without prejudice negotiations or mediation, should be protected.

<u>Scotland Legislation</u>

33. The Steering Committee advised that the Apologies (Scotland) Bill has been passed by the Parliament on 19 January 2016 (§10.11 Consultation Report). In the Consultation Report, the Steering Committee quoted an extract of the Stage 1 Debate in the Chamber of the Scottish Parliament on 27 October 2015 (§ 10.10, *ibid*).

34. There are other passages in the above debate which have not been quoted and which we consider should be brought up in this consultation. For instance, Ms Margaret Mitchell (who introduced the Scotland Bill) in the same debate said[2]

> *"Some concern has been expressed that making an apology inadmissible in civil proceedings could prejudice a pursuer's future case. However, as the Massachusetts experience makes plain and as various witnesses have confirmed, that places too much emphasis on the assumption that the majority of individuals automatically wish to pursue a claim in court. It also downplays the potentially life-altering benefits of an apology.*
>
> *As the Scottish Human Rights Commission, the Law Society of Scotland and Prue Vines—the academic expert on apologies—state from their experience, the pursuers are not prejudiced because, in most cases, no apology would be forthcoming if it was admissible in civil proceedings. I hope that those observations help to allay any concerns that members have about the issue."*

35. What is worth noting from the above is the wide consultation and researches the Scottish Parliament has been able to receive in the scrutiny of their bill.

36. Stage 2 of the parliament debate on the Apologies (Scotland) Bill took place on 8 December 2015. In the Stage 2 debate, the Minister for Community Safety and Legal Affairs Mr Paul Wheelhouse explained why the Scotland has at that (late) stage agreed the definition of apology should be revised to exclude the statement of facts. Among other things, Mr Wheelhouse said[3]

> *"Making expressed or implied admissions of fault inadmissible because they are preceded by an expression of regret would not strike an appropriate balance. Some jurisdictions, including New South Wales, on whose legislation the bill is based, have largely replaced the common law of negligence with statutory no-fault compensation schemes. In such a context, apologies legislation does not present the same challenges. When*

[2] http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10157&i=93671#ScotParlOR

[3] http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10263&mode=pdf

*fault is not at issue, apologising for causing injury does not put the person who caused the injury in a worse position. As I noted, making admissions of fault inadmissible as evidence in a largely common-law-based adversarial system presents concerns about access to justice for pursuers. That was clear from the evidence from the Faculty of Advocates and the Association of Personal Injury Lawyers at stage 1 [of the Parliament debate].*

*Ronald Conway of APIL explained that*

*"The first thing that any justice system has to do is to get at the truth." If "admission of fault" was retained in the definition of an apology, it would, in his words, remove an*

*"extremely powerful and persuasive piece of evidence."— [Official Report, Justice Committee, 9 June 2015; c 5.]*

*He gave the example of a road traffic accident, but there are other scenarios where injustice could arise in cases where an admission of fault was the only means of demonstrating liability for the harm caused. A pursuer would be unable to succeed in an action for damages if "fault" remained part of the definition.*

*As I explained to the committee previously, one of my main concerns was about the evidential hurdles that survivors of historical child abuse can face when they seek to progress a court action. Preventing the use of an admission of fault in the way proposed in the bill could add to their evidential burden.*

*...*

*In its stage 1 report, the committee made it clear that it must be reassured that individuals who wish to pursue fair claims will not be disadvantaged by the measures in the bill. In an effort to work constructively with Margaret Mitchell, I have undertaken further inquiries into the impact of protecting a simple apology, which is what we would get if the definition was amended to remove references to "fault" and "fact". Having listened to stakeholders, I have been persuaded that, if the definition is amended to remove "fault" and "fact" and the necessary exceptions are provided for in section 2, the concerns about access to justice that have been raised*

*will be addressed. I trust that, if amendments 10 and 1 are agreed to, they will provide the committee with sufficient reassurance that the concerns about access to justice that were voiced during stage 1 have been addressed."*

37. The above references are absent from the Consultation Report. They are relevant to the discussion. We ask that the above and the rationales underlining the U-turn in the legislation process of the apology bill in the Scotland be closely examined and analysed *in the local context*, and *together with those issues we have raised in the above paragraphs*.

*Question 3: The draft Apology Bill*

38. We express no views, at this stage, on the drafting in the Bill.

**CONCLUSION**

39. Making an apology is not rare in the mediation context and/or without prejudice negotiations. There is a legal framework currently in place to encourage settlement by making apologies. For example, an apology rendered in the course of mediation communication, is confidential and is protected under the Mediation Ordinance (Cap.620). Those in general could not be disclosed unless in exceptional circumstances.

40. The objective of the proposed apology legislation i.e. to promote and encourage the making of apologies with a view to facilitating the resolution of disputes is laudable. However, whether the proposed legislation could deliver the above objective and provide incentives to make apologies and thus reduce litigation calls for further analysis.

**The Law Society of Hong Kong**
**26 April 2016**