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### Enactment of apology legislation in Hong Kong: Report and second round consultation

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# **CONSULTATION PAPER**

## **ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG**

This Consultation Paper is also published online at:

*<http://www.doj.gov.hk/eng/public/apology.html>*

This Consultation Paper is prepared by the Steering Committee on Mediation (“Steering Committee”) chaired by the Secretary for Justice. The views and recommendations in this Consultation Paper are published with a view to facilitating comments and discussions. They do not represent the final views of the Steering Committee.

The Steering Committee invites comments on the matters raised in this Consultation Paper by 3 August 2015. All correspondence (marked “Apology Legislation”) should be addressed to:

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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 Consultation Paper. 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.

# CONSULTATION PAPER

## ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG

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## *Preface*

1. In the report published by the Working Group on Mediation of the Department of Justice in 2010, it was recommended, among others, that the question of whether there should be an apology ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement deserves further consideration. In 2012, the Secretary for Justice established the Steering Committee on Mediation (“Steering Committee”) with a view to further promoting the development of mediation in Hong Kong. The Regulatory Framework Sub-Committee is a sub-committee set up under the Steering Committee and it has been tasked to consider whether there is a need to introduce apology legislation in Hong Kong.

2. On 26 February 2013, the Regulatory Framework Sub-committee formed a Working Group on Apology Legislation. The Working Group on Apology Legislation, which was instrumental in the completion of this Consultation Paper, held a total of 7 meetings during the period from 26 February 2013 to 17 February 2015 to consider the matter. The group consists of the following members, and we are grateful to the contribution made by each of them:-

Chairman: Professor Nadja Alexander  
Members: Dr Dai Lok Kwan, David, JP  
Professor Leung Hing Fung  
Mr Iu Ting Kwok  
Dr Chiu Shing Ping, James

The Working Group on Apology Legislation was assisted by the Mediation Team of the Department of Justice which provided secretariat support, including drafting and legal research.

3. In preparing this Consultation Paper, Professor Robyn Carroll of the University of Western Australia was consulted and we are grateful for her valuable insights and comments. Needless to say, we are also grateful for the assistance and support provided by the members of the Regulatory Framework Sub-committee and each of our members of the Steering Committee. The lists of members of the Steering Committee and its Regulatory Framework Sub-committee can be found at **Annex 1** and **Annex 2** respectively.

4. This Consultation Paper consists of 7 chapters. Chapters 1 and 2 introduce the concept of apology. Chapter 3 explains the legal significance of apology under the existing law (except considerations which are only relevant to criminal law). Chapter 4 gives an introduction of the history and development of apology legislation in other relevant jurisdictions and covers the details of the apology legislation (including an apology bill in Scotland) in most of the common law jurisdictions. Chapter 5 discusses the pros and cons of apology legislation and the various issues identified from overseas experience. Chapter 6 contains further discussion of the issues and the recommendations. Chapter 7 sets out the recommendations for the purpose of consultation.

5. It is emphasised that this is a consultation paper and the recommendations presented herein are put forward for the purpose of facilitating discussions. We welcome views, comments and suggestions on any issues raised in this paper. Final recommendations will be drawn up after the Steering Committee has a chance to consider the responses to this consultation.



## *Chapter 1: Introduction*

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1.1 In a dispute following a mishap, a party causing injury may wish to convey his<sup>1</sup> apology to the injured person for the loss and suffering sustained. Alternatively, a party to a dispute may genuinely believe that he has done nothing wrong but would nevertheless wish to convey his condolence or sympathy to the other party solely out of goodwill and benevolence. However, it appears there is a common concern that an apology or a simple utterance of the word “sorry” may be used by a plaintiff in civil or other non-criminal proceedings (such as disciplinary proceedings) as evidence of an admission of fault or liability by the defendant for the purpose of establishing legal liability.

1.2 Although the question of whether a party is legally liable for a mishap (e.g. in negligence) is usually a matter for the court and that an apology (depending on its terms and other relevant circumstances) is not necessarily an admission of fault or liability, the fact that the courts may draw the conclusion that an apology (especially one bearing an admission of fault or liability) provides evidence from which liability can be inferred is sufficiently alarming to a party which might otherwise be willing to offer an apology or a statement of condolences, sympathy or regret after a mishap has happened.

1.3 Further, it is not uncommon that a party may have concerns that an insurance policy covering the incident giving rise to the dispute may be rendered void or otherwise adversely affected by an apology because of clauses in the policy that prohibit the admission of fault by the insured.

1.4 For these reasons, it seems that there is a general unwillingness on the part of the persons causing injury to extend their sorrow, regret or sympathy to the person injured, not to mention extending formal apology when there are pending court proceedings. The concern that their apologies or expressions of similar effect

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<sup>1</sup> Words and expressions importing masculine gender include feminine and neuter genders.

could be used as evidence in court to support the assertion that there was a prior admission of fault has halted many from doing so.

1.5 It is unfortunate that this is the perceived legal position as regards apologies, for the heat of the moment so commonly found in a dispute could have been extinguished (or at least reduced) by an apology or an expression of sympathy or regret, thus preventing the escalation of the dispute into legal action or making it more likely for the legal action to be settled.

1.6 This phenomenon of reluctance of the parties causing injury to apologise or express regret or sympathy to the injured persons is not confined to private individuals and commercial entities. Public officials and civil servants acting in their official capacities are similarly concerned with the legal implications of an apology or expression of regret. Indeed, as the general public might not appreciate the aforesaid concern on the part of public officials or civil servants, government departments in various jurisdictions have attracted criticisms at various times on the basis that they have appeared to be apathetic or uncaring to the misfortune of injured persons, as apparently neither sympathy was shown nor condolences were expressed to mishaps which had resulted in great suffering or even death. The observation that government officials may not apologise lightly for fear that it would incur legal liability was made by the former Ombudsman Mr Alan Lai Nin.<sup>2</sup>

1.7 From the above, it appears that there is a general reluctance in both the public and the private sectors of our community to apologise, particularly when the issue of liability is yet to be decided. Such an attitude is not conducive to the prevention of escalation of disputes or the amicable settlement thereof. Indeed, anxiety and anger on the part of the persons injured or their families might in time inflate where there is neither sign of regret nor expression of sorrow coming from the persons causing injury by the lapse of time. Total apathy about the mishap from the party causing the same remains a stumbling block rendering it unlikely for the parties to be willing to attempt to resolve their disputes amicably, e.g. by mediation.

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<sup>2</sup> Available at <http://www.scmp.com/news/hong-kong/article/1288645/plan-make-it-easier-say-sorry> (news on 23 July 2013) (visited May 2015).

1.8 This led the Working Group on Mediation of the Department of Justice (“Working Group”) to conclude in its 2010 Report (“Working Group Report”) that there is advantage of introducing legislative provisions to deal with apologies in the context of mediation.<sup>3</sup> As stated in the Working Group Report:

*“ ... experience in other jurisdictions shows that such provisions will make parties to a dispute more willing to offer an apology during the mediation process, which in turn will enhance the chance of settlement.”*<sup>4</sup>

1.9 Accordingly, in Recommendation 43 of the Working Group Report, it was proposed that “[t]he question of whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement deserved fuller consideration by an appropriate body.”<sup>5</sup>

1.10 This recommendation of the Working Group was echoed by the former Ombudsman who recommended that there was “*the need to consider introducing legislation to enable public agencies to apologise without fear of incurring extra legal liabilities.*”<sup>6</sup>

1.11 Indeed, the absence of a piece of clear and comprehensive legislation on apology may be a reason for the general reluctance of parties (both public and private) to apologise before legal advice has been taken or before there is a final determination of liability by the courts or other relevant tribunals.

1.12 In November 2012, the Secretary for Justice established the Steering Committee on Mediation (“Steering Committee”). The Regulatory Framework Sub-Committee is a sub-committee set up under the Steering Committee and it has been tasked to consider whether it is desirable to introduce apology legislation in

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<sup>3</sup> Report of the Working Group on Mediation (February 2010), para 7.198, p 123, available at <http://www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf> (visited May 2015).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Available at <http://www.info.gov.hk/gia/general/201307/22/P201307220529.htm> (Press release on 22 July 2013) (visited May 2015).

Hong Kong. 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.

1.13 This Consultation Paper (“Paper”) endeavours to set out the possible legal implications of an apology made by a party to a dispute in Hong Kong. It draws on the experience of a number of overseas jurisdictions which have enacted apology legislation. The arguments for and against an apology legislation for Hong Kong will be deliberated in depth, followed by focused discussion on the scope of such legislation, namely, whether it should cover full or just partial apologies and whether it should extend to disciplinary or other forms of non-criminal proceedings. This Paper also raises two areas that may potentially be affected by the making of an apology by a party to a dispute, namely, the reckoning of statutory limitation period and insurance contracts, and examines the need to make express provisions in the apology legislation to deal with them. It also addresses the form the proposed legislation should take. The recommendations and issues for consultation are summarised in Chapter 7.

## Chapter 2: Apology and Scope of this Consultation Paper

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### What is an Apology?

2.1 To ordinary people, the word “apology” may bear no more than its ordinary and literal meaning. It may appear to be quite unnecessary to ask for a further definition of the word, for that is something which a lot of people are doing every day. For instance, a person may easily (and in fact sometimes to his unawareness) say “sorry” (and has thus apologised) to another person whom he has inadvertently bumped into whilst on board a bus running on a bumpy road. The person might have said so although he bumped into the other person through no fault of his own. Accordingly, a person might have apologised by saying “sorry” not because he admits to be blameworthy, but solely out of courtesy, good manners or goodwill. However, a driver driving a bus involved in a traffic accident causing deaths and injuries to the passengers would be less prepared to say “sorry”. The reason is because he is unsure whether the word “sorry” would amount to an admission of blameworthiness which may cause him to incur legal liability.

2.2 Dictionaries have provided various explanations of the word “apology”. In the *Advanced Learner’s English-Chinese Dictionary*, the word “apology” is defined as “*a word or statement saying sorry for something that has been done wrong or that causes a problem.*”<sup>7</sup> According to this definition, it is an apology if the word “sorry” is said in respect of a wrong done or a problem caused; but if the word “sorry” is said merely out of goodwill, courtesy or sympathy, it is not strictly an apology. Such a dictionary definition of apology, however, does not offer full relief to the party making apologetic statement out of goodwill or sympathy, for it is uncertain how weighty the dictionary definition is in law. In the *Shorter Oxford English Dictionary*, apology is defined as “*a frank acknowledgment of fault or failure, given by way of reparation; an explanation that no offence was*

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<sup>7</sup> *Advanced Learner’s English-Chinese Dictionary* (The Commercial Press, Oxford University Press, 6<sup>th</sup> edn).

*intended, with regret for any given or taken*".<sup>8</sup> This definition of "apology" includes an expression of regret and an acknowledgment of fault.

2.3 The academics are similarly divided in their views as to what would amount to an apology. For example, Erving Goffman suggested "[i]n its fullest form, the apology has several elements: expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution."<sup>9</sup> On the other hand, Aviva Orenstein suggested that "[a]t their fullest, apologies should: (1) acknowledge the legitimacy of the grievance and express respect for the violated rule or moral norm; (2) indicate with specificity the nature of the violation; (3) demonstrate understanding of the harm done; (4) admit fault and responsibility for the violation; (5) express genuine regret and remorse for the injury; (6) express concern for future good relations; (7) give appropriate assurance that the act will not happen again; and if possible, (8) compensate the injured party."<sup>10</sup> As with dictionary meanings, it is uncertain whether and, if so, which academic definitions of the word "apology" would be accepted by the courts.

2.4 The next step is to see if any assistance may be drawn from the case law. In a case concerning the power of the court to order an unwilling defendant to apologise for unlawful conduct under the Disability Discrimination Ordinance (Cap. 487), the former Chief Justice said "[t]o apologise is simply to say sorry. An apology is a regretful acknowledgment of a wrong done."<sup>11</sup> However, this definition may not be applicable to other types of proceedings or situation in different contexts. For instance, in the defamation case of *Hsiang-Hsi Kung (No.2) v Sing Tao Jih Pao Limited* [1959] HKLR 65, Reece J said as follows (at page 92):

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<sup>8</sup> *The Shorter Oxford English Dictionary* (Oxford University Press, 5<sup>th</sup> edn).

<sup>9</sup> Erving Goffman, *Relations in Public: Microstudies of the Public Order* (1971).

<sup>10</sup> Aviva Orenstein, "Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It" (1999) 28 *Sw U L Rev* 221, 239.

<sup>11</sup> *Ma Bik Yung v Ko Chuen* (2006) 9 HKCFAR 888; [2002] 2 HKLRD 1, para 34.

*“In Ward Jackson v. Cape Times quoted in the 4<sup>th</sup> Edn. of Gatley on Libel & Slander, page 435 Note 20 it is stated – ‘The essence of an apology is that it should contain an unreserved withdrawal of all imputations made but that it should also contain an expression of regret that they were ever made’”*

Given the context of the case, this explanation of an “apology” appears to apply only to defamation cases, and is not intended to be of general application to other types of cases involving different causes of action.

2.5 In the other defamation case of *Hung Yuen Chan Robert v Sing Tao Ltd* [1996] 4 HKC 539, the meaning of “apology” was again considered and it was held that “[a]n apology could be a sincere expression of regret or mere admission of guilt”.

2.6 In the light of the various judicial definitions of “apology” which may only be applicable to a specific type of proceedings, if apology legislation is to be introduced in Hong Kong, a clear legal definition of “apology” would seem necessary in order to remove the legal uncertainty as to the meaning of an apology and to allay parties’ worry as to whether what they said would amount in law to an apology and therefore be protected by the legislation in any specific circumstances. In the absence of a clear definition of “apology”, parties would be unsure about what statement or expression would fall outside the ambit of apology which might attract legal consequences and lawyers will remain reluctant to advise their clients to apologise. Such a situation would defeat the whole purpose of having an apology legislation, which is to remove legal disincentives to making apologies with a view to facilitating settlement of disputes.

## **The Social Role of Apology**

2.7 In his welcome address delivered at the Mediation Conference 2014, Chief Justice Ma said, quoting from an English case,<sup>12</sup> “*Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant’s precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away*”. This gives an example of an injured person simply wanting an apology for what happened to him so that closure could be effected.

2.8 Apologies have many roles: “*psychological, sociological, philosophical and anthropological literature shows that apology can have a healing and rebalancing function for both the victim and often for the offender as well. They may have a moral, meaning-creating and educative function of reinforcing the sense of the norms of right, wrong and responsibility in the community and between the victim and the offender*”.<sup>13</sup>

2.9 Healing the psychological harm is seen as an important function of apology. An apologetic act is proved to have the power to alleviate the injured person’s stress, anxiety and anger.<sup>14</sup> Experimental studies in primarily non-legal contexts have also demonstrated that an apology or an expression of remorse may influence a number of perceptual and attributional judgments which are thought to underlie negotiation behaviour and to influence the outcomes of settlement negotiations.<sup>15</sup> In their empirical study, McCullough, Worthington and Rachel (1997) suggest that an apology may lead to empathy and finally forgiveness. The relationships are found to be sequential and the steps are statistically significant. In other words, apology is not directly linked to forgiveness. Instead, there is an intermediate variable, namely, empathy. Similarly, the sequence of believability-acceptance-forgiveness-restoration was explored in an article

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<sup>12</sup> *Dunnett v Railtrack Plc* [2002] 1 WLR 2434 at para 134 (*per* Lord Woolf MR).

<sup>13</sup> Prue Vines, “Apologies and civil liability in the UK: a view from elsewhere” (2008) 12(2) *Edinburgh Law Review* 200, 206.

<sup>14</sup> A. Allan, “Apology in civil law: A psycho-legal perspective” (2007) *Psychiatry, Psychology and Law*, 14 (1), 5-16; D. W. Shuman, “The role of apology in tort law” (2000) *Judicature*, 83 (4), 180-189.

<sup>15</sup> Jennifer K. Robbennolt, “Apologies and Legal Settlement: An Empirical Examination” 102 *Mich L Rev* 460, 475, citing Leigh Thompson, “Negotiation Behaviour and Outcomes: Empirical Evidence and Theoretical Issues” (1990) 108 *Psychol Bull* 515, 527.



concerning the use of apology in the criminal justice system.<sup>16</sup> Added to the above, apologies or expressions of remorse have been found to influence “attributions of responsibility or blame for the incident, beliefs about the stability of the behaviour (i.e. its likelihood of recurrence), expectations about the future relationship between the parties, perceptions of the character of the wrongdoer, affective reactions such as anger and sympathy, and behaviours such as forgiveness, aggression, and recommendations for punishment.”<sup>17</sup> These studies reveal that the personal cognitive process of apology may lead to the resolution of disputes, whereas its absence may compromise the relationship between the involved parties.

2.10 After healing a person’s psychological harm, the next step is about restoring the relationship between the person causing injury and the person injured. In psychological literature, forgivingness, as a motivational change, would promote relationship-constructive response and decrease the likelihood of retaliatory response.<sup>18</sup> Empathy of the person causing injury and the person injured would allow them to take the other’s perspective and understand his emotion and reactions. Thus, empathy and forgivingness foster reconciliation between parties, which is the ultimate aim of apology.

2.11 Throughout the process of reconciliation, apology is often used as a medium of “social exchange”.<sup>19</sup> There are various roles of apology in the exchange with recipients of apology.

2.12 First, an apologetic act becomes a “moral gyroscope” to emphasise the responsibility of offensive behaviour.<sup>20</sup> This is important because some injured persons may self-blame and an apology from the persons causing injury defines who are blameworthy. Regardless of the final responsibility, the person committing

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<sup>16</sup> C. J. Petrucci, “Apology in the criminal justice setting: Evidence for including apology as an additional component in the legal system” (2002) *Behavioral Sciences and the Law*, 20, 337-362.

<sup>17</sup> Jennifer K. Robbennolt, “Apologies and Legal Settlement: An Empirical Examination” (n 15 above), p 475, citing a number of academic journals, researches and studies in support of the author’s observations.

<sup>18</sup> A. Allan, “Apology in civil law: A psycho-legal perspective” (n 14 above), pp 5-16; M. E. McCullough, E. L. Worthington & K. C. Rachal, “Interpersonal Forgiving in close relationships” (1997) *Journal of Personality and Social Psychology*, 73(2), 321-336; Slocum, Allan & Allan, “An emerging theory of apology” (2011) *Australian Journal of Psychology*, 62(2), 83-92.

<sup>19</sup> N. Tavuchis, *Mea culpa: A sociology of apology and reconciliation* (Stanford, CA: Stanford University Press, 1991); N. Smith, *I was wrong: The meanings of apologies* (New York: Oxford University Press, 2008).

<sup>20</sup> D. W. Shuman, “The role of apology in tort law” (n 14 above), p 183.

an offensive act owes the person against whom the act was committed a moral debt<sup>21</sup> and the moral debt is repaid after an apology.<sup>22</sup>

2.13 Second, an apology may equalise the unequal and damaged status of the person causing injury and the person injured.<sup>23</sup> That is to say, making of an apology equalises the power dynamic between the two parties and the “human dignity and moral worth” of the persons injured.<sup>24</sup> Such equalisation of the unequal and damaged status between the parties is supported by the “equity theory”.<sup>25</sup> *“The equity theory posits that a transgression by an offender against an injured party results in an inequity in their relationship (i.e., the wrong creates a moral imbalance between the parties). Moreover, ‘when individuals find themselves participating in inequitable relationships, they become distressed. The more inequitable the relationship, the more distress individuals feel’. Upon discovering that a relationship is inequitable, individuals are motivated to attempt to restore equity to the relationship.”*<sup>26</sup> *“Equity theorists have suggested a number of ways in which equity might be restored to the relationship between the parties, including the offender offering an apology, and that an apology may persuade the injured party that the relationship is indeed equitable, perhaps in part because it demonstrates that the wrongdoer has suffered as a result. To apologize is to engage in a social ‘ritual whereby the wrongdoer can symbolically bring himself low (or raise us up).”*<sup>27</sup>

2.14 Furthermore, an apology also serves as a kind of corrective “facework”.<sup>28</sup> In an event of norm violation, the “face” of both parties is damaged because of the undesirable behaviours. According to B.T. White, the offender’s face

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<sup>21</sup> Moral duty, in N. Smith, *I was wrong: The meanings of apologies* (n 19 above).

<sup>22</sup> T. Govier & W. Verwoerd, “The promise and pitfalls of apology” (2002) *Journal of Social Philosophy*, 33 (1), 67-82.

<sup>23</sup> R. Abel, *Speaking respect, respecting speech* (Chicago, IL: University of Chicago Press, 1998).

<sup>24</sup> T. Govier, & W. Verwoerd, “The promise and pitfalls of apology” (n 22 above), p 69.

<sup>25</sup> Jennifer K. Robbennolt, “Apologies and Legal Settlement: An Empirical Examination” (n 15 above), p 477. The author cited Elaine Walster et al., “New Directions in Equity Research” (1973) 25 *J Personality & Soc Psychol* 1, 153-154.

<sup>26</sup> *Ibid.*

<sup>27</sup> Jennifer K. Robbennolt, “Apologies and Legal Settlement: An Empirical Examination” (n 15 above), in which the author made reference to Jeffrie Murphy, “Forgiveness and Resentment, in *Forgiveness and Mercy*” (1988) 14, 28 Jean Hampton & Jeffrie Murphy eds.

<sup>28</sup> B. T. White, “Saving face: the benefits of not saying I’m sorry” (2009) *Law and Contemporary Problems*, 72 (2), 261-269.

is threatened, as his social identity is no longer positive whereas the other party's face is simultaneously damaged because he seemingly "deserves" some unfair treatment. Both parties indeed may feel that they need to do something to reverse the scenario or to "unstate" the words<sup>29</sup> and raise their self-esteem. An apology justifiably fills the gap and serves as an agent to save their "face".

2.15 Most of these functions require an apology to acknowledge fault rather than merely to express regret if it is to be effective.

2.16 In gist, the power of an apology is that it can restore trust between people. Human relationships are based on trust rather than coercion. When conflict arises, trust is damaged. An apology, however, has the power to restore trust. When there is trust, disputes are less likely to be escalated or can be resolved more easily because it would not be necessary to have an authoritative adjudication regarding the legal rights and responsibilities of the parties.

### **Scope of this Consultation Paper**

2.17 The setting of the scope of this study, which is to promote the making of apologies with a view to preventing the escalation of disputes and facilitating the amicable settlement of disputes in non-criminal contexts, is vital. It is readily obvious that purely civil proceedings (or other forms of non-criminal proceedings) in which parties have the right to withdraw or settle their claims would fall within that scope. Civil proceedings generally refer to "*proceedings in any civil or commercial matter*".<sup>30</sup> This would include, for example, civil actions in court or before a tribunal and arbitration.<sup>31</sup> This is indeed the position of most overseas

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<sup>29</sup> T. Govier, & W. Verwoerd, "The promise and pitfalls of apology" (n 22 above), pp 67-82.

<sup>30</sup> S.74 of the Evidence Ordinance (Cap. 8).

<sup>31</sup> S.60(1) & s.68(1) of the Evidence Ordinance (Cap. 8) states "civil proceedings" (民事法律程序) includes, in addition to civil proceedings in any court-

- (a) civil proceedings before any tribunal, being proceedings in relation to which the strict rules of evidence apply; and
  - (b) an arbitration or reference, whether under an enactment or not,
- but does not include civil proceedings in relation to which the strict rules of evidence do not apply.

jurisdictions where apology legislation has been enacted. In this connection, it is noted that in some Australian jurisdictions, certain causes of action such as intentional torts and sexual assaults are excluded from the application of the apology legislation. Such exclusion, however, does not appear in the subsequent apology legislation in Canada. To make the apology legislation most effective and to avoid complicated legal problems (e.g. where a plaintiff can raise multiple causes of action from the same facts), it appears to us that serious consideration should be given as to whether such exclusion should be provided for in Hong Kong. Further discussion could be found in Chapters 4 and 6 below.

2.18 On the other hand, the prevention of the escalation of disputes and the facilitation of the amicable settlement of disputes may not be applicable to criminal proceedings. In criminal proceedings, the parties involved are the state which is acting in the public interest and the accused. As opposed to civil or other non-criminal proceedings, there is a wider public interest in criminal proceedings which serve multiple purposes including the upholding of justice by punishing the convicted persons and the prevention of crime by deterrence. It does not appear that apology legislation would serve these purposes based on public interest. Indeed, in some jurisdictions<sup>32</sup> which will be considered in Chapter 4, criminal proceedings are expressly excluded from the application of apology legislation. Based on the above, it is not for the time being proposed that the proposed apology legislation would be applicable to criminal proceedings. There are instances where mediation has been applied in other overseas jurisdiction to victim-offender situation with the goal of achieving restitution and reconciliation between the victim and the offender in a criminal case. However, the proposed apology legislation does not apply to these situations.

2.19 The applicability of apology legislation to disciplinary or other forms of non-criminal proceedings will be discussed in Chapter 6 below.

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<sup>32</sup> For example, Alberta, Nova Scotia, Northwest Territories, Nunavut and Ontario of Canada and Indiana of the United States.

## *Chapter 3: The Existing Law regarding Apology*

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### **Apology and its Legal Consequences in Hong Kong**

3.1 A person involved in a dispute may be reluctant to apologise for fear that such an act of making of an apology may bring upon legal liability. This may also be the case where a person knows that he is in fact responsible for an act causing harm, but is still unwilling to apologise for fear that that might attract extra legal liability. From the standpoint of these persons, their concerns are not without reasons, for an apology (particularly an apology bearing an admission of fault or liability) may (at least in some circumstances) be taken by the court as evidence upon which a finding of responsibility or liability can be based. Besides, a person who is insured in respect of the act causing harm may refuse to give an apology for fear that his insurer may repudiate the insurance policy which prohibits the admission of fault by the insured and decline to take over the conduct of the defence of the claim on his behalf.

3.2 While there is no comprehensive set of law in Hong Kong explaining the general meaning of “apology” and the legal consequences for persons making an apology, there are decided cases on what apology means in a particular context as discussed in Chapter 2 above. However, these decisions and the definitions so given do not seem to have provided an explanation of the meaning of “apology” in general and the consequences of making an apology in civil and non-criminal cases. In *Hung Yuen Chan Robert v Sing Tao Ltd & Anor* [1996] 4 HKC 539, as mentioned above, the definition of apology (“[a]n apology could be a sincere expression of regret or mere admission of guilt”) could still give rise to uncertainty (apart from the uncertainty as to whether this definition applies generally to non-defamation cases), for while a sincere expression of regret and a mere admission of guilt *could* amount to an apology, it remains uncertain as to whether some other acts such as a simple expression of sympathy or remorse without any admission of fault, or an offer to the injured person or his family of a gratuitous or contingent payment, could

also amount to an apology which may adversely affect the apology-maker's legal position.

3.3 Although there is currently no clear legal definition of apology that is valid for general application, there appears to be no dispute that the main purposes of tendering an apology is to express one's regret and sorrow in respect of a wrong that has been done. Further, an apology may be accompanied by an open acknowledgment of responsibility or an admission of fault, responsibility or liability. Understandably, the reasons why people tender apologies are many and cannot be exhaustively listed. Generally speaking, the apology-maker hopes that the tendering of an apology would help soothe the anger, anxiety, tension, or bereavement of the person harmed. However, as discussed above, people are generally reluctant to tender their apologies for fear of the potentially adverse legal consequences.

3.4 As mentioned above, there are also instances where an alleged wrongdoer is not prepared to accept the responsibility of a mishap (for he may believe that he is innocent) and is prepared to contest liability in court. However, this alleged wrongdoer may at the same time be prepared to show his care, concern and sympathy to the injured person or his family by making a statement showing condolences and concern, and may even wish to offer financial assistance purely out of sympathy or on humanitarian grounds. As there is thus far no clear and comprehensive definition of what would amount to an "apology" in law, potential apology-makers might dismiss the idea for fear that their deeds might be interpreted as an admission of responsibility for the mishap which has occurred. The experience of British Columbia, Canada prior to introducing apology legislation is illustrative of these situations:

*"Yet, notwithstanding the recognized value of apologies, both morally and as an effective tool in dispute resolution, apologies are not fully embraced within our legal culture. A recent review of apologies in Canadian law indicates the legal consequences of an apology are far from clear. However, lawyers continue to be legitimately concerned that an apology could be construed as an admission of liability. As apology could also have adverse consequences for insurance*

*coverage. As a result, lawyers generally advise their clients to avoid apologizing.”*<sup>33</sup>

3.5 Thus, in order to encourage an alleged wrongdoer to provide a sincere and frank expression of goodwill or sympathy or to apologise to the victim of a mishap, a clear legal definition for what would amount to an “apology” in law would seem necessary, as an apology might have an important effect on legal liability as well as quantum of damages.

3.6 It is pertinent to note the case of British Columbia, where it was said that: “*lawyers continue to be legitimately concerned that an apology could be construed as an admission of liability ...As a result, lawyers generally advise their clients to avoid apologizing.*”<sup>34</sup> It must be clearly stressed that as the court is the sole and ultimate body to decide whether a person is liable, it is strictly speaking wrong to suggest that an apology would invariably amount in law to an admission of fault or liability. As mentioned in the earlier part of this Paper, the court remains to be the tribunal to conclude whether an apology, including an apology bearing an admission, would lead to legal liability in the relevant disputes. There are instances where the court has refused to find liability despite the fact that an apology was made. In *Dovuro Pty Limited v Wilkins* [2003] HCA 51, the High Court of Australia said as follows:

“70. *Different questions arises where, as here, the suggested admission includes a conclusion which depends upon the application of a legal standard. In Grey, Glass JA considered an admission sought from a witness to the effect that he had assigned certain choses in action at law or in equity. His Honour said:*

*‘By extorting from a party an admission that he was negligent, or that he was not provoked, or that his grandfather possessed testamentary capacity, there is added to the record something which is, not merely*

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<sup>33</sup> Ministry of Attorney General, British Columbia, *Discussion Paper on Apology Legislation* (30 January 2006), pp 2-3.

<sup>34</sup> *Ibid.*

*of dubious value, but by definition valueless, owing to the witness' unfamiliarity with the standard governing his answer.'*

71. *That reasoning, which in terms applies to the suggested admission by Dovuro, has been applied in cases arising under the [Real Property] Act [1900]. In Eastern Express Pty Ltd v General Newspapers Pty Ltd, a question arose as to whether certain statements amounted to an express admission of a proscribed purpose for the application of s.46 of the Act. Lockhart and Gummow JJ said on that subject:*

*'As a general proposition, an informal admission as to a matter of fact, by words or conduct which is made by a party or a privy, is admissible evidence against that party of the truth of its contents ... admissions by a trader in the course of cross-examination that his conduct was 'misleading' and 'deceptive' cannot be relied upon to usurp the task of the court to judge the legal quality of that conduct ...'.*

*The so called 'admissions' of the officers of Dovuro as outlined in the passages quoted above provide no basis for a finding of negligence in this case"*<sup>35</sup>

3.7 The finding of liability often requires the application of the relevant legal standard or principles. A person who has admitted that he was negligent might not be so regarded by the court if the court is of the view that such admission was made out of one's unfamiliarity with or ignorance of the relevant legal standard or legal principles thus rendering the admission to be of dubious value. For our present purposes, one of the most significant points mentioned in *Dovuro Pty Limited v Wilkins* is that an apology, including an admission of liability or fault, would not by itself automatically impose legal liability on its maker. A contrary view would, in the words of *Dovuro Pty Limited v Wilkins*, "usurp the task of the court to judge the legal quality of that conduct".<sup>36</sup> The determination of liability

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<sup>35</sup> *Dovuro Pty Limited v Wilkins* (2003) HCA 51, at paras 70 and 71.

<sup>36</sup> *Ibid.*, at para 71.



remains the function of the court or the relevant tribunal. Accordingly, as a matter of law, an apology or even an admission of fault or liability in a civil dispute would not automatically lead to liability.

### **Admissibility of an Apology in Civil Proceedings under the Evidence Ordinance**

3.8 This, however, does not help to ameliorate the fear of a person who wishes to apologise, or to admit that he was at fault and sincerely wishes to ask for forgiveness. As pointed out in *Dovuro Pty Limited v Wilkins*: “[a]s a general proposition, an informal admission as to a matter of fact, by words or conduct which is made by a party or a privy, is admissible evidence against that party of the truth of its contents”.<sup>37</sup>

3.9 In civil proceedings, an apology relevant to the dispute before the court may be admissible in evidence to prove the matters stated in the apology. The same applies to hearsay evidence, e.g. a third party repeating what the defendant said (e.g. apology) after the accident to establish the truth of what is contained therein (see definition of “hearsay” under section 46 of the Evidence Ordinance (Cap. 8)<sup>38</sup>). In civil proceedings, hearsay evidence is generally admissible under section 47(1) of the Evidence Ordinance, which stipulates as follows:

*“47 Admissibility of hearsay evidence*

*(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay unless*

*(a) A party against whom the evidence is to be adduced objects to the admission of the evidence; and*

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<sup>37</sup> *Ibid.*

<sup>38</sup> Hearsay (a) means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matter stated; (b) includes hearsay of whatever degree.

(b) *The court is satisfied, having regard to the circumstances of the case, that the exclusion of the evidence is not prejudicial to the interests of justice.*”

3.10 “Under section 47(1) of the Evidence Ordinance, the court can only exclude hearsay evidence if, having regard to all the circumstances, it considers that there is no prejudice to the interests of justice. Where the hearsay evidence of a witness is based on accurate and truthful documents and, despite being given the opportunity the witness is not cross-examined, the evidence will be admissible.” See *Hong Kong Civil Procedure 2015*, Vol. 1, at paragraph 38/21/1 on “Admissibility of hearsay evidence”.

3.11 Accordingly, although an apology or an admission of liability or fault would not by itself automatically create for its maker legal liability as the determination of liability is a matter for the court, the fact that an apology (whether bearing an admission of liability or not) is admissible evidence upon which the court may rely on to reach its conclusion on liability against the apology-maker renders it a serious concern for the parties and their lawyers alike.<sup>39</sup> The potential prejudicial effect of an apology explains why lawyers would rather err on the safe side and thus would generally advise their clients against making apologies.

## **Apology Legislation**

3.12 The term “apology legislation” has been defined by different jurisdictions in many different ways. The term and its various definitions will be further considered in the subsequent chapters of this Paper. It is sufficient for readers’ initial understanding to describe it as a “... *legislation that would prevent liability being based on an apology*”.<sup>40</sup>

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<sup>39</sup> It is important to distinguish between what is said by someone after an accident or other incident and an admission of liability on the pleadings, which will bind the parties under the rules of evidence and procedures.

<sup>40</sup> Ministry of Attorney General, British Columbia, *Discussion Paper on Apology Legislation* (n 33 above), p 1.

3.13 As will be seen in the next chapter, the detailed provisions of apology legislation enacted in overseas jurisdictions vary. Their aim, as can be seen from the relevant debates in various legislatures, is to reduce the propensity of victims of accidents to sue. This is based on the assumption that if people apologise, this will reduce the likelihood that others will sue them.

3.14 Understandably, for the reasons discussed above, there has been in Hong Kong a general unwillingness amongst private individuals and government officials to apologise for wrongs alleged against them, due to legal considerations, although a simple apology may resolve the dispute or prevent the escalation thereof. This has serious repercussion for Hong Kong, for such an attitude would directly run counter to the Government's policy, as well as to the Judiciary's directions, of promoting the use of mediation and other means to resolve disputes in an amicable manner. The reason for this is because if an apology is not coming from the alleged wrongdoer as soon as is practicable, the injured person or his family, in rage, anxiety, anger or suffering, would very likely be unwilling to come to terms with any proposals for settling the dispute through means such as mediation or other modes of dispute resolution apart from litigation.

## *Chapter 4: Development of Apology Legislation in Other*

### *Jurisdictions*

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#### **Introduction**

4.1 As noted in the previous chapter, the legal consequences of an apology are not clear in Hong Kong. As a result, a person causing harm may be reluctant to apologise for fear that it would amount to an admission of fault or liability which would, in turn, adversely affect his position on legal liability (and possibly quantum) if court action ensues. Further, as stated above, there may be a concern by some that an insurance policy may be avoided or otherwise affected because of provisions in the policy that prohibit the admission of fault by an insured. Such reluctance on the part of the party causing harm is clearly not conducive to the prevention of escalation of disputes and inhibits the chance of an early amicable resolution of disputes. In cases which could otherwise be settled amicably, a lot of court resources are wasted, and unnecessary legal and other expenses are incurred.

4.2 Hong Kong is not the only jurisdiction which faces this phenomenon. Other jurisdictions such as the United States of America, Australia and Canada faced the same problem prior to the enactment of apology legislation in the different provinces or states of these countries. Voices were heard from different quarters of these jurisdictions calling for the cessation of equating an expression of sympathy, regret or an apology (whether or not bearing an admission of fault or liability) with an admission of liability.

4.3 There were debates in these jurisdictions on whether the apology legislation should apply to a “full apology” (thus giving statutory protection to an apology accepting liability or fault), or whether it should apply only to a “partial apology” (i.e. statutory protection would not be given to an apology which admits liability or fault).

4.4 There were also arguments on whether the statutory protection of apologies should be limited to particular types of cases and parties, or whether they should be applied generally to all non-criminal disputes.

4.5 This chapter sets out the reforming sentiment of the aforesaid jurisdictions on apologies, immediately prior to and during the enactment of apology legislation in their various provinces or states as well as the nature of apology legislation eventually enacted in these provinces or states. It is hoped that Hong Kong could learn from the different experiences and areas of concern of these jurisdictions, and to consider what is the best way forward for Hong Kong.

### **Chronology of Apology Legislation in Other Jurisdictions under Study**

4.6 As far as our research reveals, the first apology legislation that excludes an apology as admissible evidence of admission of liability was enacted in Massachusetts in 1986. The trend was then spread to other states in the United States. At present, over 30 American states have apology legislation. Characteristics of the legislation vary. Some deem an apology not to be an admission of liability while others only limit the admissibility of an apology in court for certain purposes. It is noted that most of the apology legislation in the United States covers partial apology only and is targeted at civil actions against the health care profession or to some other aspects of personal injuries only.

4.7 The trend did not stop at the United States and continued to develop across the other end of the Pacific. In the early 2000s, apology legislation was enacted in Australia and at present each state and territory in Australia has its own apology legislation. The scope of the Australian apology legislation has been broadened to cover most civil proceedings except certain specified proceedings. Some cover full apology while some do not.

4.8 The scope of the apology legislation was further broadened when the trend hit Canada in the late 2000s and early 2010s. Apology legislation exists in

most provinces and territories of Canada. All of the apology legislation in Canada under study covers full apology and applies to all proceedings. Some of the legislation specifically excludes criminal proceedings from its application. In addition, all Canadian apology legislation thus far identified includes provisions directly preventing apologies from voiding or affecting insurance contracts. Most of the legislation also 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.

4.9 One can discern from the above three main waves of apology legislation worldwide: the first wave commencing in the 1980s in the USA, the second wave in the early 2000s led by Australia and the third wave of Canadian legislation in the late 2000s. Below is a table showing the apology legislation or bill in various jurisdictions covered by our study.

#### Apology Legislation in Other Jurisdictions

<b>Jurisdictions &amp; States/Provinces</b>	<b>Apology Legislation</b>	<b>Relevant Sections (if not self-contained)</b>
<b>Australia</b>		
Australian Capital Territory	Civil Law (Wrongs) Act 2002	Part 2.3 “Apologies”, ss.12-14
New South Wales	Civil Liability Act 2002	Part 10 “Apologies”, ss.67-69
Northern Territory	Personal Injuries (Liabilities and Damages) Act 2003	Division 2 “Expressions of regret”, ss.11-13
Queensland	Civil Liability Act 2003	Part 1 “Expression of regret”, ss.68-72  Part 1A “Apologies”, ss.72A-72D
South Australia	Civil Liability Act 1936	s.75 “Expressions of regret”
Tasmania	Civil Liability Act 2002	Part 4 “Apologies”, ss.6A-7
Victoria	Wrongs Act 1958	Part IIC “Apologies”, ss.14I-J
Western Australia	Civil Liability Act 2002	Part 1E “Apologies”, ss.5AF-AH

<b>Canada</b>		
Alberta	Evidence Act 2000	s.26.1 “Effect of apology on liability”
British Columbia	Apology Act 2006	-
Manitoba	Apology Act 2007	-
Newfoundland and Labrador	Apology Act 2009	-
Nova Scotia	Apology Act 2008	-
Northwest Territories	Apology Act 2013	-
Nunavut	Legal Treatment of Apologies Act 2010	-
Ontario	Apology Act 2009	-
Prince Edward Island	Health Services Act 1988	s.32 “Apology”
Saskatchewan	Evidence Act 2006	s.23.1 “Effect of apology on liability”
Yukon	Apology Act (negatived on 30 April 2008)	-

<b>The United Kingdom</b>		
The United Kingdom (excluding Scotland)	Compensation Act 2006	s.2 “Apologies, offers of treatment or other redress”
Scotland	Apologies (Scotland) Bill (introduced on 3 March 2015, not yet enacted)	-

<b>United States of America</b>		
Arizona (AZ)	Arizona Revised Statutes §12-2605	§12-2605 “Evidence of admissions; civil proceedings; unanticipated outcomes; medical care”
California (CA)	California Evidence Code §1160	§1160
Colorado (CO)	Colorado Revised Statutes	§13-25-135 “Evidence of

	§13-25-135 (2003)	admissions - civil proceedings - unanticipated outcomes - medical care”
Connecticut (CT)	Connecticut General Statutes §52-184d	§52-184d “Inadmissibility of apology made by health care provider to alleged victim of unanticipated outcome of medical care”
Delaware (DE)	Delaware Code Title 10, §4318 (2006)	Title 10, §4318 “Compassionate communications”
District of Columbia (DC)	D.C. Code §16-2841	§16-2841 “Inadmissibility of benevolent gestures”
Florida (FL)	Florida Statutes §90.4026 (2001)	§90.4026 “Statements expressing sympathy; admissibility; definitions”
Georgia (GA)	Georgia Code §24-4-416	§24-4-416 “Statements of sympathy in medical malpractice cases”
Hawaii (HI)	Hawaii Revised Statute §626-1, Rule 409.5	Rule 409.5 “Admissibility of expressions of sympathy and condolence”
Idaho (ID)	Idaho Code §9-207	§9-207 “Admissibility of expressions of apology, condolence and sympathy”
Illinois (IL)	735 ILCS 5/8-1901 (2005)	735 ILCS 5/8-1901 “Admission of liability”
Indiana (IN)	Indiana Code §34-43.5	§34-43.5 “Communications of Sympathy”
Iowa (IA)	Iowa Code §622.31	§622.31 “Evidence of Regret or Sorrow”
Louisiana (LA)	Louisiana Revised Statute §13:3715.5 (2005)	§3715.5. Confidentiality of communication from health care provider
Maine (ME)	Maine Revised Statute 24§2907 (2005)	§2907. Communications of Sympathy or Benevolence
Maryland (MD)	Maryland Code, Courts and Judicial Proceedings §10-920	§10-920
Massachusetts	Massachusetts General Laws,	§23D “Admissibility of



(MA)	Chapter 233 Witnesses and Evidence, §23D (1986)	benevolent statements, writings or gestures relating to accident victims”
Missouri (MO)	Missouri Revised Statutes §538.229 (2005)	§538.229 “Certain statements, writings, and benevolent gestures inadmissible, when - definitions”
Montana (MT)	Montana Code §26-1-814 (2005)	§26-1-814 “Statement of apology, sympathy, or benevolence -- not admissible as evidence of admission of liability for medical malpractice”
Nebraska (NE)	Nebraska Revised Statute §27-1201 (2007)	§27-1201 “Unanticipated outcome of medical care; civil action; health care provider or employee; use of certain statements and conduct; limitations”
New Hampshire (NH)	New Hampshire Revised Statute §507-E:4 (2005)	§507-E:4 “Evidence of Admissions of Liability”
North Carolina (NC)	North Carolina General Statute §8C-1, Rule 413 (2004)	§8C-1, Rule 413 “Medical actions; statements to ameliorate or mitigate adverse outcome”
North Dakota (ND)	North Dakota Century Code §31-04-12 (2007)	§31-04-12 “Expressions of empathy”
Ohio (OH)	Ohio Revised Code §2317.43 (2006)	§2317.43 “Medical liability action - defendant's expression of sympathy for victim inadmissible”
Oklahoma (OK)	Oklahoma Statutes Title §63-1-1708.1H	§63-1-1708.1H “Statements, conduct, etc. expressing apology, sympathy, etc. – Admissibility – Definitions”
Oregon (OR)	Oregon Revised Statute §677.082 (2003)	§677.082 “Expression of regret or apology”
South Carolina	South Carolina Code of Laws	§19-1-190 “South Carolina

(SC)	§19-1-190 (2006)	Unanticipated Medical Outcome Reconciliation Act”
South Dakota (SD)	South Dakota Codified Laws §19-12-14 (2005)	§19-12-14 “Statements and actions by health care providers not admissible to prove negligence in medical malpractice actions”
Tennessee (TN)	Tennessee Code §409.1	§409.1 “Expressions of Sympathy or Benevolence”
Texas (TX)	Texas Civil Practice and Remedies Code §18.061 (1999)	§18.061 “Communications of Sympathy”
Utah (UT)	Utah Rules of Evidence, Rule 409	Rule 409 “Payment of medical and similar expenses; expressions of apology”
Vermont (VT)	Vermont Statutes Title 12 Court Procedure §1912 (2006)	§1912 “Expression of regret or apology by health care provider inadmissible”
Virginia (VA)	Virginia Code §8.01-581.20:1 (2005)	§8.01-581.20:1 “Admissibility of expressions of sympathy”
Washington (WA)	Washington Revised Code §5.64.010 (2002)	§5.64.010 “Civil actions against health care providers — Admissibility of evidence of furnishing or offering to pay medical expenses — Admissibility of expressions of apology, sympathy, fault, etc.”
West Virginia (WV)	West Virginia Code §55-7-11a (2005)	§55-7-11a “Settlement, release or statement within twenty days after personal injury; disavowal; certain expressions of sympathy inadmissible as evidence”
Wyoming (WY)	Wyoming Statutes §1-1-130	§1-1-130 “Actions against health care providers; admissibility of evidence”

4.10 Further, **Annex 3** is a table containing the details of the overseas apology legislation.<sup>41</sup> With each wave of legislation, significant developments in the contents of the laws on apology are apparent. These developments are discussed below.

## **The United States of America**

4.11 Compared with Australia and Canada, the United States is more divided amongst its states on issues such as whether apology legislation should cover full apology or partial apology and whether apology legislation should be made applicable to all cases to be dealt with by the civil courts or restricted in its application to cases involving health care providers. The following excerpt is illustrative of the division:

*“The earliest apology provisions arose in 1986 in Massachusetts. By 2007, over 30 states had adopted apology-type legislation. Although approximately 20 of these have incorporated legislation to provide full protection for apology, in each case this is limited to apologies given in the context of the provision of health care. A further eight have legislated to provide partial protection for apologies made by any person. However, this was limited to apologies that do not include an admission of responsibility or fault. Four states have legislated to provide partial protection only in the context of the provision of health care.”<sup>42</sup>*

An update is provided for in the tables below.

4.12 Massachusetts was the first of all states in the United States that legislated on apology. §23D of the Massachusetts General Laws Chapter 233 provides as follows:

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<sup>41</sup> The hyperlinks to the overseas apology legislation can be found at [www.doj.gov.hk/eng/public/apology.html](http://www.doj.gov.hk/eng/public/apology.html).

<sup>42</sup> Leandro Zylberman, “Apology Legislation: Should it be safe to Apologize in Manitoba? An Assessment of Bill 202” (2009) *Underneath the Golden Boy*: Volume 6, 178.

*“Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death or a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.”*

4.13 As this Massachusetts law “*remained silent on expressions that could contain admissions of fault*”,<sup>43</sup> arguably it covers only a partial apology and an apology which contains an admission of liability or fault would not be protected.

4.14 Texas was the next state in the United States to enact apology legislation. Texas, however, was clear on expressions containing admissions of fault by providing in its enactment that protection was restricted only to “partial apologies”. §18.061 of the Texas Civil Practice and Remedies Code provides as follows:

*“a communication, including an excited utterance ... which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability.”*

4.15 In Texas, the word “apology” is not used in its apology legislation. Instead, the phrase “*communication that expresses sympathy or a general sense of benevolence*” (“sympathy communication”) is used. Comparing with Massachusetts, Texas is clearer on the extent of its legal protection to a sympathy communication. §18.061 of the Texas Civil Practice and Remedies Code deals with communications of sympathy in terms as follows:

*“(a) A court in a civil action may not admit a communication that:*

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<sup>43</sup> Graham Andrew Burch Barr, “Disingenuous or Novel? An Examination of Apology Legislation in Canada” (LLM thesis: 2009, Graduate Department of Law, University of Toronto), p 6.

- (1) *expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual involved in an accident;*
- (2) *is made to the individual or a person related to the individual within the second degree by consanguinity or affinity, as determined under Subchapter B, Chapter 573, Government Code; and*
- (3) *is offered to prove liability of the communicator in relation to the individual.*

(b) *In this section, “communication” means:*

- (1) *a statement;*
- (2) *a writing; or*
- (3) *a gesture that conveys a sense of compassion or commiseration emanating from humane impulses.”*

It clearly provides that legal protection would not be extended to statements concerning negligence or culpable conduct. The Texas Civil Practice and Remedies Code thus in effect covers merely “partial apologies”. Statements admitting negligence or culpability would not be covered.

4.16 The Texas model was well received by 35 states in the United States, making it the most popular type of apology legislation in the United States:

*“By only protecting ‘partial apologies’ most American Apology Legislation fails to protect statements of culpability. The protection of ‘full apologies’, for statements and gestures that acknowledge fault has found very limited support in the United States.”<sup>44</sup>*

4.17 Unlike the majority of states in the United States, Colorado and a few other states provide legislative protection to full apologies. However, such a protection is restricted to the medical community and to similar apologies made in

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<sup>44</sup> *Ibid.*, p 7.

other civil disputes. Colorado Revised Statutes Title 13-Article 25-section 135 provides as follows:

*“(1) In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.”* (emphasis added)

4.18 Accordingly, an apology made by a health care provider or an employee of a health care provider will not be admissible in a court hearing as an admission of liability or an admission against interest. While such a legislative stipulation would provide full legal protection to the maker of an apology, its restricted application to health care providers or employees of a health care providers has inevitably led to criticism of being unfair for its one-sidedness protection to the health care profession. The following excerpt is illustrative of this:

*“The Colorado legislature was interested in granting blanket immunity regarding the expression of apology to one class of people: health care providers and their employees. This statute, shocking both in its breadth and its one-sidedness ... is disingenuous in that even though the proponents of this kind of statute understand that is one-sided protection is potentially unfair, they encourage its enactment.”*<sup>45</sup>

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<sup>45</sup> Lee Taft, “Apology and Medical Mistake: Opportunity or Foil” (2005) 14 *Annals of Health Law*, 55, 79-80.

4.19 The apology law in Oregon is similar in nature and effect to that in Colorado. Section 677.082 of the Oregon Revised Statutes provides as follows:

*“(1) For the purposes of any civil action against a person licensed by the Oregon Medical Board or a health care institution, health care facility or other entity that employs the person or grants the person privileges, any expression of regret or apology made by or on behalf of the person, the institution, the facility or other entity, including an expression of regret or apology that is made in writing, orally or by conduct, does not constitute an admission of liability.*

*(2) A person who is licensed by the Oregon Medical Board, or any other person who makes an expression of regret or apology on behalf of a person who is licensed by the Oregon Medical Board, may not be examined by deposition or otherwise in any civil or administrative proceeding, including any arbitration or mediation proceeding, with respect to an expression of regret or apology made by or on behalf of the person, including expressions of regret or apology that are made in writing, orally or by conduct.”*

4.20 Below are the tables highlighting our findings of the apology legislation in the United States under our study (for the full names of the abbreviations, see paragraph 4.9 above):

Full apology vs. partial apology

	States/District	Number of states/district
Apology legislation covering full apology (i.e. including admission of fault or mistake)	AZ, CO, CT, GA, SC	5
Apology legislation covering partial apology (i.e. without admission of fault or mistake)	CA, DE, DC, FL, HI, ID, IL, IN, IA, LA, ME, MD, MA, MO, MT, NE, NH, NC, ND, OH, OK, OR, SD, TN, TX, UT, VT, VA, WA, WV, WY	31
Total		36

### Coverage (health care profession)

	States/District	Number of states/district
Apology legislation covering health care profession only	AZ, CO, CT, DE, DC, GA, ID, IA, LA, ME, MD, MT, NE, NH, NC, ND, OH, OK, OR, SC, SD, VT, VA, WA, WV, WY	26
Apology legislation covering beyond health care profession	CA, FL, HI, IL, IN, MA, MO, TN, TX, UT	10
Total		36

### **Australia**

4.21 In Australia, the call for apology legislation stemmed from an alarming growth rate in litigation on medical malpractice. The following excerpt summarises Australia’s position prior to the enactment of the various apology laws in the Australian states:

*“Reform in Australia was spurred from the belief that litigation rates concerning medical malpractice were rising at an alarming rate. Such fears, whether perceived or real, pushed legislators and advocacy groups to generate legal reforms concerning negligence and evidential burdens. The IPP Report, prepared by the Panel for the review of the law of Negligence, failed to register the reforms concerning apologies, but it would become clear that Apology Legislation would impact every province in Australia. A Legal Processes Reform Group, under the auspices of the Australian Health Ministers’ Advisory Council (“AHMAC”), was asked to specifically report on issues concerning medical negligence. They recommended that, ‘legislation provide that an apology made as part of an open disclosure process be inadmissible in an action for medical negligence.’ Apologies were, therefore, now deemed to form an integral part of the process of healing. Following the work of the AHMAC, each province and territory undertook reform for the*



*protection of apologies made in any matter. However, the type of protection offered to apologies varied dramatically in each area.*”<sup>46</sup>

4.22 This excerpt brings home three important messages. First, at the initial stage, the recommendation was that apology legislation should be limited in scope and should be confined to cases concerning medical negligence. It was only at a later stage following the work of the AHMAC that each province and territory undertook reform for the protection of apologies made in any matter. Second, apologies were deemed to be part of the healing process. This is an important finding as it lends support to the saying that “*an apology can have a therapeutic impact on the person injured, [thus] facilitating the healing process and the process of reconciliation and closure.*”<sup>47</sup> Third, the type of protection offers to persons who apologise varies dramatically in each area. Suffice to mention here that the main difference between the various Australian states in respect of apology legislation lies in the extent the state is prepared to protect the persons offering their apologies. Some states are willing to offer full protection and protect even a fault-based apology; while some are unwilling to do so and offer protection only to apologies fall short of any admission of fault. The following is a summary of the Australian position:

*“New South Wales (N.S.W.) was the first common law jurisdiction to legislate legal protection to the general public for a full apology. That is, one that includes an admission or acceptance of fault or responsibility. It did so by introducing a broad statutory protection through amendments to the Civil Liability Act 2002 that came into effect on 6 December 2002 ...*

*... Since the incorporation of apology provision into the N.S.W. Civil Liability Act 2002, every other state and territory in Australia has followed the N.S.W. lead and*

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<sup>46</sup> Graham Andrew Burch Barr, “Disingenuous or Novel? An Examination of Apology Legislation in Canada” (n 43 above), pp 10-11.

<sup>47</sup> Ministry of Attorney General, British Columbia, *Discussion Paper on Apology Legislation* (n 33 above), p 1.

*brought in legislation that provides varying levels of protection for apologies or expressions of regret in relation to civil liability.”<sup>48</sup>*

4.23 The law governing apology in New South Wales is contained in the Civil Liability Act 2002 (“NSW 2002 Act”). Section 67 provides that Part 10 of the NSW 2002 Act on apologies applies to civil liability of any kind, save the exception as provided in subsection (2) which states that Part 10 does not apply to civil liability that is excluded from the operation of Part 10 by section 3B or civil liability for defamation. Under section 68 of the NSW 2002 Act, an “apology” is defined to mean *“an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.”*

4.24 Section 69 of the NSW 2002 Act provides for the effect of apology on liability. Section 69(1) of the NSW 2002 Act provides that *“an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and (b) is not relevant to the determination of fault or liability in connection with that matter.”*

4.25 As regards admissibility of an apology in a hearing, section 69(2) of the NSW 2002 Act provides that *“[e]vidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.”*

4.26 Under this “broad definition” approach to apology (i.e. one that aims at covering full apologies), any express or implied admission of fault would be covered by the apology legislation. An apology so covered will be inadmissible in any civil proceedings as evidence of fault or liability.

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<sup>48</sup> Leandro Zylberman, “Apology Legislation: Should it be safe to Apologize in Manitoba? An Assessment of Bill 202” (n 42 above), pp 180-181.

4.27 New South Wales and Australian Capital Territory are the only state and territory in Australia that adopt a “broad definition” approach to apology. The rest of Australia adopt a “narrow definition” approach to apology, the gist of which is the exclusion (or non-inclusion) of an admission of fault or liability in the definition of “apology”. Under this “narrow definition” approach, a statement bearing an admission of fault or liability contained in an apology in the ordinary sense of the word may be taken in evidence in any civil proceedings against the statement-maker.

4.28 The law governing apologies in Western Australia exemplifies the “narrow definition” approach to apologies. The law governing apologies in Western Australia is provided in Part 1E of the Civil Liability Act 2002 (“WA 2002 Act”). Section 5AF of the WA 2002 Act defines “apology” as “*an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.*”. Under this definition, an apology would not include an admission of fault or liability. Accordingly, an admission of fault or liability will not be regarded as an apology under section 5AF. Under the WA 2002 Act, such an admission may incur for its maker liabilities, for the legal protection proffered to an apology defined under section 5AF of the WA 2002 Act does not extend to an admission of fault or liability.

4.29 Section 5AH of the WA 2002 Act provides that an “apology”, as narrowly defined in Section 5AF(1), “*made by or on behalf of a person in connection with any incident giving rise to a claim for damages (a) does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and (b) is not relevant to the determination of fault or liability in connection with that incident.*”. Accordingly, an apology which by definition is restricted to an expression of sorrow, regret or sympathy would not constitute an express or implied admission of fault or liability. Moreover, they would not be relevant to the determination of fault or liability.

4.30 Section 5AF(2) of the WA 2002 Act provides that “*evidence of an apology made by or on behalf of a person in connection with any incident alleged to*

*have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.”.*

4.31 Below are the tables highlighting our findings of the apology legislation in Australia under our study:

Full apology vs. partial apology

	States/Territories	Number of states/territories
Apology legislation covering full apology (i.e. including admission of fault or mistake)	Australian Capital Territory, New South Wales	2
Apology legislation covering partial apology (i.e. without admission of fault or mistake)	Northern Territory, South Australia, Tasmania, Victoria, Western Australia	5
Mixed: cover full apology for most civil proceedings; cover partial apology for personal injury claims	Queensland	1
Total		8

Coverage (types of civil proceedings)

	States/Territories	Number of states/territories
Apology legislation covering all civil actions with a few specified exceptions	Australian Capital Territory, New South Wales, Northern Territory, Queensland, Tasmania, Victoria, Western Australia	7
Apology legislation covering tort action only	South Australia	1
Total		8

**Canada**

4.32 In Canada, the reform providing for the wider protection of apologies was rooted in a discussion paper entitled “*Discussion Paper on Apology Legislation*” (“BC Discussion Paper”) published by the Ministry of Attorney

General (“MAG”) in British Columbia.<sup>49</sup> According to the BC Discussion Paper, there are two types of apology legislation:

*“... legislation that stops short of protecting apologies that include admissions of liability and legislation that extends to the latter. To date, the more limited legislation has been adopted by more legislation undoubtedly because it is less controversial. However, the following concerns have been raised about this type of legislation:*

- It is not particularly effective in changing the status quo: i.e., it is most unlikely that expressions of condolence would now be construed as admission of fault;*
- It does not encourage true apologies – and may encourage insincerity for strategic purposes.”*<sup>50</sup>

4.33 The drawbacks found in the more limited legislation led the MAG to propose in the BC Discussion Paper that wider protection should be offered to apologies:

*“... to adopt the broader form of apology legislation. This could be accomplished by enacting legislation preventing liability arising out of an apology, by making the apology inadmissible for the purpose of proving liability and by providing that an apology does not constitute an admission of liability”*<sup>51</sup>

4.34 Thus, the MAG suggested the adoption of full, or a broader, protection to persons who were to apologise. By so doing, it was hoped that disputes *“could be resolved earlier, more effectively and less expensive”*.<sup>52</sup>

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<sup>49</sup> Graham Andrew Burch Barr, “Disingenuous or Novel? An Examination of Apology Legislation in Canada” (n 43 above), p 12.

<sup>50</sup> Ministry of Attorney General, British Columbia, *Discussion Paper on Apology Legislation* (n 33 above), p 5.

<sup>51</sup> *Ibid.*, p 6.

<sup>52</sup> *Ibid.*, p 6.

4.35 The BC Discussion Paper was followed by a report by the Ombudsman of British Columbia, which stated that:

*“[o]ften, providing an apology is simply the right thing to do. I also ask the Attorney General to consider the New South Wales Civil Liability Act (2002) as a model for legislative debate in British Columbia and I urge the Attorney General to introduce legislation to protect public officials so that they can apologize without fear of litigation on the grounds that an apology is an admission of negligence ....Providing apologies may not completely replace the option of seeking justice through litigation, but might offer an alternative to the adversarial process for those who seek recognition and remorse in order to feel justice is served. In recognition of the power behind the words of apology, this office will continue to seek and to recommend apologies ....”<sup>53</sup>*

4.36 This message from the Ombudsman of British Columbia sums up an experience from which Hong Kong may benefit. Arguably, providing for Hong Kong an apology legislation would ease the concern of both public and private alleged wrongdoing parties<sup>54</sup> which might wish to offer their sincere apologies for the mishaps and the pain and suffering of the injured persons or their families as a result of the mishaps. Apologies made under such statutory protection would understandably be less reserved and could thus be more receptive. Such a relationship is conducive to parties’ agreement to turn to a less confrontational option to settle their disputes.

4.37 Another important message one can make out from the report of the British Columbia Ombudsman is that providing protection for apologies does not necessarily mean that the option of seeking justice through litigation would be ruled out. In other words, access to justice (which is an important element of the rule of law) will not be prejudiced. Parties would still retain their rights to sue or to defend

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<sup>53</sup> Graham Andrew Burch Barr, “Disingenuous or Novel? An Examination of Apology Legislation in Canada” (n 43 above), p 13.

<sup>54</sup> For a discussion about the concern from both the public and the private sectors regarding apology, see paragraphs 1.1 to 1.7 above.

the allegations made against them. However, tendering an apology at the first reasonable opportunity might be the right thing to do and might help to allay the anxiety, anger, pain or suffering of the party injured, thus paving the way for better and more cost-effective resolution of a dispute.

4.38 In British Columbia, the Apology Act was enacted in 2006, making British Columbia the first of all Canadian provinces to have such legislation.<sup>55</sup> Other provinces followed and carried out legislative reforms to bring in apology legislation.<sup>56</sup>

4.39 The apology legislation in Canada contains the broadest provisions so far in terms of their definitions of apology and scope of application. Most of the apology legislation in Canada extends the scope of application to proceedings before a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity. The majority of such legislation also goes further by expressly covering issues of limitation of actions and insurance policies.

4.40 As mentioned, British Columbia was the first Canadian province to legislate on “apologies” under the Apology Act 2006 (“BC 2006 Act”). The BC 2006 Act is a stand-alone piece of legislation containing only three sections: section 1 deals with definitions; section 2 deals with the effect of apology on liability and section 3 deals with commencement.

4.41 Section 1 of the BC 2006 Act defines “apology” as “*an expression of sympathy or regret, a statement that one is sorry or any 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.*”. An apology under this section would include one containing an admission of fault (i.e. full apology) and the same definition is used in all provinces in Canada under study.

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<sup>55</sup> Leandro Zylberman, “Apology Legislation: Should it be safe to Apologize in Manitoba? An Assessment of Bill 202” (n 42 above), p 182.

<sup>56</sup> Graham Andrew Burch Barr, “Disingenuous or Novel? An Examination of Apology Legislation in Canada” (n 43 above), p 14.

4.42 Section 2 deals with the effect of apology on liability. Section 2(1) provides that:

*“An apology made by or on behalf of a person in connection with any matter*

- (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,*
- (b) does not constitute an acknowledgment of liability in relation to that matter for the purposes of section 24 of the Limitation Act,*
- (c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and*
- (d) must not be taken into account in any determination of fault or liability in connection with that matter.”*

4.43 Section 2(2) provides that *“[d]espite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter”*.

4.44 Section 2 therefore prevents an apology from constituting an admission of fault, from rendering insurance contracts void, from being taken into account in the determination of fault and from constituting a confirmation of a cause of action for the purposes of statutory limitations. It also prevents evidence of an apology from being admitted into court or referred to in court or disclosed to the court. What is already a very broad provision is made even broader by the fact that the kind of apology protected is defined to include an acknowledgment of fault.

4.45 Alberta (under its Evidence Act), Manitoba (under its Apology Act), Newfoundland and Labrador (under its Apology Act), Nova Scotia (under its Apology Act), Northwest Territories (under its Apology Act), Nunavut (under its



Legal Treatment of Apologies Act), Ontario (under its Apology Act), Prince Edward Island (under its Health Service Act) and Saskatchewan (under its Evidence Act) are some other provinces of Canada that have adopted apology legislation which is similar to the BC 2006 Act.

4.46 Of particular relevance to our study is that the apology legislation in Alberta, Nova Scotia, Northwest Territories, Nunavut and Ontario specifically legislate against providing protection to apologies made in situations which eventually lead to a criminal prosecution. Section 26.1(4) of the Alberta Evidence Act provides that *“This section does not apply to the prosecution of an offence.”*. Section 4 of the Apology Act in Nova Scotia provides that *“Nothing in this Act affects a prosecution for a contravention of an enactment”*. Section 3 of the Apology Act in Northwest Territories provides that it does not affect *“the admissibility of any evidence in the prosecution of an offence”* or *“the use that may be made in any legal proceeding of a conviction for an offence”*. The same is stipulated in section 3 of the Legal Treatment of Apologies Act in Nunavut. Likewise, sections 2(2) and 3 of the Apology Act in Ontario respectively provide that protection to an apology would not apply to proceedings under the Provincial Offences Act and to a criminal proceeding, including a prosecution for perjury.

4.47 Below are the tables highlighting our findings of the apology legislation in Canada under our study:

Full apology vs. partial apology

	Provinces/Territories	Number of provinces/territories
Apology legislation covering full apology (i.e. including admission of fault or mistake)	Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Nunavut, Ontario, Prince Edward Island, Saskatchewan	10
Apology legislation covering partial apology (i.e. without admission of fault or mistake)	-	0
Total		10

### Coverage (criminal proceedings)

	Provinces/Territories	Number of provinces/territories
Apology legislation expressly provides that it does not apply to criminal proceedings	Alberta, Nova Scotia, Northwest Territories, Nunavut, Ontario	5
Apology legislation does not expressly provide that it does not apply to criminal proceedings (therefore arguably it is applicable to criminal proceedings)	British Columbia, Manitoba, Newfoundland and Labrador, Prince Edward Island, Saskatchewan	5
Total		10

### **The United Kingdom (Excluding Scotland)**

4.48 As noted above, the law providing immunity to apologies in the UK (excluding Scotland in view of the Scotland Act 1998 which established the devolved Scottish Parliament) is relatively brief and narrow in scope. It does not seem to be sufficiently broad to cover an apology bearing an admission of fault or liability. Also, the substantive law governing apologies in the UK is contained in a single section in the Compensation Act 2006 (“the Compensation Act”), i.e. section 2 which provides as follows:

*“An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty”.*

4.49 Under section 2 of the Compensation Act, an apology, an offer of treatment or other redress would not be taken as factors relevant to a court’s determination of a claim in negligence or breach of statutory duty.

4.50 The Compensation Act, however, does not contain any definition of the term “apology”. In the absence of such a definition, it seems that a mere apology such as “I am sorry” could be covered by the section. However, a literal interpretation of section 2 would suggest that it might not be wide enough to cover

an apology bearing an admission of fault or liability. From such a perspective, it seems that section 2 of the Compensation Act could not have immunised one from being liable in negligence or breach of statutory duty where there is an admission of fault or liability in an apology. Professor Prue Vines<sup>57</sup> thus remarked as follows:

*“This provision differs from most of the other apology provisions in the common law world in its brevity, in that it does not define apology and that it makes no provision about admissibility or insurance. It is also striking in that the only remark made about it in the explanatory note for the Act states ‘This provision is intended to reflect the existing law’. One might then ask why it is necessary. Does this mean that there is no difference in the treatment of apologies in Scotland where the Act does not apply compared with England and Wales where it does apply?”*<sup>58</sup>

4.51 Professor Vines has highlighted a number of significant features of section 2 of the Compensation Act. First, it is comparatively brief and it does not define apology. Second, it makes no provision on admissibility and insurance. These might lead to the argument that the UK apology law may be less attractive than those found in other common law jurisdictions. The uncertainty as to whether an apology carrying with it an admission of fault or liability can be protected by section 2 has made it even more important to give the provision careful consideration before a decision is taken whether the UK model is appropriate for the unique needs of Hong Kong. The following further observations of Professor Vines are highly relevant:

*“In the light of the evidence, if apologies are to be protected for the purpose of increasing them it is preferable to have legislation making it clear that an apology can include an admission of fault and that that is also protected. The New South Wales, Australian Capital Territory*

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<sup>57</sup> Professor at the University of New South Wales; MA Syd, DipEd SydTeachColl, LLB UNSW.

<sup>58</sup> Prue Vines, “Apologies and Civil Liability in England, Wales and Scotland: The View from Elsewhere” (2007) *University of New South Wales Faculty of Law Research Series*, Paper 61.

*and British Columbia legislation make this clear as do some of the United States medical provisions. The UK Compensation Act does not make it clear.”*<sup>59</sup>

4.52 Furthermore, there is another problem in the explanatory note for the Compensation Act which states that section 2 is intended to reflect the existing law. Professor Vines, however, does not think that such a statement is fully acceptable:

*“It seems in England and Wales and in Scotland that is already true that an apology ‘of itself will not amount to an admission of liability’, particularly in relation to negligence law as liability is a legal conclusion which courts will always have to draw themselves. There is appellate authority which has refused to hold people liable in negligence where they have apologised and where they have stated in court that they should have acted differently. However, there cannot be complete confidence about this position because there are isolated negligence cases where a court has treated an apology as creating liability or possibly creating liability and the appellate authority in some of those cases is specifically overruling a decision by a lower court judge that an apology does constitute a legal admission of liability and therefore creates liability. As a matter of principle such decisions must be wrong – negligence is always a determination for the court to make – but the fact that courts are quite often swayed to consider an apology as an admission of liability or as extremely persuasive evidence going to liability should ring the alarm bells.”*<sup>60</sup>

4.53 It thus seems unclear whether the UK courts would, prior to the enactment of section 2 of the Compensation Act, always consider that an apology of itself would not amount to an admission of liability; for some courts did rule that an apology amounted to an admission of liability or was at least persuasive evidence to prove liability. This casts considerable doubt on the reliability of the explanatory note.

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<sup>59</sup> *Ibid.*, p 23.

<sup>60</sup> *Ibid.*, p 15.

4.54 Furthermore, what makes section 2 of the Compensation Act even more uncomfortable to those who have apologised (or who might want to make an apology) is that there is nothing in the Act to prevent an apology from being admitted into evidence which would then be taken by the court as highly persuasive in proving liability. According to Professor Vines, “[t]his is unusual amongst apology-protecting legislation.”<sup>61</sup> Professor Vines explained the importance of preventing an apology from being admitted into evidence by saying that such a prohibition would “prevent a jury drawing a wrong conclusion about liability from the fact that an apology has been uttered.”<sup>62</sup>

## Scotland

4.55 As stated in the opening page of a 2012 Consultation Paper in Scotland entitled “*Apologies (Scotland) Bill*” (“Scottish Consultation Paper”) presented by Margaret Mitchell MSP, the objective of the proposed Apologies (Scotland) Bill is to “provide that an expression of apology does not amount to an admission of liability and is inadmissible as evidence, for the purposes of certain legal proceedings.”<sup>63</sup> Thus, the intention of the proposed Apologies (Scotland) Bill is to ensure that an apology cannot be used as evidence in civil proceedings.<sup>64</sup>

4.56 In advocating the enactment of the proposed Apologies (Scotland) Bill, Margaret Mitchell MSP stated that one of the reasons for people’s reluctance to apologise was their fear that an apology or an acknowledgment of “mistakes” would lead to litigation.<sup>65</sup> Argued against this was the view that in some situations what the complainant wanted was just an apology acknowledging the problem and to ensure that the same thing would not happen again.<sup>66</sup>

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<sup>61</sup> *Ibid.*, p 20.

<sup>62</sup> *Ibid.*, p 20.

<sup>63</sup> Consultation by Margaret Mitchell MSP 29 June 2012 - *Apologies (Scotland) Bill*: Available at [http://www.scottish.parliament.uk/S4\\_MembersBills/Apologies\\_Consultation.pdf](http://www.scottish.parliament.uk/S4_MembersBills/Apologies_Consultation.pdf) (visited May 2015).

<sup>64</sup> *Ibid.*, p 2.

<sup>65</sup> *Ibid.*, p 2.

<sup>66</sup> *Ibid.*, p 5.

4.57 As stated in the Scottish Consultation Paper, at present Scotland does not have a statutory framework that deals specifically with the effect of apologies on civil or criminal liability.<sup>67</sup> It further points out that, in a strict sense, although an apology on its own is unlikely to determine liability, it can be of relevance as evidence in some cases.<sup>68</sup>

4.58 To ensure that an apology would not be admissible as evidence of one's admission of liability, the Scottish Consultation Paper specifically recommends<sup>69</sup> that the proposed Apologies (Scotland) Bill should specify that certain forms of apologies would not be admitted as evidence to establish legal liability or fault in certain civil matters. The following definition of apology is believed to be able to achieve this:

*“[O]ne person (A) apologises to another (B) if:*

- *A acknowledges that there has been a bad outcome for B*
- *A conveys regret, sorrow or sympathy for that bad outcome, and*
- *A recognises direct or indirect responsibility for that bad outcome.*

*...In order for an apology to be effective, it has been suggested that the proposed definition include a fourth key element, namely ‘an undertaking, where appropriate, to review the circumstances which led to the bad outcome with a view to making, if possible, improvements and or learning lessons.’*

*Such an undertaking would not be appropriate in all situations or even, in some instances, possible. However, it has been suggested that a definition of an apology that does not include an undertaking to review does not constitute the effective apology that people desire and the culture change which the Bill seeks to promote.”<sup>70</sup>*

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<sup>67</sup> *Ibid.*, p 8.

<sup>68</sup> *Ibid.*, p 8.

<sup>69</sup> *Ibid.*, p 16.

<sup>70</sup> *Ibid.*, p 16.

4.59 Thus, under the Scottish Consultation Paper, an apology under the proposed Apologies (Scotland) Bill would not only be a mere expression of regret, sorrow or sympathy, there is also the need for the alleged wrongdoer to recognise either direct or indirect responsibility for the wrongful deed. However, the Scottish Consultation Paper is cautious enough to ensure that the proposed apology law would not be abused:

*“Consequently, it is proposed that the Bill will not protect apologies in so far as they include admissions of legal fault, culpability, or liability and will be limited in its application to civil proceedings.*

*The provisions should, however, allow for the acknowledgement that ‘things could or should have been done better’ or differently and this will be taken on board for the future.*

*It is the intention that the proposed Bill should allow that where someone makes an admission of fault, in the context of an apology, it should still be possible to construe those statements as implying legal liability”<sup>71</sup>*

4.60 Perhaps, an example of an acknowledgment of direct or indirect responsibility for a bad outcome that would not necessarily amount to an admission of fault can be found in the following illustration:

*“By apologizing, A could, in effect, be saying ‘Yes, I made a mistake, but it was the sort of mistake that everybody can be expected to make from time to time,’ and in some circumstances this will not constitute a failure to exercise a reasonable duty of care.”<sup>72</sup>*

4.61 Thus, what the Scottish Consultation Paper means to propose is that although legal protection would be provided to an apology, it would not be provided to “statements of facts made in the context of the apology which could be used to

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<sup>71</sup> *Ibid.*, p 18.

<sup>72</sup> *Ibid.*, p 18.

*determine fault or wrongdoing*”.<sup>73</sup> The intention for this is to “*secure redress for the person who has suffered the bad outcome.*”<sup>74</sup> It appears that this has been reversed after the consultation which will be discussed below in Chapter 5.

4.62 Other major proposals of the Scottish Consultation Paper include the suggestion that an apology should not be used as evidence of liability in civil proceedings;<sup>75</sup> and that the proposed Bill would cover all forms of apology:

*“It is intended that the Bill’s provisions will apply to all forms of apology, from the spontaneous apology to the more considered apology of an individual or institution in response to a complaint, anticipated litigation or historic wrongdoing. Hence, it would apply to both written and oral apologies.”*<sup>76</sup>

4.63 The Scottish Consultation Paper also suggests that the proposed Apologies (Scotland) Bill should not be limited in the subjects to which it applies so that “*government organisations, public authorities, commercial bodies, and private individuals will be able to rely on the Bill*”<sup>77</sup> when making an apology.

4.64 Perhaps, the gist of the proposed Apologies (Scotland) Bill can be found in the following excerpt from the Consultation Paper:

*“The guiding principle behind such legislation is that if individuals, corporations, or institutions can make apologies, without fear of apologies being taken into account in any subsequent legal proceedings, they will be much more likely to actually make apologies to those who seek such a remedy. Therefore all the benefits of encouraging apologising in a society can be reaped.”*

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<sup>73</sup> *Ibid.*, p 18.

<sup>74</sup> *Ibid.*, p 18.

<sup>75</sup> *Ibid.*, p 16.

<sup>76</sup> *Ibid.*, p 20.

<sup>77</sup> *Ibid.*, p 20.



4.65 Accordingly, the proposed Apologies (Scotland) Bill calls for the enactment of apology legislation to protect those who have made apologies from the fear that their apologies would be taken into account in any subsequent legal proceedings. However, the situation would be different where there is an admission of fault. In such a situation, the proposed Apologies (Scotland) Bill provides a fair recourse to the party injured by providing that it would not protect apologies in so far as they include admissions of legal fault, culpability, or liability.<sup>78</sup> It appears that this has also been reversed after the consultation.

4.66 The consultation was closed on 28 September 2012. About 56% of the persons responded were supportive of legislation as the appropriate mechanism for addressing the issues identified in the consultation. In the “Summary of Consultation Responses”,<sup>79</sup> arguments in favour of legislation as the mechanism to take forward the principles behind the proposed Apologies (Scotland) Bill included:-

- (a) *“It would provide a framework for practitioners to use in responding promptly.*
- (b) *It could provide space where communication could be protected and help towards culture change.*
- (c) *Guidelines would not have the same impact as legislation as they were discretionary.*
- (d) *There was evidence that legal uncertainties inhibited apologies and ‘there would be multiple benefits as a result of the legislation: to the public who use the health service; to those delivering public services; and to the public purse (through reduced litigation and the cost of other dispute resolution mechanisms)’. (The Royal College of Physicians of Edinburgh).”<sup>80</sup>*

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<sup>78</sup> *Ibid.*, p 18.

<sup>79</sup> Available at [http://www.scottish.parliament.uk/S4\\_MembersBills/Apologies\\_summary\\_final.pdf](http://www.scottish.parliament.uk/S4_MembersBills/Apologies_summary_final.pdf) (visited May 2015).

<sup>80</sup> *Ibid.*, p 6.

4.67 Those arguing against a legislative requirement highlighted issues such as:-

- (a) *“There was a risk that a mandatory approach could render apologies meaningless and fail to ensure organisations learnt lessons.*
- (b) *It might be unhelpful where an apology was rejected.*
- (c) *It was already open to anyone to express regret and that expression need not be construed as an admission of liability.*
- (d) *Mechanisms to render apologies inadmissible as evidence already existed – for example, apologies in correspondence about settlement of a dispute and marked “without prejudice” might be protected by legal privilege.*
- (e) *There was a risk that it would add unnecessary complexity to the litigation process – for example, determining the meaning of an apology and whether or not it was statutorily protected might require evidence about the apology and its context before it was decided whether or not it was inadmissible.*
- (f) *The usefulness of such legislation was doubtful in the absence of provisions in relation to insurers and the fact that this matter was reserved.”*<sup>81</sup>

4.68 A Final Proposal was lodged with the Scottish Parliament on 2 April 2014 for a Bill to provide that an expression of apology, including an expression of sympathy or regret and any statements of fact, does not amount to an admission of liability and is inadmissible as evidence for the purposes of certain non-criminal legal proceedings.<sup>82</sup> The Apologies (Scotland) Bill, a Member’s Bill, was introduced in the Scottish Parliament on 3 March 2015.<sup>83</sup> The Apologies (Scotland) Bill has the following features: (i) it applies generally to civil proceedings but not criminal proceedings; (ii) it provides that an apology would not be admissible as

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<sup>81</sup> *Ibid.*, p 7.

<sup>82</sup> Available at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/52684.aspx> (visited May 2015).

<sup>83</sup> Available at [http://www.scottish.parliament.uk/S4\\_Bills/Apologies%20\(Scotland\)%20Bill/b60s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Apologies%20(Scotland)%20Bill/b60s4-introd.pdf) (visited May 2015).

evidence of anything relevant to the determination of liability and cannot be used in any other way to the prejudice of the apology-maker; (iii) it covers full apology and also statements of facts conveyed during apology. These will be discussed further in the next chapter.

## Observation

4.69 From the above summary and analysis of the apology legislation of different jurisdictions in the United States, Australia, Canada, the UK and Scotland, it appears that the global trend is pointing to the direction of providing protection for full apology (as opposed to partial apology) in civil proceedings in general which will be discussed in detail in the next chapter. It also appears that the Canadian approach is the broadest one insofar as existing apology legislation is concerned.<sup>84</sup>

4.70 Indeed, as remarked by John C. Kleefeld, the British Columbia Apology Act has 3 aspects:

*“[I]n the absence of a codified law of evidence, a legislative solution is needed. The Apology Act provides that solution, in a triple-barrelled manner. It has a declarative aspect—an apology does not constitute an express or implied admission of fault (s. 2(1)(a)); a relevance aspect—an apology must not be taken into account in any determination of fault (s. 2(1)(d)); and a procedural aspect—an apology is inadmissible as evidence of fault in connection with the matter for which the apology was given (s. 2(2)). This is about as strong a message as the Legislature could send that it wants apologies protected, and while there may be cases that test the limits of that protection, the Apology Act is likely to keep evidence of most out-of-court apologies out of courtrooms.”<sup>85</sup>*

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<sup>84</sup> Prue Vines stated that “The Apology Act 2006 of British Columbia is the broadest provision in existence so far”; see Prue Vines, “Apologies and Civil Liability in England, Wales and Scotland: The View from Elsewhere” (n 58 above), p 202.

<sup>85</sup> John C. Kleefeld, “Thinking Like a Human: British Columbia’s Apology Act” (2007) 40 *UBCL Rev* 769, 801-802

4.71           It is noted that under the Canadian approach, the effect of apology on the (1) limitation period and (2) insurance policy is also dealt with. These two aspects will be discussed in the next Chapter.

## *Chapter 5: Arguments For and Against the Enactment of Apology*

### *Legislation in Hong Kong*

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#### **Introduction**

5.1 As mentioned above, it is the uncertainty in the law as to whether the making of an apology would give rise to adverse legal consequences that causes concern. This leads to the observation that “*many who have wished to give an apology after harming another have refrained either for fear of admitting legal liability or because their lawyers counseled them to keep quiet. Furthermore, it is typical for insurance companies to advise policyholders against expressing sympathy or apologizing.*”<sup>86</sup> The result is that apologies or statements of sympathy are sparing even in cases where a simple utterance of “sorry” would have arrested the case from proceeding to a court hearing through settlement. As discussed above, it seems that a case has been made out for a serious consideration of whether an apology legislation should be enacted in Hong Kong for the purpose of removing these disincentives to apologising.

5.2 In the previous chapter, we considered the different voices coming from various common law jurisdictions calling for a varying degree of protection to makers of apologies. There were proposals and demands to either exclude apologies or statements of similar effect from being admitted in evidence or to legislate against equating apologies or statements of similar effect to an admission of liability or fault. We have also studied the various types of apology legislation in a number of common law jurisdictions. In this chapter, we shall proceed to consider the pros and cons of apology legislation, as well as those of protecting full, as opposed to partial, apologies. In addition, the potential effects of an apology on limitation of action and insurance policy will also be discussed. This will be followed by a study of the latest development in apology legislation in Scotland, namely the protection

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<sup>86</sup> Elizabeth Latif, “Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions” (February 2001), 81 *BUL Rev* 289, 319.

of statements of facts conveyed in an apology. Finally, an illustration of the significance of apology in the context of the medical profession is given.

## **Pros and Cons of Apology Legislation**

5.3 In the BC Discussion Paper,<sup>87</sup> the MAG set out the factors in favour and against apology legislation. These factors are direct and comprehensive. They are as follows:-

*“A review of recent academic literature suggests that factors in favour of apology legislation include:*

- a. To avoid litigation and encourage the early and cost-effective resolution of disputes;*
- b. To encourage natural, open and direct dialogue between people after injuries; and*
- c. To encourage people to engage in moral and humane act of apologizing after they have injured another and to take responsibility for their actions.*

*Negative factors include:*

- a. Public confidence in the courts could be adversely affected if a person who has admitted liability in an apology is found not liable;*
- b. Insincere and strategic apologies could be encouraged; and*
- c. Apologies encouraged by such legislation might create an emotional vulnerability in some plaintiffs who may accept settlements that are inappropriately low.”<sup>88</sup>*

5.4 Similar observations were expressed in a paper of the Uniform Law Conference of Canada<sup>89</sup> which argued cogently that the three reasons in the BC

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<sup>87</sup> Ministry of Attorney General, British Columbia, *Discussion Paper on Apology Legislation* (n 33 above).

<sup>88</sup> *Ibid.*, at Section 4: “Factors in favour and against apology legislation”.

<sup>89</sup> Russell J. Getz, *Policy Paper on Apology Legislation* (September 2007) Uniform Law Conference of Canada.

Discussion Paper in favour of having apology legislation are interrelated in a practical sense: “*in that encouraging people to take responsibility and to apologize encourages people to be reconciled with one another, which in turn encourages people to resolve their disputes, which lessens litigation.*”<sup>90</sup>

5.5 The above observations are echoed by a number of scholars who have argued that apologising has important benefits for both parties to a lawsuit, including increasing the possibilities for reaching settlements.<sup>91</sup> They suggest that apologising may avoid litigation altogether, and even where it does not, it may reduce tension, antagonism and anger so as to allow less protracted, more productive, more creative, and more satisfying negotiation.<sup>92</sup> Survey research also suggests that claimants desire apologies and that some would not have filed suit had an apology been offered.<sup>93</sup> In addition, there is anecdotal evidence of injured parties who would not have filed lawsuits had apologies been proffered,<sup>94</sup> of plaintiffs who would have preferred an apology as part of a settlement,<sup>95</sup> and of occasions on which a failure to apologise promoted litigation by adding insult to injury.<sup>96</sup>

5.6 Furthermore, according to some academic journals, there are empirical studies which demonstrated that the number of lawsuits decreases following an apology, at least insofar as the health care industry is concerned:

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<sup>90</sup> *Ibid.*, para 15.

<sup>91</sup> See, e.g., Johnathan R. Cohen, “Advising Clients to Apologize” (1999) 72 *S Cal L Rev* 1009.

<sup>92</sup> Jennifer K. Robbennolt, “Apologies and Legal Settlement: An Empirical Examination” (n 15 above), p 463, citing a number of academic journals in support of the author’s observations.

<sup>93</sup> *Ibid.*

<sup>94</sup> See an example given in Bruce W. Neckers, “The Art of the Apology” *Mich BJ*, June 2002, 10, 11: “*In a case in which I represented the plaintiff, the wrongdoer himself tearfully acknowledged his role in the tragic accidental death of my client’s son. It had a huge impact on the settlement of the case. There would never have been a lawsuit if the same person had made the same comments to the mother during the 30-day period in which her son lay dying in the hospital, or during the three days his young body was at the funeral home. The sad part in that case is that the defendant and his company wanted to express the same thought near the time of the accident, but claimed to have been prohibited from doing so by their insurance carrier.*”

<sup>95</sup> Jennifer K. Robbennolt, “Apologies and Legal Settlement: An Empirical Examination” (n 15 above), p 464, in which the author cited, e.g., Piper Fogg, “Minnesota System Agrees to Pay \$500,000 to Settle Pay-Bias Dispute” (14 February 2003) *Chron Higher Educ*, p A12 (describing class-action plaintiff’s disappointed reaction to the settlement: “*I want an apology,*” she said, “*and I am never going to get it*”); Editorial, “The Paula Jones Settlement” (15 November 1998) *Wash Post*, p C6; Nathalie Des Rosiers et al., “Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System” (1998) 4 *Psychol Pub Pol’y & L* 433, 442.

<sup>96</sup> See, e.g., Johnathan R. Cohen, “Advising Clients to Apologize” (n 91 above); Aviva Orenstein, “Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It” (n 10 above), p 243.

*“Studies have demonstrated that the number of suits decrease following an apology. For instance, some hospitals in Pennsylvania and Tennessee have found that effective apologies and disclosure programs reduce malpractice payments. A study by the University of Michigan Health Service reported that ‘per case payments decreased 47% and the settlement time dropped from 20 months to 6 months since the introduction of their 2001 Apology and Disclosure Agreement.’ Papers from Cornell University and the University of Houston, which examined hospitals in those states with apology laws, found that expressions of regret increased the incident of closed cases due to faster settlement times. The total number of malpractice claims declined in these jurisdictions, and the cases with the most severe medical errors settled sooner in states with apology laws. These types of remedial statutes also ‘reduce claim payouts of the most severe cases by \$58,000 to \$73,000 per case and the claim payouts of the “somewhat” severe cases by \$7,000 to \$14,000 per case.’ In the short run, the study proved that the number of resolved cases increased and the payments involving minor injuries went down in those states with apology laws. This type of legislation also reduced the amount of time involved in reaching a settlement, and in the long run, ‘evidence suggests there could be fewer cases overall.’*

*These findings are consistent with a six year study at the Lexington Veterans Affairs Medical Center in Kentucky which implemented an apology program during which time the hospital ‘paid an average \$15,622 per claim, compared with a \$98,000 average at VA hospitals without “I’m sorry” policies.’ Under its policy, the Lexington Center ‘investigates and discloses the result [of a medical procedure], even if findings show the adverse event was the result of an error. An apology is offered when appropriate, along with a financial settlement.’*

*The Early Resolution Program at the COPIC Insurance Company, a liability insurer directed by physicians in Colorado, is the best-known*



*private-sector disclosure program that has met with success since its inception in 2000. This company reported that, in 2003, an average malpractice incident using the 3R's of the 'Recognize, Respond, and Resolve' program paid \$6,094 compared to \$88,056 for closed claims, \$29,097 for cases closed with no indemnity, and \$303,326 for cases closed with payments of indemnity.”<sup>97</sup>*

5.7 The above-mentioned Uniform Law Conference of Canada paper further points out that in certain tort cases where purely money damages might be inadequate to fully compensate people for their non-pecuniary loss and suffering, “[a]n apology can be important addition to monetary damages in compensating for intangible loss, which can be the largest element of a tort damage award.”<sup>98</sup>

5.8 The recent experience in Scotland in 2012 on the consultation on the “*Apologies (Scotland) Bill*” to “provide that an expression of apology does not amount to an admission of liability and is inadmissible as evidence, for the purposes of certain legal proceedings”<sup>99</sup> provides useful reference for the arguments in favour of and against apology legislation. The arguments have been covered in the previous chapter but are reproduced again for easy reference.

5.9 Arguments in favour of legislation included:-

- (a) *“It would provide a framework for practitioners to use in responding promptly.*
- (b) *It could provide space where communication could be protected and help towards culture change.*
- (c) *Guidelines would not have the same impact as legislation as they were discretionary.*
- (d) *There was evidence that legal uncertainties inhibited apologies and ‘there would be multiple benefits as a result of the legislation: to the*

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<sup>97</sup> Nichole Marie Saitta, Samuel D. Hodge, Jr., “Is it unrealistic to expect a doctor to apologise for an unforeseen medical complication? – a primer on apologies law” (2011) 82 *Pennsylvania Bar Association Quarterly*, 93, 99-100.

<sup>98</sup> Russell J Getz, *Policy Paper on Apology Legislation* (n 89 above), para 17.

<sup>99</sup> Consultation by Margaret Mitchell MSP 29<sup>th</sup> June 2012 - *Apologies (Scotland) Bill* (n 63 above).

*public who use the health service; to those delivering public services; and to the public purse (through reduced litigation and the cost of other dispute resolution mechanisms)'. (The Royal College of Physicians of Edinburgh)."*

5.10 Arguments against a legislative requirement included:-

- (a) *"There was a risk that a mandatory approach could render apologies meaningless and fail to ensure organisations learnt lessons.*
- (b) *It might be unhelpful where an apology was rejected.*
- (c) *It was already open to anyone to express regret and that expression need not be construed as an admission of liability.*
- (d) *Mechanisms to render apologies inadmissible as evidence already existed – for example, apologies in correspondence about settlement of a dispute and marked "without prejudice" might be protected by legal privilege.*
- (e) *There was a risk that it would add unnecessary complexity to the litigation process – for example, determining the meaning of an apology and whether or not it was statutorily protected might require evidence about the apology and its context before it was decided whether or not it was inadmissible.*
- (f) *The usefulness of such legislation was doubtful in the absence of provisions in relation to insurers and the fact that this matter was reserved."*

### **Full Apology vs. Partial Apology**

5.11 Arguments for and against providing legislative protection to partial and full apologies have been thoroughly considered by Professor Jennifer K. Robbennolt<sup>100</sup> in her paper entitled "Apologies and Legal Settlement: An Empirical

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<sup>100</sup> Professor of Law and Psychology, University of Illinois College of Law; H. Ross & Helen Workman Research Scholar in Law; B.S. 1991, Willamette University; J.D. 1996, Ph.D 1998 (Psychology), University of Nebraska.

Examination”<sup>101</sup>. In order to examine the effects of apologising in legal settlement, Professor Robbennolt designed and conducted experimental studies which were outlined in her paper. In particular, she explored the differences in offering partial apologies as opposed to full apologies in facilitating settlement of legal disputes.<sup>102</sup>

5.12 In her studies, Professor Robbennolt first examined the effects of apologies on the apology-recipients’ willingness to accept a settlement offer in a dispute. She set a hypothetical scenario which detailed a relatively simple personal injury dispute, i.e. a pedestrian-bicycle accident. A total of 145 participants were assigned to stand in the shoes of the injured party and were randomly divided into three experimental groups to evaluate three versions of the scenario: (i) a scenario in which no apology was offered (these were control participants); (ii) a scenario in which a partial apology (i.e. the other party merely expressed sympathy for the potential claimant’s injuries) was offered; and (iii) a scenario in which a full apology (i.e. the other party both expressed sympathy and took responsibility for causing the potential claimant’s injuries) was offered. The result of the above study was that, even though all participants were told that they had suffered the same injuries and received the same offer of settlement, the nature of the apology offered influenced recipients’ willingness to accept the offer. When no apology was offered, 52% of the respondents indicated that they would definitely or probably accept the offer, while 43% would definitely or probably reject the offer and 5% were unsure. When a partial apology was offered, only 35% of the respondents were inclined to accept the offer, 25% were inclined to reject it, and 40% indicated that they were unsure. When a full apology was offered, in contrast, 73% of respondents were inclined to accept the offer, with only 13-14% each inclined to reject it or remaining unsure.<sup>103</sup>

5.13 The conclusion drawn by Professor Robbennolt from the above results was that, comparing each type of apology to the condition in which no apology was received, receiving a partial apology increased the likelihood that the respondent would be unsure about how to respond to the settlement offer, while receiving a full

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<sup>101</sup> Jennifer K. Robbennolt, “Apologies and Legal Settlement: An Empirical Examination” (n 15 above).

<sup>102</sup> *Ibid.*, p 484.

<sup>103</sup> *Ibid.*, pp 484-486.

apology increased the likelihood that the respondent would choose to accept the offer and decreased the likelihood that the respondent would choose to reject the offer.<sup>104</sup>

5.14 Second, Professor Robbennolt further analysed the effects of the nature of the apology on a number of perceptions and attributions thought to underlie the effect of apology on settlement decision-making. The average ratings for variables on which an apology had a significant effect are reproduced as follows<sup>105</sup>:-

Participants' Perceptions and Attributions <sup>106</sup>			
	No Apology	Partial Apology	Full Apology
Sufficient apology	1.90	2.30	3.82
Regret	2.86	2.63	4.14
Moral character	2.65	2.70	3.86
Careful in future	3.50	3.30	4.18
Belief that responsible	2.86	3.00	4.68
Bad Conduct	4.05	3.85	3.10
Sympathy	1.57	1.65	2.60
Anger	3.71	3.74	2.86
Forgiveness	3.62	3.85	4.23
Damage to Relationship	3.29	3.50	2.00
Offer make up for injury	2.52	2.35	3.55

Note: All constructs were measured on 5 point scales; higher numbers represent "more" of the construct. For each rating, means with different superscripts differ significantly ( $p < .05$ ).

5.15 Based on the above results, Professor Robbennolt reached the conclusion that *"a full apology was viewed as more sufficient than either a partial apology or no apology. An offender who offered a full apology was seen as experiencing more regret, as more moral, and as more likely to be careful in the future than one offering a partial or no apology. While an offender offering a full apology was seen as believing that he or she was more responsible for the incident than one who offered a partial or no apology, the conduct of the full apologiser was*

<sup>104</sup> *Ibid.*, p 486.

<sup>105</sup> *Ibid.*, p 487.

<sup>106</sup> *Ibid.*

*judged more favourably than that of offenders who offered either a partial or no apology. Participants (as apology-recipients) expressed greater sympathy and less anger at the offender who offered a full apology than they did at offenders who offered either a partial or no apology. Participants also indicated more willingness to forgive an offender who gave a full apology than they did for offenders offering a partial or no apology and expected that less damage to the parties' relationship would result following a full apology than they did following a partial or no apology. Finally, participants indicated that the settlement offer would better make up for their injuries when they had received a full apology than when they had received a partial or no apology.”*<sup>107</sup>

5.16 Third, Professor Robbennolt also explored in the same study the effects of evidential rules on settlement decision-making. The above participants who were offered an apology (either partial or full) were further divided into three groups: (i) one of which was told of a set of evidentiary rules protecting the apology; (ii) the other one of which was told of a set of evidentiary rules not protecting the apology; and (iii) the remaining one of which was told nothing about any evidentiary rule. The result of the study was that differences in evidentiary rules did not produce significant differences in settlement rates, nor did they produce differences in participants' perceptions and attributions.<sup>108</sup>

5.17 The conclusion drawn by Professor Robbennolt from the above result was that there were no effects of the evidentiary rules on ratings of the sufficiency or sincerity of the apology given. Participants were, however, aware of the differences in the rules as they assessed the scenario. Analysis of participants' ratings of the likely motives for the apology revealed that apologies that were not protected by an evidentiary rule were seen as less likely to have been motivated by desire to avoid a lawsuit. Thus, participants were aware of the content of the different evidentiary rules, but did not adjust their assessments of the apologies received in response to those rules.<sup>109</sup>

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<sup>107</sup> *Ibid.*, pp 487-488.

<sup>108</sup> *Ibid.*, pp 484, 490-491.

<sup>109</sup> *Ibid.*, pp 490-491.

5.18 In summary, Professor Robbennolt was of the view that apologies have the effect of influencing the inclination of apology-recipients to accept or reject a settlement offer. In particular, only a full, responsibility-accepting apology increases the likelihood that the settlement offer would be accepted<sup>110</sup> and positively impacts upon the apology-recipient's perception of the situation and the prospects for settlement.<sup>111</sup> In contrast, a partial, sympathy-expressing apology increases the apology-recipient's uncertainty about whether or not to accept the settlement offer<sup>112</sup> and has fewer effects, both positive and negative, and is more dependent on context.<sup>113</sup> Professor Robbennolt clearly expressed her view that a full apology is better than a partial apology; that a partial apology is (often) not different from no apology;<sup>114</sup> and that instead there was evidence showing that a partial apology can be particularly detrimental when the resulting injury is severe or when there is strong evidence of the offender's responsibility.<sup>115</sup> Overall, she remarked that full apologies improve the participants' perceptions of the situation and the offender, while partial apologies do little to alter such perceptions.<sup>116</sup>

5.19 In respect of the effect of evidentiary protection for apologies, Professor Robbennolt concluded that while participants were aware of the different evidentiary rules governing the admissibility of the apology, the nature of the applicable rule did not influence the apologies' effect on settlement decisions, nor did these rules influence participants' perceptions of the situation or the offender.<sup>117</sup>

5.20 The following is said by Professor Vines in her article regarding Professor Robbennolt's aforesaid experiment:

*“Studies focusing on apology as an element in reducing litigation or changing behaviour in relation to settlement offers are rare. One set of experimental studies based on simulated accidents between a*

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<sup>110</sup> *Ibid.*, p 491.

<sup>111</sup> *Ibid.*, p 515.

<sup>112</sup> *Ibid.*, p 491.

<sup>113</sup> *Ibid.*, p 515.

<sup>114</sup> *Ibid.*, p 495, in which Professor Robbennolt has conducted a second study on factors influencing the effects of apologies and come to results consistent to her first study as outlined above.

<sup>115</sup> *Ibid.*, p 497.

<sup>116</sup> *Ibid.*, p 500.

<sup>117</sup> *Ibid.*, p 497.

*bicycle and pedestrian was carried out by Jennifer Robbennolt. Participants reviewed the scenario and then, standing in the shoes of the injured party, evaluated a settlement offer. In one study the only variable was the nature of the apology offered: partial apology (expression of regret), no apology, or full apology (acknowledging fault). Another study examined how respondents reacted to an apology in the light of their knowledge of the evidentiary rules which admitted or did not admit the apology, and did or did not protect it. The results of these studies suggested that respondents were far more inclined to accept a settlement offer where a full apology was offered, less so for partial apologies, and far less so where no apology was offered. It was also noted that respondents saw offenders as more moral, more forgivable, and as more likely to be careful in the future if they offered a full apology. A partial apology appeared to create uncertainty in participants as to whether to accept the offer. The results suggested that where an injury was severe a partial apology might actually be detrimental and make the respondents more inclined to reject a settlement offer. This effect was not seen where injury was slight. This suggests that the apology most likely to reduce the desire of a person to sue is the apology that includes an admission of fault.*

*A great deal of the literature on apology has been developed in relation to medical negligence, and it too tends to support these conclusions. A German study of handling of errors found that, while severity of injury was the major factor affecting patients' choice of action to be taken, in a case of severe injury:*

*Most patients accept that errors are not entirely preventable, but they expect accountability and clear words. These clear words should include the acknowledgment that something wrong has happened, that measures will be taken to prevent future events ... and an expression of sincere regret.”<sup>118</sup>*

5.21 The BC Discussion Paper referred to in the previous chapter also sums up the benefits of an apology legislation that provides wider protection and the

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<sup>118</sup> Prue Vines, “Apologies and civil liability in the UK: a view from elsewhere” (n 13 above), p 220.

drawbacks over a more limited legislation to cover only partial apology (see paragraphs 4.32-4.34 above).

## **Factual Information Conveyed in an Apology**

5.22 As mentioned in paragraph 4.9 above, it seems that three main waves of apology legislation can be discerned: the first wave of apology legislation commencing in the 1980s in the United States, the Australian-led wave in the early 2000s and the Canadian legislation in the mid to late 2000s. It appears from the Apologies (Scotland) Bill introduced on 3 March 2015<sup>119</sup> that a fourth wave may be in the course of formation and that it may further broaden the scope of apology legislation in respect of the factual information contained in an apology.

5.23 When one makes an apology, he may not simply say sorry but may go on to explain or disclose what has gone wrong. If an apology is mixed with a statement of fact, in the absence of a specific provision in the relevant apology legislation as to how to deal with the accompanying statement of fact, whether it becomes part of the apology and is therefore protected by the legislation is often a matter of interpretation as well as debate.

### The Apologies (Scotland) Bill

5.24 In the “Summary of Consultation Responses” of the proposed Apologies (Scotland) Bill,<sup>120</sup> the arguments for and against excluding statements of facts accompanying an apology from the protection of apology legislation, and other comments and views are set out.

5.25 Arguments for excluding statements of facts from the protection of apology legislation are:

- *“Specifically protecting facts would lead to the assumption that some facts should not normally be released because they needed protecting.*

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<sup>119</sup> n 83 above.

<sup>120</sup> Consultation by Margaret Mitchell MSP 29<sup>th</sup> June 2012 - *Apologies (Scotland) Bill* (n 63 above).



- *The Faculty of Advocates felt that ‘...it might become difficult in practice to disentangle the admissible factual statements from the non-admissible elements of an apology. We are unclear how in practice this separation could be achieved...’*<sup>121</sup>

5.26 Arguments for including statements of facts in the protection of apology legislation are:

- *“If statements of fact were not protected, it could result in encouraging minimum, bare apologies, making more apologies meaningless to the recipient, because the person apologising would be wary of giving of any details along with the apology.*
- *If statements of fact were not protected, the anticipated effectiveness of the proposals of encouraging a culture change could be limited.*
- *The opportunity to provide an explanation could be compromised, along with information about any review or lessons learned.”*<sup>122</sup>

5.27 There were also other relevant comments and views:

- *“Any explanation (i.e. statement of facts) might be made a highly desirable, rather than a necessary, element of the apology.*
- *To avoid unintended consequences it might be preferable for the Bill to remain silent on this matter and to focus on an appropriate definition of what would receive evidential protection, rather than seek to define what would not.*
- *Where the statements acknowledged a shortfall in service, it could be productive to offer those receiving the apology an opportunity to discuss how the service would approach similar situations in future. Discussion with staff might also allow the complainer to understand some of the constraints in how the service was delivered’*<sup>123</sup>

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<sup>121</sup> *Ibid.*, p 20.

<sup>122</sup> *Ibid.*, pp 20 – 21.

<sup>123</sup> *Ibid.*, p 21.

5.28 The Final Proposal is that “*any factual information conveyed in the apology will not be admissible in proceedings covered by the Bill*”.<sup>124</sup> Two reasons are put forward to support this proposal. First, without a factual explanation of the cause of the event(s) which may include facts relating to the incident, an apology may not satisfy the needs of the intended recipient. Second, that facts admitted by the defendant but excluded with the apology can still be relied upon as evidence of liability if they can be independently proved by the plaintiff.

5.29 In line with such recommendation, the term “apology” is defined in section 3 of the Apologies (Scotland) Bill as follows:

“In this Act an apology means 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 the 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.”  
(emphasis added)

5.30 In the Explanatory Notes to the Bill, it is stated that “(Section 3) provides that an apology is a statement (which could be written or oral) made either by the person who is apologising (whether a natural person, or a legal person such as a company), or by someone else on their behalf (e.g. a spokesperson or agent). The core element is an indication that the person is sorry about, or regrets, an act, omission or outcome. Where the statement includes an admission of fault, statement of fact, or an undertaking to look at the circumstances with a view to preventing an occurrence, these qualify as part of the apology itself.”<sup>125</sup>

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<sup>124</sup> *Ibid.*, p 27.

<sup>125</sup> *Apologies (Scotland) Bill Explanatory Notes (and Other Accompany Documents)*, para 11: Available at [http://www.scottish.parliament.uk/S4\\_Bills/Apologies%20\(Scotland\)%20Bill/b60s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Apologies%20(Scotland)%20Bill/b60s4-introd-en.pdf) (visited May 2015).

5.31 In the Apologies (Scotland) Bill Policy Memorandum, it is stated that “[i]n the final proposal, the reference to an expression of apology was expanded to include ‘an expression of sympathy or regret and any statements of fact’. The revised approach reflects further assessment by the member, during the consultation process, of apologies legislation already in place in other jurisdictions – in particular, the New South Wales Civil Liability Act 2012 (‘the NSW Act’). Section 68 of the NSW Act defines an apology as –

*‘an expression of sympathy or regret, or of an general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.’*

*The member, therefore, wished to include provision to the effect that statements, including admissions of fault in the context of an apology, are inadmissible in certain legal proceedings.”*<sup>126</sup>

### The Canadian Experience

5.32 In Alberta where the apology legislation is silent on whether it covers statements of facts, the Court of Queen’s Bench, in *Robinson v Cragg*, 2010 ABQB 743, ruled that the part of a letter which contained an expression of sympathy or regret and an admission of fault was inadmissible under the Alberta Evidence Act R.S.A. 2000 and should be redacted from the letter. In reaching the decision, the court noted that the legislature has determined that an expression of sympathy or regret combined with an admission of fault is “unfairly prejudicial” and should be “kept away from the trier of fact”. The remaining part of the letter was ruled admissible because it contained admissions of facts that were not combined with the apology.

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<sup>126</sup> *Apologies (Scotland) Bill Policy Memorandum*, paras 15 & 16: Available at [http://www.scottish.parliament.uk/S4\\_Bills/Apologies%20\(Scotland\)%20Bill/b60s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Apologies%20(Scotland)%20Bill/b60s4-introd-pm.pdf) (visited May 2015).

5.33 This decision was commented upon by Professor Robyn Carroll as having given “*proper effect to the intent of the legislation. It remains to be seen though how closely connected the ‘admission’ and the other words of ‘apology’ will need to be before both will be redacted or excluded completely*”.<sup>127</sup> Professor Carroll was of the view that “*an apology that does not incorporate, or is not attached to admission of fact or fault, lacks evidentiary value to establish liability. It follows that apology legislation is not necessary to protect a party who makes an apology that contains no admission of any kind. Where an apology does contain admissions, Robinson v Cragg confirms that apology legislation, depending on its terms, is effective to exclude evidence of words expressing emotion and admissions.*”<sup>128</sup>

5.34 The decision was, however, criticised by Ms Nina Khouri as being “*problematic*”. She argued that the “*defendants would most likely not have made the factual statements at all if not for the expectation that the letter would be protected from admission into evidence. As argued unsuccessfully by the defendants, it is analogous to saying that a without prejudice settlement letter becomes admissible simply by redacting the proposed settlement amount. This would be legally wrong; all common law jurisdictions protect surrounding statements made in connection with the attempt to settle the dispute. This narrow interpretation of the legislative protection is inconsistent with the legislation’s aim of encouraging apologetic, pro-settlement discourse. Instead, it will have a chilling effect on defendants’ willingness to apologise.*”<sup>129</sup>

#### Arguments For and Against Protecting Statement of Facts Accompanying Apology

5.35 From the experience in Scotland and Canada, it seems that there are competing arguments for and against applying the proposed apology legislation to statements of facts conveyed during apologies in Hong Kong.

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<sup>127</sup> Robyn Carroll “When Sorry is the Hardest Word to Say, How might an Apology Legislation Assist?” (2014) *HKLJ* 491, 509.

<sup>128</sup> *Ibid.*

<sup>129</sup> Nina Khouri “Sorry Seems to Be the Hardest Word: The Case for Apology Legislation in New Zealand” (2014) *New Zealand Law Review* 603, 625.

5.36 Arguments for applying apology legislation to statements of facts in Hong Kong include:

- (1) If statements of fact are not protected, people may just offer bare apologies without appropriate disclosure of facts which may render apologies meaningless and ineffective (the chilling effect).
- (2) A bare apology may be viewed as insincere and may even be counterproductive to the prevention of escalation of disputes and settlement thereof.
- (3) Apology would be far more effective if it comes with disclosure of facts and explanation (see, for example, the experience of the health care industry discussed in paragraphs 5.72 – 5.77 below).
- (4) Very often, it is difficult, if not impossible, to segregate statements of facts from an apology.
- (5) The plaintiff could still adduce independent evidence to prove the facts included in the apology.
- (6) Disclosure of facts may assist the parties to understand the underlying circumstances of the mishap and this may facilitate settlement and prevent recurrence.

5.37 Arguments for excluding statements of facts from the protection of apology legislation in Hong Kong include:

- (1) Statements of facts, by their nature, are directly relevant to liability directly and should therefore as a matter of principle be admissible.
- (2) If statements of facts are inadmissible, the plaintiff's claim may be adversely affected or even be stifled in some circumstances, for example when those facts cannot be otherwise proved (c.f. while one of the underlying objectives of the Civil Justice Reform in Hong Kong in 2009 is to facilitate the settlement of disputes (O.1A, r.1 of the Rules of the High Court), in giving effect thereto, the Court shall always recognise that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the

substantive rights of the parties (O.1A, r.2(2) of the Rules of the High Court).

- (3) Whether the plaintiff may be able to adduce independent evidence depends on whether the fact can be proved by independent means and how resourceful he is. The extra burden on the part of the plaintiff may not be justified.
- (4) 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.
- (5) The existing overseas legislation, which do not expressly protect statements of facts, seem to have worked well over the years.
- (6) The provision of factual information addresses a need of the person injured that is different from that met by the giving of an apology (whether bearing an admission of fault or liability), i.e. the need to know what had happened and/or what had been/would be done to prevent future occurrences.

5.38 The Steering Committee is yet to reach a conclusion on this issue, and hence no recommendation is made in this Paper as to whether the apology legislation should also apply to statements of fact accompanying an apology. Apart from closely following the development in Scotland, the Steering Committee invites comments and opinions in this regard.

### **Effect on Limitation of Actions**

5.39 Put shortly, limitation period in the context of civil proceedings is the period of time since the accrual of the relevant cause of action within which legal proceedings must be commenced. Many common law jurisdictions have enacted limitation legislation which sets the limitation periods for different causes of action to which the legislation applies.

5.40 Many such jurisdictions provide in their limitation legislation that a limitation period for a cause of action will be extended by an acknowledgment or a part payment by the defendant. For example, in the context of a claim for recovery

of debt, an acknowledgment of a debt is an admission that a debt or payment is due.<sup>130</sup> It is noted that there is jurisdictional variations as to the effect of acknowledgment and part payment in extending the limitation periods, as well as the application of the extension provision to all causes of action or only certain specified causes of action (for example, actions to recover debts, claims to legacies, etc.).<sup>131</sup> Formal requirements of an acknowledgment are common. For example, in Hong Kong and all jurisdictions in Australia, an acknowledgment must be in writing and signed.<sup>132</sup>

5.41 The acknowledgment provisions in limitation legislation may have potential application when a defendant offers an apology to a plaintiff that includes an admission of a cause of action. Issue might arise in any particular case as to whether a cause of action being pursued by a plaintiff has expired or whether an apology offered by a defendant acknowledges the cause of action thereby extending the limitation period. With this possibility in mind, there is a real or perceived risk that offering a full apology might 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. That being the case and where there is doubt, a lawyer is likely to advise his client not to offer an apology that admits liability or fault. Therefore, the operation of the acknowledgment provisions in limitation legislation may potentially deter offers of apologies by individuals, corporations and governments.

5.42 As discussed in the previous chapter, many provinces in Canada have enacted legislation to expressly provide for the effect of an apology on the operation of a statutory limitation period.

5.43 The Canadian Uniform Apology Act (2007) states that an apology:

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<sup>130</sup> Peter Handford, *Limitation of Actions: The Laws of Australia* (Thomson Reuters, 3<sup>rd</sup> edn). Professor Handford explains that part payment is a particular form of acknowledgement that takes the form of conduct rather than words, p 312.

<sup>131</sup> *Ibid.*, pp 302-306.

<sup>132</sup> *Ibid.*, p 309. See also section 24(1) of the Limitation Ordinance (Cap. 347).

*“does not constitute [a confirmation of a cause of action or an acknowledgment of a claim] in relation to that matter for the purposes of [appropriate section of the applicable limitation statute]”*

5.44 The comments accompanying the Uniform Act state:

*“To ensure the general efficacy of the Act, it is also provided that an apology cannot be used as a confirmation or acknowledgment of a cause of action to extend a limitation period.”*

5.45 A number of the Canadian provinces and territories, including Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Nunavut, Ontario<sup>133</sup> and Saskatchewan, have included a limitation act section in their apology legislation. However, not all apology legislation in Canada includes the provision set out in the Uniform Act. Manitoba and Prince Edward Island have no provisions relating to the effect of an apology on the operation of the law of limitation.

5.46 In Hong Kong, the limitation of actions is governed by the Limitation Ordinance (Cap. 347). It prescribes limitation periods within which actions must be commenced. For example, actions founded on simple contract, tort and certain other actions must be commenced within six years from the date on which the cause of action accrues (section 4). Actions in respect of personal injuries generally must be commenced within three years (section 27).

5.47 The Limitation Ordinance further provides for circumstances in which the limitation period can be extended. In particular, section 23 provides for the fresh accrual of a right of action to recover land, to bring a foreclosure action in respect of personal property, to redeem land in the possession of a mortgagee, to recover a debt or other liquidated pecuniary claim and to make a claim to the personal estate of a deceased person from the date of an acknowledgment or part payment in respect of the right of action. Section 24(1) further provides that every such

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<sup>133</sup> It should be noted that for Ontario, the apology legislation provides that it does not affect whether an apology constitutes an acknowledgment of liability (see paras 5.57-5.60 below).



acknowledgment shall be in writing and signed by the person making the acknowledgment.

5.48 The pertinent question here is whether an apology would constitute an acknowledgment for the purpose of the Limitation Ordinance. The Limitation Ordinance does not provide any definition for “acknowledgment”. Some assistance may be drawn from the case law and other authorities to ascertain what constitutes an acknowledgment, and particularly, whether an apology would constitute an acknowledgment. For instance, in an action for a debt or other liquidated pecuniary claim, a statement is an acknowledgment of a claim where the debtor admits his indebtedness and legal ability to pay.<sup>134</sup> An acknowledgment must contain a sufficiently clear admission of the claim being acknowledged.<sup>135</sup> However, what amounts to an acknowledgment is ultimately a question of construction<sup>136</sup> and decided cases may be of little value as precedents.<sup>137</sup>

5.49 Therefore, it is legally uncertain whether an apology would constitute an acknowledgment for the purposes of, thereby leading to an extension of the limitation period under, section 23 of the Limitation Ordinance. Without such legal certainty, it is likely that a lawyer will advise his client not to offer an apology for fear of attracting the consequence of having the limitation period extended, which would in effect defeat the whole purpose of an apology legislation which is to remove disincentives to apologising.

5.50 If the apology legislation provides that an apology shall not constitute an acknowledgment for the purpose of the Limitation Ordinance, it may be able to remove a further disincentive of giving apologies.

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<sup>134</sup> *Ibrahim Jaafar v Bank Bumiputra Malaysia Berhad*, HCA 2238/1992 (12 January 1996); *Chitty on Contracts* (31<sup>st</sup> edn, 2012), Vol 1, para 28-095; *Halsbury Laws of Hong Kong* (2<sup>nd</sup> edn, 2011) at paras 245.150-167.

<sup>135</sup> A. McGee, *Limitation Periods* (7<sup>th</sup> edition, 2014), para 18.025.

<sup>136</sup> Per Ribeiro PJ in *New World Development Co Ltd & Others v Sun Hung Kai Securities Ltd & Another* (2006) 9 HKCFAR 403.

<sup>137</sup> *Chitty on Contracts* (n 134 above) para 28-095, which makes reference to *Spencer v Hemmerde* [1922] 2 AC 507, p 519.

5.51 From the experience of Canada, three distinct approaches to legislating for the interaction between an apology and the acknowledgment of claim provisions in limitation acts can be observed, in that the legislation:-

- (a) expressly precludes 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;
- (b) makes no provision for the legal effect of an apology for the purposes of limitation legislation;
- (c) expressly provides that an apology does not prevent the operation of the acknowledgment provisions in the limitation legislation.

5.52 Approach (a) is the Canadian Uniform Apology Act approach. The British Columbia legislation illustrates how the provision operates.

5.53 Section 2 of the BC 2006 Act provides:-

- “(1) An apology made by or on behalf of a person in connection with any matter;*
- (b) does not constitute an acknowledgment of liability in relation to that matter for the purposes of section 24 of the Limitation Act”*

5.54 Section 24 of the British Columbia Limitation Act<sup>138</sup> provides:

- “(1) If, before the expiry of either of the limitation periods that, under this Act, apply to a claim, a person acknowledges liability in respect of the claim,*
- (a) the claim must not be considered to have been discovered on any day earlier than the day on which the acknowledgment is made,*
- and*

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<sup>138</sup> Note this current version of the Act has been in force since 1 June 2013 and replaces RSBC 1996, c 266.

- (b) *the act or omission on which the claim is based is deemed to have taken place on the day on which the acknowledgment is made.*
- (2) *An acknowledgment of liability in respect of a claim for interest is also an acknowledgment of liability in respect of a claim for*
- (a) *the outstanding principal, if any, and*
- (b) *interest falling due after the acknowledgment is made.*
- (3) *An acknowledgment of liability in respect of a claim to realize on or redeem collateral under a security agreement or to recover money in respect of the collateral, if made by a person in possession of the collateral, is an acknowledgment of liability in respect of the claim by any other person who later comes into possession of the collateral.*
- (4) *An acknowledgment by a trustee of liability in respect of a claim is an acknowledgment of liability in respect of the claim by any other person who is or who later becomes a trustee of the same trust.*
- (5) *An acknowledgment of liability in respect of a claim to recover or enforce an equitable interest in personal property, if made by a person in possession of the personal property, is an acknowledgment of liability in respect of the claim by any other person who later comes into possession of the personal property.*
- (6) *Subsection (1) does not apply to an acknowledgment, other than an acknowledgment referred to in subsection (7), (8) or (9), unless the acknowledgment is*
- (a) *in writing,*
- (b) *signed, by hand or by electronic signature within the meaning of the Electronic Transactions Act,*
- (c) *made by the person making the acknowledgment or the person's agent, and*
- (d) *made to the person with the claim, the person's agent or an official receiver or trustee acting under the Bankruptcy and Insolvency Act (Canada).*

- (7) *In the case of a claim for payment of a liquidated sum, part payment of the sum by the person against whom the claim is or may be made or by the person's agent is an acknowledgment by the person against whom the claim is or may be made of liability in respect of the claim.*
- (8) *A debtor's performance of an obligation under or in respect of a security agreement is an acknowledgment by the debtor of liability in respect of a claim by the creditor for realization on the collateral under the security agreement.*
- (9) *A creditor's acceptance of a debtor's payment or performance of an obligation under or in respect of a security agreement is an acknowledgment by the creditor of liability in respect of a claim by the debtor for redemption of the collateral under the security agreement.*
- (10) *This section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even though the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum still owing.”*

5.55 The issue that may arise, therefore, is whether an apology can constitute an acknowledgment of liability. The purpose and effect of section 2(1)(b) of the BC 2006 Act is to provide that it cannot.

5.56 Approach (b) is adopted in Manitoba and the Yukon<sup>139</sup>, i.e. they have no provision in their apology legislation relating to the effect of an apology on the operation of the law of limitation. In the absence of provision to the contrary, it is arguable that the limitation periods for certain actions could be extended by an apology that constitutes an acknowledgment or confirmation. There is no indication in the Manitoba and the Yukon second reading speeches of the reason why the insurance coverage “disincentive” was dealt with but the limitation “disincentive” was not. There is no discussion of the absence of this section in the Manitoba Act by Zylberman other than to note that the Yukon also does not include it.<sup>140</sup> It might

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<sup>139</sup> The Yukon Apology Act was introduced on 24 April 2007 but was repealed on 30 April 2008.

<sup>140</sup> Leandro Zylberman, “Apology Legislation: Should it be safe to Apologize in Manitoba? An Assessment of Bill 202” (n 42 above), p 189. (The author appears to have erroneously referred to Saskatchewan rather than the Yukon legislation).

reflect a view in these jurisdictions that there is a low likelihood that the law relating to acknowledgments of claims is a real or perceived disincentive to offers of apologies. In both Manitoba and the Yukon, as in other Canadian jurisdictions, the acknowledgment provisions relate to claims of a monetary nature.<sup>141</sup>

5.57 Approach (c) is adopted in Ontario. The Ontario Apology Act contains a different limitation provision to British Columbia and other jurisdictions adopting approach (a). When the Apology Bill was introduced, it did not include a limitation act provision. The limitation period provision in the Ontario Apology Act as enacted was discussed in the debates and Committee proceedings. The Bill as introduced was amended in Committee to add section 4 of the current Act.

5.58 Section 4 of the Ontario Apology Act provides:

*“For the purposes of section 13 of the Limitations Act, 2002, nothing in this Act,*

*(a) affects whether an apology constitutes an acknowledgment of liability; or*

*(b) prevents an apology from being admitted in evidence. 2009, c.3, s.4.”*

5.59 Section 13 of the Ontario Limitation Act<sup>142</sup> provides:-

*“(1) If a person acknowledges liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made. 2002, c.24, Sched.B, s.13 (1).*

*(2) An acknowledgment of liability in respect of a claim for interest is an acknowledgment of liability in respect of a claim for the principal and*

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<sup>141</sup> Manitoba Limitation of Actions Act CCSM cL150, s 9; Yukon Limitation of Actions Act, RSY 2002, c139 s 6.

<sup>142</sup> Limitations Act, 2002, S.O. 2002, c 24, Sch B.

*for interest falling due after the acknowledgment is made. 2002, c.24, Sched.B, s.13 (2).*

- (3) An acknowledgment of liability in respect of a claim to realize on or redeem collateral under a security agreement or to recover money in respect of the collateral is an acknowledgment by any other person who later comes into possession of it. 2002, c.24, Sched.B, s.13 (3).*
- (4) A debtor's performance of an obligation under or in respect of a security agreement is an acknowledgment by the debtor of liability in respect of a claim by the creditor for realization on the collateral under the agreement. 2002, c.24, Sched.B, s.13 (4).*
- (5) A creditor's acceptance of a debtor's payment or performance of an obligation under or in respect of a security agreement is an acknowledgment by the creditor of liability in respect of a claim by the debtor for redemption of the collateral under the agreement. 2002, c.24, Sched.B, s.13 (5).*
- (6) An acknowledgment by a trustee is an acknowledgment by any other person who is or who later becomes a trustee of the same trust. 2002, c.24, Sched.B, s.13 (6).*
- (7) An acknowledgment of liability in respect of a claim to recover or enforce an equitable interest in personal property by a person in possession of it is an acknowledgment by any other person who later comes into possession of it. 2002, c.24, Sched.B, s.13 (7).*
- (8) Subject to subsections (9) and (10), this section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even though the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum still owing. 2002, c.24, Sched.B, s.13 (8).*
- (9) This section does not apply unless the acknowledgment is made to the person with the claim, the person's agent or an official receiver or trustee acting under the Bankruptcy and Insolvency Act (Canada) before the expiry of the limitation period applicable to the claim. 2002, c.24, Sched.B, s.13 (9).*

*(10) Subsections (1), (2), (3), (6) and (7) do not apply unless the acknowledgment is in writing and signed by the person making it or the person's agent. 2002, c.24, Sched.B, s.13 (10).*

*(11) In the case of a claim for payment of a liquidated sum, part payment of the sum by the person against whom the claim is made or by the person's agent has the same effect as the acknowledgment referred to in subsection (10). 2002, c.24, Sched.B, s.13 (11)."*

5.60 Ontario, like a number of other common law jurisdictions (including other Canadian provinces and territories and Hong Kong), does not provide for the extension of a limitation period for all causes of action by acknowledgment or confirmation. The types of claims to which acknowledgment or confirmation applies relate largely to money and property claims.

5.61 Upon analysis of the above 3 approaches, it presently appears that approach (a) may be adopted in the proposed apology legislation for Hong Kong. By expressly precluding in the apology legislation an admission of a claim by way of an apology from constituting an acknowledgment of a claim for the purposes of section 23 of the Limitation Ordinance, lawyers are expected to be more ready to advise their clients to offer an apology free from the fear of attracting the undesirable consequence of having the limitation period extended. Such removal of a disincentive of giving apologies 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. However, at the same time, we appreciate that whether such a proposal may give rise to other ramifications on recovery of debts or other similar claims requires careful consideration.

### **Effect on Insurance Contracts**

5.62 Another provision that appears in all the Canadian apology legislation is that an apology shall not render void or otherwise affect an insurance coverage. The effect of this provision 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.

5.63 This appears to be an important component of the apology legislation because it responds to reported anecdotal evidence of defendants and their lawyers 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.

5.64 The purpose of this provision is clear, *viz.* to remove a further disincentive of making apologies. This point was made clearly by the British Columbia Attorney General in the BC Discussion Paper.<sup>143</sup>

5.65 The debates in Canada support the inclusion of this provision in stand-alone apology legislation. The objections of some Members of Parliament in Ontario to legislation focus on the protection of full apologies rather than this provision relating to insurance coverage.

5.66 The Australian state and territory legislation dealing with apologies do not include a provision that prevents an apology from voiding or invalidating insurance coverage. The parliamentary debates do not suggest that this was considered as an additional provision. According to the report prepared by Professor Robyn Carroll,<sup>144</sup> this reflects the fact that the provisions that protect apologies in Australia vary in scope from jurisdiction to jurisdiction and are not in uniform or stand-alone legislation. There is state legislation relating to state based compulsory insurance schemes and federal legislation dealing with insurance contracts that deals with the effect of admissions of liability by an insured. These form part of the complex legislative framework in Australia that deals with admissions of liability, which can include an apology.

5.67 For example, section 46 of the New South Wales Motor Accidents Act 1988 provides that an insured shall not make an admission of liability without the

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<sup>143</sup> Ministry of Attorney General, British Columbia, *Discussion Paper on Apology Legislation* (n 33 above).

<sup>144</sup> Professor at the University of Western Australia; LLB BJuris W. Aust, BCL Oxf.



written consent of the insurer (section 46(1)(d)) and that “*an offer, promise or admission made in contravention of this section is of no effect*” (section 46(2)). More generally, provision is made in the Insurance Contracts Act 1984 (Cth) (see sections 41 and 51) for circumstances in which an insurer is and is not able to rely on an admission of liability by an insured. The states are unable to legislate on matters over which the federal parliament has legislative power.

5.68 In any case, and as a result of the terms in medical indemnity insurance contracts in the area of medical adverse events in Australia, the practice in the medical field is to express regret only. Despite the fact that New South Wales, the Australian Capital Territory and Queensland have put in place apology legislation to protect full apologies, to ensure consistency across Australia in respect of medical practice and medical insurance, medical and health practitioners and providers are advised to express regret but not to apologise in terms that admit fault or liability.

5.69 The limited research from Australia as to the use and effectiveness of apology legislation points to a lack of awareness of the provisions and the consequential minimal impact of the legislation. This lack of awareness is supported by anecdotal evidence (see paragraph 6.47 below). There are most likely a number of reasons that account for this. Firstly, the fact that full apologies are not protected in Northern Territory, South Australia, Tasmania, Victoria and Western Australia may result in a sense of uncertainty and confusion on the parties of parties and their legal advisers and insurers as to whether a particular apology is protected. Secondly, the absence of a legislative provision to prevent an apology from rendering an insurance contract void or ineffective means that a term in an insurance contract will deter many apologies because of the actual or perceived effect of that term.

5.70 The Scottish consultation process and the Apologies (Scotland) Bill do not address this issue of the potential effect of apology on insurance contracts.

This is because the subject of insurance is reserved for the UK parliament under the Scotland Act 1998.<sup>145</sup>

5.71 Based on the above analysis, it is recommended that a provision to the effect of preventing an apology from rendering void or otherwise affecting an insurance contract should be introduced to achieve the purpose of apology legislation, and the approach taken by the Canadian provinces and territories is recommended to be followed. The provision goes hand in hand with the provisions that protect a full apology.

### **An Illustration: apology in the context of the medical profession**

5.72 The modern medical profession recognises and accepts that “*to err is human*”.<sup>146</sup> It is a regrettable but inevitable fact that medical professionals (just like other professionals) could commit errors, which may amount to negligence. After an incident occurs, an injured patient and his doctor would be in a position of conflict. However, academic journals have suggested that “injury by itself does not translate into intense hostility that a lawsuit expresses”.<sup>147</sup> To patients, how a physician “treats” them on an interpersonal level is often more important than the medical treatment received.<sup>148</sup> Studies found that physicians’ failure in communicating diagnoses and affronts to patients’ values were significantly related to a patient’s decision to consult a lawyer about a medical incident.<sup>149</sup> Therefore, how a medical error incident is dealt with upfront by the medical profession and institutions can affect the subsequent outcomes, including whether the dispute would finally develop into court proceedings.

5.73 Apology is important in the upfront management of anger and the emotional dimension of a complaint and conflict. It is observed that apology can

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<sup>145</sup> Consultation by Margaret Mitchell MSP 29<sup>th</sup> June 2012 - *Apologies (Scotland) Bill* (n 63 above), p 9.

<sup>146</sup> Linda T. Kohn et al. eds., *To Err Is Human: Building a Safer Health System* (National Academy Press, Washington D.C. 1999).

<sup>147</sup> Ann J. Kellett, “Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients” (1987) *J Disp Resol*.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

have an impact in preventing litigation.<sup>150</sup> A sincere apology serves three functions, namely, (i) expresses the subjective state of mind of the apologiser – remorse and non-hostility; (ii) indicates an intent to compensate the injured party; and (iii) ameliorates the injured person’s hostility toward the person causing the injury.<sup>151</sup> In 1994, a report was published of a study which was conducted of a group of families (patients and their relatives) which were taking, or contemplating, legal action in a medical negligence claim. The study showed that 41.4% of the respondents indicated that some actions taken after the incident “would have meant that [they] did not feel the need to take legal action”. It is important to note that more respondents chose “explanation and apology” than “pay compensation” as a reason that might have prevented litigation.<sup>152</sup>

5.74 Academic scholars also suggest that apart from the lack of apologies, the present problem in the medical and healthcare sector is the lack of disclosure.<sup>153</sup> Disclosure must be timely in letting the patient and complainant be well informed. Full disclosure is the most appropriate and ethical policy, both in terms of what the patient wants, honesty and as a deterrent to potential litigation. Information should be conveyed in terms that are understandable to the patient and that minimises the patient’s stress; and to make sure to express appropriate regret for the error and the concern for the patient and/or the family.<sup>154</sup> However, if a patient opts for a resolution of the dispute by civil proceedings, disclosure may only appear at the stage of discovery of documents between the parties and will conventionally be a lengthy and painstaking exercise. On the other hand, if the doctor offers an apology to the patient, thereby preventing the escalation of the conflict and ameliorating the patient’s hostility toward the doctor, the patient would be more ready and willing to speak to the doctor and to allow the doctor to disclose more information as to the causes of the incident. Hence, the advantages of offering an apology include not only the abovementioned emotional aspects (e.g. prevention of escalation of

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<sup>150</sup> *Ibid.*, citing Haley, “Comment: The Implications of Apology” (1986) 20 *Law & Soc’y Rev* 499, p 504.

<sup>151</sup> *Ibid.*

<sup>152</sup> Vincent, C, Young, M and Phillips, A, “Why do people sue doctors? A study of patients and relatives taking legal action.” (1994) *Lancet*, Vol. 343 Issue 8913, at 1612.

<sup>153</sup> Marlynn Wei, Doctors, “Apologies, and the Law: An Analysis and Critique of Apology Laws” (2006) *Student Scholarship Papers*, Paper 30.

<sup>154</sup> “*When Things Go Wrong: Responding to Adverse Events*” Massachusetts Coalition for the Prevention of Medical Errors, March 2006. Available at <http://www.macoalition.org/documents/respondingToAdverseEvents.pdf> (visited May 2015).

conflicts), but also the practical aspect of facilitating disclosure and communication of information between doctor and patient. Disclosure can both preserve trust and improve the physician-patient relationship in order for the patient and doctor to heal after an adverse event.

5.75 The Disclosure, Apology and Offer (DA&O) model has been proposed as an innovative approach receiving national attention in the USA for its early success as an alternative to the existing inherently adversarial, inefficient and inequitable medical liability system. The model emphasises both honest communication with the patients and their families and a systems approach to errors. It promotes a principled institutional response to unanticipated clinical outcomes in which healthcare organisations (1) proactively identify adverse events, (2) distinguish between injuries caused by medical negligence and those arising from complications of disease or intrinsically high-risk medical care, (3) offer the patients full disclosure and honest explanations, (4) encourage legal representation for the patients and families, and (5) offer an apology with rapid and fair compensation when the standards of care were not met. The model was also conceived to be central to improving safety culture. A major roadblock to gaining physicians' acceptance, however, was the fear of name-based reporting to the National Practitioner Data Bank and the state Board of Registration or the Department of Public Health.<sup>155</sup>

5.76 According to the famous report from the Institute of Medicine's Committee on Quality of Health Care in United States in 1999, adverse events occur in about 3% of hospitalisations. Approximately 10% of adverse events led to the patient's death. Over half of these adverse events can be preventable. The World Health Organisation adopted in 2002 a Resolution<sup>156</sup> which recognises the need to promote patient safety as a fundamental principle of all health care systems. The Council of Europe in 2006<sup>157</sup> stated that patient safety is the underpinning philosophy of quality improvement. The traditional legal answer to the issue of

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<sup>155</sup> Bell S, Smulowitz P, Woodward A, Mello M, Duva A, Boothman R & Sands K, "Disclosure, Apology and Offer Programs: Stakeholders' Views of Barriers to and Strategies for Broad Implementation" *The Milbank Quarterly* 2012; 90(4): 682-705.

<sup>156</sup> Available at [http://apps.who.int/gb/archive/pdf\\_files/WHA55/ea5513.pdf?ua=1](http://apps.who.int/gb/archive/pdf_files/WHA55/ea5513.pdf?ua=1) (visited May 2015).

<sup>157</sup> Available at <https://wcd.coe.int/ViewDoc.jsp?id=1005439> (visited May 2015).

patient safety has been brought about by the tort system, which focuses on redressing what went wrong for the patient. The legal advice traditionally given to physicians has been to neither disclose nor apologise for errors. Law can have a symbolic value e.g. apology laws when enacted along with other norms on patient safety, may be helpful in making medical customs evolve. The Council of Europe document also asked Member States to ensure that a health-care professional reporting to the system shall not, as a sole result of such reporting, be subjected to disciplinary investigation. The Australian Commission on Safety and Quality in Health Care also stipulated that health service organisations should create an environment in which all staff are: encouraged and able to recognise and report adverse events; prepared through training and education to participate in open disclosure; and supported through open disclosure process.<sup>158</sup> Disclosure will facilitate subsequent institutional inquiry into the adverse event employing root cause analysis and other risk interventions to reduce future occurrences. Studies show that full disclosure does not lead to more litigation, but has decreased the number of claims filed and the average settlement value (see paragraph 5.6 above). As full disclosure policies are adopted by institutions with legislation to protect expressions of apology, the result will be improved patient care and a decrease in future errors.<sup>159</sup> Interest-based mediation has been studied as a route to improve patient safety, and reveals that change will require medical leaders, hospital administrators, and malpractice insurers to temper their suspicion of the tort system sufficiently to approach medical errors and adverse events as learning opportunities, and to retain lawyers who embrace mediation as an opportunity to solve problems, show compassion, and improve care.<sup>160</sup>

5.77 Patients are not the only ones who can benefit from an apology after an adverse event. Wayne Cunningham's research demonstrates the deep impact of adverse events and complaints against medical practitioners. Typical feelings

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<sup>158</sup> McLennan S & Truog R, "Apology laws and open disclosure" *Med J Aust* 2013; 198:411-2.

<sup>159</sup> Pelt J & Faldmo L, "Physician Error and Disclosure" *Clinical Obstetrics and Gynecology* 2008; 51(4) 700-708.

<sup>160</sup> Hyman C, Liebman C, Schechter C & Sage W, "Interest-Based Mediation of Medical Malpractice Lawsuits: A Route to Improved Patient Safety?" *Journal of Health Politics, Policy and Law* 2010; 35(5)797-828.

include anger, shame, guilt, and a loss of confidence in their abilities.<sup>161</sup> For the health practitioner, the benefits of apologising fall into two categories: internal and external. The internal benefits include alleviating guilt and maintaining self-esteem. A heartfelt apology, particularly when followed by forgiveness from the patient, may help to lift that burden of self-reproach. The external benefits of apologising relate to the way that a health practitioner is perceived by his patients, colleagues and community. Health practitioners who apologise are demonstrating their commitment to enduring principles of medical ethics: telling the truth and acting with charity and kindness. In addition, the process of apology invariably calls for candid self-reflection and, as a result, may lead to better and safer care.<sup>162</sup>

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<sup>161</sup> Cunningham W., “The immediate and long term impact on New Zealand doctors who receive patient complaints” *New Zealand Medical Journal* 2004; at 117:U972.

<sup>162</sup> The view is expressed in “The Power of Apology” (9 October 2009) *New Zealand Medical Journal*, Vol 122 No. 1304; ISSN 1175 8716, available at [www.nzma.org.nz/\\_data/assets/pdf\\_file/0010/17785/Vol-122-No-1304-09-October-2009.pdf](http://www.nzma.org.nz/_data/assets/pdf_file/0010/17785/Vol-122-No-1304-09-October-2009.pdf) (visited May 2015).

## **Enactment of an Apology Legislation in Hong Kong**

6.1 In proposing the introduction of an apology legislation in Hong Kong, the following are the key factors which we have taken into account:

- There prevails a general concern or even misconception that an apology would amount to an admission of liability. In a strict sense, an apology *per se* is unlikely to determine liability conclusively. The conclusion as to liability is a matter for the courts, and the courts alone. However, an apology can be of relevance as evidence. An apology whether containing an admission of fault or liability or not is evidence upon which the court may rely to determine liability. This is where the fear to apologise lies, and this is why people are so inhibited from tendering their apologies even when they would very much wish to do so.
- To allay such a fear so that the parties causing injury could step forward to express their sympathy and/or regret or to proffer an outright commitment to make right the wrongs, legal protection to them for doing so without compromising the rights of the injured parties to seek remedies are essential. A more amicable relationship between the parties could be created from truthful and sincere apologies coming from the parties causing injury. Such a relationship would prevent the disputes from escalating and assist in the more amicable settlement of disputes. In the medical or health care context, an appropriate apology would pave the way for further disclosure which may be what the patient ultimately wants.
- Lawyers are understandably inclined to advise their clients against making apologies for fear that adverse legal consequences may follow,

such as being regarded as having admitted legal liability or have the limitation period for a potential claim extended.

- Insurance companies object to their insured making apologies for fear that legal responsibilities may follow.
- The international trend is in favour of providing a varying degree of statutory protection to apologies.

6.2 In view of these considerations, it appears that “no change” would not be a desirable option.

### **Full Apologies vs. Partial Apologies**

6.3 Before coming to a proposal on the nature of apology legislation appropriate for Hong Kong, we have in Chapter 4 considered the various models of current apology legislation or bill in different common law jurisdictions, which can be broadly divided into the following 2 categories:-

#### ***(a) Legislation that provides legal protection for full apologies***

6.4 This type of legislation has been adopted by jurisdictions such as the Australian Capital Territory, New South Wales, Queensland, Canada and some states of the United States.

6.5 Legislation of this nature offers a broad statutory protection for an apology even when it contains an admission of fault or liability, i.e. a full apology.

6.6 Under this type of apology legislation, a “full apology” which carries with it an admission of fault or liability would be legally protected in that such an apology is inadmissible as evidence to infer liability in court proceedings. Apart from inadmissibility, an apology legislation of this nature may specify that an apology broadly defined as above should not be deemed as an admission of fault or liability, nor should it be relevant to deciding fault or liability in relation to the mishap.



***(b) Legislation that provides legal protection for partial apologies***

6.7 This type of legislation has been adopted by jurisdictions such as the Northern Territory, South Australia, Tasmania, Victoria, Western Australia, most states of the United States and possibly the UK (excluding Scotland).

6.8 This type of apology legislation offers legal protection only to apologies which fall short of any admission of fault or liability. Accordingly, the definition of apology under this type of legislation excludes any statements of fault or liability. Examples such as “*an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person*” as provided in Part 1E of the Civil Liability Act 2002 of Western Australia; and “*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*” as provided in section 7(3) of the Civil Liability Act 2002 of Tasmania are illustrative of partial apology provisions.

6.9 Under this type of legislation, an apology consisting of expressions of sorrow, regret, sympathy, a general sense of benevolence or compassion would not in any way be regarded as an admission of liability or fault; nor would they be admissible in court as evidence of an admissions of liability or fault. However, an apology containing any admission of fault or liability would not be regarded as an apology and would not gain any protection from being admissible evidence to determine legal liability.

6.10 The arguments for and against providing protection to full and partial apologies have been examined in paragraphs 5.11 – 5.21 above. They will not be repeated here.

***(c) Recommendation***

6.11 Having considered the nature and effect of the different types of apology legislation in the abovementioned 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, it is proposed that an apology legislation be enacted in Hong Kong to provide that an apology, including an admission of fault or liability, does not amount to an admission of liability and is inadmissible for the purpose of civil proceedings.

### **Effect on Limitation of Actions**

6.12 As discussed and suggested in paragraphs 5.39 – 5.61 above, the proposed apology legislation should also provide to the effect that an apology does not constitute an acknowledgment of a right of action in relation to that matter for the purpose of the Limitation Ordinance (Cap. 347). This is to ensure that an apology cannot be used to extend a limitation period if the matter is not settled and would remove a further barrier to apologies being offered.

### **Effect on Insurance Contracts**

6.13 As discussed and suggested in paragraphs 5.62 – 5.71 above, the proposed apology legislation should also contain a section to the effect that an apology made by or on behalf of a person in connection with any matter does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, render void or otherwise affect any insurance coverage that is available to the person in connection with that matter. This section would remove a disincentive to apologising arising from a concern to preserve insurance coverage and is considered necessary to achieve the purpose of the apology legislation.

### **Scope of Civil Proceedings to Which the Proposed Apology Legislation Should Apply – Disciplinary Proceedings**

6.14 The proposed apology legislation is to apply to civil and other forms of non-criminal proceedings. As stated in paragraph 2.17 above, civil proceedings generally refer to “*proceedings in any civil or commercial matter*”. This would include, for example, civil actions in court or before a tribunal and arbitration. While it is relatively less controversial that the proposed apology legislation should not be applicable to criminal proceedings (see discussion in paragraph 2.18 above), whether it should cover disciplinary or other forms of non-criminal proceedings (such as regulatory proceedings) warrants further and careful consideration.

6.15 Apart from Canada, there are a few jurisdictions that expressly extend legislative protection of apologies to disciplinary proceedings. This is usually in the context of legislation that applies to personal injuries claims and/or medical cases. In Australia, for example, the Victorian Wrongs Act protects an apology in civil proceedings where death or injury of a person is in issue or relevant to a fact or issue (Part 11C). Civil proceedings are defined to include professional conduct proceedings and inquiries. The legislation in North Dakota and Oregon refer to administrative proceedings as well as civil proceedings in the health care context.

6.16 The Canadian legislation appears to apply to disciplinary proceedings that are conducted in court or tribunal or arbitral proceedings because civil proceedings are not limited to particular types of claims (as they are in Australia and most of the US states). In the Ontario and Nunavut apology legislation, there is express reference to “administrative proceedings”.

6.17 There are a number of arguments for and against applying the apology legislation to disciplinary proceedings.

***(a) Considerations in support of applying apology legislation to disciplinary proceedings***

6.18 Disciplinary proceedings are clearly not criminal proceedings, although whether it should be regarded as part of civil proceedings is debatable.

6.19 Moreover, the objectives of the legislation will largely be defeated if disciplinary proceedings are excluded. This is a strong argument in favour of including disciplinary proceedings. It is supported by:

- (i) the Canadian approach which extends protection to administrative proceedings. The purpose of the Canadian legislation is to remove disincentives to apologies in the settlement of civil proceedings, in the broad sense of non-criminal proceedings. The reports and debates surrounding the enactment of the legislation do not discuss the arguments for and against including disciplinary proceedings. The focus in these materials is predominantly on claims involving physical and psychological harms and the application of the legislation to disputes involving government acts and omissions and civil disputes.<sup>163</sup>
- (ii) signs of ongoing reticence in offering full apologies in Australia in the medical context notwithstanding the existence of protection of full apologies in New South Wales, the Australian Capital Territory and Queensland.

6.20 Furthermore, disciplinary proceedings are covered in the apology legislation in other overseas jurisdictions. The legislation in some Canadian jurisdictions covers “*proceedings before a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity*”. The provision applies to disciplinary proceedings that fall within the meaning of “administrative proceedings” in the Canadian apology legislation.

6.21 Similarly, in Australia, administrative “super” tribunals are conferred with original and review jurisdiction under legislation that regulates a wide range of vocations.<sup>164</sup> The Australian apology legislation (which applies to civil actions) does not apply to these proceedings save where express provision is made. For

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<sup>163</sup> Defamation actions, for example, which are a civil proceeding and for which specific provision for apologies is made in Australian defamation acts, also is not specifically discussed.

<sup>164</sup> For example, the State Administrative Tribunal Act 2004 of Western Australia and the Victorian Civil and Administrative Tribunal Act 1998. Not all vocational matters come within the tribunal’s jurisdiction. For example, in Western Australia, the State Administrative Tribunal does not deal with vocational matters relating to prison officers, police officers, emergency services personnel and auctioneers.

example, see section 14I in Part 11C of the Wrongs Act (Vic) 1958 which was introduced by the Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Victoria) and which defines “civil proceedings” to include:

*“(a) a proceedings before a tribunal; and*

*(b) a proceedings under an Act regulating the practice or conduct of a profession or occupation; and*

*(c) an inquiry by board appointed or by a commission of inquiry issued under Division 5 of Part 1 of the Evidence (Miscellaneous Provisions) Act 1958.”*

6.22 This is a wider range of proceedings than that provided for in most Australian jurisdictions. No express reference is made in most US legislation to disciplinary proceedings. Exceptions include Iowa, North Dakota, Oregon, Vermont and Virginia which extend the coverage to medical review panel proceedings, administrative proceedings, civil proceedings in the health care context as well as medical malpractice review panel proceedings.

***(b) Considerations against applying apology legislation to disciplinary proceedings***

6.23 Firstly, it might be argued that the rationale for apology legislation, namely to facilitate amicable settlement, does not apply to disciplinary proceedings. This is because the primary purpose of disciplinary proceedings is “*to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour*”.<sup>165</sup> Even if the parties settle, the disciplinary proceedings may still proceed (depending on the rules or regulations of the relevant profession). The encouragement of apologies to facilitate settlement, however, is only one of a number of aims of the legislation (others are given in the BC Discussion Paper and the Canadian Uniform Apology Act policy paper). Precluding apologies from being admitted as evidence of fault and liability in civil proceedings between parties (including corporate and government entities) is not inconsistent

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<sup>165</sup> *R (Coke-Wallis) v Institute of Chartered Accountants* [2011] 2 AC 146, para 60.

with pursuing these other legislative aims where there are broader interests at stake through disciplinary proceedings (and other investigative proceedings, for example inquiries and commissions).

6.24 As noted here, the disciplinary proceedings can still proceed even if a civil claim is settled and/or a complaint against a practitioner is resolved. It does not prevent the party bringing the disciplinary proceedings from proving that the grounds for disciplining the respondent have been made out on the basis of provable facts and evidence other than the apology.

6.25 Secondly, it is true that public confidence in the integrity of the profession can be advanced by bringing proceedings. A practitioner might find it difficult to understand why a civil claim can be settled (including with a full apology) but disciplinary proceedings are still pursued. However, this can happen even where there is no apology legislation. It is for the person or body conducting the disciplinary proceedings to determine why it is in the public interests to bring or continue with the proceedings.

6.26 There is perhaps a danger that a disciplinary body will be reluctant to discipline a professional or other person who has offered a full apology. Again, this could arise even without apology legislation and it is for the person or body conducting the disciplinary proceedings to determine why it would be in the public interest not to bring or to discontinue the proceedings.

6.27 Another consideration is how the public will view disciplinary proceedings being brought against a person who has offered a full apology. It will be important to articulate the public interest in the proceedings that are distinct from the private interests met by a civil action.

6.28 Thirdly, rules of evidence often do not apply to disciplinary proceedings. For some disciplinary (and other non-criminal) proceedings, the statute expressly states the usual evidentiary rules do not apply. An apology may be admitted as evidence even with apology legislation. It might be asked, therefore, whether it will make much difference if disciplinary proceedings are excluded from

the legislation. While this might seem to be the case, it is not a good reason for not applying the legislation. This is the point of the express exclusion of evidence of an apology for specific purposes. The apology legislation will operate in proceedings even where formal rules of evidence do not apply. An apology will not be an admission, and it will not be admissible as evidence, of fault or liability.

6.29 Even in civil proceedings where the usual rules of evidence apply, it is unclear what significance a court will attach to an apology in any particular case. The courts have made it clear it is not conclusive of fault or liability. There is a concern however that some weight would still be attached by a court to apology in determining fault or liability. Hence, the clarifying effect of the legislation as well as the amendment of the law of evidence.

6.30 It can be argued that an apology would not be a formal admission in any case where the rules of evidence do not apply. At the same time, there is a strong argument that allowing evidence that a respondent apologised for their conduct to be admitted will be a disincentive to them offering an apology before privileged negotiations or mediation is underway. It is also likely that a lawyer will advise a client who might face disciplinary proceedings not to say anything that might be prejudicial to his interests should disciplinary proceedings be commenced at a future time, even if any civil claims are settled.

6.31 Therefore, while it might not make a significant difference in a practical sense from a legal point of view, apology legislation is aimed as much at uncertainty and perceptions of legal consequences as it is at real legal risks.

6.32 Another consideration is about the hybrid nature of disciplinary proceedings. These hybrid proceedings may deserve special consideration and it will be important to identify what particular concerns might exist about the impact of apology legislation on these “public interest” proceedings. At the same time it is helpful to consider the reasons why a person who could be disciplined might not offer an apology after a matter has arisen. There may be non-legal reasons which include avoiding loss of face, personality and cultural norms. Further, a person may well choose to express sympathy and/or regret but not offer a full apology because

they do not believe they have engaged in misconduct. The apology legislation does not address these reasons directly; instead it seeks to remove the legal reasons why people do not apologise and indirectly helps to influence attitudes and behaviour. It does this firstly by providing that if they offer an apology it will not be treated as an admission of fault or liability. This is particularly important when a full apology is offered. Secondly, it provides that an apology will not affect their insurance coverage. Thirdly, it provides an apology cannot be used in evidence to determine whether they were at fault in disciplinary proceedings. The aim is to remove the key disincentives to apologising.

6.33 It should be noted that the legislation does not prevent evidence that an apology was offered (or was not offered) from being presented as evidence for other purposes: for example where this is relevant to the assessment of damages or costs or for any legal purpose including the imposition of civil fines and sanctions. A person who offers an apology in circumstances that may result in disciplinary proceedings therefore can rely on the legislation to require a disciplinary body or court to disregard his apology in determining whether there has been misconduct but have it taken into account for other purposes such as sentencing if misconduct is established. Similarly, a person bringing disciplinary proceedings could refer to the fact that no apology was offered in circumstances where it could have been expected. It might be evidence of lack of remorse for acting in a way that could bring the profession into disrepute. A refusal to apologise could have even greater significance when there is legislation that protects full apologies.

6.34 A further consideration is about the practical effect of an exclusion of evidence of apology on disciplinary proceedings. In practice, as disciplinary proceedings will be conducted by fellow professionals, the defendant will be judged by his conduct and practice and seldom be judged by what he had said by way of an apology. This is as much a consideration in support of applying apology legislation as it is against. It is difficult to imagine a disciplinary proceedings being brought or being successful where the only evidence of misconduct or grounds for imposing a disciplinary sanction is an apology made by the practitioner concerned. The facts and evidence used to establish misconduct need to prove that there has been



misconduct and that the applicable standards have been breached,<sup>166</sup> and this cannot be based on the practitioner's view of the events that have occurred.

6.35 The apology legislation does potentially exclude evidence that may have some relevance. This loss has to be balanced against the gains that the legislation aims to achieve.

6.36 There may be concerns that professionals facing a disciplinary charge will be able to “walk free” because evidence of an apology is excluded by the operation of the apology legislation. However, the inadmissibility in evidence of an apology (whether full or partial) does not prevent disciplinary proceedings from being brought. There is an important message to be conveyed that offering an apology does not mean that professional standards will not be upheld through disciplinary proceedings.

### ***(c) Recommendation***

6.37 The rationale for the apology legislation applies to disciplinary proceedings. Such legislation only precludes an apology from having legal effect for specific purposes and does not preclude misconduct proceedings from being brought and pursued and misconduct proved nor does it prevent an apology from being admissible evidence for other purposes, including for decisions about sanctions.

6.38 In any case, aside from the apology legislation exclusionary provision, other legal principles or legislation might apply to prevent disclosure of an apology, particularly in subsequent civil proceedings, such as the confidentiality of mediation communication under section 9 of the Mediation Ordinance (Cap. 620) and the

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<sup>166</sup> “[T]he applicable standard of proof for disciplinary proceedings in Hong Kong is a preponderance of probability under the *Re H* approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability” per Mr Justice Bokhary PJ (as he then was) in *A Solicitor v The Law Society of Hong Kong* (2008) 11 HKCFAR 117; [2008] 2 HKLRD 576, para 116.

privilege attached to without prejudice communications. In some jurisdictions this will be of practical relevance to disciplinary proceedings.<sup>167</sup>

6.39 Based on the above, it is recommended that the apology legislation is to be extended to disciplinary proceedings.

### **Scope of Civil Proceedings to Which the Proposed Apology Legislation Should Apply – Regulatory Proceedings**

6.40 Regulatory proceedings refer to proceedings involving the exercise of regulatory powers of a regulatory body under an enactment. Examples of regulatory proceedings include proceedings brought before the Market Misconduct Tribunal or the Securities and Futures Appeals Tribunal under the Securities and Futures Ordinance (Cap. 571), inquiry proceedings before the Estate Agents Authority under section 34 of the Estate Agents Ordinance (Cap. 511), applications for transfer of long term business by an insurance company made under section 24 of the Insurance Companies Ordinance (Cap. 41) which the Insurance Authority has a right to be heard before the Court of First Instance.

6.41 These proceedings involve the exercise of regulatory functions of a regulatory body and are instituted for protecting the general public. In some circumstances, these proceeding may have a serious consequence on a person against whom the proceedings are directed. For example, the Market Misconduct Tribunal has powers to prohibit a person, if found guilty of market misconduct, from being a director of a listed company or to deal in securities for a certain period except with the leave of the court.

6.42 Some of the rationales behind the inclusion of disciplinary proceedings also apply to regulatory proceedings. In view of the specific nature and consequence of the regulatory proceedings as stated above, we would like to invite your views and comments on, insofar as non-criminal proceedings are

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<sup>167</sup> For example, in the Western Australian State Administrative Tribunal, mediation is used in vocational matters. A member of the Tribunal conducts the mediation. If a settlement is reached and the Tribunal is satisfied of its terms, the public interest nature of the proceedings is upheld by making the terms of settlement as orders and publishing a summary of the facts and circumstances of the complaint and the orders on the Tribunal website.

concerned, whether the apology legislation should also apply to regulatory proceedings.

### **Part of Mediation Ordinance or a Stand-alone Legislation?**

6.43 If an apology legislation is to be enacted, considerations have to be given as to whether such legislation should be included as part of the existing Mediation Ordinance (Cap. 620) and thus applicable only when parties are engaged in mediation, or whether the same should be a “stand-alone” legislation the provisions of which would thus be of general application. For the avoidance of doubt, it is not our intention to alter the existing law regarding apology in other contexts such as defamation (e.g. sections 3, 4 and 25 of the Defamation Ordinance (Cap. 21)).

6.44 It is noted that the majority of the apology legislation in Australia and Canada takes the form of a stand-alone legislation. In Scotland, the Apologies (Scotland) Bill takes the same approach. The position in the UK is an exception where a single section providing that an apology shall not amount to an admission of negligence or breach of statutory duty is part of the Compensation Act 2006. Another exception can be found in Alberta, Canada where a single provision entitled “Effect of apology on liability” is contained in the Evidence Act 2000.

6.45 There are advantages of enacting a stand-alone legislation. It will be visible leading to greater awareness of it, it will 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, it recognises that the legal effects of the provisions are not confined to the law of evidence and it recognises that apologising is regarded by the law as important to the resolution of civil disputes from the time that an accident or injury occurs, not just once “without prejudice” negotiations or mediation have begun.

6.46 Indeed, public awareness of the apology legislation is crucial for the legislation to be effective. The legal profession’s awareness of the legislation is

particularly important because sometimes, especially when court proceedings is threatened, people would consult lawyers whether to apologise before being served with proceedings. In this connection, the anecdotal evidence from Canada and Australia as extracted in an academic journal is of particular relevance:

*“A 2012 article in The Lawyers Weekly, a pan-Canadian newsletter for lawyers, reports that lawyers remain cautious about advising their clients to apologise, notwithstanding the protective legislation. The reported reasons for this include: (a) the fact that judicial treatment of the legislation is, so far, sparse and inconsistent (referring specifically to the Bilan v Wendel and Robinson v Cragg decisions); (b) the fact that the scope of the protection varies between provinces, which poses particular challenges for Canadian businesses who operate nationally (and their insurers); and (c) the fact that many lawyers do not know about the legislation. The article quotes Michael Smith, a defamation and product liability partner with Borden Ladner Gervais, a large law firm in Toronto, describing the legislation as ‘...almost incognito. Most counsel have never heard of it or have never peeked into it.’ He states that this is unfortunate, as ‘[t]he benefits could be significant. Apologies are incredibly important tools in avoiding disputes and de-escalating disputes. They address human nature. We need to fell dignity and self-worth, especially when we feel we’ve been wronged.’*

*Similarly, in Australia, a 2013 article in the lawyers’ newsletter Precedent suggests that many people are not aware of the protection offered by apology legislation and that lawyers continue to advise clients not to apologise, even in situations where the protection is complete. This article also blames inconsistent legislative protection between states and a lack of knowledge on the part of the legal profession about the protection.”<sup>168</sup>*

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<sup>168</sup> Nina Khouri “Sorry Seems to Be the Hardest Word: The Case for Apology Legislation in New Zealand” (n 129 above), p 626.

6.47 The situation in Australia is best exemplified by the decision of the Supreme Court of the Australia Capital Territory in *Hutchison v Fitzpatrick* [2009] ACTSC 43 in which Master Harper stated in paragraphs 31-32,

*“I should say at this point that the advice was perhaps unfortunate. Part 2.3 (Apologies) of the Civil Law (Wrongs) Act 2002 was in effect at the time. The part appears to have been included in the Act with a view to encouraging apologies. An apology is defined in section 13 as an oral or written expression of sympathy or regret, or of a general sense of benevolence or compassion, in relation to an incident, whether or not the expression admits or implies fault or liability in relation to the incident. Section 14 provides that an apology is not and must not be taken to be an express or implied admission of fault or liability and is not relevant to deciding fault or liability. Evidence of an apology is not admissible in a civil proceeding as evidence of fault or liability.*

*On my interpretation of these provisions, the defendant would not have been placing himself at risk by visiting the plaintiff or proffering an apology to him. If solicitors are still advising their clients not to apologise and not to visit or telephone or write to people who might sue them, notwithstanding part 2.3 of the Act, this would be regrettable.”*

6.48 From the experience of Australia and Canada, it appears that even if apology legislation has been enacted, much has to be done in order to promote it so that the general public, including lawyers, would be aware of its existence and would make use of it. Therefore, to make the apology legislation more visible, it is recommended that there should be a “stand-alone” apology legislation in Hong Kong.

6.49 A summary of the Recommendations is set out in Chapter 7. Your views and comments are welcome.

## *Chapter 7: Recommendations for Consultation*

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Your views are sought on the following recommendations and issues arising therefrom (including issues identified in this Paper).

### **Recommendation 1**

An apology legislation is to be enacted in Hong Kong.

### **Recommendation 2**

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

### **Recommendation 3**

The apology legislation is to cover full apologies.

### **Recommendation 4**

The apology legislation is to apply to the Government.

### **Recommendation 5**

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

**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.

**Recommendation 7**

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

## *Annex 1: Membership of the Steering Committee on Mediation*

Mr Rimsky Yuen, SC, JP, Secretary for Justice (**Chairperson**)

The Honourable Mr Justice Lam Man Hon, Johnson, VP

Ms Lisa Wong, SC

Mr So Shiu Tsung, Thomas

Mr Chan Bing Woon, SBS, MBE, JP

Mr John Robertson Budge, SBS, MBE, JP

Mrs Wong Ng Kit Wah, Cecilia

Prof To Wing, Christopher

Prof Nadja Alexander

Ms Siu Wing Yee, Sylvia, JP

Prof Leung Hai Ming, Raymond

Ms Amarantha Yip

Mr Peter Tam

Mr Danny McFadden

Dr Dai Lok Kwan, David, JP

Mr Simon Chui

Dr Ferrick Chu

Ms Christina Cheung (from 26 February 2015)

Mrs Tan Kam Mi Wah, Pamela, JP or her delegate

Mr Kwong Thomas Edward, JP or his delegate

Mr Lai Ying Sie, Benedict, SBS, JP (Up to 25 February 2015)

Prof Leung Hing Fung (up to 26 November 2014)



*Annex 2: Membership of the Regulatory Framework Sub-committee  
of the Steering Committee on Mediation*

Ms Lisa Wong, SC (**Chairperson**)

Mrs Wong Ng Kit Wah, Cecilia (**Vice-Chairperson**)

The Honourable Mr Justice Au Hing Cheung, Thomas

Professor Nadja Alexander

Dr Dai Lok Kwan, David, JP (from 27 November 2014)

Professor Leung Hing Fung

Mr Law Wai Hung, Francis

Ms Queenie Lau

Mr Iu Ting Kwok

Dr Chiu Shing Ping, James

Dr Shahla Ali (from 27 November 2014)

Mr Michael Beckett (from 27 November 2014)

Mr Thomas Edward Kwong, JP, or his delegate

*Annex 3: Table: Analysis of apology legislation from different jurisdictions*

<b>Jurisdiction, Relevant Act and section(s)</b>	<b>Definition of Apology/ expression of regret</b>	<b>Apology defined to include fault</b>	<b>Scope of matter</b>	<b>Apology deemed not to be admission</b>	<b>Apology not admissible as admission of liability</b>	<b>Apology not admissible as admission against interest</b>	<b>Apology not to be taken into account / not relevant in determination of fault or liability</b>	<b>Apology does not make time run</b>	<b>Apology does not void insurance contract</b>
<b>AUSTRALIA</b>									
Australian Capital Territory (2002), Civil Law (Wrongs) Act 2002 ss.12-14	An oral or written expression of sympathy or regret, or of a general sense of benevolence or compassion, in relation to an incident, whether or not the expression admits or implies fault or liability in relation to the incident (s.13)	Yes	All civil actions except defamation and actions under certain statutes. (s.12)	Yes (s.14(1)(a))	Yes (s.14(2))	-	Yes (s.14(1)(b))	-	-
New South Wales (2002), Civil Liability Act 2002 ss.67-69	An expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter (s.68)	Yes	All civil actions except defamation, intentional torts, sexual assaults/misconduct, injury from dust diseases or from use of tobacco or actions under certain statutes. (s.67)	Yes (s.69(1)(a))	Yes (s.69(2))	-	Yes (s.69(1)(b))	-	-

Northern Territory (2002), Personal Injuries (Liabilities and Damages) Act 2003 ss.11-13	An oral or written statement by a person: (a) that expresses regret for an incident that is alleged to have caused a personal injury; and (b) that does not contain an acknowledgement of fault by that person (s.12)	No	All civil actions for personal injury except damages for dust diseases or actions under certain statutes. (s.4)	-	Yes (s.11)	Yes (not admissible for any purpose) (s.13)	-	-	-
Queensland (2002), Civil Liability Act 2003, ss.68-72 “Expressions of regret”, ss.72A-72D “Apologies”	An “expression of regret” made by an individual in relation to an incident alleged to give rise to an action for damages is any oral or written statement expressing regret for the incident to the extent that it does not contain an admission of liability on the part of the individual or someone else. (s.71)  An “apology” is an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, whether or not it admits or implies an admission of fault in relation to the matter. (s.72C)	No (for “Expression of regret”)  Yes (for “Apology”)	“Expressions of regret” applies only in relation to a claim for personal injury damages. (s.68)  “Apologies” applies to civil liability of any kind with a few exceptions, e.g. defamation, unlawful intentional act done by the person with intent to cause personal injury, unlawful sexual assault or other unlawful sexual misconduct committed by the person (s.72A)	Yes (s.72D(1)(a) for “Apology”)	Yes (s.72 for “Expression of regret”; s.72D(2) for “Apology”)	Yes for “Expression of regret” (not admissible in the proceeding: s.72)  No clear for “Apology” (s.72D(2) only provides for “not admissible as evidence of the fault or liability”)	Yes (for “Apology”, s.72D(1)(b))	-	-
South Australia (2002), Civil Liability Act 1936 s.75	Nil, but it covers “regret” expressed (s.75)	No	Any matter in tort (s.75)	Yes (s.75)	-	-	-	-	-

Tasmania (2002), Civil Liability Act 2002 ss.6A-7	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 (s.7(3))	No	All civil actions except defamation, intentional torts, sexual assaults/misconduct, injury from use of tobacco or actions under certain statutes (s.6A & s.3B)	Yes (s.7(1)(a))	Yes (s.7(2))	-	Yes (s.7(1)(b))	-	-
Victoria (2002), Wrongs Act 1958 ss.14I-J	An expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault (s.14I)	No	All civil proceedings, which is defined to include (a) a proceeding before a tribunal; and (b) a proceeding under an Act regulating the practice or conduct of a profession or occupation; and (c) an inquiry by a board appointed or by a commission of inquiry issued under Division 5 of Part I of the Evidence (Miscellaneous Provisions) Act 1958 (s.14I)	Yes (s.14J)	- (But note s.14J(3): "Nothing in this section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.")	-	-	-	-
Western Australia (2002), Civil Liability Act 2002 ss.5AF-AH	An expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person (s.5AF)	No	All civil actions except defamation, intentional torts, sexual assaults/misconduct, injury from dust diseases or from use of tobacco or actions under certain statutes (ss.5AG, 3A & 4A)	Yes (s.5AH(1)(a))	Yes (s.5AH(2))	-	Yes (s.5AH(1)(b))	-	-
<b>CANADA</b>									

Alberta, Evidence Act 2000 s.26.1	An expression of sympathy or regret, a statement that one is sorry or any 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 (s.26.1(1))	Yes	Any matter, but does not apply to the prosecution of an offence (s.26.1(4))	Yes (s.26.1(2)(a))	Yes (s.26.1(3))	-	Yes (s.26.1(2)(d))	Yes (s.26.1(2)(b))	Yes (s.26.1(2)(c))
British Columbia (2006), Apology Act 2006	ditto (s.1)	Yes	Any matter	Yes (s.2(1)(a))	Yes (s.2(2))	-	Yes (s.2(1)(d))	Yes (s.2(1)(b))	Yes (s.2(1)(c))
Manitoba, Apology Act 2007	ditto (s.1)	Yes	Any matter	Yes (s.2(1)(a))	Yes (s.2(2))	-	Yes (s.2(1)(c))	-	Yes (s.2(1)(b))
Newfoundland and Labrador, Apology Act 2009	ditto (s.2(a))	Yes	Any matter	Yes (s.3(1)(a))	Yes (s.3(2))	-	Yes (s.3(1)(d))	Yes (s.3(1)(b))	Yes (s.3(1)(c))
Nova Scotia, Apology Act 2008	ditto (s.2(a))	Yes	Any matter, but does not affect a prosecution for a contravention of an enactment (s.4)	Yes (s.3(1)(a))	Yes (s.3(2))	-	Yes (s.3(1)(d))	Yes (s.3(1)(b))	Yes (s.3(1)(c))
Northwest Territories, Apology Act 2013	ditto (s.1)	Yes	Any matter, but does not affect prosecution or use of conviction (s.3)	Yes (s.2(1)(a))	Yes (s.2(2))	-	Yes (s.2(1)(d))	Yes (s.2(1)(b))	Yes (s.2(1)(c))
Nunavut, Legal Treatment of Apologies Act 2010	ditto (s.1)	Yes	Any matter, but does not affect prosecution or use of conviction (s.3)	Yes (s.2(1)(a))	Yes (s.2(2))	-	Yes (s.2(1)(d))	Yes (s.2(1)(b))	Yes (s.2(1)(c))

Ontario, Apology Act 2009	ditto (s.1)	Yes	Any matter, but does not apply to testimony given at civil proceeding, including out of court examination in the context of the civil proceeding, administrative proceeding or arbitration (s.2(4))  Does not affect criminal or provincial offence proceedings or use of conviction (s.3)	Yes (s.2(1)(a)), except provincial offence proceedings (s.2(2))	Yes (s.2(3))	-	Yes (s.2(1)(c)), except provincial offence proceedings (s.2(2))	No (s.4)	Yes (s.2(1)(b))
Prince Edward Island, Health Services Act 1988 s.32	ditto (s.26(a))	Yes	Any matter in relation to provision of a health service (s.32(1))	Yes (s.32(1)(a))	Yes (s.32(2))	-	Yes (s.32(1)(c))	-	Yes (s.32(1)(b))
Saskatchewan (2006), Evidence Act 2006 s.23.1	ditto (s.23.1(1))	Yes	Any event or occurrence (s.23.1(2))	Yes (s.23.1 (2)(a))	Yes	-	Yes (s.23.1 (2)(d))	Yes (s.23.1 (2)(b))	Yes (s.23.1(2) (c))
Yukon, Apology Act (Negatived on 30 April 2008)	An expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration (s.1)	Yes	Any matter	Yes (s.2(1)(a))	Yes (s.2(2))	-	Yes (s.2(1)(c))	-	Yes (s.2(1)(b))
<b>UNITED KINGDOM</b>									
UK (excluding Scotland) (2006), Compensation Act 2006 s.2	No definition.  It is a short provision which states that "An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty." (s.2)	No definition	Negligence or breach of statutory duty (s.2)	No.	No	No (not of itself an admission)	No	-	-

Scotland, Apologies (Scotland) Bill	“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 the 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 a recurrence”	Yes	All civil proceedings (including inquiries, arbitrations and proceedings before tribunals) except inquiries under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, and defamation proceedings. It does not apply to criminal proceedings.	-	Yes (s.1(a))	Yes (s.1(b))	-	-	-
<b>UNITED STATES</b>									
Arizona (2005), Arizona Revised Statutes §12-2605	No definition, but the section covers “any statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence”	Yes	Any civil action of unanticipated outcome of medical care	-	Yes	Yes	-	-	-

California (2000), California Evidence Code §1160	No definition, but the section covers “the portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence”  "Benevolent gestures" is defined to mean “actions which convey a sense of compassion or commiseration emanating from humane impulses.”	No (§1160(a))	Accidents (not wilful action)	-	Yes	-	-	-	-
Colorado (2003), Colorado Revised Statutes §13-25-135	No definition, but the section covers “any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence”	Yes	Unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action  "Unanticipated outcome" is defined as “the outcome of a medical treatment or procedure that differs from an expected result”	-	Yes	Yes	-	-	-
Connecticut (2005), Connecticut General Statutes §52-184d	ditto	Yes	Unanticipated outcome in healthcare	-	Yes	Yes	-	-	-



Delaware (2006), Delaware Code Title 10, §4318	No definition, but the section covers “any and all statements, writings, gestures, or affirmations made by a health care provider or an employee of a health care provider that express apology (other than an expression or admission of liability or fault), sympathy, compassion, condolence, or benevolence”	No	Unanticipated outcome of medical care  "Unanticipated outcome" is defined as “the result of a medical treatment or procedure that differs from an expected medical result”	-	Yes (inadmissible for any purpose with the exception of the admission of liability or fault)	Yes (inadmissible for any purpose with the exception of the admission of liability or fault)	-	-	-
District of Columbia (2007), D.C. Code §16-2841	No definition, but the section covers “an expression of sympathy or regret made in writing, orally, or by conduct made”	No, can only be “an expression of sympathy or regret”	Any civil action or administrative proceeding alleging medical malpractice	-	Yes	-	-	-	-
Florida (2001), Florida Statutes §90.4026	No definition, but the section covers “the portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence”  “Benevolent gestures” is defined as “actions that convey a sense of compassion or commiseration emanating from human impulses”	No (See §90.4026: “A statement of fault shall be admissible pursuant to this section”)	Accidents, in civil action	-	Yes (inadmissible for any purpose)	Yes (inadmissible for any purpose)	-	-	-
Georgia (2006), Georgia Code §24-4-416	No definition, but the section covers “any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence”	Yes (“error”)	Any claim or civil proceeding alleging an unanticipated outcome of medical care	Yes	Yes	Yes	-	-	-

Hawaii (2007), Hawaii Revised Statute §626-1, Rule 409.5	No definition, but the section covers “statements or gestures that express sympathy, commiseration, or condolence”	No (“This rule does not require the exclusion of an apology or other statement that acknowledges or implies fault...”)	Any matter	-	Yes	Potentially, statute says “not admissible to prove liability for any claim growing out of the event”	-	-	-
Idaho (2006), Idaho Code §9-207	No definition, but the section covers “all statements and affirmations, whether in writing or oral, and all gestures or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence, including any accompanying explanation”	No (§9-207(2))	Unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action  "Unanticipated outcome" is defined as “the outcome of a medical treatment or procedure that differs from an expected, hoped for or desired result”	-	Yes	Yes	-	-	-
Illinois (2005), 735 ILCS 5/8-1901	It is not about apology, but about provision of or payment for medical, surgical services, facilities, equipment, etc.	No Fault not discussed in definition – unclear but probably not	Unanticipated outcome in healthcare	Yes (“...shall not be construed as an admission of any liability”)	Yes	-	-	-	-
Indiana (2006), Indiana Code §34-43.5	It covers "communication of sympathy" which is defined as “a statement, a gesture, an act, conduct, or a writing that expresses: (1) sympathy; (2) an apology; or (3) a general sense of benevolence.	No (§34-43.5-1-5)	Any cause of action in tort, including a medical malpractice action (§34-43.5-1-2), any action in tort for loss, injury, pain suffering, death or damage to property (§34-43.5-1-4), but does not apply to a criminal proceeding (§34-43.5-1-1)	-	Yes (inadmissible for any purpose)	Yes (inadmissible for any purpose)	-	-	-

Iowa, Iowa Code §622.31	No definition, but the section covers “portion of a statement, affirmation, gesture, or conduct expressing sorrow, sympathy, commiseration, condolence, compassion, or a general sense of benevolence”	No	Any civil action for professional negligence, personal injury, or wrongful death or in any arbitration proceeding for professional negligence, personal injury, or wrongful death against a person in a profession...a hospital...or a health care facility	-	Yes (inadmissible as evidence)	Yes (inadmissible as evidence)	-	-	-
Louisiana (2005), Louisiana Revised Statute §13:3715.5	No definition, but the section covers “any communication, including but not limited to an oral or written statement, gesture, or conduct by a health care provider expressing or conveying apology, regret, grief, sympathy, commiseration, condolence, compassion, or a general sense of benevolence” (§13:3715.5)	No (“A statement of fault... shall not be made inadmissible pursuant to this Section.”)	Any medical review panel proceeding, arbitration proceeding, or civil action brought against health care provider (§13:3715.5)	Yes	Yes	Yes	-	-	-
Maine (2005), Maine Revised Statute 24§2907	No definition, but the section covers “any statement, affirmation, gesture or conduct expressing apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence” (§2907 s.2)	No (“Nothing in this section prohibits the admissibility of a statement of fault”)	Any civil action for professional negligence or in any arbitration proceeding related to such civil action as a result of the unanticipated outcome (§2907 s.2)  "Unanticipated outcome" is defined as “the outcome of a medical treatment or procedure that differs from an expected result” (§2907 s.1C)	-	Yes	Yes	-	-	-
Maryland (2004), Maryland Code, Courts and Judicial Proceedings §10-920	It covers “an expression of regret or apology, including an expression of regret or apology made in writing, orally, or by conduct”	No (§10-920(b)(2))	Any civil action against a health care provider, or any proceeding subject to Title 3, Subtitle 2A of this article	-	Yes, except admission of liability or fault (§10-920(b)(2))	Yes, except admission of liability or fault (§10-920(b)(2))	-	-	-

<p>Massachusetts (2007), Massachusetts General Laws, Chapter 233 Witnesses and Evidence, §23D</p>	<p>No definition, but the section covers “statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence” (§23D)  “Benevolent gestures” is defined as “actions which convey a sense of compassion or commiseration emanating from humane impulses” (§23D)</p>	<p>No Fault not discussed in definition – unclear but probably not</p>	<p>Accident (an occurrence resulting in injury or death to one or more persons which is not the result of wilful action by a party)</p>	<p>-</p>	<p>Yes (§23D)</p>	<p>-</p>	<p>-</p>	<p>-</p>	<p>-</p>
<p>Missouri (2005), Missouri Revised Statutes §538.229</p>	<p>No definition, but the section covers “portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence” (§538.229(1))  "Benevolent gestures" is defined as “actions which convey a sense of compassion or commiseration emanating from humane impulses” (§538.229(2)(1))</p>	<p>No (§538.229(1))</p>	<p>Civil action (§538.229(1))</p>	<p>-</p>	<p>Yes (§538.229(1))</p>	<p>-</p>	<p>-</p>	<p>-</p>	<p>-</p>

Montana (2005), Montana Code §26-1-814	The section covers “a statement, affirmation, gesture, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence”  “Apology” is defined as “a communication that expresses regret”; "Benevolence" is defined as “a communication that conveys a sense of compassion or commiseration emanating from humane impulses”; while "Communication" means a statement, writing, or gesture.	No Fault not discussed in definition – unclear but probably not	Civil action for medical malpractice	-	Yes (inadmissible for any purpose)	Yes (inadmissible for any purpose)	-	-	-
Nebraska, Nebraska Revised Statute §27-1201	It covers “any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence”	No	Civil action of unanticipated outcome of medical care  “Unanticipated outcome” is defined as “the outcome of a medical treatment or procedure that differs from the expected result”	-	Yes	Yes	-	-	-
New Hampshire (2006), New Hampshire Revised Statute §507-E:4	No definition, but the section covers “a statement, writing, or action that expresses sympathy, compassion, commiseration, or a general sense of benevolence”. (§507-E:4 II)  However, it does not apply to a statement of fault, negligence, or culpable conduct. (§507-E:4 III)	No (§507-E:4 III)	Medical injury action (§507-E:4 II)	-	Yes	-	-	-	-

North Carolina (2004), North Carolina General Statute §8C-1, Rule 413	No definition, also covers “offers to undertake corrective or remedial treatment or actions, and gratuitous acts to assist affected persons”	No Fault not discussed in definition-unclear but probably not	Actions against healthcare providers for negligence or culpable conduct	-	Yes	Inadmissible to prove negligence /culpable conduct	-	-	-
North Dakota, North Dakota Century Code §31-04-12	No definition, but it covers “a statement, affirmation, gesture, or conduct which expresses apology, sympathy, commiseration, condolence, compassion, or benevolence” (§31-04-12(1))	No Fault not discussed in definition-unclear but probably not	Civil action, arbitration proceeding, or administrative hearing regarding health care provider (§31-04-12(1))	-	Yes	Yes	-	-	-
Ohio (2004), Ohio Revised Code §2317.43	No definition, but it covers “any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence”	No Fault not discussed in definition-unclear but probably not	Any civil action of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action (§2317.43(A))  "Unanticipated outcome" is defined as “the outcome of a medical treatment or procedure that differs from an expected result” (§2317.43(B)(4))	-	Yes	Yes	-	-	-
Oklahoma (2004), Oklahoma Statutes Title §63-1-1708.1H	No definition, but it covers “any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence”	No Fault not discussed in definition-unclear but probably not	Any medical liability action as the result of the unanticipated outcome of the medical care	-	Yes	Yes	-	-	-
Oregon (2003), Oregon Revised Statute §677.082	No definition, but it covers “any expression of regret or apology... including an expression of regret or apology that is made in writing, orally or by conduct”	No Fault not discussed in definition-unclear but probably not	Any civil action against person licensed by the Oregon Medical Board or a health care institution, health care facility or other entity that employs the person or grants the person privileges	Yes (677.082(1))	Yes	-	-	-	-

South Carolina (2006), South Carolina Code of Laws §19-1-190	No definition, but it covers “any and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence” (§19-1-190(B))	Yes	Any claim or civil action of unanticipated outcome resulting from their medical care (§19-1-190(B))  "Unanticipated outcome" is defined as “the outcome of a medical treatment or procedure, whether or not resulting from an intentional act, that differs from an expected or intended result of such medical treatment or procedure” (§19-1-190(C)(10))	For all civil actions, yes (§19-1-190(B))	For actions involving unanticipated healthcare outcomes, yes (§19-1-190(D)) (subject to Defendant’s right to waive such inadmissibility in a medical malpractice action: §19-1-190(E))	For actions involving unanticipated healthcare outcomes, yes (§19-1-190(D)) (subject to Defendant’s right to waive such inadmissibility in a medical malpractice action: §19-1-190(E))	-	-	-
South Dakota (2005), South Dakota Codified Laws §19-12-14	No definition, but it covers “statement made by a health care provider apologising for an adverse outcome in medical treatment”, “offer to undertake corrective or remedial treatment or action” and “gratuitous act to assist affected persons”	No Fault not discussed in definition-unclear but probably not	Actions against health care providers for adverse outcomes, but does not prevent admission for the purpose of impeachment.	-	Yes (not “admissible to prove negligence”)	No	-	-	-
Tennessee (2003), Tennessee Code §409.1	No definition, but it covers “that portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence”  “Benevolent gestures” is defined as “actions which convey a sense of compassion or commiseration emanating from humane impulses”	No (§409.1(a))	Accidents, which is defined as “an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party” (§409.1(b)(1))  i.e. Inapplicable in criminal cases (Advisory Commission Comment [2003])	-	Yes (§409.1(a))	-	-	-	-

Texas (1999), Texas Civil Practice and Remedies Code §18.061	No definition, but it covers “communication that expresses sympathy or a general sense of benevolence” (§18.061(a))  "Communication" is defined as “a statement; a writing; or a gesture that conveys a sense of compassion or commiseration emanating from humane impulses” (§18.061(b))	No	Accidents (civil action), but it does not apply to communication (such as excited utterance) which includes statements concerning negligence or culpable conduct pertaining to an accident or event.	-	Yes	Yes (inadmissible if offered to prove liability: §18.061(a)(3))	-	-	-
Utah (2006), Utah Rules of Evidence, Rule 409	No definition, but it covers “evidence of unsworn statements, affirmations, gestures, or conduct that expresses (1) apology, sympathy, commiseration, condolence, compassion, or general sense of benevolence; or (2) a description of the sequence of events relating to the unanticipated outcome of medical care or the significance of events” (Rule 409(b))  It also covers “Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses” (Rule 409(a))	No Fault not discussed in definition- unclear but probably not	Rule 409(b) applies to malpractice action against a health care provider but there is no such limit for Rule 490(a)	-	Yes (not admissible to prove liability for an injury)	Yes (not admissible to prove liability for an injury)	-	-	-
Vermont (2006), Vermont Statutes Title 12 Court Procedure §1912	No definition, but it covers “an oral expression of regret or apology, including any oral good faith explanation of how a medical error occurred”	No Fault not discussed in definition- unclear but probably not	Any civil or administrative proceedings against a health care provider for medical errors	Yes	Yes	Yes (inadmissible for any purpose)	-	-	-



Virginia (2005), Virginia Code §8.01-581.20:1	No definition, but it covers “portion of statements, writings, affirmations, benevolent conduct, or benevolent gestures expressing sympathy, commiseration, condolence, compassion, or a general sense of benevolence, together with apologies”	No	Any civil action of an unanticipated outcome of health care, or in any arbitration or medical malpractice review panel proceeding related to such civil action  "Unanticipated outcome" is defined as the outcome of the delivery of health care that differs from an expected result.	-	Yes	Yes	-	-	-
Washington, Washington Revised Code §5.64.010	No definition, but it covers “any statement, affirmation, gesture, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence; or any statement or affirmation regarding remedial actions that may be taken to address the act or omission that is the basis for the allegation of negligence” (§5.64.010(2)(b))  It also covers “evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury”	No Fault not discussed in definition-unclear but probably not	Any civil action against a health care provider for personal injuries which is based upon alleged professional negligence, or in any arbitration or mediation proceeding related to such civil action	-	Yes	Yes (“inadmissible as evidence” for any purpose)	-	-	-
West Virginia (2005), West Virginia Code §55-7-11a	No definition, but it covers “statement, affirmation, gesture or conduct of a healthcare provider who provided healthcare services to a patient, expressing apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence”	No Fault not discussed in definition-unclear but probably not	Actions for medical professional liability for discomfort, pain, suffering, injury or death	-	Yes (§55-7-11a(b)(1))	Yes (§55-7-11a(b)(1))	-	-	-

Wyoming (2005), Wyoming Statutes §1-1-130	No definition, but it covers “any and all statements, affirmations, gestures or conduct expressing apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence”	No Fault not discussed in definition- unclear but probably not	Any civil action or arbitration of an unanticipated outcome of medical care against a health care provider  "Unanticipated outcome" is defined as the result of a medical treatment or procedure that differs from an expected result.	-	Yes	Yes	-	-	-
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