Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation

Submission of the Hong Kong Bar Association

1. The Steering Committee on Mediation released, in February 2016, the "Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation" ("the Consultation Report"), and has invited the public to take part in the 2nd round of consultation on 3 specific issues.

2. The Hong Kong Bar Association ("the HKBA") makes this Submission with a focus on the issue of statements of fact plus an expression of support for the Recommendations for the rest of the 3 specific issues aforementioned.

Issue 1

Excepted proceedings to which the proposed apology legislation shall not apply

3. Having further considered the arguments for and against the enactment of an apology legislation to be applicable to civil and other forms of non-criminal proceedings including disciplinary and regulatory proceedings, the HKBA is generally in support of the Recommendation that the apology legislation shall apply generally thereto, and in particular welcome the Recommendation to embrace views of relevant stakeholders who propose specific disciplinary or regulatory proceedings to be exempted therefrom.

Issue 2

Whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation

4. This issue is under close scrutiny by the Steering Committee, as it is seldom raised in the existing apology legislations enacted in other jurisdictions. Although the Scottish Parliament considered this issue in their draft apology bill, it is worth noting that in the Apologies (Scotland) Bill passed by the Scottish Parliament on 19th January 2016, *there is no reference to statements of fact*. The reason for removing statements of fact from the protection of apology law is essentially that such protection would affect a claimant's right particularly when the statement of fact in an apology was the only evidence available.

5. The key reasons[1] put forward by those who support the inclusion of statements of fact in the definition of apology are not different from those arguments summarized by the Steering Committee in para. 5.36 of the Consultation Paper. The HKBA analyzed and commented on each of those arguments in its submission dated 17th August 2015 and will not repeat herein. It seems that there are no sufficient reasons to justify the interference with and infringement of a claimant's right to adduce evidence in order to prove his claim given that evidential value of statements of fact in connection with an apology outweighs its prejudicial effect.

[1] Paragraph 10.2 of the Consultation Report.

6. The Steering Committee considers that there are 3 alternative approaches which may be adopted to address this issue.[2] The HKBA takes the view that the Second Approach is the most appropriate one for the following reasons:

The First Approach

a) Under the First Approach, statements of fact in connection with the matter in respect of which an apology has been made is treated as part of the apology and should be protected. The court does not have any discretion to admit the apology containing statements of fact as evidence against the maker of the apology. This blanket approach would indeed provide clarity and certainty; nevertheless, there is a high risk that such approach would infringe on a claimant's right to seek justice. It is argued that a claimant would not suffer any prejudice because he would not have received an apology (and the accompanying statements of fact) in the first place.[3] However, such reasoning does not apply to a spontaneous apology tendered immediately after the adverse event, as spontaneous apology is unlikely to be influenced by the existence or non-existence of an apology legislation. Furthermore, case law shows that statements of fact contained in a spontaneous apology may be closely related to the adverse event and have evidential value. Ms Margaret Mitchell, a member of the Scottish Parliament who introduced the apology bill pointed out that she included statements of facts to "try to encourage the *fullest possible apology*". The HKBA considers that this is an ideal rather than an inevitable result. To put it in another way, protection of

[2] Paragraph 10.14 of the Consultation Report.
[3] Paragraph 10.15 of the Consultation Report.

statements of fact thereby running a risk of infringing on or interfering with a claimant's right is more than necessary to accomplish the objective of the proposed legislation which is to "promote and encourage the making of the apologies with a view to facilitating the resolution of dispute".[4]

The Third Approach

b) Under the Third Approach, the court retains the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances. One of the examples given by the Steering Committee is when those statements of fact would be the only evidence available to the claimant. However, it is unclear as to why claimants who cannot independently establish their claim should be more favoured than those who can, and this will create unfairness among claimants. It is also unclear as to when and how the Court would exercise its discretion.

The Second Approach

c) Under the Second Approach, the definition of apology would make no reference to statements of fact, and whether the statements of fact form part of the apology depends on the circumstances of a particular case and is a question to be determined by the Court. This approach would be comparatively better off to promote the objective of an apology legislation and achieve a just outcome in a particular case because of the following reasons:

[4] Section 2 of the draft Apology Bill.

i) Statements of fact, by their nature, are directly relevant to civil liability; and in our common law based adversarial system, it is for the Court to determine liability.[5]

ii) The arguments for protecting statements of fact are less compelling because (a) the objective of an apology legislation is to promote and encourage the making of apologies, not "perfect" apologies or "fullest possible" ones; and (b) statements of fact are less likely to be prejudicial to a defendant compared to expression of sympathy and admission of fault.[6]

iii) It allows litigants to adduce relevant statements of facts as evidence thereby removing the potential injustice to litigants. As pointed out by Mr. Paul Wheelhouse, the Minister for Community Safety and Legal Affairs of Scotland, "we cannot ignore the rights of claimants or pursuers who might need to draw upon an apology in their evidence base simply because such cases are likely to be few in number. Surely, protecting the rights of minorities is at the heart of good law making".[7]

iv) It allows the Court to scrutinize the circumstances surrounding the making of the apology and determine whether the statements of fact form part of the apology.

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[5] Official Report of Meeting of the Scottish Parliament on 8 December 2015, p9: Available at http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10263&mode=pdf.

[6] Robyn Carroll, Cristopher To and Marc Unger, "Apology Legislation and its implications for International Dispute Resolution", 15th October 2015. Available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=998e05e0-552b-4160-bb8f-857515c212f4#aims.

[7] Official Report of Meeting of the Scottish Parliament on 27 October 2015, p54: Available at http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10157

d) The Second Approach is actually the Canadian approach which was demonstrated by the case of *Robinson v Cragg*[8]. It shows that the Court can separate factual contents from an apology containing expression of regret or sympathy and an admission of fault when an apology legislation does not refer to statements of fact. Master Laycock noted that- "It is the expression of sympathy or regret combined with the admission of fault that the legislature has determined is unfairly prejudicial."[9]

e) In *Cormack v Chalmers*[10], a very recent case handed down on 8 September 2015, in dealing with similar legislation in Ontario, the Honourable Justice Sheila Ray faced an issue concerning the legal effect of the Apology Act on certain evidence that the plaintiff proposed calling. In this case, the plaintiff was badly injured after she was hit by a motorboat while she was swimming near a harbor entrance. At the time of the accident, the plaintiff had been a guest at the residence of Shannon Pitt and Erik Rubadeau, the defendants. The plaintiff believed that the defendants had been negligent in not informing her about the danger of swimming at the end of the dock.

   i) The evidence the plaintiff proposed to call is as follows: "Asen spoke with Shannon Pitt and Eric Rubadeau. Shannon told Asen that she was sorry and she could not forgive herself. She said that she alwaystells

[8] 2010 ABQB 743
[9] *Ibid*, at para.20.
[10] 2015 ONSC 5599: Available at http://www.canlii.org/en/on/onsc/doc/2015/2015onsc5599/2015onsc5599.html?autocompleteStr=cormack%20v%20chalmers&autocompletePos=2

people not to swim behind the dock and has told her father not to go swimming there. Shannon regretted not telling Rumiana."[11]

ii) Justice Ray referred to *Robinson v Cragg* [12]and noted that- "Clearly any evidence of an apology as defined is inadmissible. The question raised is whether an otherwise admissible relevant admission coupled to an apology is admissible. This requires a contextual analysis of the words used. The statements in question each convey separate and distinct thoughts or messages". [13] Justice Ray ruled that Shannon's words expressing she was sorry about the plaintiff's accident was inadmissible thereby conforming with the requirements of the Apology Act but the remaining sentences were admitted as evidence.[14]

iii) This is a correct and just result. If all the sentences were ruled inadmissible, it would create an extra burden on the plaintiff to prove that the defendants were negligent.

7. Given that no other apology legislations had covered statements of fact in the leading common law jurisdictions and the Canadian approach works well, it would be better off to leave the issue for the courts of Hong Kong to decide instead of making a blanket protection.

[11] *Ibid*, at para.4
[12] *Ibid*, at para.7.
[13] *Ibid*, at para.8.
[14] *Ibid*, at para.9.

8. Therefore, the HKBA supports the Second Approach among the 3 aforesaid Approaches put forward by the Steering Committee in dealing with factual information conveyed in an apology under the proposed apology legislation.

Issue 3

The draft Apology Bill as prepared by the Department of Justice

9. Other than the concerns as discussed under Issue 2 aforementioned, the HKBA is generally in support of the draft Apology Bill as prepared by the Department of Justice.

Dated the 22nd April 2016

HONG KONG BAR ASSOCIATION