

APOLOGY

Hong Kong will soon become the first jurisdiction in the Asia-Pacific region to have an apology legislation

Hong Kong's Apology Ordinance is set to commence – what you need to know

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Introduction

The Apology Ordinance (Cap 631) (Ordinance) was passed on 13 July 2017 and will become effective on 1 December 2017.

The introduction of the Ordinance can be seen as another initiative by the government to promote alternative forms of dispute resolution, aimed at promoting and encouraging parties to make sincere apologies to prevent the escalation of disputes and to facilitate their amicable resolution. Similar to the Arbitration and Mediation (Third Party Funding) (Amendment) Ordinance, passed earlier on 14 June 2017, which clarifies the position of third party funders to further promote arbitration, the Ordinance will also further enhance Hong Kong's position as a centre for international legal and dispute resolution services in the Asia-Pacific region.

In gist, the Ordinance clarifies the legal consequences of a party making an apology by stating that it will generally be inadmissible as evidence against them in the relevant proceedings as an admission of fault. Sometimes, a party may still wish to express their condolences or sympathy despite genuinely believing that they are not at fault. The Ordinance will give protection to such party by ensuring that such an apology does not constitute an express or implied admission of the party's fault or liability in connection with the matter and must not be taken into account in determining fault or liability on any other issue in connection with the matter to the prejudice of that party.

Hong Kong will soon become the first jurisdiction in the Asia-Pacific region to have an apology legislation. At the moment, Australia, the United States, Canada and Scotland have also enacted similar legislation, but the scope of protection given to apologies under the Ordinance in Hong Kong can be seen as one of the widest yet.

References:

[*Apology Ordinance \(Commencement\) Notice*](#)

[*Executive Summary of the Consultation Paper, Enactment of Apology Legislation in Hong Kong*](#)

[*Legislative Council Brief – Apology Bill*](#)

[*Robyn Carroll, When 'Sorry' is the Hardest Word to Say, How Might Apology Legislation Assist? \(2014\) 44\(2\) Hong Kong Law Journal 491*](#)



The legal definition of an ‘apology’

An apology is defined under section 4 of the Ordinance as ‘an expression of the person’s regret, sympathy or benevolence in connection with the matter’. Such an expression may be oral, written or by conduct. Interestingly, the Ordinance in Hong Kong has adopted a broad definition of an ‘apology’. Unlike the apology legislation in some other jurisdictions, such as the most recently enacted Apologies (Scotland) Act 2016, the Ordinance also extends protection to apologies made by way of conduct, eg an offer to pay the other party’s medical expenses, sending flowers, taking bows of apology, etc. The apology also includes any part of the expression that is an express or implied admission of fault or a statement of fact in connection with the matter.

An apology could also be made in the form of an electronic record, for example through e-mails, SMS messages and various forms of social media.

It should be noted that an apology made in documents filed or submitted in the proceedings (for example apologies made in the pleadings and witness statements) or an apology made by a person in testimony given at the hearing of the proceedings remains admissible and will not be protected under the Ordinance: section 5(a). This is to be distinguished from an apology, the existence of which, is only referred to in the pleadings or other documents filed or submitted in the proceedings. An apology in the latter should still be protected under the Ordinance.

Further, the Ordinance does not affect discovery, or similar procedures in which parties are required to disclose or produce documents in their possession, custody or power in applicable proceedings: section 11(a).

Reference:

Administration’s reply to the questions of the Assistant Legal Adviser in the letter dated 6 February 2017

Wide range of applicable proceedings

In addition to the broad definition, the Ordinance is intended to apply to a wide range of civil proceedings, which include judicial, arbitral, administrative, disciplinary, regulatory and other proceedings.

It will, however, not apply to criminal proceedings, proceedings of the Legislative Council and proceedings conducted under the Commissions of Inquiry Ordinance (Cap 86), the Control of Obscene and Indecent Articles Ordinance (Cap 390) and death inquests under the Coroners Ordinance (Cap 504).

Further, the Ordinance does not have any extra-territorial effect. Therefore, it is possible for an apology made in relation to applicable proceedings in Hong Kong to be admissible in proceedings in other countries. On the other hand, an apology made outside Hong Kong will still be protected by the Ordinance and is generally inadmissible as evidence in applicable proceedings taking place in Hong Kong.



Apologies made in mediation and in defamation proceedings

As it is common for parties to make an apology during mediation, it is important to make a distinction between an apology made in the context of mediation and an apology intended to be protected under the Ordinance.

Section 11(c) of the Ordinance makes it clear that the operation of the Mediation Ordinance (Cap 620) will not be affected. The effect is that an apology made in the context of mediation will remain as part of the confidential mediation communication between the parties, as governed by the Mediation Ordinance. Whether or not such confidential mediation communication would be made admissible is a matter under the Mediation Ordinance and the Ordinance will have no application at all.

Section 11(b) of the Ordinance also provides that the Ordinance does not affect the operation of sections 3, 4 or 25 of the Defamation Ordinance (Cap 21). This means that an apology made by the defendant in a defamation action may still be taken into account in mitigation of damages: section 3. This also means that a defendant in a libel action can still publish an apology and rely on the defence that the libel was made without actual malice and without gross negligence: section 4. Further, the procedures on publishing an apology for the purpose of making an offer of amends under section 25 will also not be affected.

Does not extend limitation periods and affect contract of insurance

Section 9 of the Ordinance makes it clear that an apology will not constitute an acknowledgment under section 23 of the Limitation Ordinance (Cap 347). Under section 23, the limitation periods for certain rights of action may be extended by an acknowledgment of the title or claim in issue. The Ordinance therefore specifically precludes an apology from operating as an acknowledgment for the purposes of extending the limitation period.

As for contracts of insurance or indemnity, parties are generally advised not to make an admission of fault or liability as this may affect their entitlement under the insurance cover. There are usually clauses in the insurance contracts prohibiting any admission of fault or liability.

Section 10 of the Ordinance expressly provides that an apology will not render any insurance cover void or otherwise affect the insurance cover under a contract of insurance or indemnity, regardless of whether the insurance was entered into before or after the commencement of the Ordinance. This safeguards the validity of insurance cover and parties may be more willing to express their condolences and sympathy without fear that such apology will affect their rights and entitlements under their insurance.

Discretion to admit statement of facts in an apology in an exceptional case

During the consultation process of the Ordinance, one of the most discussed aspects was the discretion given to the decision maker under section 8(2) of the Ordinance to admit statements of fact in an apology as evidence in the proceedings.

This section provides that such discretion can be exercised in an exceptional case, where the decision maker is satisfied that it is just and equitable to do so, having regard to the public interest or the interests of the administration of justice.

An example where such discretion may be exercised is set out in the Ordinance, namely where there is no other evidence available for determining an issue. While it is anticipated that this discretion will rarely be invoked and will only be exercised in limited circumstances, no further illustrations were given as to what would constitute 'an exceptional case'.

By way of background, the decision to include the discretion to admit statements of fact in an apology was driven by constitutional concerns. It was considered that an absolute protection of all statements of fact in an apology may be a disproportionate restriction of a party's right to a fair hearing and may run the risk of being struck down for being unconstitutional. The right to a fair hearing entails that all relevant evidence should be heard and a party should have a reasonable opportunity to present any admissible evidence relevant to their case.

In light of this, it was decided that an absolute protection of all statements of fact in an apology may deny a party's access to justice, which is contrary to the policy intent of the Ordinance to facilitate the settlement of disputes. It was also considered that the current approach, which includes the discretion of the decision maker, allows more flexibility and strikes the proper balance between the policy intent and the need to safeguard a party's right to a fair hearing.

Potential uncertainties in the exercise of discretion

Given the wide range of applicable proceedings under the Ordinance, this could potentially lead to greater uncertainties as to how the discretion under section 8(2) would be exercised by different decision makers. A decision maker is defined under section 8(4) as the person (whether a court, a tribunal, an arbitrator or any other body or individual) having the authority to hear, receive and examine evidence in the proceedings.

Although the courts may be familiar with phrases such as 'just and equitable', 'in the public interest' and in the 'interests of the administration of justice' and are expected to exercise the discretion in a consistent manner, concerns arise from the fact that not all the decision makers in the relevant tribunals and disciplinary boards are judges or are legally trained. Further, the fact that decision makers in other non-judicial proceedings are not bound by the decisions of the courts only creates even more uncertainties for potential apology makers.

It remains to be seen if the discretion can indeed be exercised by decision makers in a consistent manner across all types of applicable proceedings.

Further, the decision maker's decision to admit a statement of fact in an apology as evidence can be challenged by way of an appeal. A party wishing to challenge the decision may lodge an appeal according to the appeal procedures of that particular court or tribunal. If there is no appeal mechanism, the decision maker's decision could be challenged by way of judicial review.

In the meantime, legal advisers when advising clients as to whether certain statements of fact may be admissible should remind clients of the potential uncertainties that may arise. It is also important to draft the apology bearing in mind that there is a chance, however rare, that the facts included in the apology could be admissible as evidence, particularly where the apology is to be given at an early stage, before any discovery has taken place.

It may also be prudent for legal advisers to not only review judgments concerning the exercise of discretion by the courts, but to also consider decisions from tribunals or disciplinary boards arising from other applicable proceedings and the same shall be made available for public reference.

Conclusion

While it may be difficult to assess empirically the effectiveness of apology legislation in changing people's behaviour and attitude in handling disputes, there have been suggestions that an apology has an important role to play in meeting people's psychological needs and promoting settlements in certain civil disputes. This is most notably so in personal injuries, defamation and medical claims, where monetary compensation might not be the top priority of the victims.

The Ordinance ambitiously seeks to change the current dispute resolution culture from one which is more adversarial-based to one that is more conciliatory in nature. It undertakes to encourage natural, open and direct dialogue between people after injuries to reduce tension, antagonism and anger. However, in cases where the decision makers exercise the discretion to admit a statement of fact as evidence, it is anticipated that the relevant parties would lodge an application to appeal against such decisions, which could potentially cause undue delay in the final determination of the matter and create further uncertainties for the parties.

Q&A

1. When can an apology be made?

Section 5(1) of the Apology Ordinance (Cap 631) (Ordinance) provides that an apology can be made by a person in connection with a matter even if proceedings concerning that matter have not commenced. The idea is that the Ordinance would encourage parties to make an apology at an early stage, irrespective of whether proceedings have been commenced and whether settlement is contemplated.

2. What type of conduct would amount to an apology?

It has been suggested that a simple gesture of good will (eg an offer or promise to pay medical expenses, sending flowers or a card) could, depending on the circumstances, also fall within the definition of an 'apology' under the Ordinance.

3. Will an apology made outside Hong Kong still be protected under the Ordinance?

An apology made outside the jurisdiction will still enjoy protection under the Ordinance, as long as the applicable proceedings in question are taking place in Hong Kong. The effect of section 8 of the Ordinance is that the apology will generally be inadmissible, even if it is not made in Hong Kong.

For example, an apology made by an overseas parent company on behalf of its subsidiary company which is involved in applicable proceedings in Hong Kong will generally be inadmissible and protected under the Ordinance.

Q&A

4. During discovery or similar procedures, can I object to the disclosure of a document containing an apology?

The test of relevance for discovery will still apply and a document (even if it contains an apology) will still be discoverable and should be disclosed if it is relevant. The Ordinance makes it clear that it does not affect the rules of discovery or similar procedures where parties are required to disclose documents in their possession, custody or power in applicable proceedings.

However, whether such document is admissible is a different matter. The fact that a document is discoverable does not mean that it is admissible. Therefore, the Ordinance is still applicable to render such document inadmissible as evidence even though it is discoverable and has already been disclosed.

A document disclosed or produced pursuant to discovery or similar procedures should be distinguished from a document that is filed or submitted in applicable proceedings. An apology in the latter (eg in pleadings or witness statements) could be admissible as evidence pursuant to section 5(2)(a) of the Ordinance.

5. Could the existence of an apology be considered in awarding damages or compensation?

Section 8 of the Ordinance only provides that an apology is not admissible as evidence for determining *fault, liability or any other issue in connection with the matter to the prejudice of the person*.

The Ordinance does not prohibit the decision maker to take into account an apology when deciding the issue of damages or compensation as this does not appear to be a matter to the prejudice of the apology maker. Keeping in mind that the objective of the Ordinance is to protect the apology maker and to encourage parties to make an apology, it appears in line with such objective that an apology made may be considered in mitigation of damages or compensation.

6. What should the apology maker do if the other side made references in their pleadings to the apology made?

Where the other side seeks to rely on an apology made to them by referring to it in their pleadings or other documents filed or submitted, it is possible to make an application to strike out the relevant parts referring to the apology on the basis of inadmissibility as this may prejudice the apology maker.

Alternatively, it may also be prudent for the apology maker to make a complaint as to such references and to put on record that such an apology should not be admissible pursuant to the Ordinance. Further, at the trial or hearing before the decision maker, the apology maker may also make submissions on their reliance on the protection conferred under the Ordinance.



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Paul is a very experienced litigator, with a wide range of experience. His areas of practice include disputes relating to property, building management, landlord and tenant, land resumption, probate, trust and family estates. He also handles a wide range of commercial litigation, including shareholders' disputes, company insolvency and winding up, contractual disputes, and debt recovery and asset tracing. His practice also includes commercial crime and handling investigations by various regulatory bodies. Paul often handles employment matters (both contentious and non-contentious), for example matters relating to discrimination, redundancy and equal opportunities.

Paul Kwan is a contributor to Lexis® Practical Guidance – Dispute Resolution and Lexis® Practical Guidance – Corporate.

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