INTRODUCTION

The Apology Ordinance (Cap.631) was passed by the Legislative Council on 13 July 2017 and gazetted on 21 July 2017.[1] It commenced on 1 December 2017. The Ordinance applies to an apology made by a person in connection with a civil matter on or after the commencement date.[2] The enactment of the Apology Ordinance has its beginnings in the establishment of the Steering Committee on Mediation (Steering Committee) in 2012 and the recommendation of the Working Group on Mediation to consider whether there should be legislation dealing with the making of apologies for the purpose of enhancing settlement of civil disputes.[3] It is no coincidence that members of the Steering Committee which managed the resultant apology legislation consultation process included experts in mediation and dispute resolution. **I.01**

Overview of the Apology Ordinance

The purpose of the Apology Ordinance

The object of the Ordinance is "to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution".[4] The Ordinance seeks to encourage people to make an apology at an early time that may help to "reduce the hostility and negative feeling of the injured person who may be more willing to communicate and engage in settlement negotiations with the person causing the harm."[5] The legislation is not confined to settlement negotiations: the aim is to encourage people to apologise irrespective of whether legal proceedings have been commenced and whether or not settlement is contemplated.[6] It is hoped that this will bring about a change in people's mindset and conduct in **I.02**

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1 See Appendices B, C and F (Table 1).

2 Section 5(1). The Ordinance does not apply to criminal proceedings, s.6(2)(a).

3 Department of Justice, Government of the HKSAR, *Report of the Working Group on Mediation* (2010) 122. <http://www.doj.gov.hk/eng/public/mediation.html> accessed 10 July 2017.

4 Apology Ordinance s.2. In this book, we refer to "apology legislation" as meaning legislation that provides for the legal consequences in civil and non-criminal proceedings of making an apology to a person after an accident or other adverse incident, civil wrongdoing and misconduct. This is also referred to as apology-protecting legislation. We refer to the Ordinance by its short title "the Apology Ordinance" or as "the Ordinance".

5 Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Final Report & Recommendations* (November 2016) 84, [5.8]. <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017.

6 *Ibid.*

that they will be more willing to make apologies so as to reduce the escalation and number of disputes that result in litigation.[7]

Essentially, as detailed in this book, the Ordinance alters the legal consequences of an apology in civil proceedings by preventing an apology from being taken into account or admitted as evidence to determine fault or liability in connection with a matter and from voiding an insurance claim or being an acknowledgement that can extend the limitation period in certain circumstances. This protection is extended by the Ordinance beyond the protection already available by law to "without prejudice" settlement negotiations and confidential mediation communications under the Mediation Ordinance (Cap.620).

The object of the Ordinance is to promote and encourage the making of apologies: it does not compel a person to make an apology and a person who has been injured cannot use the Ordinance to force a person to apologise. A person who chooses to apologise is free to decide whether and, if so, how they will apologise in connection with an accident or other matter, for example whether their apology will include an admission of fault and whether they will disclose facts related to the matter.[8] The Ordinance does not require a person to whom an apology is made to accept the apology nor prevent that person from bringing civil proceedings against a person who has made an apology to recover compensation and other legal remedies in connection with the matter. Nor does it derogate from the powers and responsibilities of administrative, disciplinary and regulatory bodies to uphold the law where there has been misconduct and other wrongdoing.

Apologies and dispute resolution

I.03 There is a rich literature on apologies within the legal system, which draws from psychological, philosophical and sociological research to aid our understanding of how apologies work in civil society and within the legal system.[9] This literature has established a number of factors which are significant to the aims of apology legislation and how it may be effective.[10]

[7] *Ibid.*

[8] Bills Committee on Apology Bill, LC Paper No CB(4)1038/16-17(01) <http://www.legco.gov.hk/yr16-17/english/bc/bc103/papers/bc10320170315cb4-1038-1-e.pdf> accessed 10 July 2017.

[9] See the Select Bibliography for some of the literature available at the time of writing.

[10] For an overview of these factors see Alfred Allan, "Apology in Civil Law: A Psycholegal Perspective" (2007) 14 *Psychiatry, Psychology and Law* 5; Kleefeld, John C, "Thinking Like a Human: British Columbia's Apology Act" (2007) 50 *University of British Columbia Law Review* 769; Prue Vines, "Apologising for Personal Injury in Law: Failing to Take Account of Lessons from Psychology in Blameworthiness and Propensity to Sue" (2015) 22(4) *Psychiatry, Psychology and Law* 624.

These include the psychological impact of apologies on their receivers[11] and the fact that the vast majority of people do not regard an apology that does not acknowledge fault as a real apology.[12] An apology given early after an incident which causes harm has been shown to help reduce the hostility and negative feeling of the injured person who may then be less likely to litigate and more willing to communicate and negotiate with the apologiser.[13] There is also evidence that the severity of the harm suffered affects the levels of blame attributed to a wrongdoer with consequences for the type of apology that is needed.[14] A significant amount of published research concerns apologies in medical malpractice cases.[15] This literature was available to the Steering Committee and informed its consultations, deliberations and recommendations.[16]

Promotion of dispute resolution in Hong Kong

The Apology Ordinance is one of a number of enactments which have as their purpose the promotion and encouragement of resolution of disputes other than by litigation. The object of the Ordinance supports and is consistent with the underlying objectives of the Civil Justice Reform in Hong Kong in 2009[17] to facilitate the settlement of disputes, the Rules of the High Court (Cap.4A, Sub.Leg.)[18] and the Rules of the District Court (Cap.336H, Sub.Leg.). The first major piece of legislation enacted for this purpose was the Mediation Ordinance which came into operation on **I.04**

[11] See, eg, Alfred Allan, D McKillop and Robyn Carroll, "Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints" (2010) 17(4) *Psychiatry, Psychology and Law* 538–550.

[12] Nicholas Tavuchis, *Mea Culpa, a sociology of apology and reconciliation*, (Stanford University Press, 1991); Jennifer Robbennolt, "Apologies and Settlement: an Empirical examination" (2003) 102 *Michigan Law Review* 460; P Davis, "On Apologies" 19(2) *Journal of Applied Philosophy* 169–173.

[13] Aaron Lazare, *On Apology* (Oxford University Press, 2005) Chapter 8.

[14] M Bennett and D Earwaker, "Victims" Responses to Apologies: the effects of offender responsibility and offence severity (1994) 134 *Journal of Social Psychology* 457; Jennifer Robbennolt, "Apologies and Settlement: an Empirical examination" (2003) 102 *Michigan Law Review* 460.

[15] See, eg, K Mazor et al, "Disclosure of Medical Errors: what factors influence how patients respond?" (2006) 21(7) *Journal of Internal Medicine* 704–710; S Kraman and G Hamm, "Risk Management: extreme honesty may be the best policy" (1999) 131(12) *Annals of Internal Medicine* 963–967; Nancy Berlinger, *After Harm: medical error and the ethics of forgiveness* Johns Hopkins University Press 2005; Boothman, R et al, "A Better Approach to Medical Malpractice Claims; The University of Michigan Experience" (2009) 2 *Journal of Health Life Science Law* 25–29; Cohen, JR, "Apology and Organisations: Exploring an Example from Medical Practice" (2000) 27 *Fordham Law Journal* 1447; Davenport, Ashley, "Forgive and Forget: Recognition of Error and Use of Apology as Pre-emptive Steps to ADR or Litigation in Medical Malpractice Cases" (2006) 6(1) *Pepperdine Dispute Resolution Law Journal* 81.

[16] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015) Chapters 2 and 3.

[17] Civil Justice Reform <www.civiljustice.hk/eng/home.html> accessed 10 July 2017.

[18] O.1A r.1.

1 January 2013. The proposal to introduce legislation on mediation for the purpose of enhancing settlements was recommended by the Working Group on Mediation of the Department of Justice in its 2010 Report.[19] The objects of the Mediation Ordinance are to promote, encourage and facilitate the resolution of disputes by mediation; and to protect the confidential nature of mediation communications.[20]

The objects of the Mediation Ordinance and the Apology Ordinance are complementary. They both encourage people who have been affected by an accident or other harmful event to communicate with each other in ways that might facilitate a resolution of their disputes. In the case of the Mediation Ordinance, the legislation supports a confidential process which creates the opportunity for open and meaningful dialogue between the parties, including explanations, admissions, apologies and assurances that steps will be taken to ensure that the same harm will not be caused to others in the future [see 11.05]. In the case of the Apology Ordinance, the legislation promotes and encourages one particular type of communication, the expression of an apology, which might facilitate resolution of a dispute and meet the parties' needs for resolution at an interpersonal personal level.[21]

Promotion and encouragement of apologies in Hong Kong

I.05 The introduction of apology legislation has been under consideration in Hong Kong for almost a decade.[22] The enactment of the Ordinance follows an extensive consultation process undertaken by the Steering Committee into the need for Hong Kong to introduce this legislation. The Working Group on Apology Legislation was established in 2013. Subsequently the Steering Committee published the *Consultation Paper on Enactment of Apology Legislation in Hong Kong* in June 2015 which included a draft Apology Bill,[23] the *Enactment of Apology Legislation in Hong Kong: Report and Second Round Consultation* in February 2016,[24] and the *Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations* in November 2016 which included a revised Apology Bill.[25] (A detailed history of the consultation process and legislative history of the Ordinance is provided in Appendix F).

The Steering Committee reported that making an apology is understood to create a risk of litigation or other unwanted legal consequences because it might be perceived by others as an admission of fault and liability.[26] Legal advice given to people not to apologise for this reason contributes to the "chilling" effect of the law. An oft-quoted example of this situation involves the former Director of Marine, Francis Liu Hon Por, who came under fire for not apologising for the Lamma ferry disaster that claimed 39 lived on 1 October 2012 until nearly eight months later — in late May 2013. Liu was reported as saying he had needed to seek legal advice first to avoid "possible problems" that could be raised by an official apology.[27] According to the Steering Committee:[28]

> "This phenomenon of reluctance to apologise…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."

The Ordinance promotes and encourages apologies by removing both real and perceived legal barriers for a person who might otherwise have been willing to offer an apology.[29] The Ordinance was developed through a series of consultations and reports which considered the evidence available to inform the design of the legislation so as best to achieve its objectives. In enacting this legislation Hong Kong has drawn on the experience of those legislative

19 Recommendation 32, Department of Justice, Government of the HKSAR, *Report of the Working Group on Mediation* (2010) 80.

20 Section 3.

21 For an overview of the literature and potential benefits of mediation for encouraging apologies and discussion of issues that may arise see Robyn Carroll, Alfred Allan and Margaret Halsmith, "Apologies, Mediation and the Law: Resolution of Civil Disputes" (2017) 7(3) *OñatiSocio-Legal Series: The Place of Apology in Law* 569.

22 In 2008 in an international scientific congress in Hong Kong, Chiu first spoke and urged the legislative body to pass laws such as the Apology Act (and) the Compensation Act in Hong Kong: James Chiu, "Mediation for Medical-Related Disputes?" *Journal of the Royal Australian and New Zealand College of Surgeons* 2008, 78 (Suppl 1) A83.

23 Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015) 1. <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017.

24 Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation* (February 2016). <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017.

25 Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations* (November 2016). <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017.

26 Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015) 3–6, [1.4–1.13].

27 South China Morning Post on 23 July 2013 <http://www.scmp.com/news/hong-kong/article/1288645/plan-make-it-easier-say-sorry> accessed 31 July 2017.

28 Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015), [1.6].

29 For discussion of these barriers, real and perceived, see eg, Jonathon Cohen, "Advising Clients to Apologise" (2002) 72 *Southern California Law Review* 1009; Prue Vines, "Apologising to Avoid Liability: Cynical Civility or Practical Morality?" (2005) 27(3) *Sydney Law Review* 483–505; Prue Vines, "Apologies and Civil Liability in the UK: a View from elsewhere" (2008) 12 *Edinburgh Law Review* 200–230, 205; Robyn Carroll, "Apologising 'Safely' in Mediation" (2005) 16 *Australasian Dispute Resolution Journal* 40.

models evident from decided cases, empirical research and commentary.[30] Experience in other common law jurisdictions demonstrates some of the benefits apology legislation can bring.[31] The aim in most jurisdictions has been not only to promote and encourage apologies, but to do so as a means of reducing litigation. The desire to reduce litigation and the finding that in many cases litigation and litigation costs have dropped in response to apology, has been the impetus in many places for apology legislation.[32] The legislation is not without controversy: general concerns have been expressed about the effect of encouraging legally protected apologies.[33] Questions were also asked in the consultation process about whether the research on apologies and legislation in other countries supports the enactment of similar legislation in Hong Kong. The Steering Committee noted that Hong Kong is part of the common law system and concluded that there is no evidence to suggest that the objectives of the legislation would be inconsistent with the local culture.[34]

When the Apology Bill was introduced into the Legislative Council on 8 February 2017 and was read the first time the Hon Mr Rimsky Yuen SC, the Secretary for Justice, opened his speech by explaining that:

> "The objective of the Bill is to facilitate the resolution of disputes by promoting and encouraging the making of apologies by parties in disputes when they want to do so by stating the legal consequences of making an apology…"

[30] More recently, and available to the Steering Committee at the time of preparing the Final Report and Recommendations, see Robyn Carroll, "When 'Sorry' is the Hardest Word to Say, How Might Apology Legislation Assist?" (2014) 44 *Hong Kong Law Journal* 491–549; Nina Khouri, "Sorry Seems to be the Hardest Word: the case for apology legislation in New Zealand" [2014] *New Zealand Law Review* 603; 2016 Workshop Paper subsequently published by John Kleefeld, "Promoting and Protecting Apologetic Discourse through Law: A Global Survey and Critique of Apology Legislation and Case Law" (2017) 7(3) *Oñati Socio-Legal Series: The Place of Apology in Law* 455.

[31] Department of Justice, Government of the HKSAR, *Report of the Working Group on Mediation* (2010) 122; David Fang, "Medical Professional Liability: A Daunting Challenge" (Spring 2009) *Focus*, the Hong Kong Academy of Medicine 8; Barry Leon, "Canada: Safe To Apologise: New Law in British Columbia" (September 2006) *Mediation Committee Newsletter*. An Australian study of medical complaints showed that where 97% of complaints had resulted in an explanation and/or apology, none had proceeded to litigation. See K. Anderson and D. Allan and P. Finucane, "A 30-month study of patient complaints at a major Australian Hospital" (2001) *Journal of Quality in Clinical Practice* 109.

[32] For example, when introducing the legislation enacted in New South Wales in 2002 the Premier at that time, Mr Carr said, "This is…an important change that is likely to see far fewer cases ending up in court." Robert Carr, Legislative Assembly of NSW, *Parliamentary Debates (Hansard)* 30 October 2002, 5764.

[33] See, eg, Lee Taft, "Apology Subverted: the Commodification of Apology" (2000) 109 *Yale Law Journal* 1135.

[34] Department of Justice, Government of HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations* (November 2016), 85–86, [5.11], responding to submissions referred to in [5.1] para.(4) and [5.2] para.(3).

In closing, he said:

> "President, the objective of the Bill is consistent with the Government's policy to encourage the wider use of mediation to resolve disputes. The introduction of new legislation is the only option that can provide legal certainty on the implications of making an apology by a party to a dispute in Hong Kong. Further, Hong Kong will become the first jurisdiction in Asia to enact apology legislation, and this will help to further enhance Hong Kong's position as a centre for international legal and dispute resolution services in the Asia Pacific Region."[35]

Hong Kong: the fifth wave of apology legislation

I.06 The enactment of legislation relating to apologies around the common law world has occurred in waves, the Ordinance being the fifth and most recent.[36] An overview and Table of the waves of apology legislation is provided in Appendix E.

The Apology Ordinance: stand-alone legislation

I.07 Unlike some jurisdictions, Hong Kong enacted stand-alone legislation. During the consultation process consideration was given to whether the apology legislation should have general application or should be included as part of the existing Mediation Ordinance and therefore applicable only when parties are engaged in mediation. As a preference emerged for legislation of general application it became clear that it was more suitable that it should stand-alone. The Steering Committee noted that the majority of the apology legislation in Canada, and in Scotland, is stand-alone. There are advantages to having stand-alone apology legislation. The Steering Committee considered it more likely that legislation with the title "Apology Ordinance" would become known to lawyers and the public. It is particularly important that the legal profession is aware of the legislation as they are involved in advising members of the public, corporations and the government whether to apologise.[37] The Committee was also of the view that apologising is important to the resolution of civil disputes from the time that an accident or other incident occurs, not just once "without

[35] *Official Record of Proceedings of Legislative Council held on 8 February 2017*. <http://www.legco.gov.hk/yr16-17/english/counmtg/hansard/cm20170208-translate-e.pdf> 3420-3423 accessed 10 July 2017.

[36] See James Chiu, "Apology Legislation", *Hong Kong Civil Procedure 2018, Special Release* (Sweet & Maxwell, 2017) 1.

[37] Department of Justice, Government of HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Report and 2nd Round Consultation* (February 2016) Chapter 9; Department of Justice, Government of HKSAR, Report of the Working Group on Mediation (2010) 80.

prejudice" negotiations or mediation has begun. It stressed that public awareness of the apology legislation was crucial for the legislation to be effective.

Structure and Content of the Ordinance

I.08 The Apology Ordinance is brief. It consists of 13 sections and a Schedule. There are three types of sections in the Ordinance:

(1) Title and Object of the Ordinance
(2) Meaning and scope of application sections
(3) Operative sections

Title and Object of the Ordinance

I.09 The Long Title of the Ordinance is "An Ordinance to provide for the effect of apologies in certain proceedings and legal matters". Section 1 states the Short Title of the Ordinance and provides for commencement as gazetted. Section 2 states the object of the Ordinance.

Meaning of words and phrases for purposes of the Ordinance and scope of application sections

I.10 Section 3 is the interpretation section which refers to s.4 for the meaning of "apology" and s.6 for the meaning of "applicable proceedings" for purposes of the Ordinance. Section 8(4) provides the meaning of "decision maker" in relation to applicable proceedings. A number of other sections determine the scope of the operation of the Ordinance; for example the proceedings to which the Ordinance applies and which proceedings are excluded (s.6) and which laws are not affected by the Ordinance (s.11). Other sections that determine the scope of application of the Ordinance are ss.5, 12, 13 and the Schedule.

Operative sections

I.11 Sections 7, 8, 9 and 10 provide for the effect of an apology for certain legal purposes.

Section 7 provides that an apology cannot be treated as an admission or be used to determine fault or liability or any other issue in connection with a matter to the prejudice of the person. Section 8 makes an apology inadmissible as evidence in judicial and other applicable proceedings, except to admit a statement of fact contained in an apology in an exceptional case. Similar operative sections of the British Columbia Apology Act 2006 have been described as having three aspects: declarative, relevance and

procedural.[38] These descriptions can usefully be applied to the Apology Ordinance. There is a *declarative* aspect—an apology does not constitute an express or implied admission of fault (s.7(1)(a)); a *relevance* aspect—an apology must not be taken into account in any determination of fault (s.7((1)(b); and a *procedural* aspect—an apology is inadmissible as evidence of fault in connection with the matter for which the apology was given (s.8(1), subject to the exception in s.8(2)).

Section 9 prevents an apology from constituting an acknowledgement within the meaning of s.23 of the Limitation Ordinance (Cap.347). Section 10 prevents an apology from making a contract of insurance or indemnity void or otherwise affected despite any other law or agreement. Both of these sections are *declarative* of the law that applies from the commencement date, 1 December 2017.

Interpretation of the Ordinance

I.12 The purpose of this annotation is to illuminate the meaning of the Apology Ordinance for lawyers, decision makers in applicable proceedings and the public. We therefore have approached the interpretation of the legislation according to the modern approach to statutory interpretation in Hong Kong which is set out in the Interpretation and General Clauses Ordinance (Cap.1) which came into force in 1966. The Ordinance sets out the meaning of a number of common words in legislation and the general approach that should be taken. Setting out the meaning of common words in the Ordinance means that in particular legislation the word does not have to be set out in the definition section of that legislation. This applies, for example to words like "law", "person" and "court". Many of these words are given in both Chinese characters and English. For example, in s.3 the word "document (文件)" [given in both English and Chinese] is said to mean "any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means".

Because both Chinese and English are official languages used in Hong Kong, both are used in legislation. The Interpretation and General Clauses Ordinance s.9 recognises that there are sometimes not true equivalences between languages, and therefore provides:

> "Chinese words and expressions in the English text of an Ordinance shall be construed according to Chinese language and custom and

[38] John Kleefeld, "Thinking Like a Human: British Columbia's Apology Act" (2007) 40 *University of British Columbia Law Review* 769, 801–802.

> English words and expressions in the Chinese text of an Ordinance shall be construed according to English language and custom."

As this book is in English, we deal principally with the English rather than the Chinese definitions, other than for the meaning of "apology" in the commentary on s.4.

At common law the general rule for statutory interpretation is that the court is to construe the legislation by arriving at the legal meaning of the words. This is done by considering the intention of the Legislative Council, as it is expressed in the legislation.[39] The common law of statutory interpretation has a very long history and is complex.

The starting point for statutory interpretation in Hong Kong is s.19 of the Interpretation and General Clauses Ordinance which provides that:

> "An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."

This approach encapsulates the modern version of the "mischief" rule:[40] that is s.19 specifies a purposive approach. However, there still remain questions about how the legislation should be interpreted. The Court of Final Appeal has discussed the modern approach to statutory interpretation. Bokhary PJ, with whom the others agreed, said, in *Medical Council of Hong Kong v Chow Siu Shek*:[41]

> "When the true position under a statute is to be ascertained by interpretation, it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting. Furthermore it is necessary to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them."

Section 19 provides first that the legislation is to be treated as "remedial". The intention of this appears to be that the statute is remedying some "mischief" and the role of the interpreter is to identify the mischief and interpret the

[39] *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th ed., 2013); Eamonn Moran et al, "Legislation about Legislation: a general overview of Hong Kong's Interpretation and General Clauses Ordinance" (Cap.1) (2010) Law Drafting Division, Department of HKSAR <www.doj.gov.hk/ing/publication.html#law> accessed 25 January 2018.

[40] *Heydon's Case* (1584) 3 Co Rep 7a, 76 ER 637, established the mischief rule — that the interpreter looked at the "mischief" that parliament intended to prevent by passing the statute.

[41] (2000) 3 HKCFAR 144, 154.

words in a way which will best give effect to the remedial effect.[42] "Remedial" does not refer to fixing the statute if it is thought something is wrong with the way it is expressed.

The modern approach to statutory interpretation in Hong Kong is set out by Li CJ in *HKSAR v Cheung Kwun Yin*:[43]

> [12] The modern approach is to adopt a purposive interpretation. The statutory language is construed, having regard to its context and purpose. Words are given their natural and ordinary meaning unless the context or purpose points to a different meaning. Context and purpose are considered when interpreting the words used and not only when an ambiguity may be thought to arise.

The Interpretation and General Clauses Ordinance however, goes beyond "remedial" and provides that legislation is to be given a "fair, large and liberal" construction. In *Medical Council of Hong Kong v Chow Siu Shek*, Bokhary PJ commented that "reasonable people may differ — and frequently do — on what would be fair, large and liberal."[44] He went on:

> [28] Section 19 plainly establishes that legislation is to be interpreted as being remedial. But beyond that the section deals with what is to be done rather than how to do it. As a general statement of the proper approach to be followed in most if not all cases calling for statutory interpretation, I think that there is much to be said for the statement in *Bennion on Statutory Interpretation* 3rd ed. (1997) at p.424 that:
>
> > "the basic rule of statutory interpretation is that it is taken to be the legislator's intention that the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned."
>
> What interpretative factors are concerned in any given instance must depend on its circumstances.
>
> [29] The upshot, as I see it, is as follows. When the true position under a statute is to be ascertained by interpretation, it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting. Furthermore it is necessary to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them.

[42] *Wong Hon Sun v HKSAR* (2009) 12 HKCFAR 877.

[43] (2009) 12 HKCFAR 568, 574E–575B.

[44] (2000) 3 HKCFAR 144, 153–154.

Thus the role of the interpreter of the statute is to read the text of the statute, including the whole statute and consider the purpose of the statute in its legal and social setting. For the Apology Ordinance the context of any provision is the whole of the Act which is the Apology Ordinance, and its purpose is clearly to facilitate the use of apologies for the purpose of reducing the escalation and continuation of disputes.

In interpreting statutes it is now possible to refer to some extrinsic materials. As Li CJ observed in *HKSAR v Cheung Kwun Yin*:[45]

> "The purpose of a statutory provision may be evident from the provision itself. Where the legislation in question implements the recommendations of a report, such as a Law Reform Commission report, the report may be referred to in order to identify the purpose of the legislation. The purpose of the statutory provision may be ascertained from the Explanatory Memorandum to the bill. Similarly, a statement made by the responsible official of the Government in relation to the bill in the Legislative Council may also be used to this end…
>
> ***Pepper v Hart***
>
> [15] Whilst as noted above, statements made by officials of the Government in relation to the bill in the Legislative Council may be used to identify the purpose of the statutory provision, employing it in order to ascertain the meaning of the statutory words stands in a fundamentally different position. In England, in *Pepper v Hart* [1993] AC 593, the House of Lords decided that such statements may be referred to as an aid to interpretation for the purpose of ascertaining the meaning of the statutory language, where the following three conditions are met : (a) The legislation is ambiguous or obscure or leads to an absurdity; (b) The material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) The statements relied upon are clear.
>
> [He noted that the English judges have strictly adhered to these requirements, but went on]…
>
> [17] In Hong Kong, although the Court has applied the approach in *Pepper v Hart* on isolated occasions on the assumption that it applies,[46]

[45] (2009) 12 HKCFAR 568, 574E–575B

[46] See *Commissioner of Rating & Valuation v Agrila Ltd* (2001) 4 HKCFAR 83, 104A–B and *Registrar of Births and Deaths v Syed Haider Yahya Hussain* (2001) 4 HKCFAR 429, 444A–C.

> it has kept open the question whether and the extent to which that approach is applicable in Hong Kong…
>
> As Anderson Chow J said for the Court of Appeal in *Ho Kwok Tai v Collector of Stamp Revenue*:[47]
>
> [53]…In our view, subject to the possible exception under the *Pepper v Hart* principles…, generally speaking extrinsic materials may be used only for the purpose of identifying the relevant statutory background, context or purpose, but they may not be used to directly derive, control, or change the meaning and effect of the statutory language used by the legislature.
>
> [57] As pointed out by Li CJ in *Cheung Kwun Yin* (at paragraphs 15 to 16 of his judgment), there is a distinction between (i) using statements made by officials of the Government in the Legislative Council to 'identify the purpose of the statutory provision', which undoubtedly is permissible, and (ii) using such statements 'to ascertain the meaning of the statutory words', which stands in a fundamentally different position…
>
> Lord Millett NPJ, with whom the other members of this Court agreed, said this in *Director of Lands v Yin Shuen Enterprises Ltd* (2003) 6 HKCFAR 1, 15 F–H:
>
> 'Such evidence is admissible for a limited purpose only, to enable the Court to understand the factual context in which the statute was enacted and the mischief at which it was aimed. This is not the same as treating the statements of the executive about the meaning and effect of the statutory language as reflecting the will of the legislature. Within the permissible limits, however, the admissible evidence is not confined to the Explanatory Memorandum of Objects and Reasons, but must logically extend to explanations given by Ministers when introducing the Bill.'"

We have therefore approached the interpretation of the Ordinance in this way. That is, we have taken a remedial approach in that we have taken account of the purpose of the legislation as it appears in the ordinary and natural meaning of the words and the context of the legislation. We have read the context of the legislation widely, as including the whole of the statute, and we have considered extrinsic materials for the purpose of determining the purpose of the legislation as a whole rather than attempting

[47] [2016] 5 HKLRD 713.

about a month after she was discharged from hospital, the defendant Luke Koch apologized to her and to Alexis, and said that he felt badly about what had happened. The Ontario Apology Act, 2009 came into force on April 23, 2009. The apology about which Ms Koch gave evidence took place (if it did) in 2006, almost three years before the Act came into force.[130] Counsel for the defendant objected to the evidence and asked that the jury be instructed to disregard it. The principal issue to be determined by the court was whether the Act (which provides that evidence of an apology is not admissible in a civil proceeding as evidence of fault or liability), applied retroactively to an apology made before the Act came into force. The defendant argued that the Apology Act applied and evidence about the apology was inadmissible. The court rejected that argument and held that the Apology Act, 2009 did not apply to the apology in issue in this case, and that the evidence of the apology was admissible. In so deciding, Bale J referred to the "strong presumption that the legislature does not intend legislation to be applied retroactively."[131] His Honour gave two reasons in support of this conclusion. First, the Act was intended to change the law relating to apologies into the future, and not to reform the law of evidence retrospectively. He stated:[132]

> The event to which the Act is directed is the making of the apology, not the trial of an action arising from the act or omission in relation to which the apology was given. In this case, the making of the apology was a discrete event which began and ended on one day in 2006, and it would be wrong for the law to reach back and change its legal effect. Doing so would not promote the social purpose of the legislation.

The second reason given by Bales J was that the provisions of clause 2(1)(b) of the Act which provides that an apology made in connection with any matter "does not, despite any wording to the contrary in any contract of insurance or indemnity and despite any other Act or law, void, impair or otherwise affect any insurance or indemnity coverage for any person in connection with that matter" takes away a defence that insurers might otherwise have to a claim for indemnity by a person who has admitted fault or liability, by way of an apology, as that term is defined in the Act. He referred to *Sun Alliance Insurance Co v Angus*[133] where the court held that the rule against retroactive application should be applied where a party is deprived of a defence to an action by the operation of a new statute. In *Angus*, the court held that immunities from suit and defences are substantive,

[130] *Ibid.*, [6].
[131] *Ibid.*, [7].
[132] *Ibid.*, [8].
[133] [1988] 2 SCR 256.

rather than procedural, and that their removal would be an extinguishment of substantive rights. Bales concluded that the same reasoning applied to the removal of a contractual defence under a policy of insurance, based upon an insured's admission of liability, evidenced in whole or in part by an apology.[134]

The Ordinance does not apply to an apology made in specified circumstances

5.04 The purpose of s.5(2) is to make it clear that the Ordinance does not apply to an apology made in connection with a matter that is the subject of applicable proceedings in certain circumstances. These are each circumstances in which a person making an apology can expect that it will be taken into account by a decision maker in applicable proceedings.[135] A party may be willing for a decision maker to have regard to their apology as evidence of their admission of fault, liability or any other issue in connection with the matter to their prejudice, for example where damages are contested but liability is not in issue. Alternatively, they may wish their apology to be taken into account in support of their case, for example when the apology maker intends to rely on their apology in support of a defence or in mitigation of damages in an action for defamation.[136]

A provision to similar effect to s.5(2) of the Ordinance was included at the Committee stage during the passage of the Ontario Apology Act 2009. Section 2(3) of that Act renders evidence of an apology as evidence of the fault or liability of any person inadmissible in relevant proceedings.[137] Section 2(4) provides that if a person makes an apology while testifying at a relevant proceeding the inadmissibility rule does not apply. The Ontario Committee parliamentary debates reveal that the purpose of limiting the effects of s.2(1)(a), 2(1)(b) and 2(1)(c) is to avoid the possibility of a court having to disregard evidence that comes into existence during the civil

[134] *Lane v Koch* 2015 ONSC 184, [10].
[135] In s.8(4) "decision maker" is defined for the purpose of s.8, in relation to applicable proceedings to mean "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 this definition does not apply to s.5(2) it is arguable that the same meaning would be given to describe a decision maker in relation to applicable proceedings for the purposes of s.5(2). See Chapter 8 for the meaning of "decision maker" for the purposes of that section.
[136] Relevantly, s.11(b) provides that the Ordinance does not affect the operation of s.3, 4, or 25 of the Defamation Ordinance (Cap.21). See commentary on s.11(b).
[137] Ontario is the only Canadian Province or Territory to include a provision to this effect in their apology legislation. There are no such provisions in apology legislation in other jurisdictions, other than Ontario and Hong Kong.

proceedings.[138] In the absence of a provision to the effect of s.5(2) of the Apology Ordinance or s.2(3) of the Ontario Apology Act the question may arise whether an apology made in open court, for example by a witness during cross-examination, is protected by the legislation. This was the case in *Wilson v Saskatchewan Government Insurance*,[139] where an appeal was brought against a finding by the trial judge that Saskatchewan Government Insurance (SGI) had breached its duty of good faith as an insurer to deal fairly with a claim by the insured, Ms Wilson, and the award of punitive damages against SGI. SGI argued that the trial judge erred by improperly taking into consideration an apology made to Ms Wilson in open court by a senior executive officer of SGI for the manner in which SGI had treated her and in which it had handled her claim. In her judgment the trial judge wrote:[140]

> "Mr McIntyre, in his cross-examination, sincerely apologised to Ms Wilson for the way in which SGI treated her and her claim."

On appeal SGI submitted that the placement of this statement in the judgment, immediately after the setting out at length of SGI's alleged misconduct, suggested that the trial judge considered SGI's apology as an admission of wrongdoing. SGI argued that use of this apology was precluded by s.23.1 of The Evidence Act, SS 2006, c. E-11.2. That section precludes the use of an apology "in any action or matter in any court as evidence of the fault or liability of the person in connection with [an] event or occurrence". The Court of Appeal rejected the submission that it could be inferred from the trial judge's reasons that she placed any reliance on the apology in her determination of fault or liability or that she accepted the apology as an admission of wrongdoing.[141] Furthermore, the Court concluded that even if the trial judge did consider the apology part of SGI's conduct:[142]

> "…she can only be said to have accepted the apology for what, I expect, it was; namely, a genuine expression of the executive officer's candid regret and sincere sympathy for Ms Wilson's predicament."

[138] Ontario Parliament Standing Committee on Justice Policy Subcommittee Report, Apology Act 2009, Thursday 26 February 2009, 13/25 available at <www.ontla.on.ca/committee-proceedings/transcripts/files_html/26-Feb-2009_JP011.htm> accessed 26 November 2017.

[139] 2012 SKCA 106.

[140] *Wilson v Saskatchewan Government Insurance* 358 Sask R 60, [132].

[141] *Wilson v Saskatchewan Government Insurance* 2012 SKCA 106 [28], [29]. Caldwell JA, with whom Vancise JA and Ottenbreight JA agreed.

[142] *Ibid.*

Section 5(2) of the Apology Ordinance precludes the issue that arose in *Wilson v Saskatchewan Government Insurance* from arising in Hong Kong.[143] An apology made during cross-examination is not protected under the Ordinance. As in *Wilson*, that does not necessarily mean the apology will be evidence that is adverse to the interests of the person who made it.

Meaning

The Ordinance does not apply to an apology made before the commencement date

5.05 The Ordinance applies to an apology made by a person on or after 1 December 2017 in connection with a matter. It does not apply to an apology made before that date.

The Ordinance affects both substantive rights and procedural rules [see I.11]. In the absence of a clear intention to the contrary a statute that affects substantive rights is presumed not to have retrospective effect.[144] It is a question of construction whether the presumption against retrospectivity applies.[145] Section 5(1) avoids uncertainty as to whether the Ordinance applies to an apology made before the Ordinance commenced. It is not intended to apply retrospectively to rules about admissibility of evidence in applicable proceedings. The section deals explicitly, therefore, with the issue of retrospectivity that was before the court in *Lane v Koch*, discussed above. Note however that s.10 retrospectively affects the right of a party to an insurance contract to enforce a term of a contract that renders a contract void or otherwise ineffective as an admission of liability in the form of an apology[146] [see 10.13].

[143] The Apologies (Scotland) Act 2016 also provides that in legal proceedings to which the Act applies, the protective provisions of the Act only apply to an apology made "outside the proceedings" in connection with any matter; s.1. This appears to exclude from the operation of the Act an apology made in the proceedings in a similar way to the Ontario Apology Act s.2(4) and the Apology Ordinance s.5(2).

[144] *Phillips v Eyre* (1870–71) LR 6 QB 1; FA Bennion, *Bennion on Statutory Interpretation: a Code*, (LexisNexis, 6th ed., 2013) s.97; *Halsburys Laws of Hong Kong* (LexisNexis) [365.077].

[145] The English approach is to focus on the degree of unfairness in applying the law to past events: the greater the unfairness, the more the intention to affect past events and transaction needs to be clear; *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486; *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

[146] Section 10(2) makes it clear that s.10 applies to contracts of insurance or indemnity regardless of whether the contract was entered into before, on or after the commencement date. See commentary on s.10. By operation of s.5(1), the rights of the parties to a contract of insurance or indemnity, regardless of when it is altered into, will only be affected by an apology entered into on or after 1 December 2017.

Illustrations of section 5 in operation

5.06 Section 5(1) operates as follows:

The Ordinance applies to an apology made on or after the commencement date regardless of when the matter to which the apology relates arose or when applicable proceedings concerning the matter were commenced.

> Example 1: an apology made by a person on 4 October 2017 in connection with an accident that occurred on 30 September 2017 is not an apology to which the Ordinance applies.

The Ordinance applies to an apology made on or after 1 December 2017 in connection with a matter regardless of whether that matter arose before, on or after 1 December 2017.[147]

> Example 2: an apology made on or after 1 December 2017 in connection with an accident that occurred on 30 September is an apology to which the Ordinance applies.

The Ordinance applies to an apology made on or after 1 December 2017 in connection with a matter regardless of whether applicable proceedings concerning the matter began before, on or after 1 December 2017.[148]

> Example 3: an apology made on or after 1 December 2017 in connection with an accident that occurred on 30 September 2017 and in respect of which proceedings were commenced on 30 November 2017 is an apology to which the Ordinance applies.

The effect of s.5(1) on the admissibility of evidence (and other evidentiary matters pursuant to sections 7 and 8) is as follows:

> In Example 1: The apology made on 4 October 2017 will be admissible evidence in proceedings commenced before, on or after 1 December 2017.
>
> In Example 2: The apology made on or after 1 December 2017 in connection with the accident on 30 September 2017 will not be admissible evidence in proceedings.

[147] This avoids the need to ascertain for the purposes of determining whether the Ordinance applies whether the matter to which the apology relates arose on or after the commencement date. In all other jurisdictions the legislation only applies to an apology in connection with a matter that arose on or after the date on which the legislation commences.

[148] In other jurisdictions the legislation does not expressly apply to proceedings commenced before the commencement date.

> In Example 3: The apology made on or after 1 December 2017 in connection with the accident on 30 September 2017 will not be admissible evidence in the proceedings commenced on 30 November 2017 or any time thereafter.

The Apology Ordinance only applies to apologies within the meaning of "apology" in s.4[149] [see 4.02].

The Ordinance does not apply in three circumstances:

5.07 The Ordinance does not apply to an apology when it is made in the circumstances set out in para(s) (a), (b) and (c) of s.5(2). The Ordinance distinguishes between an apology made by a person after an accident or other adverse incident and an apology made in the proceedings. Section 5(2) concerns the latter apology. In this situation an apology is taken into account in the proceedings because "the apology maker so decides."[150] The subsection ensures that evidence of an apology in these circumstances can be brought forward in proceedings in accordance with the usual rules of procedure. There appear to be at least two interrelated rationales for this provision. First, it allows an apology maker to decide whether to allow their apology to be taken into account and second, where the apology maker has so decided, the need for the protection provided by the Ordinance does not arise. The legislative object of encouraging apologies is not detracted from either by the admission of a deliberate and considered apology or by taking it into account in decision making.

The Ordinance does not apply to an apology made by a person "in a document filed or submitted in applicable proceedings" (section 5(2)(a))

5.08 A written apology made in court documents including pleadings is not an apology to which the Ordinance applies. Therefore an apology in connection with the matter made by a party in his pleading or otherwise in writing, in which he admits the truth of the whole or any part of the case of any other party, will be binding on a party as an admission in accordance with O.27 r.1 of the Rules of the High Court.[151] It may also be taken into account for any purposes not precluded by ss.7 and 8 of the Ordinance, for example in the circumstances to which ss.3, 4, and 25 of the Defamation Ordinance apply [see 11.03].

[149] Section 3 refers to s.4 for the meaning of "apology" in the Ordinance.

[150] *Explanatory Memorandum of the Apology Bill* <https://www.legco.gov.hk/yr16-17/english/bills/b201701271.pdf> accessed 8 February 2018, [6].

[151] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015) <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017, p.20 [3.11] n 39.

The Ordinance does not apply to an apology made by a "person in a testimony, submission, or similar oral statement, given at a hearing of applicable proceedings" (section 5(2)(b))

5.09 An oral apology made in a hearing is not an apology to which the Ordinance applies.[152] As a result an apology made by a person in these circumstances may be admissible as evidence of fault, liability or any other issue in connection with the matter to the prejudice of the person in applicable proceedings. The evidentiary value of an oral apology given at a hearing will depend upon what was said, including whether it includes an express or implied admission of the person's fault or liability in connection with the matter.[153] The House of Lords has cautioned that a court must take care not to give undue weight to an expression of regret, after the event, by a witness in the witness box as an admission[154] [see 7.03].

The Ordinance does not apply to an apology "adduced as evidence in applicable proceedings by, or with the consent of, the person who made it" (section 5(2)(c)).

5.10 An apology adduced as evidence in applicable proceedings by, or with the consent of, the person who made it is admissible as evidence in applicable proceedings.[155] This situation might arise when a party has made an apology and is willing for evidence of their apology to be placed before the court: for example, for the purpose of mitigating damages if they are found liable but who denies that their apology is an express or implied admission of fault or liability.

Apology made outside proceedings after proceedings have commenced

5.11 Each of the circumstances identified in s.5(2) concerns an apology made intentionally in the course of and as part of the applicable proceedings.

[152] This means that in a case like *Wilson v Saskatchewan Government Insurance*, discussed above, [see 5.04] a court would not make an error of law if it were to take an apology made in court into account. Although in that case the Court of Appeal held that the judge had not taken the apology into account and therefore had not erred, this subsection intends that it can be taken into account in determining fault, liability or any other issue in connection with the matter to the prejudice of the person.

[153] See commentary on s.7.

[154] *Glasgow Corp v Muir* [1943] AC 448, 454.

[155] There is a similar provision to this effect in the South Carolina Unanticipated Medical Outcome Reconciliation Act 1976. Section 19-1-190 (D) provides that in "any claim or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any…apology…by a health care provider…shall be inadmissible as evidence…". Section (E) provides that "the defendant in a medical malpractice action may waive the inadmissibility of the statements defined in sub-s.(D)" of s.1.

On a plain reading of the subsection the Ordinance does not apply to an apology made in the circumstances specified in s.5(2). What if a person makes an apology in connection with a matter to which s.5(1) applies after applicable proceedings are commenced but in the course of negotiations to settle those proceedings, rather than in the circumstances specified in sub-s.(2)? In our view, on a plain reading of s.5, the Ordinance applies to an apology made after proceedings have been commenced, other than where s.5(2) applies. This interpretation is consistent with encouraging a party to the proceedings to make an apology in connection with a matter outside the court with a view to resolving the dispute and possibly for the purpose of settling the proceedings. Section 5(2) does not show an intention to preclude the Ordinance from applying to an apology made after the date on which proceedings were commenced in this scenario. Rather it has a narrower intention which is to leave the rules of evidence and procedure that apply to a hearing unchanged.

Even though an apology made after proceedings have been commenced may be less likely to result in amicable resolution than one made earlier on, the object of promoting and encouraging apologies can still be furthered by protecting apologies made outside the court, including when made during settlement negotiations between the parties. An apology in this scenario may be effective to prevent further escalation of the dispute and facilitate its resolution. The rationale for protecting an apology made by a person in connection with a matter still applies, albeit to a lesser extent than when an apology is made earlier on. In this scenario the party to whom the apology is made will have already commenced the proceedings and prepared their case without the apology. Settlement, however, is always a possibility and is encouraged by the law. As discussed in the commentary on s.2, facilitating the resolution of disputes is consistent with the underlying objectives of the Civil Justice Reform in 2009,[156] the Rules of the High Court,[157] the Arbitration Ordinance[158] and the Mediation Ordinance.[159] The parties can also take the opportunity to reach a settlement agreement and compromise the proceedings in mediation. In this case the Mediation Ordinance will apply to make an apology in mediation communications inadmissible. The Apology Ordinance does not affect the operation of the Mediation Ordinance[160] [see 11.05–11.09]. Similar protection can be achieved through "without prejudice" negotiations between the parties to the proceedings.

[156] Civil Justice Reform <www.civiljustice.hk/eng/home.html> accessed 8 February 2018.

[157] O.1A r.1.

[158] Section 3(1).

[159] Section 3(a).

[160] Apology Ordinance s.11(c).

Therefore an interpretation of s.5(2) that means it does not apply to an apology made in connection with a matter outside of court is consistent with the dispute resolution objectives of the Apology Ordinance.

6. Meaning of applicable proceedings

(1) In this Ordinance, the following proceedings are applicable proceedings—

(a) judicial, arbitral, administrative, disciplinary and regulatory proceedings (whether or not conducted under an enactment);

(b) other proceedings conducted under an enactment.

(2) However, applicable proceedings do not include—

(a) criminal proceedings; or

(b) proceedings specified in the Schedule.

COMMENTARY

Purpose

6.01 This section enumerates the proceedings to which the Ordinance applies (s.6(1)) and does not apply (s.6(2)). This is necessary because the Ordinance provides for "the effect of apologies in certain proceedings and legal matters".[161] The legislation addresses the concern that parties to disputes may be deterred from making apologies because of the fear that an apology or a simple utterance of the word "sorry" may have potential implications in legal proceedings.[162] The potential legal implications include that an apology made by a person will constitute an express or implied admission of the person's fault or liability in connection with a matter and that an apology will be taken into account in legal proceedings determining fault, liability or any other issue in connection with the matter to the prejudice of the person, (see s.7).[163] The application of the legislation is determined in large part by the proceedings

[161] Apology Ordinance, Long Title.

[162] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015) <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017, p.3, [1.1].

[163] Section 9 (an apology is not an acknowledgement of a right of action for limitation legislation purposes) and s.10 (an apology does not void or otherwise affect insurance or indemnity) address two further concerns about the potential legal implications of an apology.

to which it applies.[164] Section 6 makes clear the proceedings in which the legal effect of making an apology, as defined in s.4, is affected by the legislation.

From the outset the proposal put forward for consultation was for the legislation to apply to civil and other forms of non-criminal proceedings.[165] The initial recommendation made by the Steering Committee was for this to include disciplinary proceedings.[166] The consultation process included a second round consultation on the proceedings to which the legislation should apply, in particular whether it should apply to disciplinary and regulatory proceedings.[167] There was a concern that making an apology in connection with a matter inadmissible in civil proceedings only, for example, for negligent conduct or a breach of contract, does not address the possibility that people may still refrain from making an apology because it might have adverse legal consequences in subsequent disciplinary or regulatory proceedings arising out of the matter.[168] The purpose of the legislation would not be achieved if the fear remained that an apology could be adverse evidence in disciplinary and regulatory proceedings. For example, a doctor who wants to apologise to a patient after an adverse medical event might remain unwilling to apologise because of the possibility that disciplinary proceedings may result from the event, even though the apology legislation provides protection in civil proceedings for professional negligence and protects insurance coverage.

A different concern identified in the consultation process is that evidence that a person who was the subject of disciplinary or regulatory proceedings made

[164] Apology legislation enacted in other jurisdictions delineates the types of proceedings to which the legislation applies in various ways. In some jurisdictions the scope of protection provided by the legislation is determined by the circumstances in which the claim arises,: for example, an apology made following an accident resulting in injury or death, California Evidence Code s.1160; or in a medical injury action, New Hampshire Revised Statutes s.507-E:4; or civil liability of any kind, Civil Liability Act 2002 (NSW). In other jurisdictions the proceedings are determined by whether the matter arises in a court, defined to include, for example, "a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity", (British Columbia Apology Act [SBC 2006] Chapter 19); or "in any civil proceedings, administrative proceedings or arbitration" (Ontario Apology Act 2009).

[165] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015), 93, [6.14].

[166] *Ibid.*, p.104 Recommendation 2.

[167] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation* (February 2016) Ch 4, <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017.

[168] *Ibid.*, 31, [4.8]–[4.10]. Aside from Canada, there are only a few jurisdictions that expressly extend legislative protection to 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 1958 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 in the Victorian Act to include professional conduct proceedings and inquiries.

an apology in connection with a matter would not be available to the decision maker in these public interest proceedings.[169] This concern is addressed by the legislation providing that an apology is only inadmissible under the legislation when to do so would be to the prejudice of the person making the apology.[170] An apology can be admitted as evidence and taken into account for other purposes, for example to show that a person has developed insight into their behaviour and is sorry for their conduct: see commentary on s.8.

The Steering Committee proposed that the legislation apply to civil and other forms of non-criminal proceedings.[171] Civil proceedings would include, for example, civil actions before a court or tribunal and in arbitration.[172] After consideration of all the responses received in the first and second round consultation, the Steering Committee recommended that the apology legislation apply to all civil and other forms of non-criminal proceedings, including disciplinary and regulatory proceedings, in order to achieve the objects of the legislation.[173]

It was not proposed as part of the consultation process that the apology legislation be applicable to criminal proceedings. This approach is consistent with the legislation in all other jurisdictions where apology legislation has been enacted. There are significant differences between criminal and civil proceedings that explain why criminal proceedings are not included as applicable proceedings. In criminal proceedings the parties are the state (which is acting in the public interest) and the accused. While an accused may make an apology to the victim of their crime and although an apology made in this setting may benefit the victim, the accused and meet the aims of restorative justice, the notion of a dispute that can be settled by the parties alone is absent.

For this reason, the object of the Ordinance is not applicable to criminal proceedings. Civil proceedings are proceedings in which parties have a right

[169] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015) <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017, 98, [6.33]. Note that an apology made as a "mediation communication" is inadmissible in any case pursuant to Mediation Ordinance s.9 except in the circumstances provided for in s.10 of that Ordinance [see 11. 06].

[170] The reference to admissibility of evidence in this context needs to take into account that the usual rules of evidence are usually not strictly applied in non-court proceedings.

[171] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Consultation Paper* (2015) <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017, 93, [6.14].

[172] *Ibid.*

[173] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation* (February 2016) 33, [4.11]. <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017.

to withdraw or settle their claims. Parties are able to resolve their dispute on their own terms and apologies may be significant to the settlement process. It is acknowledged that parties are constrained by interests other than their own, including the public interest, in disciplinary and regulatory proceedings.[174] The distinction stands, however, between these proceedings which are non-criminal in nature and criminal proceedings. The policy behind allowing evidence of admissions that are adverse to a defendant's interests in criminal proceedings is a component of the criminal justice system. The case for altering this by excluding evidence that may be important to the prosecution has not been advanced by advocates of apology legislation for civil proceedings.

A number of other proceedings are excluded from the definition of "applicable proceedings." During the consultation process the Steering Committee invited submissions on whether there were proceedings to which the legislation should not apply. After considering all the responses received, the Steering Committee recommended that the legislation apply generally to civil and other forms of non-criminal proceedings except for proceedings included in the Schedule.[175] In making this recommendation the Steering Committee noted and agreed with the submission by the Ombudsman that exemption from the proposed apology legislation should be granted "sparingly and only with strong justifications."[176]

Meaning

The meaning of "applicable proceedings" for the purposes of the Ordinance is defined in s.6: see s.3. **6.02**

The definition of "applicable proceedings" is directly relevant to ss.5, 7, 8 and 11. The reference to the different types of proceedings conducted in different fora, whether conducted under an enactment or not, shows an intention to give a wide meaning to "applicable proceedings" that includes all civil and non-criminal proceedings other than those itemised in the Schedule. The word "enactment" in this section has the same meaning as "ordinance".[177] A

[174] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation* (February 2016) 31–33, [4.8]–[4.10]. <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017.

[175] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations* (November 2016) <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017, 33, [3.7].

[176] *Ibid.*, 32, [3.6(8)].

[177] Interpretation and General Clauses Ordinance s.3.

wide interpretation of "applicable proceedings" is consistent with a remedial approach to the Ordinance, as required by s.19 of the Interpretation and General Clauses Ordinance.

Meaning of judicial, arbitral, administrative, disciplinary and regulatory proceedings

6.03 The reference to "judicial", "arbitral", "administrative", "disciplinary" and "regulatory" proceedings in s.6(1)(a) shows an intention to include all proceedings in which the outcome of civil and non-criminal disputes and complaints can be determined by a decision maker if they are not resolved by the parties. Historically, the term "proceeding" was given a narrow interpretation to mean the invocation of jurisdiction of the court by process other than a writ.[178] It is clear from the reference to proceedings other than judicial proceedings that this narrow interpretation does not apply to this section. An intention to refer to civil proceedings more generally is clear from the reference to proceedings other than "judicial". It is relevant to interpreting this section that "civil proceedings" are defined for certain purposes in the Evidence Ordinance to mean civil proceedings in any court, tribunal or arbitration.[179]

"Disciplinary" and "regulatory" proceedings are not defined in the Ordinance. Disciplinary proceedings are mostly applicable to professionals, including healthcare, legal and engineering professionals.[180] Examples of disciplinary proceedings include those brought before the Medical Council of Hong Kong founded under the Medical Registration Ordinance (Cap.161) and the Solicitors Disciplinary Tribunal established under the Legal Practitioners Ordinance (Cap.159). An example of regulatory proceedings is proceedings before the Market Misconduct Tribunal established under the Securities and Futures Ordinance (Cap.571) to hear cases of suspected market misconduct.

A common characteristic of the proceedings referred to in s.6(1) is that the civil standard of proof applies to the determination of a dispute, complaint or other matter that can be the subject of proceedings. Section 8(4) defines "decision maker" in relation to applicable proceedings for the purpose of s.8. A decision maker is defined in s.8(2) to mean "the person (whether a court,

[178] *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437.

[179] See Evidence Ordinance (Cap.8) s.60(1) and 60(8).

[180] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations* (November 2016) <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017, 31, [3.6]. See generally Andrew Mak, *Disciplinary and Regulatory Proceedings in Hong Kong* (LexisNexis, 2nd ed., 2014).

a tribunal, an arbitrator or any other body or individual) having the authority to hear, receive and examine evidence in the proceedings." The reference to "a court, a tribunal, an arbitrator or any other body or individual" in s.8(4) indicates that arbitral, disciplinary and regulatory proceedings refer to proceedings by "any other body or individual" other than a court or tribunal that has authority to hear, receive and examine evidence in non-criminal proceedings.

Meaning of judicial, arbitral, administrative, disciplinary and regulatory proceedings (whether or not conducted under an enactment)

6.04 Proceedings include those that are not conducted under an enactment. This includes proceedings conducted pursuant to an agreement by which power has been conferred on a decision maker to conduct proceedings, for example, arbitral proceedings.[181]

Meaning of other proceedings conducted under an enactment

6.05 Section 6(1)(b) provides support for a wide interpretation of "applicable proceedings". The Ordinance is intended to apply to all civil or non-criminal proceedings which might deter a person from making an apology in connection with a matter. Arguably, this would include disciplinary proceedings brought before a committee pursuant to an enactment.[182]

Applicable proceedings do not include criminal proceedings

6.06 Section 6(2)(a) provides that applicable proceedings do not include criminal proceedings. Apology legislation in some jurisdictions expressly excludes criminal proceedings from the operation of the legislation.[183]

[181] Arbitration proceedings can be commenced under the UNCITRAL Model Law on International Commercial Arbitration. Note that the Model Law has the force of law in Hong Kong; Arbitration Ordinance s.4 and by s.5 the Arbitration Ordinance applies to an arbitration under an arbitration agreement, whether or not the agreement is entered into in Hong Kong, if the place of arbitration is in Hong Kong.

[182] For example, a Disciplinary Committee constituted under the University of Hong Kong Ordinance (Cap.1053) or similar enactment.

[183] In Canada, criminal proceedings are the responsibility of the federal government and therefore provincial apology legislation cannot apply in any case. The apology legislation in some Canadian provinces states explicitly that the provisions do not apply to apologies that could be admissible as evidence of an admission in criminal proceedings (Alberta Evidence Act s.26.1(4); Nunavut Legal Treatment of Apologies Act s.3; Nova Scotia Apology Act s.4). In some instances in the United States it is made clear that the provisions only apply to civil proceedings. For example, in Indiana the legislation states "This Chapter does not apply to a criminal proceeding" (Indiana Code s.34-43.5-1-1); see also Tennessee Rules of Evidence s.409.1. In Maine, the applicable legislation concerning

In other jurisdictions it is implicit that the provisions only apply to civil proceedings. The Ordinance does not affect the law as it applies to an apology made in connection with a matter for the purposes of criminal proceedings. An apology is admissible as evidence of an admission for the purpose of determining guilt of an offence. See, eg, *HKSAR v Chung Kwai Wing*.[184] In this case, a handwritten letter to the victim purportedly signed by the accused contained statements including an apology. The letter in its terms was held to amount to "a complete admission to the *actus reas* [*sic*] of the charged offence" of obtaining property by deception contrary to s.17(1) of the Theft Ordinance (Cap.210) that could be taken into account as evidence against the accused.[185] As a consequence an apology made by a person in connection with a matter that is inadmissible and cannot be taken into account for determining fault, liability and any other issues to the prejudice of the person remains admissible as evidence in criminal proceedings.

Applicable proceedings do not include other proceedings specified in the Schedule

6.07 The Schedule itemises four proceedings that are not "applicable proceedings" as defined in s.6 of the Ordinance. These are proceedings that by their nature are not conducted for the principal purpose of determining questions of fault or liability in respect of civil and non-criminal matters [see Sch.01].

7. Effect of apology for purposes of applicable proceedings

(1) For the purposes of applicable proceedings, an apology made by a person in connection with a matter—

(a) does not constitute an express or implied admission of the person's fault or liability in connection with the matter; and

(b) must not be taken into account in determining fault, liability or any other issue in connection with the matter to the prejudice of the person.

(2) This section is subject to section 8.

evidence of admission refers to "In any civil action" thereby confining the operation of the provision (Maine Revised Statute s.24-2907 (2005) s.2).

184 (HCMA 206/2002, [2002] HKEC 692).

185 See also *HKSAR v Lam Kam Kong* (HCMA 503/2008, [2008] HKEC 2097), [4.08], [8.01].

COMMENTARY

Purpose

7.01 Section 7 is one of the key operative provisions of the Ordinance. Its purpose is to establish that apologies will not constitute admissions of fault or liability and that they cannot be taken into account in the determination of fault or liability. The section goes further than legislation in other jurisdictions by adding to the provision that the apology must not be taken into account in determining any other issue in connection with the matter to the prejudice of the person who apologised.

In most jurisdictions people are concerned that an apology may amount to an admission and therefore, either directly or indirectly, create liability. This section addresses that concern. It is a valid concern because we are aware that the prejudicial effect of an apology is extremely high and may increase the likelihood of a jury or judge deciding that liability should be found.[186] Although in many cases courts have held that apologies do not amount to admissions of negligence[187] for example, this concern has been the source of a great deal of legal advice not to apologise. Addressing this concern is therefore a major part of the provisions the legislation uses to achieve its purpose of encouraging the use of apologies.

Admissions at common law

7.02 An admission is a statement that goes against the interest of the speaker. Admissions may be formal, or informal. Formal admissions are binding and are dealt with by the Rules of Court. Apologies which are formal admissions are not covered by the Ordinance: s.5(2). The basic rule in civil liability is that where someone makes an informal admission which is against their interest, it can be received as proof of the truth of the contents, as an exception to the rule against hearsay, unless it is more prejudicial than probative.[188] This is

186 Gijs van Dijk, "'I'm sorry (and therefore liable)': on the detrimental effect of non-monetary relief" (2017). (June 20, 2017). *Maastricht Faculty of Law Working Paper No 2989486*. Available at SSRN: <https://ssrn.com/abstract=2989486>. The prejudicial effect arises from the way the apology is perceived psychologically.

187 [See 7.03].

188 Evidence Ordinance s.47:

(1) 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 (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

so unless the admission is explained away, or contradicted by the maker and then the tribunal of fact determines the weight to give the admission.[189] For example, in the English case *Slack v Rotherham General Hospital NHS Trust*[190] the plaintiff argued that the defendant had apologised and admitted liability for her broken nose by saying "I'm sorry, I should have put it across before I put your head forward." The judge held that she had said "Just ease your head back we will re-adjust it. Oh sorry, this is taking longer than I thought" and that therefore there had been no apology and no admission.

Arguably, because in civil proceedings the hearsay rule is not strongly enforced, admissions may be more likely to be admitted as evidence than is likely in criminal law proceedings. In addition to admission by words, admissions by conduct, which might include benevolent gestures such as paying medical costs, giving flowers, and forgoing fees are also generally admissible[191] [see 4.07].

Apologies as admissions of fault or liability

7.03 Admissions may be admissions of fact, or admissions of liability. Whether an apology is necessarily an admission of liability at common law will depend on the nature of the apology and the circumstances in which it is made. Where an apology is merely an expression of regret there is no issue: it will not be an admission of liability.[192] Where an apology appears to admit fault cases have gone either way on the question of whether this can amount to an admission of liability, although the preponderance of evidence in all jurisdictions seems to be not to treat apologies — even full apologies which acknowledge fault — as admissions of liability. There are cases from a number of jurisdictions that show the variability of outcomes that can result at common law when one party seeks to rely on an apology by the other party as an admission.

In the United Kingdom (including Scotland), apologies have generally not been regarded as admissions of liability, particularly in relation to the law

(2) The court may determine whether or not to exclude evidence on the ground that it is hearsay—
  (a) in the case of civil proceedings before a jury, at the beginning of the proceedings and in the absence of the jury;
  (b) in the case of any other civil proceedings, at the conclusion of the proceedings.
(3) Nothing in this Part shall affect the admissibility of evidence admissible apart from this section.

189 *Heane v Rogers* (1829) 9 B & C 577, 586; 109 ER 215, 218; *Voulis v Kozary* (1975) 180 CLR 177, 193 (Jacobs J); *Menck v Dickinson* [1924] VLR 131; *Aikman v Arnold* (1934) 51 WN (NSW) 205; *Smith v Smith* [1957] 1 WLR 802. See also, for example, California Evidence Code s.1152; Georgia Code s.24-4-409.

190 (Court of Appeal (Civil Division), 9 October 2000).

191 *James v Biou* (1826) 2 Sim & St 600, 57 ER 475, 477.

192 *Glasgow Corp v Muir* [1943] AC 448.

of negligence. In *Glasgow Corp v Muir* the defender's employee, when in the witness box giving evidence, expressed regret at what had happened. Lord Thankerton said:[193]

> "The Court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened or that witnesses in the witness box are prone to express regret, *ex post facto*, that they did not take some step, which it is now realized would definitely have prevented the accident. In my opinion, the learned judges of the majority have made far too much of that which Lord Moncrieff regarded as an admission by Mrs Alexander. It is not an admission in the sense that it can bind the appellants, though it may be of some evidential value as to what the ordinary person would regard as a reasonable standard of care."[194]

Lord Macmillan agreed that the expression of regret could not be a binding admission. The other judges did not discuss the issue, deciding that there was no liability. Here the court distinguished between an apology which was an expression of regret and an admission which could be binding on the appellant.[195]

In some cases however courts appear to treat admissions of fault as admissions of liability despite arguments about the difference. This is important because it creates uncertainty about how the courts will treat an apology which includes an acknowledgement of fault. An example from Scotland is *Hogg v Carrigan*[196] where an interim damages award was made on the basis that the defender had admitted fault, and hence liability.[197] Cases which consider a defendant's ability to withdraw an admission of liability made before the action are also relevant. Here the issue is whether a person who has made a statement on which the other party relied should be allowed to withdraw it. In *Sowerby v Charlton*,[198] where the defendant solicitors sought to withdraw a statement in a letter admitting "a breach of duty", the court held that its discretion to allow the withdrawal had to consider the balance of prejudice, including the public interest in reducing litigation. In *Gale v Superdrug Stores*

193 [1943] AC 448, 454.

194 Section 5(2) of the Ordinance provides that the Ordinance does not apply to an apology given in testimony.

195 This is implicit in Lord Thankerton's judgment and explicit in Lord Macmillan's: [1943] AC 448, 459.

196 2001 SC 542.

197 To some extent, however, the decision turned on Rules of the Court of Session 1994 r 43.9.

198 [2006] 1 WLR 568.

COMMENTARY

Purpose

11.01 The Apology Ordinance does not affect the legal consequences of making an apology in connection with a matter other than as provided for by the Ordinance. This section stipulates certain procedures and laws that are not affected by the Ordinance to avoid uncertainty about whether those laws are affected. Each of the laws the subject of s.11 has facilitation of the resolution of disputes as at least one of its purposes. Preserving these laws is consistent with the underlying objectives of the Civil Justice Reform in 2009,[316] the Rules of the High Court,[317] the Mediation Ordinance[318] and the Defamation Ordinance.

Meaning

The Ordinance does not affect discovery and similar procedures

Meaning of "does not affect [d]iscovery, or a similar procedure in which parties are required to disclose or produce documents in their possession, custody or power, in applicable proceedings"

11.02 Order 24 r.1 of the Rules of the High Court provides for discovery by the parties in an action of documents which are or have been in their possession, custody or power relating to matters in question in the action. A document in which an apology has been made remains discoverable in accordance with existing rules that apply to the applicable proceedings.

Section 7 of Apology Ordinance provides that an apology does not constitute an admission of fault or liability and cannot be taken into account in determining fault or liability and s.8 renders an apology made by a person in connection with a matter inadmissible in applicable proceedings. The question might arise therefore, whether parties to civil proceedings to which the Rules apply must give discovery of a written apology in accordance with O.24 r.1 of the Rules of the High Court.[319] This section makes it clear that where a dispute relating to a matter is not resolved and proceedings are

[316] Civil Justice Reform <www.civiljustice.hk/eng/home.html>.
[317] O.1A r.1.
[318] Section 3(a).
[319] This question was raised in a submission in response to the Draft Bill by the Hong Kong Association of Banks and noted in the Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations* (November 2016) <http://www.doj.gov.hk/eng/public/apology.html> accessed 5 December 2017, 75–75, [5.1].

commenced, the parties to those proceedings are required to comply with the Rules.

There is no provision equivalent to s.11(a) in apology legislation in other jurisdictions. The question whether the usual rules of discovery rules apply notwithstanding the inadmissibility of evidence of an apology for certain purposes under apology legislation was answered in the affirmative by the court in *Coles v Takata Corp*[320] [see 7.08, 8.12]. This case concerned a public apology made in Japan and the United States expressing regret for defective airbags. The plaintiffs' claims were brought against the defendant in a series of product liability class actions in Ontario. The defendant brought a motion to strike out certain paragraphs of the plaintiffs' statements of claim on the ground that they contained statements that were apologies and the pleadings therefore contravened the Ontario Apology Act 2009. The plaintiffs argued that apologies can be admissible evidence of liability in Japan and the United States although they are protected in Ontario, and that Japanese and United States law applied to the apology. The court held that the apology could not be pleaded as evidence of an admission, nor could the apologies be used to determine liability because the Ontario apology legislation applied. Notwithstanding that the defendant's strike-out motions were granted because a pleading of an apology is an improper pleading, Perell J held that an apology can be the subject of examinations for discovery, stating:[321]

> The purposes of the examination would be to discover whether the statement alleged to be an apology is indeed an apology and to determine whether there are portions of the statement that are relevant non-apologetic evidence of liability.

Perell J disagreed with the suggestion by Master Short in his decision in *Simaei v Hannaford*,[322] that once the decision is made, that a pleading of an apology should be struck as an improper pleading (as decided in that case) "an apology then goes nowhere in the litigation."[323]

The reasoning of Perell J in *Coles v Takata Corp* is to be preferred for the reasons given by his Honour. It is also consistent with the purpose of s.11(a) of the Ordinance. Discovery of documentary evidence bearing on the issues between the parties may be relevant notwithstanding that evidence of an apology is *prima facie* inadmissible. For example, discovery remains important to the operation of s.8(2) of the Ordinance. That section provides for circumstances in which a decision maker may exercise discretion to admit

[320] 133 OR (3d) 47.
[321] *Ibid.*, [25].
[322] 2014 ONSC 7075.
[323] *Ibid.*, [41].

a statement of fact contained in an apology as evidence in the proceedings. It is necessary to the operation of that subsection that parties give discovery of documents relating to the matter in question in the proceedings.

Note that s.8(2)(b) of the Mediation Ordinance is another instance where the discovery rules apply notwithstanding that mediation communications are generally inadmissible in subsequent proceedings.[324] This section provides that the prohibition against disclosure of a mediation communication does not apply if the disclosure of the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power.[325] The purpose of this section is to ensure that documentary evidence is subject to discovery or other similar procedures "before, during and after the mediation".[326] This "prevents parties from abusing the mediation process by introducing otherwise discoverable information into mediation in an attempt to make it undiscoverable."[327] The section is consistent with the principle that any factual information disclosed in mediation that is able to be proved by a party can be relied upon in subsequent proceedings.[328] While the purposes of sections 11(a) of the Apology Ordinance and 8(2)(c) of the Mediation Ordinance are not identical, both provisions ensure that documentary evidence, including evidence of an apology, is available to parties to a dispute in subsequent proceedings in the event that they do not resolve their dispute by agreement.

The Ordinance does not affect certain sections of the Defamation Ordinance

Meaning of "does not affect the operation of sections 3, 4 or 25 of the Defamation Ordinance"

11.03 Each of these three sections of the Defamation Ordinance allow an apology, made by a person in connection with a defamation matter, to be taken into taken into account for the benefit of the person making the apology.[329] It is consistent with the objects of the Apology Ordinance in s.2, namely to

[324] There are exceptions to the non-disclosure and inadmissible rule. See the commentary on s.11(c) below on admissibility of an apology under the Mediation Ordinance and the Apology Ordinance, [11.06].

[325] Section 8(2)(c). See *Hong Kong Civil Procedure 2018* Volume 3, para.V1/8/31, for commentary on the meaning of "Discovery in civil proceedings".

[326] Nadja Alexander, *Hong Kong Annotated Statutes: Mediation Ordinance (Cap.620)* (Kluwer 2013) 84.

[327] Claire Wilson, *Hong Kong Mediation Ordinance: Commentary and Annotations* (Sweet & Maxwell 2013) 1.04, [8.06].

[328] *AWA Ltd v Daniels* (1992) 7 ACSR 463; *Aird v Prime Meridian Ltd* [2007] CP Rep 18.

[329] See, eg, *Hung Yuen Chan Robert v Sing Tao Ltd* [1996] 4 HKC 539 (ss.3 and 4); *Robin Miles Bridge v Wai Kin Bong* [1984] HKLR 225 (s.4); *Chu Siu Kuk Yuen v Apple Daily Ltd* [2002] 1 HKLRD 1 (s.4); *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2012] 1 HKLRD 848 (s.25).

"promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution," that these provisions are not affected by the Apology Ordinance.

Arguably, even without this section a court could be expected to construe the Apology Ordinance as not intended to prevent a person who makes an apology in relation to a defamation matter from seeking to admit that apology into evidence for it to be taken into account for the purposes of ss.3, 4 and 25 of the Defamation Ordinance. This is because ss.7 and 8 of the Ordinance only operate to alter the consequences of making an apology in determining fault, liability or any other issue in connection with the matter "to the prejudice of the person"[330] [see 7.11]. Section 11(b) makes it explicit that the legislation is not intended to prevent an apology made by a person in connection with a defamation matter from being admitted in evidence and taken into account where doing so is to the benefit of that person.

The Apology Ordinance does not affect the following three sections of the Defamation Ordinance:

Section 3. Admissibility in evidence, in mitigation of damages in action for defamation, of apology

> In any action for defamation it shall be competent to the defendant (after notice in writing of his intention to do so duly given to the plaintiff within a reasonable time before the trial of the cause) to give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so in case the action has been commenced before there was an opportunity of making or offering such apology.

Section 4. Right of defendant in action for libel to plead absence of malice, etc. and apology

> In an action for a libel contained in any newspaper it shall be competent to the defendant to set up as a defence that the libel was inserted in the newspaper without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the newspaper a full apology for the libel, or if the newspaper in which the libel appeared is ordinarily published at intervals exceeding 1 week, had offered to publish the said apology in any newspaper to be selected by the plaintiff in the action: and to such defence to the action it shall be competent to the plaintiff to reply generally denying the whole of such defence:

[330] Sections 7(1)(b) and 8(1).

Provided that it shall not be competent to any defendant in such action to set up any defence as aforesaid without at the same time making a payment of money into court by way of amends, and every such defence so filed without such payment into court shall be deemed a nullity and may be treated as such by the plaintiff in the action.

Section 25. Unintentional defamation

(1) A person who has published words alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends under this section; and in any such case—

(a) if the offer is accepted by the party aggrieved and is duly performed, no proceedings for libel or slander shall be taken or continued by that party against the person making the offer in respect of the publication in question (but without prejudice to any cause of action against any other person jointly responsible for that publication);

(b) if the offer is not accepted by the party aggrieved, then, except as otherwise provided by this section, it shall be a defence, in any proceedings by him for libel or slander against the person making the offer in respect of the publication in question, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.

(2) An offer of amends under this section must be expressed to be made for the purposes of this section, and must be accompanied by an affidavit specifying the facts relied upon by the person making it to show that the words in question were published by him innocently in relation to the party aggrieved; and for the purposes of a defence under sub-s.(1)(b) no evidence, other than evidence of facts specified in the affidavit, shall be admissible on behalf of that person to prove that the words were so published.

(3) An offer of amends under this section shall be understood to mean an offer—

(a) in any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of those words;

(b) where copies of a document or record containing the said words have been distributed by or with the knowledge

of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.

(4) Where an offer of amends under this section is accepted by the party aggrieved—

(a) any question as to the steps to be taken in fulfilment of the offer as so accepted shall in default of agreement between the parties be referred to and determined by the Court of First Instance, whose decision thereon shall be final;

(b) the power of the court to make orders as to costs in proceedings by the party aggrieved against the person making the offer in respect of the publication in question, or in proceedings in respect of the offer under paragraph (a), shall include power to order the payment by the person making the offer to the party aggrieved of costs on an indemnity basis and any expenses reasonably incurred or to be incurred by that party in consequence of the publication in question, and if no such proceedings as aforesaid are taken, the Court of First Instance may, upon application made by the party aggrieved, make any such order for the payment of such costs and expenses as aforesaid as could be made in such proceedings.

(5) For the purposes of this section words shall be treated as published by one person (in this subsection referred to as the publisher) innocently in relation to another person if and only if the following conditions are satisfied, that is to say—

(a) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or

(b) that the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person, and in either case that the publisher exercised all reasonable care in relation to the publication; and any reference in this subsection to the publisher shall be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication.

(6) Subsection (1)(b) shall not apply in relation to the publication by any person of words of which he is not the author unless he proves that the words were written by the author without malice.

Effect of the Ordinance on other aspects of defamation law

11.04 The reference to three sections of the Defamation Ordinance in s.11(b) of the Apology Ordinance raises the question whether the Apology Ordinance is intended to affect the law of defamation in other respects. At least two possible situations may need to be considered.

First, there may be circumstances in which a defendant who made an apology in connection with a defamation matter seeks to tender evidence of their apology in defamation proceedings other than pursuant to these sections. For example, they may seek to have evidence of an apology admitted in their favour in support of an application for costs against the plaintiff. There is nothing in the Apology Ordinance to indicate that they would not be able to do so [see 7.10].

Second, a plaintiff to defamation proceedings might seek to tender evidence of the apology in evidence for purposes other than to prove liability. If the apology is in the form of an admission on the pleadings or is made by consent, for example an apology is made in open court, arguably it would be admissible under s.5(2) in any case. A plaintiff might also seek to have evidence of an apology admitted in support of an application for costs in their favour or to have evidence of the apology made by a person in connection with the defamation admitted as evidence in support of a claim for aggravated or punitive damages.[331]

It is a question of statutory interpretation whether the protections under the Apology Ordinance preclude a court from considering an apology for these purposes. On a narrow interpretation of s.11(b) general law principles that apply to the assessment of defamation damages are not affected by the Ordinance. On a broader interpretation, which takes into consideration the objects of the Ordinance in s.2 and ss.7 and 8, an apology is not admissible or able to be taken into account as evidence in determining "fault, liability or any other issue in connection with the matter to the prejudice of the person" who made the apology. This may limit the purposes for which a plaintiff can admit evidence of an apology in defamation proceedings [see 7.10–7.11].

[331] Aggravated and exemplary damages are available in some circumstances for defamation; *Rookes v Barnard* [1964] AC 1129; *Cassell & Co Ltd v Broome* [1972] AC 1027; *Sim Hok Gwan v Tin Tin Yat Po Ltd* [1981] HKLR 227; *Li Yau Wai Eric v Genesis Films Ltd* [1987] HKLR 711; *Halsburys Laws of Hong Kong* (LexisNexis) [380.531]; Matthew Collins, *Collins on Defamation* (OUP 2014); [11.60], [21.32], [21.40] (relevance of apology).

There is no equivalent of s.11(b) in apology legislation in other jurisdictions. The legislation in most jurisdictions that have enacted apology legislation which applies to civil actions does not apply to defamation proceedings.[332] No need for a similar provision arises, therefore, in these jurisdictions. The apology legislation enacted in Canada does not explicitly exclude defamation proceedings from the operation of the legislation, nor does it specifically preserve the operation of defamation law as do ss.3, 4 and 25 of the Defamation Ordinance.[333] The defamation legislation in each state and territory in Australia expressly protects an apology in defamation proceedings. In contrast to the Defamation Ordinance however, Australian defamation legislation expressly provides for a court to consider apologies in the assessment of damages and in an application for costs to be awarded on an indemnity basis.[334]

The Ordinance does not affect the Mediation Ordinance

Meaning of "the operation of the Mediation Ordinance"

11.05 The Mediation Ordinance creates a regulatory framework for certain aspects of the conduct of mediation in Hong Kong.[335] The objects of the Mediation and Apology Ordinances are complementary: both encourage communications that facilitate the resolution of disputes by excluding evidence of communications between parties in legal proceedings[336] [see I.04]. The objects of the Mediation Ordinance are (a) to promote, encourage and facilitate the resolution of disputes by mediation; and (b) to protect the confidential nature of mediation communications.[337] The Ordinance applies to any mediation conducted under an agreement to mediate if the mediation is wholly or partly conducted in Hong Kong or the agreement provides that the Mediation Ordinance or law of Hong Kong is to apply.[338]

[332] See, eg, Compensation Act 2006 (UK) where this is implicit. In contrast, see Apologies (Scotland) Act 2016 s.2(1)(d) which expressly excludes defamation proceedings from the civil proceedings to which the Act applies.

[333] It is impossible to identify uniform treatment across all the Canadian provinces because the legislative regimes differ; see generally Raymond Brown, *Brown on Defamation* loose leaf ed. (Toronto, Thomson Reuters, 1994) vol 7. 25.4(2), 25.5(1). The authors have found no case law on the inter-relationship between apology legislation and defamation legislation and general law principles in Canadian jurisdictions.

[334] Defamation Act 2005 (NSW) s.38 (mitigation), s.40 (costs) and equivalent provisions in the other Australian jurisdictions.

[335] Mediation Ordinance, Long Title.

[336] "Proceedings" for purposes of the Mediation Ordinance include "judicial, arbitral, administrative or disciplinary proceedings" (Section 9 Mediation Ordinance).

[337] Section 3.

[338] Section 5(1) Mediation Ordinance. The Ordinance does not apply to processes specified in Schedule 1, s.5(2).

The Mediation Ordinance promotes the objects of that legislation by protecting the confidentiality of the mediation process.[339] Section 8(1) provides that a "mediation communication" must not be disclosed except as provided by sub-s.(2) or (3).[340] An apology made by a person in mediation is a mediation communication and therefore must not be disclosed and is inadmissible other than in accordance with these provisions. To the extent that an apology made in mediation is inadmissible as evidence in proceedings, the objects of both Ordinances are promoted.

The Mediation Ordinance also provides for exceptions to confidentiality and inadmissibility and the circumstances in which mediation communications can be disclosed or admitted in evidence.[341] As explained by the Court of Appeal in *Crane World Asia Pte Ltd v Hontrade Engineeering Ltd*, the Mediation Ordinance adopts a similar policy to disclosure of mediation communications as "without prejudice privilege".[342] Section 8(2) sets out a number of circumstances in which a person may disclose a mediation communication. Section 8(3) provides for the circumstances in which a person may disclose a mediation communication with leave of the court or tribunal under s.10. Section 9 provides that a mediation communication may be admitted in evidence in proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only with the leave of the court or tribunal under s.10. As an apology may be made in mediation there is scope for the question to arise about how the admissibility provisions of the two Ordinances interact. Section 11(c) addresses that question.

Meaning of "does not affect" the operation of the Mediation Ordinance

11.06 The provisions of the Mediation Ordinance apply to an apology made in mediation between parties to a civil dispute and to mediation of matters before a disciplinary and regulatory body. For example, in the event that

[339] Wilson n [327] ch 8; Alexander n [326] 80-1 [3.03]. See also Owen Gray "Protecting the Confidentiality of Communications in Mediation" (1998) 35(4) *Osgoode Hall Law Journal* 667; Robyn Carroll, "All for One and One for All or One at All - Mediation Legislation: Trends in Australia and the US" (2002) 30 *University of Western Australia Law Review* 167, 183–186.

[340] "Mediation communication" is defined in Mediation Ordinance s.2(1).

[341] Section 8 (confidentiality of mediation communications); s.9 (admissibility of mediation communication in evidence).

[342] [2016] 3 HKLRD 640, referring [16] to the modern law on this privilege from the judgment of Robert Walker LJ (as he then was) in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436. In *Crane World Asia Pte Ltd v Hontrade Engineeering Ltd* the court noted, [20] that "before the enactment of the Ordinance, mediation communications were protected by 'without prejudice privilege' as confirmed by *Chu Chung Ming v Lam Wai Dan* [2012] 4 HKLRD 897".

a matter is not settled and applicable proceedings are brought, disclosure of the apology made during mediation is permissible under the Mediation Ordinance by consent.[343] It may also be disclosed if the content of a mediation communication is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power.[344] The apology will be inadmissible in subsequent proceedings unless leave is granted under s.10.[345]

If an apology is made in connection with a matter as a mediation communication and a person seeks to have that communication admitted in evidence in any proceedings they must obtain leave of the court or tribunal pursuant to s.10.[346] If leave is granted by a court or tribunal there is potential for an apology to be admitted as evidence in "any proceedings" pursuant to s.9.

It is a question of construction whether the Apology Ordinance applies to an apology (made as a mediation communication) in these circumstances. The answer to this question depends on the meaning of the words in s.11(c) of the Apology Ordinance that say it "does not affect" the operation of the Mediation Ordinance.

There are at least two ways to construe s.11(c) of the Apology Ordinance. First, the Apology Ordinance does not apply to an apology that is ruled admissible under s.10 of the Mediation Ordinance and the apology is admissible as evidence in "applicable proceedings" [see 6.03]. Alternatively, the Apology Ordinance does apply in these circumstances and ss.7 and 8 prescribe the legal consequences of the apology in "applicable proceedings" notwithstanding the decision made under s.10 of the Mediation Ordinance. On this construction the only circumstance in which the apology made in mediation would be admissible in applicable proceedings would be those provided for by s.8(2) of the Apology Ordinance [see 8.09] or if s.5(2) applied [see 5.07].

[343] Mediation Ordinance s.8(2)(a).

[344] This provision prevents people from abusing the mediation process by introducing otherwise discoverable information into mediation in an attempt to make it undiscoverable; Wilson n [327] [8.06].

[345] Mediation Ordinance s.9.

[346] Section 10 provides that "in deciding whether to grant leave for a mediation communication to be disclosed or admitted in evidence the court or tribunal must take into account: (a) whether the mediation communication may be, or has been, disclosed under s.8(2); (b) whether it is in the public interest or the interests of the administration of justice for the mediation communication to be disclosed or admitted in evidence; (c) any other relevant circumstances or matters that the court or tribunal considers relevant."

The second construction should be preferred for several reasons. First, it does not appear to be the intention that the Apology Ordinance not apply to an apology that forms part of a mediation communication which is admitted under s.10 of the Mediation Ordinance. Section 11(c) states that that the Ordinance does not "affect the operation" of the Mediation Ordinance: it does not state that the Apology Ordinance does not apply when the Mediation Ordinance provisions apply. Second, the matters to be taken into account in s.10 of the Mediation Ordinance concern the protection of confidentiality of the mediation rather than the protection of apologies, which is the purpose of Apology Ordinance. Third, arguably the second interpretation does not defeat the purpose of the Mediation Ordinance whereas the first interpretation defeats the purpose of the Apology Ordinance [see 2.01]. In construing the legislation a court must consider the objects of the Apology Ordinance.[347] Fourth, this interpretation avoids the need for a court or tribunal deciding whether to grant leave under s.10 of the Mediation Ordinance to take into account whether or not an apology made in mediation requires different consideration in view of the objects of the Apology Ordinance. The following examples based on the second interpretation illustrate how the Ordinances should interact.

> Example 1: A person makes an apology in mediation. This is a mediation communication that is not admissible in any proceedings. The protections otherwise conferred on the apology by the Apology Ordinance need not be invoked.
>
> Example 2: A person makes an apology in mediation as a mediation communication. An application is made under s.10 of the Mediation Ordinance for leave for the mediation communication to be admitted in evidence under s.9 of the Mediation Ordinance. Leave is not granted. The apology is inadmissible and the protections otherwise conferred on the apology by the Apology Ordinance need not be invoked.
>
> Example 3: A person makes an apology in mediation as a mediation communication. An application is made under s.10 of the Mediation Ordinance for leave for the mediation communication to be admitted in evidence under s.9 of the Mediation Ordinance. Leave is granted. In this case the Apology Ordinance protections apply to the apology and can be invoked.

[347] Interpretation and General Clauses Ordinance s.19; *Medical Council of Hong Kong v Chow Siu Shek* (2000) 3 HKCFAR 144.

Application of the Mediation Ordinance to an apology made as a mediation communication in regulatory proceedings

11.07 Section 9 of the Mediation Ordinance does not refer expressly to "regulatory" proceedings (which are applicable proceedings under s.6(1) of the Apology Ordinance). Section 9 of the Mediation Ordinance uses inclusive language to describe the proceedings in which a mediation communication may be admitted ("including judicial, arbitral, administrative or disciplinary proceedings"). It is likely that as this is a non-exhaustive list of civil and non-criminal proceedings, s.10 of the Mediation Ordinance regulates the admissibility of evidence of an apology made as a mediation communication in a regulatory dispute.

Application of the Apology Ordinance to an apology made under "without prejudice privilege"

11.08 Section 11 of the Apology Ordinance does not state whether an apology made under "without prejudice privilege" is admissible in applicable proceedings if the privilege that attaches to such communications for any reason is unavailable to the person who made the apology.[348] In this situation it would be consistent with the object of the Apology Ordinance for the protections in s.7 and s.8 to apply to the apology, as defined in s.4, notwithstanding any exception to the privilege that may apply.

Mediation in the criminal justice context is not affected by the Apology Ordinance

11.09 The Mediation Ordinance applies to mediation, a process in which the parties to a dispute are assisted to reach an agreement regarding the resolution of the whole, or part of, the dispute.[349] Although the definition of dispute is wide and inclusive,[350] there is no indication in the Mediation Ordinance that it is intended to apply to mediation in a criminal justice context. The Steering Committee noted that there are instances where mediation has been applied in overseas jurisdictions to victim-offender mediation with the goal of achieving restitution and reconciliation between the victim and the offender in a criminal case.[351] It did not propose that the apology legislation apply to these situations.[352]

[348] For exceptions to the without prejudice privilege see *Crane World Asia Pte Ltd v Hontrade Engineeering Ltd* [2016] 3 HKLRD 640, [16] citing Robert Walker LJ (as he then was) in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436.

[349] Mediation is defined in the Mediation Ordinance s.4.

[350] Dispute is defined in the Mediation Ordinance s.2(1) to include a difference. For commentary on the meaning of "dispute" for the purpose of the Mediation Ordinance see Wilson n [327] 70-1 [2.09]; Alexander n [326] 27-7 [2-012].

[351] Department of Justice, Government of the HKSAR, Steering Committee on Mediation, *Enactment of Apology Legislation Hong Kong: Consultation Paper* (2015) 14, [2.18].

[352] *Ibid.*