

**PCPD’s Submissions in response to the
Public Consultation on Apology Legislation in Hong Kong**

This submission is made by the Office of the Privacy Commissioner for Personal Data (“**PCPD**”) in response to the Public Consultation carried out by the Steering Committee on Mediation chaired by the Secretary for Justice on the enactment of apology legislation in Hong Kong in June 2015 (“**Consultation Paper**”). The main objective of the proposed apology legislation is to promote and encourage the making of apologies in order to facilitate amicable settlement of disputes. Public views are sought on seven recommendations put forward by the Steering Committee on Mediation. As the regulator to protect individuals’ privacy in relation to personal data under the Personal Data (Privacy) Ordinance (Cap. 486) (“**PDPO**”), the PCPD would like to share our practical experiences and views related to handling of complaints under PDPO for the consideration by the Steering Committee on Mediation when determining whether or not to enact an apology legislation.

Responses to the Consultation Paper

Recommendation 1 An apology legislation is to be enacted in Hong Kong

Recommendation 3 The apology legislation is to cover full apologies

Enactment of specific legislation

2. It is proposed that Hong Kong should follow the overseas trend to enact its own apology legislation¹. The PCPD is generally in support of the enactment of an apology legislation which seeks to promote a general willingness

¹ See Chapter 1 of the Consultation Paper.

among those causing adverse consequences to others to extend their sorrow, regret or sympathy to those affected and to facilitate conciliation of disputes.

3. In the process of handling complaints by the PCPD under the PDPO, it is not uncommon for an aggrieved individual to request the PCPD to “*direct*” a party being complained against (“**PCA**”) to make an apology for the infringement of their personal data privacy rights under the PDPO. In the absence of explicit provision under the PDPO, the Privacy Commissioner has no power to direct a PCA to make an apology to the aggrieved individual². With well-defined meaning and legal effect of an apology set out in the future legislation, the PCAs may become more willing to make apologies to the aggrieved individuals for infringement of their privacy rights. The PCPD therefore supports the proposed legislation which generally facilitates and promotes conciliation of disputes.

The meaning of apology (full vs partial)

4. According to the information provided in the Consultation Paper, the major difference between a full and partial apology is that the former also includes an admission of fault apart from an expression of regret or sympathy.

5. The Consultation Paper sets out in great details the overseas trend in apology laws. The idea of apology legislation is completely novel in Hong Kong. It is far from certain (and not readily seen from the Consultation Paper) whether or how the idea of full apology will be readily accepted under the culture of Hong Kong. As recognised in the Consultation Paper, other factors such as avoiding loss of face, personality and cultural norms³ will also affect the

² The Administrative Appeals Board took the view that the PCPD has no such power in its decision in Administration Appeals Board No.4 of 1997.

³ Paragraph 6.32 in Chapter 6 of the Consultation Paper.

willingness of making apologies.

6. From the PCPD's past experience, some aggrieved individuals are prepared to drop their complaints if the PCAs are willing to make sincere apologies. While some aggrieved individuals are prepared to accept partial apology (i.e. expression of regret or sympathy), more insist that a sincere apology should include to a certain extent an admission of fault or acknowledgement of the wrong done. The PCPD's observation is that some of the PCAs are reluctant to make apology partly because they believe they have done nothing wrong unless they are being so adjudged. More too often, they are uncertain about the legal consequence of such apology. Generally, those PCAs who are customer service-oriented are more willing to tender an apology (or even a full apology). With the clarification of the legal consequence of apology in the proposed legislation, it will undoubtedly help ease the tension between the aggrieved individuals and the PCAs as well as promote settlement or conciliation of disputes.

Recommendation 2 The apology legislation is to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings

7. Paragraph 3.7 of the Consultation Paper elaborated that the High Court of Australia⁴ took the view that even though an apology itself may become admissible evidence against the apology maker of the truth of its contents, “*an apology or even an admission of fault or liability in a civil dispute would not automatically lead to liability*” and the Court will determine the liability separately. Whilst the PCPD has complete confidence on the impartiality of the Court, the general public may well have a misconception of what exactly is the legal consequence of an apology and how the court is to perceive the

⁴ *Dovuro Pty Limited v Wilkins* [2003] HCA 51

same. Such fear or misconception may turn out to be a countervailing factor against the ultimate goal to promote willingness to make apologies. To avoid any “*chilling*” effect that an admission of fault may have on any subsequent legal proceedings (be it before a tribunal, arbitrator, and any person who is acting in a judicial or quasi-judicial capacity), the PCPD submits that it is appropriate for the proposed apology legislation to contain specific provision to deal with the effect of apology particularly that it will not automatically lead to liability.

8. Paragraphs 6.40 to 6.42 of the Consultation Paper specifically seek views as to whether the apology legislation should also apply to other forms of non-criminal proceedings such as regulatory proceedings. In this connection, section 43 of the PDPO confers on the Privacy Commissioner certain investigation powers including the holding of an investigative hearing⁵. While the Privacy Commissioner’s proceedings is not quoted as an example under paragraph 6.40, it is likely that our proceedings may fall within the description of “*proceedings involving the exercise of regulatory powers of a regulatory body under an enactment*” because the PCPD regulates the act or practice of data users pursuant to the PDPO. On the same rationale as stated in the foregoing paragraphs, we support that the apology legislation should also apply to the Privacy Commissioner’s proceedings.

Recommendation 4 The apology legislation is to apply to the Government

9. Paragraph 1.6 of the Consultation Paper expressly recognised the general unwillingness of public officials and civil servants acting in their official capacities to tender an apology owing to their concerns on the legal implications.

⁵ Section 43 of the PDPO “*Proceedings of Commissioner*” provides for certain investigation powers of the Commissioner including to carry out any hearing for the purpose of an investigation (see section 43(2)).

10. Section 3 of the PDPO provides that the PDPO binds the Government. In 2014/2015, 10% of the complaints received by the PCPD were made against government departments and other public bodies⁶. The PCPD supports the proposed apology legislation shall apply to the Government as well so as to facilitate settlement or conciliation of complaints.

The Office of the Privacy Commissioner for Personal Data

30 July 2015

⁶ See page 51 of the PCPD Annual Report 2014-15 available at: https://www.pcpd.org.hk/misc/annual_reports/ar2014_15/ar2014_15/index.html