



## **International Virtual Colloquium on Multi-disciplinary Research Impact (2<sup>nd</sup> Series)**

Organised by Research Nexus UiTM (ReNeU)  
Office of Deputy Vice Chancellor (Research and Innovation)  
Universiti Teknologi MARA 40450 Shah Alam, Malaysia, 15 June 2022



# **Comparative Analysis of Legislative Reform of Admission by Apologetic Discourse**

**Nurul Shuhada Suhaimi, Haswira Nor Mohamad Hashim,  
Noraiza Abdul Rahman, Nurruhluda Ahmad\***

Faculty of Law,  
Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia  
\*Corresponding Author

[haswira648@uitm.edu.my](mailto:haswira648@uitm.edu.my), [nurulshuhadasuhaimi@gmail.com](mailto:nurulshuhadasuhaimi@gmail.com), [noraizarahman@uitm.edu.my](mailto:noraizarahman@uitm.edu.my)  
Tel: +603 55444122

### **Abstract**

This study compares the protection of admission by apologetic discourse through legislative reform in selected Common Law jurisdictions. The legislative reform provides a solution to the long-standing problem of adverse legal effects of admission by apologetic discourse made by professionals/practitioners who had breached their duty of care, code of ethics, or conducts. A similar problem is reported in Malaysia due to similarities in evidentiary rules, insurance contract clauses and statutory limitation law attributed to the Common Law system. The findings of this comparative study help towards the development of the law that protects admission by apologetic discourse for professional negligence and misconduct in Malaysia.

**Keywords:** Apologetic discourse; admission; legislative reform; professional negligence and misconduct

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DOI: <https://doi.org/10.21834/ebpj.v7iSI7.3814>*

### **1.0 Introduction**

The objective of this study is to compare the legislative reform of admission by apologetic discourse in selected Common Law countries. The second decade of the 21st century had been a worldwide movement toward legislative reform of the law underpinning admission by apologetic discourse amongst Common Law countries (McMichael et al., 2019; Hübenthal, 2016; Robyn & Vines, 2017; Runnels, 2009). Legislative reform of admission by apologetic discourse is more prevalent in the Common Law system compared to the Civil Law system due to different sets of rules of evidence and tort law between the systems (Vandenbussche, 2018; Leung & Porter, 2019; Carroll, 2014; Macleod, 2008). Being part of the Common Law system, admission by apologetic discourse amounts to admission to negligence and misconduct in Malaysian courts (see *Gurmit Kaur A/P Jaswant Singh v Tung Shin Hospital & Anor* [2013] 1 CLJ 699 HC; *Norizan bt Abd Rahman v Dr Arthur Samuel* [2013] 9 MLJ 385; *Mammoth Empire Construction Sdn Bhd v Lifomax Woodbuild Sdn Bhd* [2017] 1 MLJ 453). As a result, tortfeasors and wrongdoers including the professional practitioners evade from offering an apology, that further strained their relationship with clients or patients (Corbett, 2014; Taft, 2013; McDonnell & Guenther, 2008). These legal ramifications have yet to be resolved in Malaysia. It is therefore pertinent for Malaysia to benchmark its Common Law counterparts that have reformed the law on admission by apologetic discourse. The selected jurisdictions for comparison are the United Kingdom, Republic of Ireland, Australia, Canada, the USA, and Hong Kong SAR. These Common Law jurisdictions have successfully undertaken legislative reform of admission

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DOI: [https://doi.org/10.21834/ebpj.v7iSI7%20\(Special%20Issue\).3814](https://doi.org/10.21834/ebpj.v7iSI7%20(Special%20Issue).3814)*

by apologetic discourse for professional negligence/misconduct (Vines & Carroll, 2018; Ginn & Boyle, 2016; Barr, 2009; Studdert & Richardson, 2010; Vines, 2008).

## 2.0 Literature Review

International literature underscores the need to overcome the shortcomings of apology laws in Common Law countries by introducing statutory protection of admission by apologetic discourse (Ross & Newman, 2021; Mastroianni et al., 2020; Agapiou & Cheung, 2017; Carroll & Unger, 2015). Helmreich (2012) proposes legislative reform modelled after the US Federal Rules of Evidence to protect full, self-critical apologies from adverse evidentiary rules. In New Zealand, Khouri (2014), who examines other Common Law countries' experience in the reform of apology legislation, urged similar reform in New Zealand (Khouri, 2014).

Local literature on admission by apologetic discourse led by Kassim et al. (2017) is more focused on medical negligence. In their later work, Kassim et al. (2018) strongly support legislative reform of admission by apologetic discourse involving medical practitioners who committed medical negligence. A later study by Hashim et al. (2020) provides a set of recommendations to exclude medical apologies from being governed by a strict evidentiary regime under the Evidence Act 1950. Compared to existing literature, this study contributes to the current body of knowledge by extending the legislative reform to include non-medical practitioners. Similar to medical practitioners. This study envisages that, besides the medical sector, professionals in legal, accounting, engineering and education sectors are equally susceptible to professional negligence and misconduct.

## 3.0 Methodology

The research methodology is designed to answer the research question: How do other jurisdictions protect admission by apologetic discourse through legislative reform? To answer the question, this study collects primary legal sources in the form of statutes and secondary legal sources from law textbooks, law journals and law committee reports. This study then conducts content analysis of the collected data. The unit of analysis is the legislation amended and/or enacted by the selected countries to give effect to legislative reform of admission by apologetic discourse. Table 1 depicts the legislations that have been identified for comparative analysis. The legislation that has been identified for comparative legal analysis is listed below:

Table 1. Legislation for comparison from selected Common Law jurisdictions

	Jurisdictions	Legislation
1.	UK	Compensation Act 2006 (England) Apologies (Scotland) Act 2016
2.	Republic of Ireland	Civil Liability (Amendment) Act 2017 (Ireland)
3.	Australia	Civil Liability Act 2002 No 22 (New South Wales) Wrongs Act 1958 (Victoria)
4.	Canada	Civil Liability Act 2003 (Queensland) Uniform Apology Act 2007 Apology Act SBC 2006 (British Columbia) Evidence Act, 2007, c.24, s.2. (Saskatchewan)
5.	USA	Colorado Revised Statutes Title 13 Revised Code of Washington Federal Rule of Evidence
6.	HKSAR	Apology Ordinance (Cap.631) 2017

Doctrinal analysis of relevant statutory provisions was conducted to determine the substantive and procedural components of the legislative reform. Later, a comparative analysis was conducted to find similarities, differences, and special/unique features of the legislative reform in each selected country. The scope of analysis comprised the definition of apology, the scope of apology protection, principles of apology protection and the procedural component.

## 4.0 Findings

### 4.1 Definition of apology

The definition of apology in the legislations of the selected jurisdictions can be divided into three categories. First the legislation that defines apology to include acknowledgement of fault. Second is the legislation that excludes acknowledgement of fault in the definition of apology. Third, where there is no definition of apology in the legislation.

In the first category, analysis finds that there are eight legislations that include acknowledgement of fault in the definition of apology (Civil Liability Act 2002 No 22 (New South Wales); Civil Liability Act 2003 (Queensland); Apology Act SBC 2006 (British Columbia); Evidence Act, 2007, c.24, s.2. (Saskatchewan); Uniform Apology Act 2007; Colorado Revised Statutes Title 13; Revised Code of Washington; and Apology Ordinance (Cap.631) 2017).

As for the second category, analysis finds three legislations that exclude acknowledgement of fault in the definition of apology (Apologies (Scotland) Act 2016; Civil Liability (Amendment) Act 2017 (Ireland); and Wrongs Act 1958 (Victoria)). The Apologies (Scotland) Act 2016 defines an apology as any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets,

an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence. The Civil Liability (Amendment) Act 2017 (Ireland) CLA 2017 defines apology as an expression of sympathy or regret but expressly excludes acknowledgement of fault. Similarly, the Wrongs Act 1958 (Victoria) defines apology as an expression of sorrow, regret or sympathy but does not include a clear acknowledgement of fault.

The third category of definition of apology is where the statute does not define apology at all, as found in the Compensation Act 2006 (England) and Federal Rule of Evidence.

#### **4.2 Scope of apology protection**

This study classifies the scope of the protected person into four categories. Firstly, protection is accorded to any person in any action. Secondly, protection is accorded to any person in the civil action. Thirdly, protection is accorded to any person in negligence and breach of statutory duty proceeding. Fourthly, protection is accorded to only health service providers and their employees.

In the first category, four legislations accord protection for admission by apologetic discourse to any person in any matter (Apology Act SBC 2006 (British Columbia); Uniform Apology Act 2007; Evidence Act, 2007, C.24, S.2. (Saskatchewan); and the USA Federal Rule of Evidence).

In the second category, five legislations accord protection to any person in civil proceedings (Apologies (Scotland) Act 2016; Civil Liability Act 2002 No 22 (New South Wales); Wrongs Act 1958 (Victoria); Civil Liability Act 2003 (Queensland); and Apology Ordinance (Cap.631) 2017 (HK SAR)).

Thirdly, the analysis finds the Compensation Act 2006 (England) as the only legislation that limits its application to apology offered pursuant to negligence and breach of statutory duty. The scope of apology protection under the third category is less comprehensive compared to the former categories.

Fourthly, analysis finds that three legislation provides the narrowest scope of protection of apologetic discourse as they only cover health service providers and their employees (Civil Liability (Amendment) Act 2017 (Ireland); Colorado Revised Statutes Title 13; and Revised Code of Washington).

#### **4.3 Principles of protection of apology**

This study analyses the principles of protection of apologetic discourse across the legislations. In terms of admissibility of apologetic discourse, all legislations protect admission by apologetic discourse from being admissible in determining liability. Even though there are differences among the legislations in terms of the definition of apology, the scope of protection, and applicability of the legislation in respective jurisdictions, all analysed legislations share the same core principle in promoting and protecting apologetic discourse.

#### **4.4 Procedural Component**

This study finds that most legislative reforms are more focused on substantive reform and overlook the procedural component of the reform. Only three legislations are equipped with the procedural component for the reform (Civil Liability (Amendment) Act 2017 (Ireland); Colorado Revised Statutes Title 13; and Revised Code of Washington). This study identifies three procedural components stipulated in the legislation. The components are i) method of communication of apologetic discourse; ii) stipulated time; and iii) place where the communication of apologetic discourse takes place.

Firstly, there are three legislations that specify the method by which the apologetic discourse must be communicated (Civil Liability (Amendment) Act 2017 (Ireland); Colorado Revised Statutes Title 13; and Revised Code of Washington).

Secondly, the Revised Code of Washington is the only legislation that prescribes the time frame of communication of the apologetic discourse.

Thirdly, the Civil Liability (Amendment) Act 2017 (Ireland), Colorado Revised Statutes Title 13 and Revised Code of Washington prescribe the place the communication of apologetic discourse must take place.

### **5.0 Discussion**

Despite the general similarity in the aim and purpose of the examined legislation, comparative analysis discovers certain aspects of legislative reform that vary between one jurisdiction to another.

In terms of the definition of apology, the common characteristic in defining apology in the legislations under analysis is the assertion of the elements of apology. These elements include expression of sympathy or regret, a general sense of benevolence or compassion, and whether the apology admits or implies an admission of fault in connection with the matter. The common characteristic of the Apologies (Scotland) Act 2016; Civil Liability (Amendment) Act 2017 (Ireland); and Wrongs Act 1958 (Victoria) is the exclusion of acknowledgement of fault in the definition of apology. Unlike other legislations, the Compensation Act 2006 (England) and the Federal Rules of Evidence protect admission by apologetic discourse without defining the term apology.

The comparative analysis also finds that the legislation that defines apology to include acknowledgement of fault (the Civil Liability Act 2002 No 22 (New South Wales); Civil Liability Act 2003 (Queensland); Apology Act SBC 2006 (British Columbia); Evidence Act, 2007, c.24, s.2. (Saskatchewan); Uniform Apology Act 2007; Colorado Revised Statutes Title 13; Revised Code of Washington; and Apology Ordinance (Cap.631) 2017) provide the most inclusive definition. The inclusivity of the elements of apologetic discourse in the definition of apology in these pieces of legislation is evidenced by the usage of the terms expression of sympathy or regret, sorry, a general sense of benevolence or compassion, and any other words or actions indicating contrition or commiseration and admission of fault in defining apology.

On the contrary, the definition of apology in the Apologies (Scotland) Act 2016, Civil Liability (Amendment) Act 2017 (Ireland) and Wrongs Act 1958 (Victoria) is restricted to a statement and expression of sorrow, regret and sympathy and an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence. The definitions of apology in the Apologies (Scotland) Act 2016, Civil Liability (Amendment) Act 2017 (Ireland) and Wrongs Act 1958 (Victoria) exclude a clear acknowledgement of fault.

In terms of the scope of apology protection, three legislations (the Apology Ordinance (Cap.631) 2017; the Apologies (Scotland) Act 2016; and the Civil Liability Act 2002 No 22 (New South Wales) exclude apology from being admissible in any action or matter in any court as evidence of fault or liability. The scope of protection under three legislations, i.e. The Apology Ordinance (Cap.631) 2017, the Apologies (Scotland) Act 2016 and the Civil Liability Act 2002 No 22 (New South Wales), are narrower. The Apology Ordinance expressly excludes criminal proceedings in its application, whilst the Apologies (Scotland) Act excludes public inquiries, children's hearings, and defamation proceedings from its scope of protection. On the other hand, the Civil Liability Act 2002 No 22 (New South Wales) only protects persons under civil action that are not expressly excluded in statutes, such as defamation.

Among the three legislations, the scope of protection under the Wrongs Act (Victoria) 1958 is broader as it includes proceeding before a tribunal, proceeding under an Act regulating the practice or conduct of a profession or occupation, proceeding of a Royal Commission, and proceeding of a Board of Inquiry or Formal Review established under the Inquiries Act 2014, apart from civil proceeding. The Civil Liability (Amendment) Act 2017 (Ireland) provides the least protection as it only protects apologies made by health service providers and practitioners during patient safety incident meetings. The Colorado Revised Statutes Title 13 expands the scope of protection to include health service providers and practitioners in civil proceedings involving the unanticipated outcome of medical care or in any arbitration proceeding related to such civil action.

The comparative analysis further finds that the Apologies (Scotland) Act 2016, Civil Liability Act 2002 No 22 (New South Wales), Wrongs Act 1958 (Victoria), Civil Liability Act 2003 (Queensland) and Apology Ordinance (Cap.631) 2017 provide comprehensive protection of admission by apologetic by extending the protection to any person in the civil action. However, the protection varies from one jurisdiction to another. The notable difference is with regards to whom the apologies must be spoken to in order to remain protected. In the Civil Liability (Amendment) Act 2017 (Ireland), Colorado Revised Statutes Title 13, and Revised Code of Washington, only statements made to the individual harmed or that individual's family or representative remain protected. Thus, these three legislations provide the least comprehensive scope of apology protection across the selected jurisdictions. The Revised Code of Washington accords protection to the apology made by the health care provider and its employees. This protection is applicable in a civil action against the health care provider and its employee for personal injuries that are based upon alleged professional negligence. Compared to the three other legislations aforementioned, the Apology Ordinance accords additional protection to an apology as it protects admission by apologetic discourse made by a natural person as well as by a private corporation or government entity. Similarly, the USA Federal Rule of Evidence also accords additional protection as it excludes the admissibility of subsequent remedial measures, compromise offers and negotiations, and offers to pay medical and similar expenses in any action or matter in any court.

In terms of the principle of protection of apology, all analysed legislations share the same core principle, i.e. to promote and protect admission by apologetic discourse. This similarity is observed despite differences in terms of the definition of apology, the scope of protection, and the applicability of the legislation in respective jurisdictions. The Apology Ordinance (Cap.631) 2017 provides that an apology does not constitute an express or implied admission and must not be considered by the court in determining fault and liability. This provision accords the most comprehensive scope of protection for cases involving tort claims and disciplinary or regulatory proceedings, where apologies are relevant to remedies and defences. The Colorado Revised Statutes Title 13 protects all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence. Section 10(1) of the Civil Liability (Amendment) Act 2017 (Ireland) enhanced the principle of protection of apologetic discourse by stating that information and apology made during a meeting following a patient safety incident is inadmissible.

In terms of procedural component, comparative analysis discovers differences with regard to the method of communication of apologetic discourse, stipulated time frame and place where the communication of apologetic discourse can take place. Compared to the other legislations, the Civil Liability (Amendment) Act 2017 (Ireland), Colorado Revised Statutes Title 13 and Revised Code of Washington prescribe the method, time and place of communication of apologetic discourse. Due to this specification, these three legislations appear to be the most restrictive protection of admission by apologetic discourse protection among the selected jurisdictions.

With reference to the stipulated time frame, the Revised Code of Washington prescribes the time frame to communicate the apologetic discourse under two circumstances. Firstly, the apologetic discourse is conveyed by a health care provider to the injured person, or to a related person within 30 days of the act or omission that is the basis for the allegation of professional negligence. Secondly, the communication is made within 30 days of the time the health care provider discovered the act or omission that is the basis for the allegation of professional negligence.

## 6.0 Conclusion and Recommendations

This study has answered the research question and has achieved its objective to compare the legislative reform of admission by apologetic discourse undertaken by six Common Law jurisdictions, i.e. the UK, Republic of Ireland, Australia, Canada, USA and Hong Kong SAR. The findings of this research are limited to the comparative analysis of the definition, scope and principles of protection of apology, and procedures that have been adopted by the selected jurisdictions. The findings from the comparative analysis can be used to propose a viable legislative reform for admission by apologetic discourse in Malaysia. It is hereby recommended for the legislative reform in Malaysia to cover both substantial and procedural aspects of the reform. Whilst some jurisdictions overlooked the procedural over substantive

aspect of the reform, it is submitted that the procedural component is critical to ensure successful implementation of the reform. It is also recommended for Malaysia to adopt a broad-based approach, covering both medical and non-medical practitioners. Further, it is also recommended for a sui generis legislative reform of admission by apologetic discourse to be undertaken rather than piecemeal and patchwork reforms undertaken in some jurisdictions. In terms of limitation, this study is limited to legislative reform in Common Law jurisdictions. Future research should attempt to analyse similar legislative reform in non-Common Law countries to enable a more holistic approach of protection and promotion of admission by apologetic discourse among professionals from various sectors.

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