

UNIVERSITI TEKNOLOGI MARA

**LEGISLATIVE REFORM OF ADMISSION BY
APOLOGETIC DISCOURSE FOR
PROFESSIONAL NEGLIGENCE AND
MISCONDUCT IN MALAYSIA**

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ABSTRACT

Since mid-21st century there has been a worldwide movement towards legislative reform of the law pertaining to admission by apologetic discourse amongst Commonwealth/Common Law countries. The legislative reform provides a legal solution to the long-standing problem of adverse legal effects of admission by apologetic discourse made by professional practitioners who had breached their duty of care, code of ethics or conducts. Similar problem is reported in Malaysia due to similarity in evidentiary rules, insurance contract clauses and statutory limitation law between Commonwealth/Common Law countries. Despite the growing trend of such reform, Malaysia seems to be left behind. Under existing legal regime, admission by apologetic discourse shall become an admission to negligence and misconduct in Malaysian courts. As a result, tortfeasors and wrongdoers including the professional practitioners are known to avoid from offering apology, that further strained their relationship with clients. Therefore, this thesis aims to propose a viable legislative reform of admission by apologetic discourse for professional negligence and misconduct in Malaysia. To achieve the aim, there are four research questions that have been answered by this thesis from theoretical and pragmatic standpoint. Following the research questions, this thesis examined the legal ramifications of apologetic discourse, explores its underpinning theories, and compares the law and policies from selected countries. A qualitative approach is adopted to collect primary and secondary data to answer the research questions. The research findings of this thesis are reported in six chapters and one concluding chapter. Throughout the chapters, this thesis discussed the underpinning theories, the legal ramifications, various approaches used in the reform and the proposal for a viable legislative reform of admission by apologetic discourse in Malaysia. This thesis explored various theories that support the proposal for legislative reform of admission by apologetic discourse i.e. therapeutic jurisprudence theory, rationale choice theory, game theory, empathy theory and attribution theory. This thesis also conducted semi-structured interviews with respondents from six leading professional bodies in Malaysia for the purpose of investigating the policies and practices of the professional bodies towards admission by apologetic discourse in Malaysia. This thesis compared and analysed the legislative reform of admission by apologetic discourse in the United Kingdom, Republic of Ireland, Australia, Canada, the USA and Hong Kong to determine the extent of protection of admission by apologetic discourse. The comparative analysis found that most jurisdictions have accorded protection to admission by apologetic discourse. The scope of protection varies from one jurisdiction to another. Based on the feedback from the respondents and the comparative analysis, a legislative reform of admission by apologetic discourse comprising of substantive and procedural laws have been proposed in this thesis. It is anticipated that the proposed legislative reform will alter the attitude and approach of the courts and professional practitioners in dealing with admission by apologetic discourse for professional negligence and misconduct in Malaysia.

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CHAPTER ONE

INTRODUCTION

1.1 Research Background

1.1.1 Apologetic Discourse

Apologetic discourse is regarded as a vital component of open disclosure practice among professionals in various sectors and industries. Apologetic discourse is also regarded as ethical social and professional conducts that has become a norm in many societies. It is founded on the duty of candour principle applicable to professional practitioners.¹ In the context of this thesis, apologetic discourse is the acts of apologising, admitting wrongs and expressing regrets following the occurrence of professional negligence and misconduct. Apologetic discourse serves as a remedial behaviour that reduces the negative consequences of the wrongful act and simultaneously restores the wrongdoer's damaged reputation.

Apologetic discourse may take place in a formal setting such as in mediation or arbitration, or in an informal setting such as during consultation or casual/private conversation. During apologetic discourse, a person will recognise that a rule has been

¹ Parker, M., "A Fair Dinkum Duty of Open Disclosure Following Medical Error", (2012) *J Law Med*, 20 (1), 35; Ritchie, J. H., & Davies, S. C. (1995). "Professional Negligence: A Duty of Candid Disclosure?" (1995) *BMJ*, 310, 888. doi:<https://doi.org/10.1136/bmj.310.6984.888>; Finlay, A. J. F., Stewart, C. L., & Parker, M., "Open Disclosure: Ethical, Professional and Legal Obligations, and the Way Forward for Regulation", (2013) *Med J Aust*, 198(8), 445. <https://doi.org/10.5694/mja12.10734>; Ho, B., *The Economics of Apologies: Theory, Experiment, and Application*, Ph.D thesis (Stanford University 2006), Retrieved from <https://www.elibrary.ru/item.asp?id=9412337>; Allan, A., "Apology in Civil Law: A Psycho-Legal Perspective" (2007) *Journal Psychiatry, Psychology and Law*, 14(1), 5.; Macleod, L. H., "A Time for Apologies: The Legal and Ethical Implications of Apologies in Civil Cases" (2008) Retrieved from https://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/report/research_papers/Phase_2_RP/3_Macleod_Apologies.pdf; Smith, N., "The Categorical Apology", (2005) *Journal of Social Philosophy*, 36(4), 473.; Smith, N. (Ed.), "I Was Wrong: The Meanings of Apologies", (2008) New York: Cambridge University Pres.; Smith, N., "Just Apologies: An Overview of the Philosophical Issues", (2013) *Pepp. Disp. Resol. L.J.*, 13(1), 35.; Lin, N., "The Restorative Role of Apology in Resolving Medical Disputes: Lessons from Chinese Legal Culture" (2015), *J Bioeth Inq*, 12(4), 699.; Kassim, P. N. J., & Saleh, M. R., "The Role of Apologies in Resolving Medical Disputes", (2017) *Pertanika J. Soc. Sci. & Hum.*, 25(S), 1.; Arizavi, S., & Choubsaz, Y., "To Use or Not to Use the Shorter Forms: A Corpus-Based Analysis of the Apologetic Expressions "Sorry and I'm sorry" in American Spoken English Discourse", (2018) *Corpus Pragmatics*, 3, 21.