

立法會
Legislative Council

LC Paper No. CB(4)1153/16-17
(These minutes have been seen
by the Administration)

Ref : CB4/BC/3/16

Bills Committee on Apology Bill

Minutes of the first meeting
held on Friday, 24 February 2017 at 10:45 am
in Conference Room 3 of the Legislative Council Complex

Members present : Hon Holden CHOW Ho-ding (Chairman)
Hon James TO Kun-sun
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Paul TSE Wai-chun, JP
Hon Claudia MO
Hon Michael TIEN Puk-sun, BBS, JP
Hon WU Chi-wai, MH
Hon Kenneth LEUNG
Hon Alice MAK Mei-kuen, BBS, JP
Hon Christopher CHEUNG Wah-fung, SBS, JP
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan
Dr Hon Junius HO Kwan-yiu, JP
Hon YUNG Hoi-yan
Dr Hon YIU Chung-yim

Member absent : Hon CHEUNG Kwok-kwan, JP

Public Officers attending : Item II

Department of Justice

Mr Simon LEE
Deputy Law Officer (Civil Law)

Miss Ada CHEN
Senior Assistant Law Officer (Civil Law)

Miss Shandy LIU
Senior Assistant Law Draftsman

Mr William LIU
Senior Government Counsel

Clerk in attendance : Ms Angel WONG
Chief Council Secretary (4)4

Staff in attendance : Mr Bonny LOO
Assistant Legal Adviser 4

Mr KWONG Kam-fai
Senior Council Secretary (4)4

Ms Sandy HAU
Legislative Assistant (4)4

Action

I. Election of Chairman (and Deputy Chairman)

Mr James TO, the member present who had the highest precedence, called for nominations for the chairmanship of the Bills Committee.

2. Dr CHIANG Lai-wan nominated Mr Holden CHOW and the nomination was seconded by Ms Alice MAK. Mr Holden CHOW accepted the nomination. There being no other nomination, Mr Holden CHOW was declared the Chairman of the Bills Committee.

3. Members agreed that there was no need to elect a Deputy Chairman.

II. Meeting with the Administration

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|---------------------------------|---|
| (LC Paper No. CB(3)294/16-17 | -- The Bill |
| File Ref.: CD/MED 012/1 | -- Legislative Council Brief issued by the Department of Justice |
| LC Paper No. LS29/16-17 | -- Legal Service Division Report |
| LC Paper No. CB(4)609/16-17(02) | -- Assistant Legal Adviser's letter dated 6 February 2017 to the Administration |
| LC Paper No. CB(4)609/16-17(03) | -- Background brief prepared by the Legislative Council Secretariat) |

Discussion

4. The Bills Committee deliberated (index of proceedings attached at **Annex**).

Global development of apology legislation

5. In response to Mr CHUNG Kwok-pan's enquiry about the global development of apology legislation, the Administration advised that the three periods of development referred to in the Consultation Paper were set out according to the chronology of apology legislation in other jurisdictions. The first period of development commenced in the 1980s in the United States, the second period began in the early 2000s in Australia and the third period took place in Canada in the late 2000s. The most recent development took place in Scotland when its apology legislation was enacted in early 2016. The trend of the global development was moving towards a wider coverage embracing full apology (as opposed to partial apology) and a more general application (extending to non-criminal proceedings). It was hoped that by studying the global development of apology legislation, Hong Kong could learn from the different experiences of other jurisdictions and consider what was the best way forward for Hong Kong.

Scope and applicability of the Apology Bill

6. Members noted that the proposed Apology Bill ("the Bill") would apply to civil and other non-criminal proceedings, but not criminal proceedings.

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Dr CHIANG Lai-wan and Ms Claudia MO enquired about the application of the Bill to traffic accidents which might involve both civil and criminal proceedings. Ms Alice MAK asked whether the Bill would apply to the disciplinary proceedings before the Medical Council of Hong Kong or the medical review panel proceedings of the Hospital Authority, and the subsequent criminal prosecutions of medical negligence. Dr YIU Chung-yim sought further information on clause 11(c) which provided that the Apology Ordinance, if enacted, would not affect the operation of the Mediation Ordinance (Cap. 620).

7. The Administration explained that the Bill would not apply to criminal proceedings which served a wide public interest in, amongst other things, achieving a measure of deterrence and punishment. Hence, the Bill would not apply to the criminal proceedings arising from traffic accidents and medical malpractice. It was possible that traffic incidents might give rise to criminal offence. People involved in these cases should well understand the differences between civil and criminal proceedings. The Administration further advised that the Bill would apply to the disciplinary inquiries before the Medical Council of Hong Kong and the medical review panel proceedings of the Hospital Authority. This application would not affect or undermine their regulatory functions and investigative powers. If the Bill did not apply to disciplinary proceedings, its efficacy would be impaired because professionals might be less likely to apologize for the fear that their apology might be used against them in disciplinary proceedings arising from alleged malpractice. Regarding Dr YIU Chung-yim's enquiry about the Mediation Ordinance, the Administration advised that the Mediation Ordinance contained provisions for the Court to grant leave for mediation communication to be disclosed or admitted as evidence. For avoidance of doubt, the Bill expressly stated that the operation of the Mediation Ordinance would not be affected.

Factual information conveyed in an apology

8. Noting that no enacted apology legislation in any overseas jurisdictions had made reference to statements of fact in the definition of an apology, Dr CHIANG Lai-wan enquired about the reason for including statements of fact as part of an apology in the Bill. The Administration advised that an apology with statements of fact would help the aggrieved party understand the underlying circumstances of the incident, and could thus be more likely to be accepted by the aggrieved party. If statements of fact were protected, the party concerned would be more willing to make full apologies (as opposed to bare or partial apologies), which would align with the objective of encouraging people to make fuller apologies to facilitate resolution of disputes.

Decision maker's discretion to admit statements of fact as evidence

9. Members expressed grave concern about the legal uncertainty arising from the admissibility of statements of fact in an apology as evidence at the decision maker's discretion under clause 8(2). Mr James TO was concerned about the guiding principles, if any, for the Court to determine whether an apology mixed with a statement of fact would be used as evidence of admission of fault or liability on the part of the apology maker. Mr WU Chi-wai was concerned as to whether the admission of statements of fact at the decision maker's discretion would affect a "without prejudice" settlement; whether there was a need to retain such discretion; and whether there were principles guiding the decision maker in dealing with a statement of fact which was closely mingled with an express or implied admission of fault or liability with reference to an example cited in Assistant Legal Adviser's letter to the Administration dated 6 February 2017. Mr Kenneth LEUNG asked whether the Administration would consider full protection of statements of fact in an apology without any discretion retained by the Court. Dr CHIANG Lai-wan said that she would not support the inclusion of the decision maker's discretion for admission of statements of fact under clause 8(2). The Chairman noted that the inclusion of an exceptional case where the apology was the only piece of evidence of fault or liability was an issue of concern surrounding the debate of the Apologies (Scotland) Bill and the reference to statements of fact had been omitted from the Apologies (Scotland) Act 2016 that was eventually enacted, and sought further information on this issue.

10. The Administration advised that the Apologies (Scotland) Bill first introduced into the Scottish Parliament for debate sought to protect a statement of fact in an apology. However, when the Bill was enacted, this protection was removed because of the concern that such protection might affect a claimant's right to remedies particularly when the statement of fact in an apology was the only evidence available. Having regard to the responses received in the first round consultation and the development of the Apologies (Scotland) Bill, the Steering Committee on Mediation ("the Steering Committee") set out three alternative options which might be adopted to address the concern on protection of statements of fact for public views during the second round consultation. The first approach was full protection of statements of fact without discretion to the decision maker to admit a statement of fact contained in an apology as evidence in applicable proceedings; the second approach was to omit wordings regarding statements of fact from the apology legislation and whether statements of fact would be protected as part of the apology was to be determined by the decision maker on a case by case basis; and the third approach was to treat statements of fact as part of the apology but with discretion to the decision maker to admit such statements of fact as evidence in exceptional cases. Equal number of respondents supported the first approach and the third approach. For the first approach, the Steering Committee was of the view that a blanket protection to

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all statements of fact accompanying an apology might unduly affect a claimant's right to a fair hearing and this might not be rationally connected with the legitimate aim of the Bill. Hence, the Steering Committee was concerned that the relevant provision might be struck down by the Court for being unconstitutional because of the potential violation of the right to a fair hearing guaranteed by the Basic Law and the Hong Kong Bill of Rights. For the third approach, it appeared that with the discretion given to the Court or the tribunal to admit the otherwise inadmissible statements of fact as evidence in an exceptional case having regard to all the circumstances when it was just and equitable to do so, the potential infringement of a claimant's right to a fair hearing could be avoided. As such, the third approach with greater flexibility was adopted as this approach would strike a proper balance between a claimant's right to a fair hearing and the policy objective of the Bill. Regarding Mr WU Chi-wai enquiries, the Administration advised that the Bill would not affect the "without prejudice" settlement. In order to determine whether part of an expression of regret, sympathy or benevolence was an admission of fault or liability, or a statement of fact, for the purposes of clauses 4(3) and 8(2), it was necessary to consider the entire expression in its context.

11. Dr Priscilla LEUNG opined that the Administration should re-consider the issues related to clause 8(2) with regard to members' strong views on the clause. The Administration responded that the Steering Committee had already studied the pros and cons of the three alternative options in addressing the concern on this issue before finalizing its recommendations. However, members' views would be noted for consideration.

Issues related to drafting of the Bill

12. Ms YUNG Hoi-yan suggested that the Administration should define what would constitute a sincere apology under clause 4, provide definitions of judicial, arbitral, administrative, disciplinary and regulatory proceedings under clause 6 and spell out all possible exceptional cases where discretion could be exercised under clause 8(2). The Administration advised that clause 4 had already provided a wide definition of "apology" to allow sufficient flexibility to an apology-maker in deciding on a suitable expression of apology. In addition, no respondents had requested for a definition of sincere apology during the two rounds of consultation. Whether an apology made was sincere would depend on the circumstances of each case. The Administration, therefore, did not see the need to define sincere apology under the Bill. Regarding clause 6, the Administration considered that the terms "judicial, arbitral, administrative, disciplinary and regulatory proceedings" were self-explanatory and it was not necessary to give definitions in the Bill. On the concern about clause 8(2), the Administration explained that as it was expected clause 8(2) would rarely be invoked, it did not have further examples to illustrate what would constitute "an exceptional case", apart from that

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already given in clause 8(2), i.e. where there was no other evidence for determining fault, liability or any other issue. However, the Administration could not preclude other presently unforeseeable circumstances which might be considered an "exceptional case" within the meaning of clause 8(2).

13. In response to the Administration's explanation on clause 8(2), Mr Kenneth LEUNG suggested that the scope of clause 8(2) should be narrowed down to the effect that the discretion was only exercisable where the apology was the only evidence of fault or liability, by amending clause 8(2) as:

~~"However, if in particular applicable proceedings there is an exceptional case (for example, w~~Where there is no other evidence available for determining an issue), the decision maker may exercise a discretion to admit a statement of fact contained in an apology as evidence in the proceedings, but only if the decision maker is satisfied that it is just and equitable to do so, having regard to all the relevant circumstances."

In this regard, Mr LEUNG indicated that he would propose a Committee stage amendment to the Bill.

14. Dr YIU Chung-yim considered it necessary to specify expressly that "any other body" in clause 8(4) would cover professional institutes or statutory bodies established under different ordinances, such as the Buildings Ordinance (Cap. 123) and the Estate Agents Ordinance (Cap. 511). The Administration responded that clause 6(1)(a) had already provided that the Bill would cover, among others, all disciplinary and regulatory proceedings, whether or not they were conducted under an enactment. Hence, the disciplinary proceedings of professional institutes or statutory bodies established under different ordinances were applicable proceedings for the purposes of the Bill.

15. Dr Junius HO was concerned that the making of apologies might consequently affect insurance contracts or indemnity available to the apology maker if legal liability was established based on the statement of fact which was the only evidence available under clause 8(2), and thus discouraging people from making apologies with disclosure of fact. For clarity, Dr HO considered it desirable to have a provision under clause 10 to expressly specify that the decision maker's discretion under clause 8(2) would not affect any insurance contracts or indemnity available to an apology maker. The Administration noted Dr HO's suggestion and assured members that insurance contracts or indemnity would not be affected under such circumstances. Moreover, clause 8(2) and clause 10 were dealing with different matters, and clause 8(2) had no bearing on clause 10.

Action

16. Dr Priscilla LEUNG suggested that clause 13 should be amended to avoid the perception that the Ordinance would only apply to the Government. The Administration noted Dr LEUNG's views and responded that the current wording had been commonly used in other legislation.

Follow-up actions by the Administration

17. The Administration was requested to:

- (a) provide a summary of court cases in the past to illustrate the guiding principles for determining whether an apology mixed with a statement of fact would be used as evidence of admission of fault or liability on the part of the apology maker;
- (b) in respect of the current drafting of clause 8(2), provide its legal opinion in detail on how the protection of statements of fact without the decision maker's discretion might lead to potential violation of the Basic Law and the Hong Kong Bill of Rights;
- (c) consider specifying explicitly that clause 10 would apply to the "exceptional case" under clause 8(2); and
- (d) consider fine-tuning the drafting of clause 13 to avoid the perception that the Ordinance would only apply to the Government.

(Post-meeting note: The Administration's written response was issued to members vide LC Paper No. CB(4)669/16-17(03) on 9 March 2017.)

III. Any other business

Invitation of views

18. Members' views on the need to invite the public to give views on the Bill would be sought at the next meeting.

Next meeting

19. Members agreed that clause-by-clause examination of the Bill would commence at the next meeting.

20. There being no other business, the meeting ended at 12:45 pm.

**Proceedings of the first meeting of the
Bills Committee on Apology Bill
on Friday, 24 February 2017 at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker(s)	Subject(s)	Action required
Agenda Item I – Election of Chairman (and Deputy Chairman)			
000121-000404	Mr James TO Dr CHIANG Lai-wan Ms Alice MAK Mr Holden CHOW	Election of Chairman	
Agenda Item II – Meeting with the Administration			
000405-001954	Chairman Administration	Briefing by the Administration on the Apology Bill ("the Bill")	
001955-002428	Chairman Dr CHIANG Lai-wan Administration	Discussion on the application of the Bill to car accidents and the inclusion of statements of fact in an apology	
002429-002954	Chairman Mr CHUNG Kwok-pan Administration	Mr CHUNG Kwok-pan's enquiry and the Administration's response regarding the development of apology legislation in other jurisdictions	
002955-003425	Chairman Mr James TO Administration	Discussion on the admissibility of evidence of apology The Administration was requested to provide a summary of court cases in the past to illustrate the guiding principles for determining whether an apology that mixed with a statement of fact would be used as evidence of admission of fault or liability on the part of the apology maker	Para. 17(a) of the minutes refers
003426-003947	Chairman Ms YUNG Hoi-yan Administration	Discussion on the meaning of apology under clause 4, applicable proceedings under clause 6 and the exceptional case in clause 8(2) of the Bill	
003948-004426	Chairman Mr Kenneth LEUNG Administration	Discussion on the admissibility of evidence of apology under exceptional cases	
004427-005001	Chairman Ms Alice MAK Administration	Ms Alice MAK's enquiry and the Administration's response regarding the applicable proceedings of the Bill	
005002-005637	Chairman Mr WU Chi-wai The Administration	Discussion on the admissibility of evidence of apology	

Time marker	Speaker(s)	Subject(s)	Action required
005638-010208	Chairman Ms Claudia MO Administration	Discussion on the scope of the Bill	
010209-010938	Chairman Dr Junius HO Administration	Discussion on the admissibility of evidence of apology under exceptional case and its possible implication on insurance contracts	
010939-011334	Chairman Dr YIU Chung-yim Administration	Discussion on the meaning of "decision maker" and reasons for the Mediation Ordinance (Cap. 620) not being affected by the Bill	
011335-012844	Chairman Administration Dr CHIANG Lai-wan	Discussion on the admissibility of evidence of apology under exceptional cases	
012845-013348	Chairman Mr Kenneth LEUNG Administration	Discussion on the drafting of clause 8(2) Mr LEUNG's indication of his intention to propose amendment to clause 8(2) to narrow down the circumstance of exceptional case	
013349-013606	Chairman Dr Junius HO Administration	Discussion on the drafting of clauses 8(2) and 10 The Administration was requested to consider specifying explicitly that clause 10 would apply to the "exceptional case" under clause 8(2)	Para. 17(c) of the minutes refers
013607-014435	Chairman Dr Priscilla LEUNG Administration	Recapitulation of the past deliberation by the Panel on Administration of Justice and Legal Services regarding the admissibility of evidence of apology under exceptional cases	
014436-015127	Chairman Dr CHIANG Lai-wan Mr Kenneth LEUNG Administration	Discussion on the admissibility of evidence of apology under exceptional cases and the drafting of clause 8(2)	
015128-015553	Chairman Dr Priscilla LEUNG Administration	Discussion on the drafting of clause 13 The Administration was requested to consider fine-tuning the drafting of clause 13 to avoid the perception that the Ordinance will only apply to the Government	Para. 17(d) of the minutes refers
015554-015835	Chairman Dr Priscilla LEUNG	In respect of the Administration's considerations for the current drafting of clause 8(2) (i.e. providing discretion to admit statement of fact contained in an apology as evidence under exceptional case), the Administration was requested to provide its detailed legal opinion on how the protection of statements of fact without the discretion might lead to its possible contravention of the Basic Law or the Hong Kong Bill of Rights.	Para. 17(b) of the minutes refers

Time marker	Speaker(s)	Subject(s)	Action required
Agenda Item III – Any other business			
015836-020104	Chairman Dr Priscilla LEUNG	Meeting arrangement	

Council Business Division 4
Legislative Council Secretariat
2 June 2017