

立法會
Legislative Council

LC Paper No. CB(4)1154/16-17
(These minutes have been seen
by the Administration)

Ref : CB4/BC/3/16

Bills Committee on Apology Bill

Minutes of the second meeting
held on Wednesday, 15 March 2017 at 4:30 pm
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 WU Chi-wai, MH
Hon Kenneth LEUNG
Hon Alice MAK Mei-kuen, BBS, JP
Hon Dennis KWOK Wing-hang
Hon Christopher CHEUNG Wah-fung, SBS, JP
Hon CHUNG Kwok-pan
Hon YUNG Hoi-yan
Hon CHEUNG Kwok-kwan, JP
Dr Hon YIU Chung-yim

Members absent : Hon Michael TIEN Puk-sun, BBS, JP
Dr Hon CHIANG Lai-wan, JP
Dr Hon Junius HO Kwan-yiu, 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. Application for late membership

(LC Paper No. CB(4)673/16-17(01) -- Letter dated 2 March 2017 from
Hon Dennis KWOK Wing-hang)

The Bills Committee accepted Mr Dennis KWOK's application for late membership.

II. Meeting with the Administration

(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

Action

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

LC Paper No. CB(4)669/16-17(01) -- Administration's reply to Assistant Legal Adviser's letter dated 6 February 2017)

Issues arising from previous meeting

(LC Paper No. CB(4)669/16-17(02) -- List of follow-up actions arising from the discussion at the meeting on 24 February 2017

LC Paper No. CB(4)669/16-17(03) -- Administration's response to issues raised at the meeting on 24 February 2017)

Discussion

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

Enactment of apology legislation in Hong Kong

3. Mr James TO doubted the need for the proposed Apology Bill ("the Bill") in Hong Kong. He took the view that the Bill might encourage insincere and strategic apologies as apology makers clearly knew there would be statutory protection for their apologies as well as any accompanying statements of fact, which might in turn reduce the chance of fact-finding. The plaintiff being the disadvantaged should be protected. However, if statements of fact were inadmissible, a plaintiff's claim might be adversely affected or even be stifled. He was therefore inclined towards admission of apology as evidence as a general rule, but would allow the decision maker to exercise a discretion to exclude evidence of an apology only when the apology maker would be unfairly affected by its admission. He also questioned whether the application of the Bill to the Government was one of the Administration's considerations for drafting clause 8(2). The Administration assured members that no political consideration was involved in the drafting of clause 8(2). The objective of the Bill was simply to facilitate early and cost-effective settlement of disputes. The

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Bill did not mean that an apology would allow a defendant to avoid liability. To safeguard a plaintiff's right, the Bill had included a provision in clause 11(a) to the effect that the plaintiff would have the same access to evidence and information disclosable in discovery or other similar procedure, which the plaintiff could use to prove liability independently of an excluded apology.

4. Noting that only 75 and 40 respondents had addressed the issue of whether factual information conveyed in an apology should be protected by the Bill during the first and second round consultations respectively, Mr Kenneth LEUNG was concerned that the general public might not well understand the Bill and how their rights would be protected/affected by the Bill, if enacted. In this regard, the Administration advised that education and publicity programmes would be launched to facilitate the public in understanding the Bill.

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

5. Ms Claudia MO, Dr Priscilla LEUNG, Mr CHEUNG Kwok-kwan, Ms YUNG Hoi-yan and the Chairman supported the Bill's objective of promoting a culture of making apologies for reaching settlement. However, they raised concerns about the uncertainties that might arise from the admission of statements of fact as evidence in exceptional cases at the decision maker's discretion under clause 8(2), which would inhibit the making of apologies with disclosure of facts and thus defeat the objective of the Bill. Ms MO considered that the terms of "exceptional case" and "discretion" and the wide definition of "decision maker" under clause 8 would create uncertainty and inhibit the making of apologies. Dr LEUNG requested the Administration to take members' views seriously. She considered it more desirable to omit exceptional case and the decision maker's discretion from the Bill to create certainty. Any infringement of a claimant's rights to a fair hearing could be dealt with through other means. Mr CHEUNG was of the view that with the current drafting of clause 8(2) and the uncertainty associated with it, lawyers would remain reluctant to advise their clients to apologize, which would defeat the purpose of the Bill. Also, the scope of the decision maker's discretion should be clearly defined to allay the worry of the public. Ms YUNG considered that clause 7(1)(a) and clause 8(2) might be contradictory. The discretion retained by the Court might lead to litigations arguing what constituted an exceptional case. The Chairman opined that given the wide coverage of decision maker (whether a court, a tribunal, an arbitrator or any other body or individual), the public might worry when and how decision makers, especially those other than judges, would exercise the discretion to admit statements of fact.

6. 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 Apologies (Scotland) Bill was enacted, the protection was removed because of the concern that such

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protection might affect a claimant's right to remedies particularly when the statement of fact in an apology was the only evidence available to establish liability. 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 in the second round consultation. The first approach was full protection of statements of fact without any 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 altogether 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 a discretion to the decision maker to admit such statements of fact as evidence in exceptional cases and where it was just and equitable to do so, having regard to all the relevant circumstances. Equal number of respondents supported the first approach and the third approach. The Steering Committee was of the view that the advantage of the first approach was clarity and certainty, in that people who intended to make apologies would know clearly in advance the legal consequence. However, a blanket protection to all statements of fact accompanying an apology regardless of the circumstances 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 infringement of the rights of a claimant 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 decision maker 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. There was, however, concern that such discretion might lead to uncertainty. To minimize the uncertainty, the Bill therefore provided that the decision maker might only exercise the discretion to admit the statements of fact in an exceptional case, for example, where the statement of fact was the only piece of evidence available and only when the decision maker was satisfied that it would be just and equitable to do so, having regard to all the relevant circumstances. By doing so, a proper balance would be struck between a claimant's right to a fair hearing and the policy objective of the Bill. Furthermore, it was anticipated that such discretion would be rarely invoked. Also, discretion of this nature by the decision maker was not uncommon in civil proceedings under common law and statutes. All decision makers should know clearly when and how to exercise the discretion. The third approach was therefore adopted.

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7. The Chairman urged the Administration to take note of members' concerns and further consider the drafting of clause 8(2) to reduce uncertainty.

Issues related to the drafting of the Bill

8. Referring to the Administration's written response regarding the current drafting of clause 13 "This Ordinance applies to the Government", the Legal Adviser to the Bills Committee supplemented that some older ordinances which applied to the Government would provide that "This Ordinance binds the Government". Examples included the Personal Data (Privacy) Ordinance (Cap. 486), the Sex Discrimination Ordinance (Cap. 480), etc.

Follow-up actions by the Administration

9. Mr James TO cited a scenario where a plaintiff in civil proceedings had requested the defendant who wished to make an apology to do so via two separate letters whereby one was a bare apology (i.e. an expression of regret, sympathy or benevolence) without facts while the other was a pure statement of fact without any expression of regret, sympathy or benevolence. In accordance with the provisions of the Bill as currently drafted, the Administration was requested to:

- (a) clarify whether the second-mentioned letter with a pure statement of fact would be treated as part of the apology within the meaning of clause 4(3)(b) and be protected by the Bill;
- (b) specify explicitly in the Bill whether such pure statement of fact contained in a separate document from the first-mentioned letter of apology could or could not be admitted as evidence against the defendant in applicable proceedings; and
- (c) explain how to address the concerns about the difficulties that a plaintiff might encounter in requesting the defendant to provide a pure statement of fact if the defendant only disclosed facts as part of an apology so that the facts conveyed would be protected by the Bill and could not be relied on as evidence against the defendant in applicable proceedings.

(Post-meeting note: The Administration's written response was issued to members vide LC Paper No. CB(4)1038/16-17(01) on 16 May 2017.)

Action

Invitation of views

10. Members agreed that deputations would be invited to express their views on the Apology Bill at the next meeting.

III. Any other business

11. There being no other business, the meeting ended at 6:20 pm.

Council Business Division 4
Legislative Council Secretariat
2 June 2017

**Proceedings of the second meeting of the
Bills Committee on Apology Bill
on Wednesday, 15 March 2017 at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

| Time marker | Speaker(s) | Subject(s) | Action required |
|---|---|--|-----------------------------------|
| Agenda Item I – Application for late membership | | | |
| 000000 – 000256 | Chairman | Application for late membership | |
| Agenda Item II – Meeting with the Administration | | | |
| 000257 - 000444 | Chairman Mr Kenneth LEUNG | Invitation of public views | |
| 000445 - 000559 | Chairman Assistant Legal Adviser 4 ("ALA4") Administration | Members noted the Administration's written response to ALA4's letter dated 6 February 2017 [LC Paper No. CB(4)669/16-17(01)] | |
| 000600 - 001613 | Chairman Mr CHUNG Kwok-pan Administration | Administration's briefing on "Item 1 – Apology and Statements of Fact" of its written response to issues raised at the meeting on 24 February 2017 [LC Paper No. CB(4)669/16-17(03)] | |
| 001614 - 002549 | Chairman Administration | Administration's briefing on "Item 2 – Clause 8(2) and Human Rights" of its written response to issues raised at the meeting on 24 February 2017 [LC Paper No. CB(4)669/16-17(03)] | |
| 002550 - 005100 | Mr James TO Chairman Administration ALA4 | Discussion on the enactment of the Apology Bill ("the Bill") and the drafting of clause 8(2) of the Bill The Administration was requested to provide written response to Mr TO's concerns with reference to the scenario he cited | Paragraph 9 of the minutes refers |
| 005101 - 005714 | Mr Kenneth LEUNG Administration | Discussion on how the public would better understand the Bill and their rights being protected/affected by the Bill, if enacted | |
| 005715 - 014026 | Ms Claudia MO Dr Priscilla LEUNG Mr CHEUNG Kwok-kwan Chairman Ms YUNG Hoi-yan Administration | Discussion on the uncertainties that might arise from the admission of statements of fact as evidence in exceptional cases at the decision maker's discretion under clause 8(2) of the Bill | |

| Time marker | Speaker(s) | Subject(s) | Action required |
|---|------------------------------------|--|------------------------|
| 014027-014253 | Chairman Administration | Administration's briefing on "Item 3 – Clause 8(2) and Clause 10" of its written response to issues raised at the meeting on 24 February 2017 [LC Paper No. CB(4)669/16-17(03)] | |
| 014254-014617 | Administration Chairman ALA4 | Administration's briefing on "Item 4 – Clause 13" of its written response to issues raised at the meeting on 24 February 2017 [LC Paper No. CB(4)669/16-17(03)] | |
| Agenda Item III – Any other business | | | |
| 014618-014802 | Chairman | Closing remarks | |

Council Business Division 4
Legislative Council Secretariat
2 June 2017