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LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (3918 4525)

6 February 2017

Mr William LIU
Senior Government Counsel
Civil Division
Department of Justice
6/F, Main Wing
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Dear Mr LIU,

Apology Bill

To assist our scrutiny of the legal and drafting aspects of the above Bill, we should be grateful for your clarification of the following issues:

Clause 4

- (a) Please provide further examples to illustrate what would constitute "an expression of the person's regret, sympathy or benevolence".
- (b) It is noted that the expression may be oral, written or by conduct (clause 4(2)). Would such an expression include "an undertaking to look at the circumstances giving rise to [the matter] with a view to preventing a recurrence" (see section 3 of the *Apologies (Scotland) Act 2016*) and/or a benevolent gesture such as an "offer or promise to pay medical, hospital or similar expenses occasioned by [the matter]" (see *Washington Revised Code* RCW 5.64.010)?

- (c) Please confirm whether the word "written" in clause 4(2) is intended to cover an apology made by way of an electronic record (e.g. email, SMS message, WhatsApp, social media etc.) by virtue of section 5(2) of the Electronic Transactions Ordinance (Cap. 553).
- (d) Is clause 4(5) redundant, because clause 5 already sets out clearly the apologies to which the Bill would and would not apply? It is noted that clause 4(5) was not in the revised draft Bill at Annex 4 to *Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations* issued in November 2016 ("Final Report").

Clauses 5(2) and 11(a)

- (e) Please explain the relationship between clauses 5(2) and 11(a):
 - (i) If a party ("A") to applicable proceedings has in his or her possession, custody or power a document (e.g. an email) containing an apology made by or on behalf of A on or after the commencement date of the Bill, must A disclose or produce the document in the proceedings under clause 11(a)?
 - (ii) If so, would the disclosure or production of such document in judicial, arbitral, administrative, disciplinary or regulatory proceedings constitute the filing or submission of a document or the adducing of evidence *by* A in applicable proceedings for the purposes of clause 5(2)(a) or (c), such that A's apology therein could be admitted as evidence for determining fault, liability or any other issue to A's prejudice?
 - (iii) Paragraph 6 of the Explanatory Memorandum states that "an apology may be taken into account in [applicable] proceedings if the apology maker so decides". If clause 5(2)(a) or (c) is *not* intended to cover an apology made in a document *required* to be disclosed or produced in discovery or other similar procedure in applicable proceedings (as opposed to an apology made in a pleading, witness statement, submission etc. *voluntarily* filed, submitted or adduced as evidence by the apology maker in the proceedings), should this policy intent be clearly reflected in clause 5?
- (f) Please respond to the queries raised in paragraph 5.1(2) of the Final Report as to whether:

- (i) clauses 7 and/or 10 (now 11) would apply to documentary evidence of an apology or admission of liability disclosed or produced upon discovery or a similar procedure; and
 - (ii) such evidence would be admissible in applicable proceedings if the apology/admission has never in fact been published or disclosed to its intended recipient or any other third party?
- (g) The word "documents" is not defined in the Bill. Under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), "document" means any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means. Is it necessary to define "document" to include an electronic record (see, for example, section 35A(4) of the Telecommunications Ordinance (Cap. 106)) for the purposes of clauses 5(2)(a) and 11(a)?
- (h) Please also address the concerns raised in paragraph 5.1(5) of the Final Report that the word "documents" in clause 11(a) may not be clear or wide enough to cover all the information that is subject to a regulator's information-seeking powers.

Clause 6 and Schedule

- (i) Paragraph 5.10 of the Final Report describes "regulatory proceedings" as those "involving the exercise of regulatory power of a regulatory body *under an enactment*", but clause 6(1)(a) appears to cover "judicial, arbitral, administrative, disciplinary and regulatory proceedings (*whether or not conducted under an enactment*)" (italics added). Please clarify whether the Bill is intended to apply to proceedings by way of non-statutory self-regulation by industry bodies such as the Travel Industry Council.
- (j) Please clarify whether the following proceedings of the Legislative Council ("LegCo") or its committees (e.g. the Public Accounts Committee, the Investigation Committee or a Select Committee) are intended to fall within the meaning of "applicable proceedings" under clause 6(1)(a) or (b):
 - (i) proceedings where LegCo or its committee exercises the powers under section 9 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) to order any person to attend before it, to give evidence and to produce documents;

- (ii) proceedings where no such powers are exercised.
- (k) If the proceedings of LegCo or its committees as aforesaid are capable of falling within the definition of "applicable proceedings" under clause 6(1), please consider whether it would accord with the object of the Bill to specify such proceedings in the Schedule (along with those conducted under the Commissions of Inquiry Ordinance (Cap. 86), the Control of Obscene and Indecent Articles Ordinance (Cap. 390) and the Coroners Ordinance (Cap. 504)) so that the Bill would not apply to any such proceedings on the basis that they are also fact-finding in nature without determining any question of civil liability (see paragraph 3.3 of the Final Report).

Clause 8

- (l) Please provide further examples to illustrate what would constitute "an exceptional case" within the meaning of clause 8(2).
- (m) Paragraph 4.16 of the Final Report suggests that the court or tribunal should retain a "discretion to admit statements of fact conveyed in apologies as evidence of fault or liability". Does the expression "statement of fact" bear the same meaning under clauses 4(3)(b) and 8(2)? Clause 4(3) seems to distinguish between: (a) an express or implied admission of fault or liability; and (b) a statement of fact. Are they mutually exclusive or do they overlap?
- (n) Under clause 8(2), how would the decision maker deal with a statement of fact which is closely mingled with an express or implied admission of fault or liability? For example:
 - (i) An apologetic taxi driver describes to the other driver how the collision has occurred and says that he has been working overnight without rest and may have dozed off at the wheel;
 - (ii) After a collision, the driver tells the Police "I'm sorry I just wasn't paying attention": see paragraph 10.6(1) of *Enactment of Apology Legislation in Hong Kong: Report and 2nd Round Consultation* issued in February 2016 ("2nd Paper");
 - (iii) The letter in *Robinson v Cragg* (2010) (see paragraph 10.6(3) of the 2nd Paper) stated: "...our registration of the Discharges was through inadvertence and I apologize for doing so.". The letter also contained some other admissions of fact; and

- (iv) In *Cormack v Chalmers* (2015) (see paragraph 4.2(18) of the Final Report), "Shannon told Asen that she was sorry and she could not forgive herself ... she always tells people not to swim behind the dock and has told her father not to go swimming there. Shannon regretted not telling Rumiana."

In dealing with each of the above statements under clause 8(2), would the decision maker admit the entire statement as evidence, or exclude or redact any expression of regret and/or those parts tending to express or imply an admission of fault or liability?

- (o) How do you address concerns about the difficulties that a decision maker (including one who is not legally trained) in applicable proceedings may encounter in extracting or segregating facts from an apology or admission of fault (see paragraph 10.6(2) and (3) of the 2nd Paper and paragraph 4.2(2) and (6) of the Final Report)?
- (p) What matters would the decision maker take into account in determining whether it would be "just and equitable" to admit a statement of fact contained in an apology as evidence in applicable proceedings (see paragraph 4.2(6) of the Final Report)? It is noted that paragraph 4.16 of the Final Report states that the relevant circumstances to which the decision maker must have regard include "where the other parties consent to the admission of the statement of fact and whether there exists any other evidence that the claimant has or may obtain (e.g. through discovery and administration of interrogatories) to establish his claim". For the sake of clarity, should these matters be specified in clause 8 (see, for example, section 10(2) of the Mediation Ordinance (Cap. 620))?
- (q) Under clause 8(3), clause 8 would apply "despite anything to the contrary in any rule of law or other rule concerning procedural matters". It is noted that the Bill would also apply to proceedings where rules of evidence do not apply (see, for example, section 31 of the Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap. 161E)). To preclude any argument that clauses 7 and/or 8 are "rules of evidence" which do not bind or apply to such proceedings, is it necessary to provide specifically that clauses 7 and/or 8 would apply regardless of whether the rules of evidence apply to any particular applicable proceedings or not?

Clause 10

- (r) Clause 10 would apply "despite anything to the contrary in any rule of law or agreement" (clause 10(3)). Is it necessary to add an explicit provision prohibiting the parties to a contract of insurance or indemnity from contracting out of the Bill by making any such contractual term null and void (see paragraphs 8.2(5) and 8.6 of the 2nd Paper and section 70 of the Employment Ordinance (Cap. 57))?

Clause 12

- (s) According to paragraph 3.6(11) of the Final Report, the Chief Executive ("CE") in Council may take into consideration all relevant factors before making any amendments to the Schedule. What are these factors? Should they be specified under clause 12?
- (t) Please confirm whether a notice made by CE in Council to amend the Schedule would be subject to scrutiny by LegCo under Cap. 1.

Chinese text

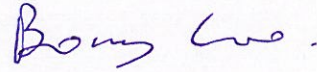
- (u) In clause 2, "disputes" is proposed to be rendered as "爭端", while the same word has previously been rendered as "爭議" in other Ordinances, such as section 19(1) of the Arbitration Ordinance (Cap. 609) and section 3(a) of Cap. 620. Please explain why a different rendition is proposed under clause 2.
- (v) In clause 4(1), "regret"¹ is proposed to be rendered as "歉意、懊悔、遺憾".² Please explain why three different terms are used to refer to "regret", and the difference (if any) between those terms.
- (w) Clauses 7(1)(b) and 8(1) and (2) propose to render "issue" as "爭議事項", whereas "issue" has previously been rendered as "爭論點" in other Ordinances, such as Order 16, rule 1(1)(c) of the Rules of the District Court (Cap. 336H) and section 15(1)(b) of Cap. 609. Please explain why a different rendition is proposed in the Bill.

¹ According to *Shorter Oxford English Dictionary* (Sixth Edition), "regret" means (an expression of) complaint, lament; a feeling of sorrow, disappointment, or pain due to some external circumstance or to reflection on something one has or has not done; and an expression of disappointment or sorrow at one's inability to do something.

² According to 漢語大詞典, these terms mean 抱歉的心情, 因過失而自恨 and 不稱心、大可惋惜 respectively.

We look forward to receiving your reply in both languages as soon as possible.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Bonny Loo".

(Bonny LOO)
Assistant Legal Adviser

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