

Bills Committee on Apology Bill
Government's response to the list of follow-up actions arising from the discussion
at the meeting on 15 March 2017

This paper sets out the Government's response to the matters raised by a Member in relation to the Apology Bill ("Bill") at the meeting on 15 March 2017.

2. An example was cited 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 facts without any expression of regret, sympathy or benevolence.

3. Before responding to the three specific questions, the Government would stress the following in order to further explain the Bill:

- (a) The Bill does not compel people to make apologies and a plaintiff cannot rely on the Bill to compel a defendant to apologise.
- (b) The objective of the Bill is to encourage people to make sincere and timely apologies which are more effective in preventing the escalation of disputes and facilitating their amicable resolution.
- (c) It is for the apology maker to decide whether, and if so how an apology is to be made, e.g. whether the apology should include an admission of fault or liability and whether facts related to the incident should also be disclosed. We are of the view that the fuller the apologies, the more effective they are in preventing the escalation of disputes and facilitating their amicable resolution.
- (d) While an apology may prevent the escalation of disputes and facilitate their amicable resolution, depending on the circumstances, an apology alone (however sincere and timely it is) may not be sufficient to lead to a full and final settlement of the dispute. In some cases, monetary compensation as part of the settlement package is also expected and, in these scenarios, the acceptance of the apology by the plaintiff would pave the way for the negotiation of compensation and possibly lead to a full and final settlement of the dispute.
- (e) While the statements of fact conveyed in apologies are protected by the Bill (subject to the discretion of the decision maker to admit them

as evidence in an exceptional case where it is just and equitable to do so), it does not prevent a party to the civil claim from obtaining the evidence related to those facts by other independent means, e.g. during the discovery process in civil proceedings where parties have a duty to produce relevant evidence to each other even though such evidence is not favourable to the party's case. In other words, for documents or information that are/is to be disclosed in civil claims under the existing law, they should still be disclosed and would not be affected by the Bill.

- (f) To address Members' concern about the uncertainty arising from the discretion of the decision maker to admit statements of fact in apologies, we have prepared a more detailed paper to give further explanation in this regard, see **Annex**.

4. In relation to the three specific questions, the Government reply as follows:

- (a) In response to question (a): whether the second-mentioned letter with a pure statement of facts would be treated as part of the apology depends on the contents of the letter and the context, e.g. the wordings of the letter, the circumstances under which the letter was written, etc. While in our preliminary view, an independent letter containing only statements of fact, on its own, appears not to be part of the apology, we do not consider it appropriate for the Government to express a conclusive view based on incomplete information of a hypothetical scenario.
- (b) In response to question (b): if such pure statements of fact contained in a separate document from the first-mentioned letter of apology do not constitute an apology under the Bill, the Bill would have no application to that document. Whether such statements of fact in that document could be admitted as evidence against the defendant in applicable proceedings depends on the applicable law on admissibility governing the particular proceedings. Generally, any relevant evidence should be admissible.
- (c) In response to question (c): although a statement of facts contained in an apology may be protected from being admissible under the Bill, the plaintiff may still separately obtain evidence related to those facts by other independent means, e.g. during discovery or by administering interrogatory or during cross-examination in the civil

proceedings (see clause 11(a) of the Bill).

Department of Justice

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This annex addresses the issues arising from the discussions at the Bills Committee meetings on 24 February 2017 and 15 March 2017 concerning clause 8(2) of the Apology Bill. Clause 8(2) provides that *“if in particular applicable proceedings there is an exceptional case (for example, 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”*.

2. Some Members have expressed concern that conferring such a discretionary power on the decision maker would undermine the efficacy of the Bill as it would give rise to uncertainty in the admission of statements of fact contained in an apology. Some have invited the Government to consider providing for an absolute protection of statements of fact in an apology or confining the exercise of discretion to only one situation, i.e. *“where there is no other evidence available for determining an issue”*.

Encouragement of making of apologies and access to justice

3. The object of the Bill is to *“promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution”*. As protecting statements of fact in an apology from being used in subsequent proceedings can encourage a fuller and more meaningful apology without fear of liability, evidence of an apology should generally not be admissible as evidence of liability or admission of fault. That said, we also need to ensure that aggrieved persons’ right to a fair hearing and to judicial remedies (which are guaranteed by the Basic Law and the Hong Kong Bill of Rights) will not be disproportionately undermined in achieving this object. A party should have a reasonable opportunity to present any admissible evidence that is relevant to his case. All relevant evidence should be heard and assessed by a tribunal so that the proceedings as a whole are fair. Otherwise it may unduly affect a claimant’s right to a fair hearing and such unintended restriction is not rationally connected with the legitimate aim of the Bill. There is unacceptable risk that the relevant provision would be struck down by the Court for being unconstitutional, having regard to the Basic Law and the Hong Kong Bill of Rights. The key question is how to encourage the making of apologies without unduly restricting access to justice.

4. The Bill seeks to strike a fair balance between these two competing considerations by conferring a discretion on the decision maker to admit an otherwise inadmissible statement of fact in an apology as evidence (a) in exceptional cases and (b) only if “*it is just and equitable to do so, having regard to all the relevant circumstances*”. This is to deal with any unintended consequences of injustice to claimants resulting from the inadmissibility of statements of fact in an apology, and to prevent denial of access to justice in exceptional cases where, for example, the claimant cannot adduce independent evidence to prove the facts mentioned in the statement of fact contained in the apology and the statement of fact is the only means of demonstrating liability for the harm caused to the claimant.

5. Members are concerned that the flexibility afforded by the discretion under clause 8(2) may give rise to uncertainty which may have a chilling effect on a person’s willingness to make an apology, thus defeating the whole purpose of the Bill. The Government has explained in the response dated March 2017¹ that the discretion would only be invoked in limited circumstances as it is rare that there is no evidence available for determining an issue other than the statements of fact contained in an apology. It is also not uncommon for the courts or other tribunals to be conferred such a discretionary power to ensure that the claimants have access to justice. The Mediation Ordinance (Cap. 620) is such an example. Any uncertainty that may arise (if indeed there be any) would gradually be settled or reduced with the development of case law², whilst the right to a fair hearing and to judicial remedies would be given effect in the meantime.

6. It is neither appropriate nor advisable to adopt the alternatives of providing for an absolute protection of statements of fact in an apology or confining the exercise of discretion to only one situation, i.e. where there is no other evidence available for determining an issue. According absolute protection to statements of fact in an apology would run the risk of the absolute protection being found to be a disproportionate restriction of the right to a fair hearing and to judicial remedies in circumstances where it is just and equitable to admit the statements. Excluding the statements in these circumstances may render the courts unable to dispose of the cases fairly and the relevant provision in the apology legislation may thus be held to be unconstitutional. The object of facilitating an amicable resolution of disputes is legitimate, but the right to a fair hearing and to judicial remedies is a fundamental right

1 See Government’s response to the 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)), March 2017, at §§24-25.

2 See also paragraph 7(4) and (5) below.

protected by Article 10 of the Bill of Rights and Article 35 of the Basic Law. The other alternative of confining the exercise of discretion to only one situation would go some way towards mitigating the unintended consequences of injustice, but does not go far enough to ensure that a statement of fact in an apology will be admissible in exceptional circumstances where the court finds that it is just and equitable to do so.

Legal certainty

7. As to whether clause 8(2) is certain or not, the Government are of the view that the phrase “*just and equitable*” in that clause is not a new concept and is legally certain as it is commonly found in existing legislation and case law (whether in Hong Kong or other common law jurisdictions). The courts are able to reconcile the notion of “*just and equitable*” or equivalent concepts with the principle of legal certainty. In gist:-

- (1) The courts have held that “*just and equitable*” is a single composite phrase which must not be split up. It carries a wide meaning and does not limit the discretion of the court to any particular type of situation. When this term is coupled with “*having regard to all the relevant circumstances*”, it directs the court to consider all the circumstances that are relevant to the case.

Gallie v Lee [1971] AC 1039 at 1047G; *Daniel v Rickett, Cockerell and Co Ltd & Raymond* [1938] 2 KB 322; *Re Tourmaline Ltd* [2000] 4 HKC 348.

- (2) Many concepts such as “*just and equitable*”, “*in the interest of justice*”, “*where the court considers it is just or convenient*”, or “*fairness*”, are well established rubrics at common law which the courts and the legal profession employ and work with day in and day out. They provide reasonable guidance to lawyers and laymen alike as to how a particular law would be applied, while providing the necessary degree of flexibility for the courts to deal with ever different and changing circumstances, to develop the law and to move with the times.

Hong Kong Television Network Ltd v Chief Executive in Council, CACV 111/2015, 6 April 2016, at §99.

- (3) Whilst precision of a law with legal certainty is desirable, experience shows that absolute precision and certainty are unattainable whereas they may entail undue rigidity. The intention of conferring a discretion on judges dealing with certain legal issues is that the court should be able to deal flexibly with a great variety of different cases.

Sunday Times v United Kingdom (1979-80) 2 EHRR 245 at §49; *LKW v DD* [2010] 13 HKCFAR 537, at §48.

- (4) Conferment of a power on the courts to do what appears just and equitable does not mean that the courts can do whatever the individual judge happens to think fair. It is well established that the concept of fairness must be applied judicially and the content given by the courts must be based upon rational principles. The phrases “*just and equitable*” and “*having regard to all the relevant circumstances*” allow the courts to subject the exercise of legal rights to equity and hence equitable considerations. This provides a measure of protection against arbitrary decisions and the extensive application of a restriction to a party’s detriment.

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379D-E; *O’Neill v. Phillips* [1999] 1 WLR 1092 (HL) at p.1098D-E; *Wong Man Yin v Ricacorp Properties Ltd and Others*, FACV 14/2002, 5 August 2003.

- (5) It may not be necessary to define the circumstances in which the considerations for exercising a discretionary power may arise. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 374F-375B;

8. On the whole, discretion provided for in clause 8(2) has struck a fair balance between the object of promoting and encouraging the making of apologies and the need to safeguard a claimant’s right to a fair hearing and to judicial remedies. Without conferring a discretion on the decision maker, it would not be possible to extend the protection from mere expression of regret or sympathy to statements of

fact contained in an apology. Further and importantly, removing the discretion will run the risk that the relevant provision will be declared unconstitutional.